

Lawyered – Episode 96
Transportation Law ft. Heather Devine

[00:03] HUSEIN: This is episode 96 of Lawyered, I'm Husein Panju. And on this week's episode, we're putting our pedal to the metal, as we chat about transportation law with in house Chief Legal Officer, Heather Devine. Firstly, we'll speak about a new act called the Towing and Storage Safety Enforcement Act, that's aimed to regulate and crack down on the towing industry. We'll find out whether this framework has enough teeth to do what it's intended to, and how the sector might respond.

[00:27] We'll also speak about a new Competition Act amendment that would adjust the market share threshold for proposed mergers of companies, and also cover a new Superior Court decision that provides new guidance and our transportation brokers should paper their contractual arrangements. And in our Ask Me Anything segment, we'll cover a range of questions submitted by our listeners on a host of topics, including last mile delivery, extreme weather events, and the use of modern slavery. All that and a lot more is coming up in just a bit. This is Lawyered.

[e Break]

[01:00] HUSEIN: Hey everybody, welcome to another episode of Lawyered, so glad you're here to join us for another installment. One thing just off the top is I wanted to appreciate everyone who's reached out to date to offer either themselves or others as post guests for the show. As I mentioned, we are in our final season, with just a couple episodes left, so unfortunately, at this point, we are no longer taking new submissions for guests for the show, but I want to thank everyone who's put their name forward and great suggestions.

[01:35] Actually, a lot of my best episodes so far have been on people just putting their hand up or other hand up/being fallen told. Again, I want to thank everyone who's contributed to the show in every way to date, and it really means a lot. On our previous episode, we had a very great discussion about the area of oil and gas law, and the lawyer for that episode was an excellent energy lawyer from Calgary, which seemed appropriate enough to the topic, Vivek Warriar, who is in addition to being a lawyer is also the president of the Canadian Energy Law Foundation, and also serves in a bunch of other associations as well.

[02:12] We talked about a range of topics, including a new Supreme Court decision and the follow up thereof of the Impact Assessment Act. We also spoke about emission cap regulations and a new creative type of tool called Common Conducts for Difference. And one thing that really stood out for me from that episode is that, as most people know, that oil and gas issues are often very politically charged and are often a big part of political campaigns as well. And we definitely talked about some of the politics in this episode.

[02:42] But it's really nice to separate the politics from the law and understand what the legal issues really are, both in terms of the case law, and also in terms of current and proposed legislation. So, if that's an area you're interested in and want to learn more about, I think this would be a great jumping off point, that's episode number 95, about oil and gas law with Vivek Warriar.

[03:05] I think you're going to enjoy today's episode as well; we're talking about the era of transportation law, how people and things get moved from point A to point B. There's a lot of very interesting legal issues that you may not have considered, including what happens when there's consumer protection legislation for the towing industry and how that might actually transpire. I had a really interesting time talking to this guest, as you'll learn from the

Lawyered – Episode 96
Transportation Law ft. Heather Devine

intro, has a fairly personal connection to this area as well. And of course, it's always nice being with a fellow in house counsel. And so, without further ado, here's our interview with our guest, Heather Devine.

[03:45] Heather is the Chief Legal Officer of TRAFFIX, which is a leading third-party logistics provider, that is the North American transportation industry since 1979. In her role, Heather focuses on providing risk management counsel, both before and after the commencement of litigation. And her extensive litigation and risk management experience has included representing diverse clients in the transportation industry, including brokers, carriers, freight forwarders, shippers, and manufacturers.

[04:07] And before becoming the company's CLO, Heather founded and led the Bay Street office for an international law firm. And previous to that, she was an equity partner with one of the top international law firms in Canada, which gained her recognition in both Laxford and best lawyers. And finally, Heather is always the Vice President of International of the IADC, which is the International Association of Defense Council. So Heather, thanks so much for joining us on the show today.

[04:28] HEATHER: No, thank you, I'm absolutely delighted to be here.

[04:32] HUSEIN: Yeah, thank you. So, before going to the topic, I wanted to chat with you about what I believe is your origin story, because in the time that we've spoken about logistics of this episode, I've learned a lot about your transportation background as an interest, I know you've got active sailing practice and other things. Can you tell us a bit more about how you landed up in this specific area of practice?

[05:00] HEATHER: Well, it was about 2007 and I was learning to fly a small aircraft, like a Cessna 152. And I fell in love with it, I really thought I would love to be a pilot and go on, you know, you have to be a bush pilot and then a commercial pilot. But you got to put a lot of years in, and it doesn't pay very well, and I already had a trial team at Gowlings, we were doing a very large piece of IP litigation. And I thought, well, I'm not going to step away from that. So, what I'm going to do is I'll combine my two loves, the law and flying, and I'll start trying to get clients in that area, and that is really how I moved into transportation, trying very much to get work from WestJet and Air Canada and others and ending up on the air cargo side, which is a little easier to get work.

[05:54] HUSEIN: Okay. So, you've got like integration of your interests.

[05:56] HEATHER: Yes, exactly.

[05:57] HUSEIN: Having both an interest in this area, like recreationally and having this as your profession as well. Like, when you travel, like in general, do you travel like a normal person?

[06:09] HEATHER: So, I was flying to Des Moines, Iowa for business, and with all the disruptions and the commercial travel, I thought to myself, you know what? I'm just going to find a good flying school and get someone to take me from Chicago to Des Moines in a single engine, but I ended up by not getting to do that, but it was very tempted and started to research.

[06:29] But I still do love flying very much, and so I know how to read all the signs for the runway, so I pick a window seat, and as I look out the window, I try to figure out, and you

Lawyered – Episode 96
Transportation Law ft. Heather Devine

can look at a map of the airport as if you were a pilot. And I like to figure out where they're going, and what the signs say, because they all have meaning, and I find that very fun.

[06:50] HUSEIN: You're like a back backseat driver for flight.

[06:53] HEATHER: Yes, I am, for parking and taking off.

[06:56] HUSEIN: Great. That must be interesting to sit beside you on the plane.

[07:01] HEATHER: Yeah.

[07:04] HUSEIN: Awesome. So, we've got a bunch of nursing topic to speak about in your area of transportation law, that span different types of transport as well. And the first topic we're going to speak about is about a new piece of legislation involving the towing sector. Now, the towing industry has been historically plagued by several criminal activities, including prevalent violent incidents, including shootings and arson.

[07:24] And to address this, the Ontario government recently addressed the Towing and Storage Safety and Enforcement Act, or the TSSEA, to address the criminal activities and to enhance public safety. And while some portions of the act came into force late last year, 2024 marked the introduction of an array of new consumer protection provisions as well. Another one of the primary parts of this new act was the introduction of new provincial certification requirements for towers. So, tell us more about what this means and how this might work.

[07:58] HEATHER: Look, just as you said, there was, it appeared to be that an element of organized crime in the towing industry, you had arson, you had gunfire, you had shootings, and so the government stepped in and put in together some regulations. And I think the purpose of the regulations, they enacted a code of conduct, they required registration of various tow truck operators.

[08:23] All towing and storage operators in the province of Ontario, they have to be certified. You have to make an application, and so that would involve identification of yourself as a company, and some of the information about your towing operation, and then you would become a certified provider, which is apparently something that you can look up and double check to see if someone has been certified to operate as a tow truck provider.

[08:52] HUSEIN: Okay, so it's like analogous to a lot of professional regulatory requirements, right?

[08:57] HEATHER: Yes, but without, sorry, but without teeth, if you really want to know. Well, you and I, when you said regulatory, we're monitored by the Law Society of Ontario, as you know, with debentures, a very robust corporate governance, we had to be very protective and careful when we stay within our license requirements, it's not like that at all, from what I can see, you just submit an application for certification and then you're certified.

[09:23] HUSEIN: Earlier this year, in 2024, there's some new consumer protection provisions that are taking effect, can you tell us more about these?

[09:31] HEATHER: So, January 1, 2024, there's a new code of conduct. And so, the purpose of that, with the code of conduct, which of course the certified tow operators are supposed to follow, the emphasis is professionalism, courtesy, fairness among operators. And really, the mandate is consumer safety and honest and transparent service provisions. The intent

was to almost become a little bit more formal, a little bit more business-like for the towing operators. I think the intent was to create a baseline against which they would measure the tow operators, giving them more teeth to go after the tow operators should they need to.

[10:10] HUSEIN: Okay. And I know that there's some new rights that apply if a consumer ends up in a car collision, for example, and the car gets towed. And I know anecdotally, there were some concerns about cars getting towed, placing without the consumer's consent, and it becomes a real hassle to retrieve it. Can you tell us about some of the mechanisms that are going to be now in place to protect against this conduct?

[10:35] HEATHER: Yeah, I think there's four. I'm sure you've seen going down the QEW, maybe even the 401. It used to be that you could see the tow truck operators congregated, they go after someone who needs a tow. That's been changed so that the first thing that the consumer has is the freedom to choose. So, it isn't first on the scene is then towing your car and you have no say. You're supposed to have the freedom to choose which towing operator you wish. And many people sign up for CAA or I drive a Mini, I have towing with Mini, so obviously those are the ones I would use, and that's how I would exercise my choice. So, number one, you decide who tows your vehicle, and importantly, where it gets towed to, that's important.

[11:20] The second component is, there's supposed to be transparent consent and pricing. So, before the towing even begins as a driver, you should receive, and you make sure you review a Consent to Tow form and a Maximum Rate schedule. And it's very important that you do that, so that there are no unpleasant surprises. The towing company can't alter the form and you shouldn't sign it if it's blank.

[11:47] The third is you can now choose your payment options and that's very important, you're not compelled to pay cash. You can do credit, debit, contactless payment, and you receive an itemized invoice before payment and a receipt afterward, which really, why do we have to emphasize that you're entitled to those actual commercial records of business, but now you are entitled to have all of those.

[12:14] And the last is the identification of the tow operator. So, you're looking to see if they're certified, you can ask to see their certificate number and their tow operator's name.

[12:22] HUSEIN: Okay. So, someone who practices in the transportation space, or at least an adjacent space, what do you think about these consumer protection provisions.

[12:34] HEATHER: Look, I was happy when they first came in. I have seen invoices that would really knock your socks off where a truck has been towed. And you take a look at it, and people are saying, "Heather, this is extortion, it's so high." Then people would try to get their truck back, and then you go to the compound, you can't get in, you have to wait over the weekend, then you're charged weekend fees, even though you've tried to get it.

[12:58] So, I thought that when these measures were coming in that it would be very good. But I have to tell you, particularly with this flare up of arson, bombs, and shootings in June, that I think really, what's now happening is you've got the gentleman aspect of tow operators who are probably following the code of conduct, and then you have the organized crime who are not. So, I think we have a parallel system now.

[13:24] HUSEIN: Are there any other legal mechanism that you can think of to address some of the core harms here.

[13:30] HEATHER: Yeah, I think...So, you have a CVOR system. We have a commercial vehicle operators record. And there's a lot of respect for you can get the long form, you can get the short form. The long form, you can only obtain from the carrier; the short form is available publicly. And I think rather than a certification of the tow truck operators, that really, we should tie it to a CVOR and in fact, that affects whether they have a license to operate at all.

[14:00] The companies that are operating within the rules are certified, you can look them up, they're doing all the right paperwork, but then again, they're going to have higher expenses, because they're actually meeting the regulations. Whereas you're going to have organize crime, who's not following any of that, it's a little cheaper, and you're broken down on the QEW late at night and someone comes to tow your car, it'd be a bit of a sticky situation to start having a negotiation for the certificate.

[14:27] HUSEIN: Yeah. So, are these consumer protection mechanisms, like, do you think these have teeth then?

[14:32] HEATHER: Yeah, I think they do. But I really think it might be better to frankly, start taking those measures of arranging with a private towing organization like CAA, like many, like some of the others that are available to you on demand. Why wouldn't we reach out to a company like Uber or Lyft and arrange for a better app system. You'd get privacy, you'd get security, you'd have the tow truck operators operating through the app. And so, it would just make a lot more sense to me to just wake up, smell the coffee, you can't fight organized crime by having a gentleman's code of conduct, you've got to have something a lot more powerful and pervasive.

[Music Break]

[15:25] HUSEIN: The principles of offer and acceptance are the basic building blocks of any legal contract. Now, a recent Ontario Superior Court decision has touched on the application of these concepts, involving the rights of brokers to recover compensation from the shipping carriers. And this finding is going to provide some new helpful instructions to ensure that logistical arrangements are secured in a way that provides certainty for all parties. So, Heather, before we go into the case itself, I just want to orient everyone about the parties that are involved here. So, I know that there's the customer, the carrier, and the broker. Can you explain how these all relate to each other?

[16:03] HEATHER: So, here the customer was Goodmark Poultry, and their cargo was frozen chicken. The broker, who was the travel agent for the frozen chicken, in a way, was Conrad Refrigerated Trucking. But the actual truck transportation, we call them at law, a motor carrier, they were called Atlas Freight. And they did the actual transportation of the cargo. And the easy way to think about it is a broker is a sales agent for the transportation of cargo.

[16:38] So, in this case, the motor carrier was Atlas Freight, I'm a broker here we are at TRAFFIX. And so, we don't transport the frozen chicken, we arrange for the transport of the frozen chicken. So, when I said we're like the agent for the transportation of goods, or the travel agent, one might say, then we arrange for the travel, but we don't actually do it.

[17:05] So, for example, if you're going on a trip, I think you told me you just were away, you could have used this travel agent. They could arrange your flight, they could arrange your hotel, you might have said, I want four-star, five-star. But they are not the hotel, and they are not the, obviously the airline, but they put it all in place to your specifications.

[17:24] HUSEIN: This involves this case called Conrad Refrigerating Trucking, and Etlas Freight, and the citation is 2023 ONSC 5433. Can you just give us a quick summary of the relevant facts that happened here?

[17:40] HEATHER: So, you've got a deal between a broker and a customer to arrange for the transportation of frozen chicken from the United States into Canada. And during the transportation, the frozen chicken was stolen. So, the broker pays its customer for the loss of the chicken and then sues the trucking company for the damages, but the trucking company avoided liability. The problem is that there is a certain amount of frozen chicken you can import into Canada, there's a quota. And so, the loss of that load affected the customer's ability to import additional chicken, so they actually lost that value for the quota, so the damages were much higher than anyone would have thought.

[18:34] HUSEIN: We have this broker that's trying to go after the actual carry of the chicken, right?

[18:40] HEATHER: That's correct.

[18:41] HUSEIN: Well, I understand that there was part of this decision involved the actual contractual arrangements between the broker and the carrier, right? Can you tell us a bit more about that?

[18:51] HEATHER: Well, and so, this is really what's important, because in the industry, after your customer tells you, hey, we want to ship frozen chicken from the United States into Canada. The broker then contacts the trucking company to arrange for the actual carriage of the cargo. And so, it's very common that the negotiation between the broker and the trucking company can be casual, there's a lot of back and forth, what time are you picking it up? How heavy is it? How much chicken is there? When will the pickup occur, where it's going to be delivered? So, there's a lot of facts that have to get communicated.

[19:28] But in this case, what happened is, the negotiations that occurred by phone did not reflect what was sent from the broker to the trucking company in writing, they were different. The written document is called the Carrier Confirmation Sheet, but it had different facts or different terms in the contract, than had been discussed over the phone.

[19:54] HUSEIN: So, how did the court analyze this issue then, in terms of the difference between the written contract and the verbal contract in the context of this case?

[20:04] HEATHER: So, the court agreed that the trucking company accepted the mandate to pick up and deliver the frozen chicken, but it had actually not accepted any of the terms in the written Carrier Confirmation Sheet. Really, there were quite a few differences, including this quota, the damages for the quota, and an assignment, the ability to assign the right to claim. But what happened is the court found that the lack of signature by the trucking company on the signature line was actually proof of non-acceptance.

[20:38] HUSEIN: So that's said, if you're saying that these kinds of casual conducts are part of the industry practices. What are some things for transmission lawyers like yourself, to consider when they are organizing contracts with other parties, especially when there are some verbal discussions as well.

[20:51] HEATHER: I think what is so important is, as you said in the introduction of this case, the formal elements of offer and acceptance in a contract have to be absolutely clear. And I think business units sometimes, at least in this case, certainly not TRAFFIX's, this case. But in

this case, what happened is, they were doing so much of the negotiation by phone, that they really allowed there to be a disconnect between what was negotiated by phone, and what was sent in the written agreement.

[21:26] If you're not going to have just a simple signature obtained, you can use DocuSign, for example, so you can have an electronic carrier confirmation sheet, and that requires the carrier to click accept to the terms that are set out therein, and that gives you a record of the acceptance.

[21:43] HUSEIN: So, are there things that could be done in a similar situation to ensure that all the things are in fact captured?

[21:50] HEATHER: Yeah, I agree. So, what I like to have is a Standard Operating Procedure, an SOP, that just sets out basically, what do you need to capture in the phone call. And so, if you have people on the phone that have already filled that out, it can be very brief. So, offer, acceptance, terms, and they make sure to tick them off that they've covered them, then you know that the phone call is going to match your carrier confirmation sheet.

[22:16] HUSEIN: So, are there other things that brokers and carriers can do to protect their rights in situations like this?

[22:23] HEATHER: I just think that they need to make sure that they are using what are called Shipper Broker Agreements, and Broker Carrier Agreements. And at all times they should include assignment rights. Sometimes, and I'm not sure why, a shipper will decline to give assignment of its rights to collect damages from the carrier. It declines to give you that right, and yet when there's a cargo loss, the shipper will say to the broker, will make me whole. And so, what happened in this case, without the assignment, the broker paid the shipper, but when they tried to collect from the trucking company, because there were no assignment rights, court said, "No, can't do it. That was a gratuitous voluntary payment, a gift to your customer for goodwill."

[Music Break]

[23:16] HUSEIN: The federal government has very strict thresholds regarding the rules for companies that want to merge with or buy other Canadian companies. And while some are projecting that the thresholds would change in 2024, the numbers have remained the same for the third year in a row, which is presenting legal issues for those inside and outside of the transportation space. So, Heather, we're going to talk about the specific merger thresholds in a moment. But so, I want you to start by telling us why we have these thresholds in the first place.

[23:43] HEATHER: I think at the very bottom line, competition is considered to be key to a healthy market. And all of the concepts that go with competition, fair market value, two companies competing for customers with the best pricing or the best service winning. All of those concepts come together to give you a sense of why competition is so protected in Canada. And so, in the transportation industry right now, you're seeing a trend to consolidation, and you're seeing a trend to acquisition of smaller companies getting acquired by midsize, which are then getting acquired by large size.

[24:22] For example, you may be familiar in our industry that RxO acquired Coyote Logistics. That is almost like a whale or a behemoth swallowing a whale. And so, the reason we do have these competition provisions is to ensure that one particular company doesn't start to

dominate the market unfairly, which takes away consumer choice. The competition act took away the new amendments, have taken away a defense.

[24:56] So, there used to be what's called the Efficiencies Defense, and that's actually been removed. And then they've also put in a provision that if a certain aspect of competition is met, a certain level, then the tribunal shall act. So, it's mandatory, there's no flexibility, there's no decision that's left up to the tribunal.

[25:22] HUSEIN: So, I know that there's these two thresholds that are important to understand, can you explain what these two thresholds are?

[25:28] HEATHER: The first is, they have a rebuttable presumption of harm that's based on market shares and concentration levels. If you picture two companies that are going to merge, you've got an A and a B. Previously, if the A and the B came together and they had less than 35 percent of the market, then the commissioner would not challenge a merger. But now what happens is it's a test, and we all know as lawyers what happens when there's a test. So, instead of it being oriented around 35 percent or some other parameters, now the tribunal has to think about whether on a balance of probabilities, if a merger will have a significant increase in the concentration of market share, that's it. Then they shall find the merger is going to prevent or lessen competition substantially.

[26:30] So, now what happens is number one, they have a concentration index that they measure, and if that increases by a certain number, then they will step in and find that it shall lessen competition. And then the second is if the market share of the merging parties is more than 30%, again, they will step in. Those are the increases that are such a problem. Previously, it had to be over 35%, but now it could be under 30% of the market. If the market share of the merging parties combined is more than 30%, that will trigger the tribunal.

[27:16] So, if you think about it, for example, how many car sellers do we have in Canada? But you might say quite a few, but then if you start to narrow the market down and say, well, how many midsize, or how many small size, or how many luxury, and of the luxury car sellers, what percentage of market do they have? You can start to see how that actually might become a little more problematic.

[27:42] The second is they have what's called a heightened remedial standard for anti-competitive mergers. So, it's heightened, and it's also remedial, so they can look back through years. They've repealed a whole defense, so the efficiencies defense is gone, it used to be that companies could argue, well, we merged, and we increased our market share significantly. But we did so, because we were looking for efficiencies and co efficiencies, and they would make an argument to the tribunal about that, you can't even have that defense anymore, it's just simply where the tribunal will look at your market share.

[28:23] HUSEIN: So, tell us more about how this is going to impact transportation lawyers like yourself, this change in the thresholds.

[28:30] HEATHER: Well, it can actually be quite significant, because if you take a look at, you had mom and pop truck companies, and so it used to be quite prevalent. You would have what's called one owner operator. And then he or she would grow from one truck to maybe five trucks, but perhaps not get bigger than 5 to 10. And now, with the aging of truck drivers and the owners of these companies, the boomers, as one might say, they're starting to look at retirement, and they're starting to sell.

[29:01] So, the M&A community in Canada is quite acquisitive when it comes to these smaller companies. But here's the thing, as you grow in Canada, because we're not actually that large of an economy, as you acquire more and more companies to consolidate, take advantage of efficiencies, you might then start to approach that 30 percent market share for whatever it is. So, we have different types of trucking as well, right? You have flatbed, you have drive in, you have bulk, which would be gas, perhaps, or milk. And so, what happens is, as you break down into those categories, you can start to see that the acquisitions can start to become problematic.

[29:47] HUSEIN: What are some things that lawyers should be doing if they're practicing this area to kind of get ahead of some of these issues that might be becoming forward and likely to be special.

[29:56] HEATHER: Well, first of all, as you can tell, it's quite complex to measure what is your market share. So, I think the lawyers in this area, they've lost the efficiencies defense. So, the focus now becomes much more focused on market share and marketing. And then number two, our presumption in Canada it's not prescribed by statute, it's very black and white. And so, it's supposed to be more like the US model, but in fact, the US model has flexibility built into it; we've taken flexibility out. And so that is going to be something that's very difficult for lawyers to navigate, because if it's black and white, and you're trying to look at market share, which is difficult enough to measure, I think their job is going to be a lot more difficult.

[30:44] HUSEIN: Yeah, for sure. So, how should lawyers go about this calculation exercise in light of this?

[30:49] HEATHER: I think you would have to become very, very familiar with the past pattern of what the tribunal accepts as a definition of market share. And then I think you would want to be very precise and very specific. Because for example, my example about cars, cars generally, that's a very large market, but you could see as I took you through the different examples. As you get into different classes, you're going to have different market share. So, depending on how you define it, that actually then will have a huge effect on what your presentation of your case will be to the tribunal.

[31:25] They've actually created a lot more power for private actions. And I think that you might start to see some competition—which is a funny word to use, but you might see some competition news where people are using the private action to actually affect the ability of other companies to do the merger.

[Music Break]

[31:52] HUSEIN: And to wrap up our episode, we're going to do Our Ask Me Anything segment with Heather about the issues and questions that have been raised about transportation law. As our listeners know, one of the bonus rewards for members of our Lawyered Patreon crowdfunding community is the opportunity to submit questions that they want to hear answered on the show, which can be questions about anything at all within our guest's area of expertise, so long as they're not asking for legal advice. We usually do our call for questions about a week or so before every recording, so if you want to learn about how you can become a patron and get other bonus rewards as well, you can check out our website, which is www.lawyeredpodcast.com/patron. That's www.lawyeredpodcast.com/patron for more information.

[32:33] All right. So Heather, this is a very interesting area of law. I've got a bunch of questions as well to support this. And the first question is about a new piece of legislation. So, I know this year the federal government implemented a new act known as the Fighting Against Forced Labor and Child Labor in Supply Chains Act. So, the question is, can you tell us more about the role that this modern slavery statute will have for the logistics and transportation space.

[33:01] HEATHER: I actually, I think this is a very important act, and it will have the ability to significantly affect change in Canada. It'll take some time, but I do think we'll see some significant change. And that's because it's got a very excellent reporting component that requires sign off by the board of directors for companies of a certain size. And what you're required to do is list for the government, enumerate in quite a number of different ways, the steps that you're taking to avoid forced labor and child slavery. And so, it could be anywhere in your trucking agreements to your manufacturer's statements for goods as to how they are manufactured.

[33:42] HUSEIN: Tell us more about how you think this act will be impacting your particular industry.

[33:48] HEATHER: Well, for example, let's take food produce. There can be concerns about whether there's forced labor amongst the migrant workers that come to help us in Canada harvest our produce. The produce is then, so once it's harvested, of course it's then transported, and it's transported off into a distribution center that in turn then goes to retail. At every step of that way, if the company falls within the parameters of the Act, and many will, they are required to create a report, and that report will show how they've implemented documentation to avoid forced labor, and that in turn is approved by their board of directors. So, you have a lot of accountability.

[34:31] HUSEIN: If you're the shipping company and you're one part of the supply chain, are you responsible then for, if there was forced labor that was used at that production side, like in this case, like the growing of the fruit, for example?

[34:45] HEATHER: Yes, you would be. And so, you're not only responsible if you're found to have forced labor, but what I like about it in a prophylactic sense is you're responsible for sitting down and coming up with ways to ensure that you don't inadvertently have forced labor amongst your workers.

[35:03] HUSEIN: What are shippers supposed to do specifically to ensure that they're not inadvertently using forced labor in this case?

[35:13] HEATHER: I think from my understanding of what their declaration would be is they would talk about different methods that they have for hiring and firing. In creating the avenue for the migrant workers to come into Canada, pay and wage allocations. And so, they have to review all those different aspects of working with the migrant workers to set out the assurance to our government, that it's not forced labor, that it's willing.

[35:43] HUSEIN: Got it. Okay. The next question that's been submitted is what are some practical things for transportation lawyers to consider when they're managing the legal risks that are associated with climate change and other extreme weather events?

[35:57] HEATHER: So, I actually think this is absolutely important, particularly having just spent the last 3 days trying to get to Des Moines and back to Toronto, with so many extreme

Lawyered – Episode 96
Transportation Law ft. Heather Devine

weather events affecting my travel. So, you have to really understand and use a force majeure clause. A force majeure clause is a clause in your contracts under the heading force majeure, and it will set out what will happen, or what the parties will do in the event that say, like, a certain occurrence takes place.

[36:29] So, you want to be a lot more specific, you don't want to leave it to acts of God. You want, if you are in an area where there's lightning storms and they could affect, that you would put in, in the event of a lightning storm, here is what will happen if one party can't perform. And the more explicit you are, the more control you have when you are dealing with an uncontrollable event. It's an offer, it's an acceptance, and it's a planned way of dealing with an unplanned event. And so, I think, perhaps because I work in a service-based industry, I think it comes down to the contract is queen.

[37:07] HUSEIN: Yeah, fair enough. And so, are there specific things that should be considered when drafting and negotiating a Force Majeure clause? Because I'm sure for both sides, no party really wants to bear the liability if there is a lightning strike or something, right?

[37:22] HEATHER: Well, I mean, look, I think as a good broker, what we do is, we do keep an eye on weather patterns and events, and we'll actually call our customer about events that may affect their shipment of goods to make alternative arrangements. And in fact, I do believe we're actually creating technology that we will use that based on past prior events and transportation patterns in response, that we will actually be starting to try to anticipate and reroute in advance the movement of goods.

[37:57] HUSEIN: Yeah, that's right. So, you're like monitoring these events before they even happen, right?

[38:02] HEATHER: That's true, that's true.

[38:04] HUSEIN: Okay. The next question is, how is the rise of e-commerce influence transportation regulations, particularly concerning last mile delivery solutions?

[38:13] HEATHER: So, last mile delivery is interesting, let's use for example, one that you and I might be familiar with, and that's the amazon delivery that comes right to your door. So, it may start in Asia and may come across on a ship, and then it lands at a port, it could go by rail, then it goes by truck to a distribution center. All of that can be done with a lot of parcels, or a lot of packages on one truck. But then they have to come off the truck to get to the end user, the consumer environment, and that's the last mile. So, at the last mile of delivery is to our doorstep.

[38:52] There hasn't been that many regulatory changes in Canada actually, around last mile. But what there have been though, has been a huge proliferation of what's called dry van or light van deliveries. And you may find it interesting to know that many of the vans that are actually doing the delivery avoid being regulated as a commercial vehicle.

[39:15] Well, so the trucks that have say, a 53 foot trailer that leave the port and are heading towards the distribution center, stuffed full of Amazon goods, those are regulated by commercial vehicle operators record, and under the Highway Act, they have a certain weight that makes them qualify as a commercial vehicle. The drivers have hours of service, and other specific qualifications that are imposed upon them for safety, security and compliance.

[39:49] However, for last mile, which if you think about it, you might see a very light, what's called a light van or a drive van, or in some cases they're delivered by car, the parcels are dropped off by an individual, that's not necessarily a commercial driver, and it's not necessarily a commercial vehicle, because it's done by weight.

[40:08] HUSEIN: Okay, I've seen those, but I always wondered what was going on there, so that's helpful to know. Okay, and the last question is specific to you, and I know that TRAFFIX, the company where you work, is a very large North American presence. So, the question is, what are some of the unique skills that are required, when you're having a legal department that has this large geographical jurisdiction?

[40:29] HEATHER: The very most important aspect of success in a company like ours, because we're over 1.1 billion. We've created an environment where we're very committed to the business units being able to operate with the least amount of legal intervention.

[40:46] HUSEIN: Tell us more.

[40:48] HEATHER: Well, so we use AI as much as we can to make life easier, and we create playbooks. So, I take a business unit, let's say our warehousing business unit, and I deconstructed every step creating a Standard Operating Procedure, and then I created legal agreements for them in all of the three countries, and they can pick and choose. They've had to work with me and they become much more sophisticated as salespeople, but by working with them, you know, I just heard the other day, and I was so proud, they negotiated a deal for warehousing in Quebec. We already had the agreement completely in place with the right insurance program, the right Force Majeure clause, and it was ready to go.

[41:32] HUSEIN: So, it's kind of like delegating the tools they need, so they don't need to come back to your department for minor questions and agreements, is that the idea?

[41:44] HEATHER: Yeah. Not only delegating the tools, but providing the education so that if they're interested in being a very knowledgeable seller, they know what paper we have that they should be selling because it's fair and reasonable for both parties.

[41:56] HUSEIN: Okay. And then you mentioned AI, we talked about this actually on a different episode about some of the risks of using AI in the legal conduct. Can you tell us about some of the ways that you found AI has been helpful in your practice?

[42:08] HEATHER: I think AI is extraordinary, particularly in terms of doing all the lighter administrative tasks. As in house counsel, I don't have access to an assistant, and so I use AI for my PowerPoint presentations, I use Jeannie on my phone to do summaries of PDFs for me. I read them first, but then I have the AI do the summary, check it over, see if I think it's good enough, and if it's good to go, I've now got a nice little summary. So, if someone calls me out of the blue and says, what the heck is going on in that contract, I've got a good summary. I use it for some research, not obviously into legal cases, but the other day was relevant to me the net, net, net profit that brokers would use in our industry, and I typed that into Genie and got a pretty fair answer, which I then verified.

[43:00] HUSEIN: When you work for a transportation logistics company, are there certain unique tasks that you come across at your desk that wouldn't come across the in-house counsel working in a different space or industry?

[43:15] HEATHER: Well, I think it is sad since fatalities worry all the time. We aren't liable for them necessarily under our role as the travel agent for the cargo. But we can learn about them, and they're very sad and distressing, and of course you care very much. So, I would say in that regard, we have that element of risk, and that's tough. But I think what's challenging for me is, I have this, we have ruling assets, we have trucks on the road, we have the service part as a travel agent. We have a huge component of our business is developing and inventing new technology. And I absolutely love it because I have to then put my technology lawyer's hat on and deal with SAS and API and other robots. And those days are very fun.

[44:04] The people at TRAFFIX, I actually look forward to talking to them, in the morning, I know my day is starting, and I think I'm looking forward to talking to my VP of Risk, or the VP of Legal or Director of Ops or any of our managing partners. They're such interesting entrepreneurial people all throughout the country, and then into Mexico and the United States. So, I'd have to say it's the people at TRAFFIX that I really enjoy.

[44:30] HUSEIN: That's great. So, Heather, I want to thank you again for joining us on the show today. You mentioned a bunch of transmission issues, and I think that many of us don't really see a lot of like the behind-the-scenes operations of how goods actually get moved from one place to another, and often you only notice a problem when one has happened. So, it's really neat to learn about how these issues are developing, including, these carriers and shipping logistical issues. We appreciate you walking us through these, and we look forward to staying in touch in the future.

[45:02] HEATHER: Oh, I look forward very much. I enjoy your podcast very much. I listen to it when I run walking, and I wanted to be on your podcast for some time, so it's quite an honor, thank you very much.

[Music Break]

[45:2] HUSEIN: And that's a wrap on this week's episode of Lawyered. Thanks for listening. On today's episode, our guest was Heather Devine. She's the Chief Legal Officer at TRAFFIX, and you can learn more about their work at their website, which is www.traffix.com. And more about Heather on her LinkedIn page as well.

[45:41] On our next episode, we're going to be speaking about the area of criminal legal issues in the area of delay. As you likely know, there's a lot of case law in this area, and much of it has been developed in recent years. We'll be speaking with Daniel Brown, who is one of the most foremost criminal lawyers in the space right now, and he's going to walk us through what these issues are, and what they'll mean for all Canadians.

[46:03] And we're in the home stretch of our series, but if you want to get some neat and affordable legal rewards, including the access to our full bonus episode catalog and early access to all of our episodes, and the ability to ask questions to our guests as well, you can get all those by becoming a member of our crowdfunding community for the last couple months of our Episodes and campaign, and you can find out more about how to do that on our crowdfunding website, which is www.lawyeredpodcast.com/patron. That's www.lawyeredpodcast.com/patron.

[46:34] I want to give a shout out to a bunch of our current and past patrons, including Candice Cooper, Carolyn Poutianen, Conner Coles, Don Bourgeois, Ethan Marx, and Flynn Paquin. Thanks so much for supporting the show, it really means a lot.

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[47:01] Our sound editing work is managed by Solomon Krause-Imlach, theme music by Ben Swirsky, and website help by Steve DeMelo. And finally, please be advised that while this show is aimed to be helpful and informative, that it is not legal advice. However, if you do want legal advice, please reach out to a lawyer directly to help you with your particular situation. And with that, we'll see you back here in two weeks' time. Until then, keep it legal!