

Interview with David Deutscher*

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I. INTRODUCTION

Bryan P. Schwartz (BPS): Our special edition is based on the theme of the transition from practitioner-based to academic legal education in the 1960s, and the current debate over whether there should be a swing back in a more practise-oriented direction.

David Deutscher (DD): My first year of law school was 1969. At that point in time, for three or four years, the concept of working half-day and going to law school half-day was gone. I was part of the full-time law school, a member of the first large law school class. If I remember correctly, it was 120 students.

BPS: What brought you to law school?

DD: To be quite honest I always had an interest in it, but I think, as most people, I had done a couple years of university, I had a BA, and I looked around and said, “What the hell do I do now?” Law seemed to be a plan. My other alternative might have been to go on in economics but the way economics was going, it was becoming very math-oriented and I hate math. I knew I had no future in math.

BPS: And yet you married a woman who is very talented in math.¹

* Interview conducted by Bryan P. Schwartz and Darcy MacPherson. David Deutscher, Robson Hall faculty, 1984-2016.

¹ Heather Leonoff, Robson Hall faculty, 1980-81. In 1998, she moved from private law to government. She later became the Director of the Constitutional Law Branch of the Attorney General of Manitoba.

Darcy MacPherson (DM): You eventually became a practising criminal lawyer and a teacher. Were you interested in criminal law from the beginning?

DD: All parts of law are of interest to me, but if I was going to practise law, my focus always had to be criminal law.

BPS: What was the classroom like in those days? Was it predominantly Socratic Method? Was it lectures?

DD: I think it was predominantly lecture-type of method. There were some people who were teaching Socratically. I think the main two were Gerry Nemiroff,² and Bernie Starkman,³ who taught Property in first year.

BPS: Bernie went on to be a federal civil servant, didn't he?

DD: Yes. He moved back east; the gossip is his wife hated it here. Now it is bringing back memories. "If so, why so; if not, why not?" were his famous questions. As my recollection was, certainly in my first year as a law student, he was the only one that used the Socratic Method.

BPS: In modern times we have a very tough job market out there for law graduates. You were not worried about getting a job in law, were you?

DD: No, not really, but I think maybe there was some misplaced confidence in myself. Remember, there were a lot of us at that time. Well, not that many graduated. You know the old urban myth of the Dean coming along and saying, "Look to the right of you. Look to the left. One of you is not going to be here next year." It was pretty close to being true. After first year, I think our class [number] was in the 80's in terms of how many graduated.

BPS: That is a pretty high rate of attrition by modern standards. If I was doing the introductory lecture today, I would say, "Look to the left. Look to the right. You are all going to be here in three years."

² Gerald Nemiroff, Robson Hall faculty, 1968-2008. For his interview, please see page 135 of this issue.

³ Bernie Starkman, Robson Hall faculty, 1968-1971.

DD: That is right. It is a kind of assumption. They were going from around 45 students to 120, so getting into law school was not a competitive business, certainly not that year or a couple years after.

BPS: In some ways that brings back recollections for me. I remember some of the more senior professors in my earlier years as a teacher arguing that first year was basically the filter year. They would mark rigorously in first year with the idea that “if you are not cutting it in first year, we are wasting your time, and you are wasting our time.” It was not as selective in terms of GPA; there were no LSATs. So there was really no filter in terms of getting in, it was getting out of first year successfully that was the challenge. Did that not make for a very stressful first year with people freaked out about making it through?

DD: I would imagine. For whatever reason, I wasn't.

DM: You had a lot of confidence in your own ability.

DD: In terms of the law, no. As I say, you get a little bit nervous and then I think we had a Property exam at mid-year and I got a B. That doesn't sound great now, but that was a really good mark.

BPS: It used to be that the gold medal was a 3.2 GPA right?

DD: In fact, that was the cut off for Dean's Honour list, not the top ten. First of all, A+s were unheard of and usually—even my first few years of teaching—we basically gave out one A in every class and then you worked from there.

BPS: When I was in first year law, which was not a lot later than you went through, I remember in my first year contracts class at Queen's Law School, Denis Magnusson⁴ who later became Dean said, “Ok, if you know as much as I do on the exam, you get a B+; if you know more than I do, you maybe get an A.”

⁴ Denis Magnusson was Dean of Law at Queen's University Law School from 1982-87 and is Professor Emeritus.

DD: And to some extent, that was the philosophy here in terms of marking, as a student and certainly for a large part of my early teaching career.

BPS: Did you do your LL.M. right after law school or did you practice first? How did you end up at Harvard?

DD: I articulated, and I practiced for a year. Teaching was a pretty good gig. By that point in time, I became good friends with our late colleague, Barney Sneiderman,⁵ and I said, “I think this is something I want to do. Let’s see if I can get into Harvard.” Now, at the end of the day, I was in the top ten percent of my class but objectively, I think I had something a little over a 3.1 average. But you have to understand...

BPS: At the time that was really, *really* good.

DD: Yeah, and first of all, it was affordable. Second was that I think they had an unspoken policy that they tried to get one person from every province in Canada. So I got in. The theory one had to think about was, “Do I go?” But at the end of the day, if you get that kind of offer, you do not turn it down.

BPS: Anytime you go to Harvard, there are going to be some figures who, at least at the time, are future legends. Any names or personalities stay in your memory as, “Wow, I actually got to meet or learn from X, Y, Z?”

DD: Another thing about Harvard is that they are very good teachers. The person who impressed me the most was a person that I did not take a course for credit from, a fellow by the name of Gary Bellow.⁶ He was really looked upon as the founder of clinical legal education in the United States. He was a professor at Harvard Law School. He started out in legal services, where he worked with farmers in California at that point in time. I would go to his classes, having practiced law a bit, and just listen to his insights. The way he was able to move from the particular to the general and provide not a

⁵ Barney T. Sneiderman, Robson Hall faculty, 1971-2007.

⁶ Gary Bellow (June 9, 1935-April 13, 2000), Harvard Law School faculty, 1971-1996.

philosophy but a methodology that could work not only for this particular case but that I could use to develop principles.

BPS: A model of practice.

DD: Yes, exactly. I remember in those days it was really in its infancy.

BPS: When you were going to law school did you have any skills or clinical options at the time? Were there moot court options? Was there anything like what we would label clinical?

DD: Well when I went to law school there was a second year course that was then called Litigation. It was basically the precursor to the Introduction to Advocacy course that was developed by Gordon Diltz.⁷ Basically, there was not a lot of difference in the sense that its combination was, at that point in time, a civil trial. There were classes that would do all sorts of things. I must admit the fact pattern was not particularly complex nor particularly legal. But again for the purpose of being able to examine, cross examine. I cannot remember but I am pretty sure we had to prepare pleadings.

BPS: Gordon was one of many remarkable figures who have passed through here. We will just talk about him briefly so there will be some mention of him. Gordon was a very active litigator, going from the active practice to the education path. In his youth he had served as a fighter pilot during the Second World War. He had a powerful, gravelly voice, enjoyed his cigars, and he had an outspoken and forceful personality. Actually I do not know how he came to the law school.

DD: For whatever reason he was just interested in it enough. The firm is now called Thompson Dorfman Sweatman, it was called Thompson, Dilts & Company, and he seemed I guess sort of interested. He was a somewhat larger than life character. He liked to have a good time and liked to be with younger people. Students generally loved him notwithstanding the age differences. Cliff Edwards⁸ at that point in history, or at least a little bit

⁷ C. Gordon Diltz, Robson Hall faculty 1954-1959. 1967-1988.

⁸ Cliff Edwards, Dean of Robson Hall 1964-1979.

before I came to law school, was able to encourage or prepared to hire people from the profession to come and teach at the law school whether they had a graduate degree or not.

It is sort of a transition from as you say practice to academics. Although Cliff was the one who was going to try to transition the Manitoba Law School to the Faculty of Law at the University of Manitoba. But he hired Roland Penner,⁹ who did not have a graduate degree but was a very prestigious, very able lawyer. He was a great lawyer as a matter of fact but he was always on the left wing so he was a little bit of an outsider to a certain extent. He did not work for a large law firm.

At the end of the day I ended up articling at his firm. That is a different story, but the three that were hired that way were Roland, Gordon Diltz and Keith Turner.¹⁰ Keith was an excellent lawyer and an excellent litigator who worked at Pitblado.

BPS: Populating people to go in and teach law school on a full time basis was probably not easy in the 1960s at that time, so he was prepared to go into the profession and ask who was interested.

DM: Can I ask a little bit about the Solomon Greenberg Moot, which was at that time the major competition, sort of the flagship both internally and for entering into the profession.

DD: Solomon Greenberg and then we went to the Westerns. There was no Sopinka Cup at that point.

DM: You were obviously interested in litigation as a student, was that a big deal for the people who were interested in litigation at the law school?

DD: Yes. What happened was you had the one or the two nights of the trial and then based upon the reports that Gordon received from the barristers who act as the judges he chose the students who would participate in the competition. I do not think there were more than eight. I just cannot remember the number. And then he chose the winner. It is amazing the

⁹ Roland Penner, Robson Hall faculty 1967-present.

¹⁰ Keith Turner, Robson Hall faculty 1957-1987.

things that come to your mind. The winner my year was Doug Abra¹¹ who is now a Queen's Bench Justice. I do not know who came in second.

BPS: He had a very long and successful career as a litigation lawyer before he was appointed.

DD: Oh yeah, for sure. He worked again at Thompson Dorfman Sweatman and he worked with Dave Hill.¹² For a time before he got promoted he was also a Crown Attorney.

BPS: When you are looking at someone like Gordon Dilts – litigators, you got to court a lot. Civil trials actually went to trial. It was not this extremely elaborate discovery. There was no Alternative Dispute Resolution. It was not a big concept.

DD: I do not think it existed. Certainly not when I went to law school.

BPS: Gordon, Mel Myers¹³ and D'Arcy McCaffrey,¹⁴ the leading litigators of that time, they were larger than life figures, charismatic, theatrical.

DD: They really were characters, but if you got them into the courtroom they were terrific.

BPS: They fought really hard and then they did not take it personally. It was just like playing a game of rugby. Tear your ear off and then we will go for a beer.

DD: Either Friday afternoons in Hy's lounge on Kennedy Street was one of the big places or also the bar at the Charter House after work.

¹¹ Douglas Abra, appointed as a judge of the Court of Queen's Bench of Manitoba in 2007. Prior to his appointment he practiced as an associate with Monk Goodwin & Company, then as a Crown Attorney with the provincial Crown from 1974-79, Thompson Dorfman Sweatman from 1980-89 and Hill Abra Dewar from 1989-2007.

¹² Dave Hill taught Agency and Insurance law at Robson Hall from 1978-1988. He is currently a partner at Hill Sokalski Walsh Olson LLP.

¹³ Mel Myers, co-founder of the Canadian Association of Labour Lawyers. Retired from active practice in 2001.

¹⁴ D'Arcy McCaffrey, co-founder of Taylor McCaffrey LLP.

BPS: It is my sense that in those days when you went into teaching at the law school it was primarily because you embraced the experience of being a teacher in the classroom and interacting with students. You thought of yourself as a teacher first and scholarship was ancillary to that. Is that fair to say?

DD: Yeah well I never did and still don't concern myself with scholarship. I came into it for a couple of reasons. For one, I did not want to have a life, if I was doing criminal defence work, where I had to get up at 3:00 in the morning with crazy phone calls. So lifestyle was a big part of it. I enjoyed being with students, enjoyed being in the classroom.

BPS: You taught Socratically didn't you?

DD: I taught Socratically, liked the interaction.

BPS: And you expected the students to come prepared and would look at them sternly when they weren't?

DD: At one point in time I think I might have been the only professor here who did that. In later years, when Harvey Sexter¹⁵ was the dean, there was an incident where the students were involved in some other things and nobody came prepared to my class. So I said "Anyone who is not prepared get out."

BPS: And did they?

DD: Yeah, and they went right up to Harvey's office and said, "How do we get back in." And he said, "Your problem." And I taught the class.

BPS: Gerry Nemiroff said that he once told the students, "Look if you are not prepared either you leave or I leave but we are not going on." Was that Gerry?

¹⁵ Harvey Sexter, Robson Hall faculty 1999-2009

DM: I have heard the story that Gerry would say, “Nobody is prepared so I am done.”

DD: Yeah I do not think that he ever actually walked out.

DM: I heard he would walk out and then come back and say, “Either let’s get serious or I am not going to be here.”

DD: Interestingly enough after you do that once you do not have to do that again.

BPS: That reminds me of Larry Robinson with the Montreal Canadiens. You only have to beat someone up once and then a stony glare will get you through the rest of your career.

DD: Well that reputation lasted me three or four years.

BPS: After you studied at Harvard under Gary Bellow, did you come back with the idea that you were going to institute clinical teaching?

DD: I did not have a job teaching at that point. I went to work at Legal Aid for a year. I had a couple of offers but just personal reasons or not I chose to come back home. It has to do with personality. The job offers were not, they did not, make me an offer I could not refuse.

DM: Just so I have the timeline straight, you go through law school here from 1969-72. You article and do another year at the firm you are at. You get accepted to Harvard. You go to Harvard for the 1974-1975 year. Then you come back for a year and you do not have a teaching gig at that point.

DD: Well I had a semi-teaching gig. I taught Criminal Procedure sessionally. I worked for legal aid in what was then called the research and education department.

DM: That gets us to 1976. And then Cliff said there is a spot where we need some things taught.

DD: It was Cliff and to the extent that I had some assistance from others I think Jack London¹⁶ had a big part in that.

DM: Where were Keith Turner and Gordon? Were they here already?

DD: They were already here, they taught me.

DM: So you were brought in to be the next generation of that cohort.

DD: I am not sure about that. I have some expertise in criminal law and procedure and had an LL.M. from Harvard, which is never a bad thing to have. In fact there were a number of people at that time who had gone from Manitoba to Harvard even earlier than I did and got an LL.M. and then came back. Justice Robert Carr¹⁷ did but he did not come back and teach. He came back and practiced with D'Arcy McCaffrey.

BPS: I thought he was appointed Superior Court Judge when he was twelve or something.

DD: Yeah, as soon as they started the Family Division he went to the bench.

II. REFLECTING ON CLIFF EDWARDS

BPS: Before we get into telling the narrative about what you did to create the clinical program, we were hoping to obtain some of your recollections of Cliff Edwards. How did Cliff strike you? You are a new law student as you go through the program, what kind of impressions of Cliff did you have? What was your impression of Cliff as you became a teacher?

DD: When you started out it was Dean Edwards, at that point in time, and to the extent that any student has anything to do with the Dean, I had nothing to do with the Dean, except that he taught me Legal History, he

¹⁶ Jack London, Robson Hall faculty, 1971-88, 1990-94; former Dean of Law at the University of Manitoba. Mr. London is now senior counsel at Pitblado Law. For his interview, please see page 191 of this issue.

¹⁷ Justice Robert Carr, appointed to the Court of Queen's Bench in 1983, elected supernumerary status in 2006.

taught other courses, he was an excellent lecturer. Just take yourself back to first year law school, you are self-centered about you and about law school and the Dean is somebody who is out there.

Although I will tell a funny story. In those days faculty had their own parking spots. The Dean's spot was of course right by the sidewalk and then the students sort of got to park out further in the lot. Martin Tadman,¹⁸ invariably, had this green MG and he used to take Cliff's spot. I remember Cliff just walking in and saying, "Where is Tadman?" He was just angry as hell. He developed some personality but otherwise at that point in time I cannot remember any huge interaction.

BPS: What about as a colleague, did you have much to do with Cliff?

DD: In later years before he retired he was my boss. Cliff was very much hands off. Sometimes we would meet once a year, sometimes once every two years, unless he had a problem. I was lucky enough that he did not have any problems with me. We certainly met to talk about terms of engagement. When I first got hired, in terms of what was going on in law school, the only thing that was available was a one year term. After the one year, things opened up and I arranged to go back. There was no union then, just a series of bylaws.

BPS: Cliff's method was, I understand, he never hired anybody on tenure track. Rather he hired everyone on contract. Then, if it was not working out from his perspective, he would not renew you. He had this incredibly diplomatic talent in that regard. I asked him once, "I was not there in those days, but I had the sense you were very deft at moving people to other tracts without them even feeling the sword." He said, "I would not tell them that they were not being renewed, I would just say 'I found you a wonderful new opportunity at the Law Reform Commission' or at the Civil Litigation Department." Instead of telling them that they were not being continued I would tell them I had found them this wonderful opportunity.

DD: In those days, certainly a little bit before my time, there was a pretty good attrition rate of people who were hired. I was hired at the same time as two other people and I was the only one who continued on over a period

¹⁸ Martin Tadman, associate at Levene Tadman Golub Law Corporation.

of time. I think the reasoning was the other two were not considered to be very good teachers.

III. TEACHERS VS. SCHOLARS

BPS: I was just going to ask you, my sense was, somewhere along the line—it's almost a continuous movement on a progression—we went from “people went into it because they wanted to be teachers” and basically you made it or failed in the classroom. Nowadays, it's my sense that people identify themselves first and foremost as scholars, and a lot of our incentive and reward system is based on scholarship and production and that's where the grant money is, that's where the prestige is.

DD: Well, that's the same thing with hiring. That's what you look at. Now I think it's just basically scholarship and what the production is going to be. I don't know if it's quite as bad as it is in other faculties, but I think it's getting there.

BPS: So Cliff wouldn't approach you or anybody and say, “Dash it all; need an article or two from you.” That just wasn't an issue in those days?

DD: I think earlier on in my career, when you had a review for pre-tenure, you have to remember—and I can't remember exactly the timing, but it was really tight—that the professors were a fast-track in terms of...

BPS: Three years to tenure and then five or six years and you're a full professor. In terms of age profile, so different because those two people were hired with practise experience but no LL.M. You had your LL.M. but you were still a relatively young person and you got tenure and a promotion within three years. Nowadays, a person needs to get a doctorate before they're even hired here, and then it's a five to six year track to become a full professor.

DD: It's six years as far as the union is concerned.

BPS: Yes, so then we're talking about a potential ten year difference in the typical profile of somebody who is hired here.

DD: I started here when I was 28 and I was a full professor at 35, something like that. I mean, I probably have a document that says what year.

BPS: I was 24 when I started as well, and I don't think that's ever going to happen again, due to the expectations that people have doctorates and so on, young professors are in their early 30's now.

DD: And given your generation, you must have skipped a couple of grades and that's why you were able to do it so young. They don't do that anymore.

BPS: I always say I didn't graduate early, I was just born late.

IV. THE UNIVERSITY LAW CENTRE

BPS: So now, Dave, you were and always will be associated as a leading figure in the creation and development of the whole clinical skills program here at the University of Manitoba law school. Could you tell us what happened? What kind of opposition or support did you have?

DD: Let's start at the beginning; when I came back from Harvard and I had that one year that I was working at Legal Aid, Jack London had started a clinical course and I can't remember what he called it. But it was a seminar on Monday nights. He had, if I remember now, Hymie Weinstein,¹⁹ and he asked me to sit in on the seminars. The students also handled cases under the supervision of lawyers. Very limited number of people; I think there was a maximum of ten. He was aware as well, because he had gone to Harvard a couple years earlier, and he knew about clinical education and he wanted to introduce it into our curriculum, which he did.

BPS: And he had gone to Harvard as well?

DD: Yes, he did. He came as a teacher; he taught me Tax but that was his first year of teaching. He graduated earlier and practiced law for a number of years. That was in '71-72, so I think he got his LL.M. from Harvard in '71 and then he came back to Manitoba.

¹⁹ Hymie Weinstein, senior partner in Myers Weinberg LLP.

BPS: So was that the opening kick-off for clinical courses?

DD: Well, that depends on how you describe the Litigation courses.

BPS: I think you would use skills vs. clinical, right? A simulation you would describe as a skills course and actually dealing with clients would be clinical?

DD: Well, no, I think they're both clinical but really you're talking live client vs. simulation. I think they can both be focused as skills.

BPS: So was that course live-client?

DD: Yes, it was. We were able to make arrangements to get clients—in all sorts of areas. It wasn't just criminal law or anything like that nature. The next move in the development is when I came onto the Law Faculty. When I was working at Legal Aid, I was also involved in the Legal Aid Clinic here, which was started in 1972. It's never been a part of the academic process, except in the latter couple of years of the law school. It was really meant to be developed as a service to the public. People such as Justice Carr, who was one of the leaders in this area thought about it. It really came into existence when I was in second year law school, 1969-70. It's the same office, same basement. At the time I was there, Al McGregor²⁰ was the lawyer supervisor, and it was student-initiated. Cliff Edwards—notwithstanding the fact that he was there in theory to turn it into a university faculty—paid for it out of his own budget.

BPS: So Cliff sounds like he was quite eclectic in his view on education—he had practitioners, he had people with advanced legal degrees. He was obviously a pioneer in bringing us out to the university environment—but at the same time, he didn't have any kind of antipathy, and in fact supported doing a clinical program as a public service and supported you in your initial efforts to develop the curriculum.

DD: He certainly was not hierarchical. One of the things he would do, just generally, is that if one came up with an idea of what they wanted to teach

²⁰ Al McGregor, graduated in 1967 and became first part-time supervisor of the University Law Centre.

or wanted to do, his usual approach to the matter was, “How can I help you get it done?” I wouldn’t say that “No” wasn’t a part of his vocabulary, but that’s certainly my recollection. His leadership style was, “Ok, go ahead and do it” and he certainly didn’t micro-manage. Obviously, if staff came back to him and said that things weren’t working out, he would take whatever steps he thought were necessary.

BPS: It sounds like his management style was basically, “I get the best people I can and if they’re not working out, then I separate them, and if you pass the filter, then I’m here to support you.”

DD: Yeah, “I’m here to support you; go do your job!”

DM: So when did your involvement as the liaison between the law school and what we now call the University Law Centre start?

DD: Well, remember the University Law Centre was always developed over time to be moved towards an association with Legal Aid, but a big part of it was that the law school had a big involvement. In any event, there’s some history involved in that, but basically, my association started when I was working at Legal Aid for a year and then after my first year of teaching, Roland Penner was in the Chair of the Board of Legal Aid Manitoba. He asked me if I would take over the Legal Aid Clinic as the Director of the Clinic here at the law school.

DM: They gradually put Legal Aid and the University Law Centre together?

DD: Well, in fact, they’d come together beforehand. Because it started out of Cliff’s pocket and then Legal Aid was founded in 1972. It looked like a good place, a better fit, to have Legal Aid Manitoba be involved in funding as well as some other things. I wasn’t around then—I was articling and I was a student—so I have no idea what the internal workings were like at that time.

DM: So while you were away from the University, it moved away from Cliff’s pocket, to essentially, Roland’s pocket.

DD: Well, our government’s pocket.

DM: So you come back and you're asked by Cliff, "You're on the teaching faculty now; would you be the liaison?"

DD: Well, it's not even a question of being the liaison. I was asked by Roland, through Legal Aid, "Would you run the Clinic?" Now I'm assuming he had talked to Cliff, because Cliff never said no. So I just sort of stepped into it.

V. DEVELOPING THE CLINICAL SKILLS PROGRAM

BPS: You mentioned that Jack did a seminar—it was a live-client seminar, which is one of the first components to be integrated into our curriculum—so eventually we ended up with your Intensive Crim course; what's the trajectory?

DD: There were discussions through that period of time about development of a new curriculum.

BPS: Yeah, I was on that committee. It's been known as the Osborne-Esau committee.

DD: Well, in fact, stuff was started before and Cliff was there and Shi-Sheng Hu²¹ and others, they would have meetings over pizza. Who knows how many things were discussed.

BPS: But that was before...

DD: That was before your time.

DM: So '78-79?

DD: Yeah, '78-79, '80 or something like that. What had happened was that I took on as my first sabbatical project—if I remember correctly, it was '82, '83—to do a study of clinical education in other places in the United States

²¹ S.S. Hu, Robson Hall faculty, 1967-78.

and report back with a plan for clinical education at the University of Manitoba and how to incorporate it into the curriculum.

BPS: I'm trying to remember the sequence. Osborne²² and Esau²³ was mid-80s. Now was that when we first incorporated or did we already have an Intensive Crim course by that time?

DD: We didn't.

BPS: So it was part of the Osborne-Esau curriculum package that we integrated into the school.

DD: To be quite honest, I don't quite see it as the Osborne-Esau other than the fact that they wrote the article, because I think Jack London had a huge part in it. There were also a number of other senior members on it. I was never on that committee. Dale Gibson, I think, was involved as well.

But what happened was I wrote a very small report and said, "Here is how I think we should set out the curriculum on the clinical side" and the vast majority made it into the report, starting from first year, which is really the precursor of Legal Methods, into second year, which is now the Negotiation course, and of course the Litigation course on the other side. I was a little more; I had bigger eyes at that point in time, and I said we should have a course for interviewing and counseling, and we tried that for a while, but then things morphed. I was also a proponent of trying to do live-client in third year. There are a couple of other things that I suggested that didn't go through; for example: that each student should be taking one of those courses.

DM: Something that we would now know as a clinical component or a live-client component?

DD: Well, I think the way that I envisaged it, because I came from Harvard, which had the idea in the US, was basically still almost all live-client. So we're sitting on a live-client system.

²² Phil Osborne, Robson Hall faculty 1971-2012. He is a Senior Scholar.

²³ Alvin Esau, Robson Hall faculty 1977-2010. He is a Senior Scholar. For his interview, please see page 257 of this issue.

BPS: The pillars of the 80's curriculum reform were that every student would have a balanced education. Doctrinal, perspective and clinical education would be a component of institution in each of the three years. The concept of perspective courses was that in a seminar environment, students would write an essay on some sort of evolving area of the law involving policy.

Legal Methods was to be your introduction to clinical education, and then you would get more skills and experience the second year, so that as you went through the three years, you were building what you learned in that sense. We haven't fully succeeded in implementing all of that. For example, we had some problems with the progression idea.

DD: Well, we've had a lot of problems. I mean, we could talk about the reasons behind that. There are really a lot of them, but that's in fact what I had suggested. I said, "Here are the kinds of questions that we want; we want to progress from theory to working for real people." So the working for real people, in terms of being mandatory, never made it into the curriculum.

BPS: Now, going back again 30 years, I remember you saying at the time that from your studies and experience in the United States, you had to adjust your sense of how many credits you would give for a clinical program. You had to realize that if a student was doing an Intensive Crim course it wasn't just being in the court preparing, it was a lot of transaction time, going downtown, coming back, a lot of busy time, and you had to reflect that accordingly in the credits given. And I think we did that.

DD: We came out with what was then-called the Intensive program with eight credit hours, and we started out, at least initially, with Intensive Criminal Law. It was initially taught by Roland and myself. Then we got an Intensive Family Law course and then an Intensive Administrative Law course. So we started out with those three. For really a lot of practical issues, Intensive Criminal Law was the only one that was able to continue on for a long period of time.

DM: It stuck around the longest. The other ones morphed into much more...

DD: They morphed into much more of a simulation course and over time, they got knocked down.

DM: In credits?

DD: In credits, as well. I taught Intensive Criminal Law until about seven years ago, when Chris Axworthy²⁴ decided that \$9000 was too much to spend to keep it going. But that's my own...That really pissed me off.

DM: That was your own "Waterloo."

BPS: I'm still going back 30 years in my memory, but I think you mentioned at the time, that when they do successful clinical programs, the expectations of scholarship for clinical teachers took into account that teaching clinical was very time-intensive and you weren't expected to produce the same volume of scholarship.

DD: Yeah.

BPS: Now you mentioned some things didn't work and some things obviously did work very well among the different clinical courses?

DD: Well, in the context of where we started—Family Law, Admin, Criminal Law Clinical—Criminal Law, to some extent, worked for really a couple of reasons. Number one, the people who were involved in it, and I hate to sound like I'm tooting my own horn, but I was interested in clinical education, and that's when Roland started. I think he was only there for a couple years before he went into politics full time, had a degree of experience in the area, and I think, more importantly, what made it work was the fact that because of the Legal Aid system, we had an easy access to clients. We were able to run the course in a way that the students would be able to deal with the clients and we would be able to handle the clients within the strictures of an academic year.

²⁴ Chris Axworthy was the Founding Dean of Law at Thompson Rivers University's law school in 2011. Prior to that he served as Dean of Robson Hall from 2008-2010.

For Family Law and Administrative Law, you could always find the family law cases, but the problem was that they always ran on, and you had nowhere to send them. Usually what happened was, we had the cooperation of Legal Aid and people at Legal Aid who are willing to put time into it. A classmate of mine, the late Bill Merrett,²⁵ would search around for cases all over the place and so we knew what to do with them. We had a way of dealing with them. You see, the one thing we were avoiding, the thing we didn't do, that the States did, was just set up a full-time clinic and run it that way, because that was tremendously expensive. Certainly, I personally didn't think we could sell it, so I didn't even propose it. With Family Law, you had the cases, but in Administrative Law, just getting the cases, in itself, presented a problem.

BPS: We've gone from teacher who does some scholarship to scholar who does some teaching. From people who usually did some practice and had an LL.M. to people who have gone through the arduous doctoral process, for which there is an opportunity cost because all the time you're spending on your thesis is time you're not spending getting more practical experience.

Did you have a sense that we were moving along this spectrum as it was happening, or was it something that you look back upon and say that this happened? Was there a cultural and political shift gradually happening, or was it that you look back and say, "Wait a minute, we're mostly PhDs now." I think you said at a recent faculty meeting—I don't know if it was a faculty meeting or faculty council—but you said, "Let's be realistic, folks, how many of us are actually qualified to do it?"

DD: Either. I guess you have to take a look at the hiring committee at the time, which some of us have served on. They never really let clinical education play a part in determining who they're going to hire. Whether it just morphed that way, I think to some extent, it morphed because we now have a collective agreement. If the Dean wants to do it, the Dean can do it, because, of course, the Dean can assign the duties and what you call service, what you call teaching, what you call scholarship.

Now they talk about 40-40-20 [percent division of a faculty member's efforts among teaching, researching and administration] but that's not in

²⁵ Bill Merrett (February 1947 – March 2015) served as the Winnipeg Area Director for Legal Aid Manitoba.

the agreement anywhere. It says the Dean can give whatever proportions they want. So it can be 95–2.5–2.5 and still satisfy the collective agreement. Now, of course, you still have to deal with the internal politics of the organization, but that's a different story.

BPS: You have focused on the influence of particular deans. But my perspective is that the move from downtown to the south-end campus has been a major long term factor. In the old days, the Cliff Edwards days, the law school had a very high degree of autonomy and if the Dean thought this was mostly about teaching with a little bit of research, there's nobody at Central Admin giving them a hard time.

Now we're much more assimilated into the university structure, and the general university culture of being research-oriented, research grant-oriented, refereed publications—all of that has permeated our life.

DD: Yeah, well, it's translated, and I think we also need to take a look in the context of the deans that were there, who really made a huge effort to maintain the independence of the law school. They basically said, "Yeah, we're a law school; yes, we're here at the university; we're dependent upon you for funding. But you know, stay away, please." To the extent that they were capable of doing that.

DM: Was that a gradual shift, or was there a point at which you said, "Ok, we've flipped the switch, as it were?"

DD: Well, it's tough to say that we "flipped the switch." My view of the matter is the whole thing is who we've got in the faculty, and that's a gradual thing. You know, we've had a pretty rapid turnover, and it's only because people are quitting, or retiring. And that has everything to do with demographics. But you have "flipped the switch" over a period of years.

DM: Ballpark it in a decade for me: where do you think that switch got flipped over a five-year period? I'm assuming you're talking about five, six-year period where you went "Ok, something is different than it was five years ago."

DD: Well, I would say, as we're in 2015, maybe 2005?

BPS: Because, all of a sudden, that's who became available, right, in terms of who you are going to hire and who applied for the jobs. And really it had to do with the way the eastern graduate schools were configured, again, with the emphasis on research, working toward a Ph.D., and with everything that comes with that: research grants, all of the stuff.

I think another major factor has been a shift in the supply and demand for lawyers. We used to think that we had a supply management of Canadian lawyers, because there were only so many English-speaking Canadian law schools. Then it turned out that you could conduct a Canadian law school outside of Canada, and we have a huge increase in the number of students coming into the profession.

Alongside that, some of the existing law schools expanded, some new law schools were created. That's placed a lot of stress on the articling system in Ontario, which drives the whole national market. Now the expectations of students is: we're in a competitive market, we're competing with students who are getting more practice-ready at some of the other law schools, and we expect University of Manitoba law school to move with the times. That's my sense of where the students are.

What's your sense of how well the law schools are responding to that change in environment? Are they recognizing it, or are we oblivious to it because we're now in the university system and our incentives as academics are different from what the students want?

DD: I've always said that the crux is who we hire and why we hire them. I was, for a whole series of years, on the hiring committee. A Ph.D. certainly was not a prerequisite for me. At the end of the day, the determinant for me was who I thought would make the best teacher, because everybody had the same credentials. Everyone had great letters of reference—and at the time I was doing it a lot of people still had a master's degree—and everybody had written stuff.

What an applicant's presence was like, what their preparation for a model class was, things like that were real the be-all and end-all for me. Having not sat on committees for a number of years—well in fact we don't do that anymore. We don't elect them...I say that, having lost my popularity.

DM: Well, we still elect the committee.

BPS: The Dean has recently exercised the prerogative to replace some elected members.

DD: I haven't sat on that for a long time.

DM: We no longer teach a model class as part of the hiring process. I have no problem with anybody who is being hired; if I have a problem, it's going to be on an individual basis. But I don't have any problems at all. I'm just saying that those who have been involved in hiring committees within the last four or five years, had a much narrower focus, in terms of the people who they are looking at.

Everyone can talk about people they knew who, for example, didn't make the short list, who had been extremely valuable colleagues, who met the requirements for being a professor. Rumor has it that at one point in time the committee said, "We're not even going to look at anybody who doesn't have a Ph.D.," which I think is awful.

BPS: One of the ways that normatively this debate is played out is that—you and I were involved in this, Dave—that to get through your stages of tenure promotion, you had to be a very good teacher, or you could compensate by being an okay teacher with superior scholarship. You and I took the view that there was a minimum requirement of having to be a very good teacher regardless of how good a scholar you were.

This issue is being revisited again by Law Faculty Council and my guess is that culturally we've changed. More people would say, "Yeah, if you're an excellent scholar, and just so-so in the classroom, it's okay." You and I came from a time—I was transitional and you were from the earlier days, a little bit earlier—of, whatever else you're doing, we're a small school, we define ourselves as being an excellent teaching school and you've got to be at least very good at teaching.

DD: I mean, when I started, what justified our existence was that we could go anywhere in Canada and say: we have small classes, we have excellent teachers, and if you're a student, or a prospective student, that would sell it. And my view is we should have tried to sell that from the beginning. But at some point in time the view came that we should be like everyone else. And then we can't compete.

BPS: My view is that when I came here, we were a first-rate, second-rank law school, meaning: our teaching program was as strong as any in the country, probably better than most of them. Ok, so we're not the Canadian equivalent of Harvard in terms of scholarship, but your quality of education here was easily as good as anywhere in the country. That continues to be my perception of the time, that we had, out of maybe 18-20 faculty members, at least 10-12 outstanding teachers, which is incredible, as a ratio. That was our identity, and like you say, identity is largely shaped primarily by who you hire and what their values are and where they come from. It's my understanding—and I guess it's your sense, too—that culturally we've changed, that we've moved more into this scholar-teaching model.

DD: Well, moved more into the university system. I mean, you keep reading articles, particularly from the US, that appears that professors don't teach anymore. Certainly in Arts, they don't teach first-year classes anymore; it's all done by TAs, or people they hire.

DM: But we don't do that.

DD: We don't do that now.

DM: Do you think that's coming?

DD: Yeah. I don't know when it's coming because it depends on whether the university will buy it, or whether or not we'll get the money. If you ask me, the current cohort that we have here now, I think there are a large number of our colleagues, and I don't say that pejoratively, I say, if you give them a chance *not* to teach, and do more scholarship, they'd be glad to take it.

VI. CLINICAL INSTRUCTORS AND THE U.S. TWO-TRACK MODEL

BPS: In the literature on clinical education in Canada, one thing you consistently read, or if you go to conferences you hear, is the following from clinical teachers, which is: even if schools say that they want clinical instruction, we don't recognize you as equals in terms of academic stature and significance.

The model seems to be that there will be the “intellectual” class, which will do the scholarship and research, and clinical people—“well, it’s not that you’re bad people, but you’re not peers. We will hire you on a different basis; you won’t have the same status or salary. You’re doing something more functional and less august.” And you’re nodding your head like that’s kind of the way you see things.

DD: Well, in fact, that’s what’s happened. In the United States, you have some schools that use an equality model if you’re going to talk about that. But now they developed the concept of clinical professors.

BPS: Tell me a bit about that. I’m not familiar with that. So that’s actually a formal title?

DD: A formal title and a different track. They’re called a Clinical Professor of Law.

BPS: So how does that work? Like you have less pay, but lower expectations of scholarship and more teaching?

DD: Well, I guess it’s a different way of doing it. My thoughts are that there is a difference in status, and I suspect that they are paid less. I hadn’t really looked into it all that carefully. But there’s basically a two-track system so I think, to some extent, it’s hierarchical. I mean, my view was in this law school, everyone should be treated as an equal.

Now what’s happened is that we’ve gone in a little bit of a different way in that we developed a model in clinical education comprised of what are called externships, or internships. These involve all of the clinical training being done outside and basically left to the organizations to provide the teaching, with the people who have been given the ultimate responsibility within the faculty, really not all that familiar with what is going on, and may not even be familiar with the area.

BPS: My view of that is that we’ve lost the track there, because the point was your basic model of practice idea, that what we do here is practical, but the idea is to do it critically and reflectively, and in a general academic way, so that no matter what you do in practise, you’re asking yourselves the questions, you know where to look for insight into it.

DD: What I tried to do was develop a basic model of practise. I would say, “In all these cases, these are the questions you taught yourself,” and then you can go back and do a case and talk about it in class, and say, “Within the context of this model, what did you do that worked well? What did you do that didn’t work well?” and learn from that.

DM: There’s also a question of depth or breadth in what you teach and how you teach it. This is one of the things that happens in the mooting program and I know with live-client, it matters how deep you go into a particular case or how many cases you have at any given time. So how does that play out with this different model, this two-track system?

DD: The two-track system I’m really talking about is the fact that we have so-called “real professors” and really, we don’t have anybody now who teaches clinical here.

DM: Not anyone who gets credit for it anyway.

DD: Well, no professors who get credit for it, or teachers who have the title of professor.

DM: I absolutely agree with you.

DD: I think to some extent, it’s the worst for law school because it’s developed into a place that is, at least in some people’s views, very hierarchical. Boy, I’m glad I’m retiring at the end of the year. I sent in the piece of paper today.

DM: Congratulations for you, but I think that’s a horrible thing for us.

DD: Therefore I can shoot my mouth off.

DM: You can say whatever you want.

BPS: The missing connect I think is that people come from the academic culture—to use the conventional language—and we hear language like, “I’m not here to teach you how to fill in forms.” There’s a sense that the practical

skills are craftsperson-like. They don't invite or require academic critical reflection. Those people who don't have that experience, don't have that orientation, don't have this model of practise idea that there are a lot of interesting, difficult questions to ask.

Even with filling in a form, there are issues requiring knowledge, experience, judgment; like what do you say, what do you not say, how do you reconcile the requirement for candor with the importance of not inviting trouble through the unnecessary disclosure of information; where to go for guidance on how to interpret a form and what the consequences are of any errors (e.g., the law concerning substantial compliance);... an artfulness to it. You need to make hard decisions...

DM: But I'm saying we don't teach that as a skill set in the law school.

BPS: My view is that many people don't recognize the artfulness that can be involved in things people view as routine tasks. You want to do an affidavit, there's a lot of interesting questions.

DD: An affidavit is not a routine task.

BPS: Is it my voice; is it the client's voice? Where is the line between fact and opinion? How much do you want to say to advance the case, and how much do you realize the more you say, of course, the more vulnerable you are? There's a whole lot of critical reflection on all that, and that seems to be really interesting academic questions. It's just that I don't have a sense that those who are more into the scholarship-research thing, would recognize the model-practise thing as constituting an academic exercise. We would recognize the potential artfulness that is associated with doing these tasks.

DD: I agree with you. At the end of the day, doing an affidavit, one of the things that one learns very early on in law practise, helps you to win your case at trial, not at the Supreme Court [of Canada]. You have to learn to prepare for trial and what's important for trial, if you can look at it from that perspective.

BPS: More so than ever, because the new standards of judicial review are extremely deferential to the first instance.

DD: Even in criminal law, the Supreme Court is extremely deferential to trial judges.

DM: I know that for a lot of people, the moot program is not one of the things that people consider live-client, because it isn't. Whether they consider it clinical or not, one of the things that I learned while being involved in the moot program was that teaching students what *not* to say in response to a question from somebody—Don't say that because you're going to lead yourself into this morass; here's the way we're going to walk ourselves back out of that—is a skill set that students need.

DD: Yes, they do. I mean, at the end of the day, it depends on where you go. If you're talking about students coming out of law school, I don't have a problem with moot courts. But one of things about moot courts is that you're dealing with a different function of the classroom. You're talking about the law, and you're generally talking about Supreme Court cases, and pretending to be in the Supreme Court.

VII. EXPERIENCES AT THE SUPREME COURT OF CANADA

DD: I've been in practice for 40 years and I've been to the SCC twice.

DM: How was that?

DD: Probably twice more than the vast majority of lawyers in this country. So, in terms of learning the skills to argue at the Supreme Court, they are vastly different from learning the skills to argue in a superior court, even a provincial Court of Appeal.

DM: So what was that like, because I'm assuming that some of it was after you were here [at Robson]?

DD: My appearances [at the SCC] were all after I was here. I was in practise for a long time, in addition to teaching.

DM: So you walk out of here, Robson Hall, south end of Winnipeg, and walk up the long steps of the Supreme Court, the thought process is what? Where is your head at when you're walking up those steps?

DD: My head is in the case.

DM: My question is where in the case are you? Because you're not thinking about it academically, as in I've got this judge or that judge. Or is that playing into it?

DD: I always thought about my case. I would always review. I mean, the judge can make a difference, but you can't do anything about that. If you're talking about the judge's predispositions, you could be a great lawyer and perhaps turn the judge around on that part of it. I wasn't that good a lawyer.

DM: What was your record for the two cases?

DD: I'm one and one.

DM: Good enough to get into Cooperstown.²⁶ I'm genuinely curious because when I walk into the superior court, the Court of Appeal here, to talk to the judges, my mindset is different than walking down the hall here at Robson Hall, talking with my colleagues.

DD: It's a different section. Even walking into the Supreme Court, I was thinking about the case. Not that I wasn't scared or nervous, but the focus was really on the case, not where I am. I never really thought about that one, because that wasn't my job.

VIII. THE CHANGING FACES OF PROFESSORSHIP

BPS: So you're retiring at the end of this year, right?

DD: Yeah.

²⁶ The National Baseball Hall of Fame is located in Cooperstown, New York.

BPS: It's my sense that if David Deutscher was trying to enter the academic legal profession today, he would not be able to enter the profession.

DD: I wouldn't have even been able to go to law school today! We can start with that proposition. Well, it's tough to say. Because of grade inflation only; with my grades, I'd never be able to get into law school.

DM: If your grades were constant...

DD: Yeah, if I presented my transcript today, they wouldn't even look at it.

BPS: Speaking about personality and interest, you're not someone who would have said, "Oh, I really want to be a classroom teacher, but to do that I need to get a Ph.D., so I'm going off to the library or basement for three or four years. I'm going to get my Ph.D. and then apply." It doesn't seem to me that people with your particular combination of practical and academic interests would have been inclined to go through that long purely academic route, from the screen, grinding out thesis, process. Or am I wrong?

DD: I think you're right. I think what would have happened is that I would have been a lawyer, probably practising criminal law. I'm not sure on which side, to be honest, as I wouldn't have developed with an academic bent. One of the things that I might have considered is working for the government in the appeal section, or things of that nature.

DM: Now, you started out as a criminal defense lawyer. Is that consideration—that you'd work for the government—based in part on 40 years of experience, having a family, not getting those 3 am phone calls as a Crown Attorney—all the things that come with it?

DD: That's part of it. Having spent a couple of years in private practice, I didn't particularly care for the business part of it, such as billing, obtaining clients and so on. At the time Legal Aid Manitoba was hiring lawyers as staff attorneys, and having worked full time at Legal Aid from 1975-1976, becoming a staff attorney there was certainly a realistic possibility for me.

IX. MEMORIES OF PRACTISE

BPS: You told me a story once that stuck in my mind, which is—it seems to be the perfect trifecta of criminal defense work—you had a client, who walked into a police station and said that they killed somebody, and you got him an acquittal.

DD: Yup! (Laughs)

BPS: Can you tell me about that?

DD: You have to understand that when we are dealing with people who are involved in criminal offences, you are usually dealing with people who, first of all, are poor, and secondly, have all sorts of problems.

DM: Substance abuse...

DD: Substance abuse, undiagnosed, or not mental illnesses, all sorts of other issues in that respect. Anyway, the killing took place around a bunch of people who were basically homeless, and what they did is they hung out all day and drank. Mostly at the time, they drank substances that you couldn't buy at the liquor commission—solvents, hairspray, whatever.

DM: Anything to get high.

DD: They weren't particularly into drugs, but it was alcohol-based. Basically what you do is you get a two litre bottle and you put some stuff in, you put some water in, and that's what you drank out of. At one point in time, the body was found of one of these individuals in a garage off a back lane where people would go to drink. The police did an investigation, and they arrested somebody else. My client walked into the police station, and he was drunk, but the police just ignored that, and he walked in and said, "I killed him." His reasoning behind that was that the guy who was charged was a friend of his, and he didn't want him to go through that by himself.

DM: So "I'm going to stand with him"?

DD: That's right. So the police at that point in time said, "Ok" and they took his confession in a different way. They didn't videotape it in those days.

DM: When? What year, so that I have a sense of the jurisprudence on confessions?

DD: In the 80s, sometime. It was pre-*Charter*,²⁷ so before '82.

DM: So, '80 or '81.

DD: Yeah, this one was pre-*Charter*. I had another murder-acquittal but it was post-*Charter*.

DM: Did that one confess, too? (Laughs)

DD: No...

BPS: It's easier when a client doesn't confess.

DD: There the police just arrested the wrong person. But, he went in and told his story, and the police wrote it all down. So they dropped the charges against the other fellow, and charged my client with murder. There are a couple problems, and one of the things that we worked through was that if you looked through the confession, there are many things in the confession that were wrong and couldn't have happened.

DM: Factually untrue?

DD: Yes, in terms of what he said he did and places that he went to. But they still had the confession and at the end of the day, who knows what the lawyer did other than analyzing that way, except that the client chose to testify and told his story and was believable in that part. The jury acquitted him.

BPS: I was going to add, that was a jury trial?

²⁷ *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

DD: Yeah.

DM: So you put your client on the stand...

DD: Yeah.

DM: ...in a jury trial with essentially a homeless client who had been abusing solvents...

DD: Yeah. I mean, this guy had a little bit of a better education and was relatively articulate. But notwithstanding that, you can't get around the confession.

DM: ...and they bought it?

DD: Yes, well, the man was innocent!

DM: Well, I'm just saying that because many juries would be swayed, innocent or not, by the confession.

DD: Yes, I mean, why would someone walk into a police station and confess? But parts of the confession were wrong and made up, and it added to the reasonable doubt, and it didn't take the jury that long.

BPS: Might as well hang up your robes, eh? I mean, if you can get an acquittal with someone who walks into a police station and confesses to a murder, you can get an acquittal anywhere!

DD: It's certainly one of the highlights of my law career, which is long enough, but not that extensive, because of course I had a full-time job.

DM: Can I ask you this: ten years from now, twenty years from now, when you're looking back at the last 40 years...

DD: Well, I'm going to be 90 years old then.

DM: ...at some point in the not too distant future, you're going to look back, 45 years into law, and think, "The one thing I remember, other than meeting and marrying my wife, is ____?"

DD: Well, it doesn't have much to do with the law school, as it turns out. I was a co-counsel, or assistant counsellor, to Norm Cuddy²⁸...

DM: Of Tapper Cuddy?

DD: ...Yes, defending Thomas Sophonow²⁹ in the appeal process of the Manitoba Court of Appeal, his last appeal.

DM: Where they found...?

DD: Where they allowed the appeal and said, "We're not going to allow the Crown to have a new trial." They acquitted him.

BPS: What was that, three times to the Manitoba Court of Appeal?

DD: Yes, this was the third time. The one thing I remember, which is really interesting, going through the appeal in the morning. I wrote a large part of the factum; that's where I helped, to a great extent. When Justice O'Sullivan came along and said, "Come back at 3 o'clock this afternoon, and we'll give you a verdict."

BPS: Wow. Did you know what that meant in terms of the judgment?

DD: Yes, that means they had to acquit, or well, I mean...they had to do something.

DM: They couldn't affirm the conviction, because they'd have to write to be able to affirm the conviction.

²⁸ Norman (Norm) Cuddy (1950-2016) B.A. LL.B. (Man.) was an active partner at Tapper Cuddy LLP until 2014.

²⁹ Thomas Sophonow was tried three times in the 1981 murder of Barbara Stoppel. Sophonow was imprisoned for four years before being acquitted in 1985 by the Manitoba Court of Appeal.

DD: Well, they could say, “You haven’t got a case,” but we had some great legal points that they would have to dump, particularly based on the issue of identification, because on the appeal before that, Justice Huband³⁰ had written a judgment allowing the appeal, where he said, “Don’t charge this if you’re going to charge on the issue of identification.” Justice Hewak³¹ turns around and charges it the exact same way, which is just basically wrong. So the Sophonow case becomes a big case on identification. And we had some other pretty good points, so they would have had to write for that.

BPS: Who was your panel for that? Joe O’Sullivan?³²

DD: Maybe Charlie Huband?

DM: Again? I doubt he would have sat the third time if he sat for the second time.

DD: Oh yeah. First of all there were only five Court of Appeal judges at the time.

BPS: That was back in the day where going to the Court of Appeal was an adventure.

DD: Depends what years you’re talking about.

³⁰ Charles Huband, sessional lecturer 1956 to early 2000s. He was a judge of the Manitoba Court of Appeal from 1979 to 2007, and currently practices at Taylor McCaffrey. For his interview, please see page xxiii of this issue.

³¹ Justice Benjamin Hewak was appointed as a judge on the Court of Queen’s Bench of Manitoba in 1977. From 1985-2003 he served as the Chief Justice of the Queen’s Bench.

³² Justice Joseph Francis O’Sullivan (1927-1992) B.A. (Man.) M.A. (Tor.) LL.B. (Man.) practiced with B.R. Coleman in Brandon, Manitoba before being made Queen’s Counsel in 1970. In 1975 he was appointed as a Justice in the Manitoba Court of Appeal.

BPS: There were some very powerful personalities there, who would be, oh, let's say, forceful in their views during an appeal and you never knew what you were going to get.

DD: I mean, Joe Sullivan was one of them, not a particularly nice person on the bench. Interestingly enough, a lot of people liked him outside of the courtroom. In any event, for whatever reason, he happened to like Norm Cuddy. Just sort of being in the courtroom in the middle of this huge case, which is still being fought, about who killed Candace Derksen.

BPS: The day after *Sophonow*,³³ in the *Free Press*, there was this long story about police sources that said, "He did this; he did that." That struck me as very not cricket for the police. Obviously the police sources were telling the *Free Press*, "Yeah, he really did it," and the *Free Press* is printing it. I was shocked that the *Free Press* would do that. Was that a surprising view from the viewpoint of journalistic ethics?

DD: From the point of journalistic ethics, they will print whatever they think will make a good story. The police come to them and say, "We have this information that the public didn't know about."

BPS: Oh, I don't know. I mean, I kind of thought, you make your case in the courts and saying the guy really did it in the press, on the side...

DD: I mean, I'm not surprised that happened.

DM: What was it like, sitting there with Norm Cuddy, and they announce that not only is the conviction vacated again, for the third time, but that enough is enough.

DD: It was an electric moment for me, and even going through it was a big deal.

DM: I mean, you were 20 years in at that point. Around '93?

³³ *R v Sophonow*, [1984] 2 SCR 524; *R v Sophonow*, 1984 CanLII 2912 (MBCA), 11 DLR (4th) 24; *R v Sophonow*, 1983 CanLII 2935 (MBQB), 150 DLR (3d) 552.

DD: Yes. And Norm was a couple years behind me; I was senior to him.

DM: What do you do first?

DD: Shake hands, and then Norm had to figure out how to deal with the media. In fact, I had another case where I had to serve something to the Crown, so I walked across the Woodsworth Building, and went up to the prosecution's desk and just served them with the papers.

DM: And then went home?

DD: No, I think I went to my office.

DM: Did you get any work done? Other than dropping off this document?

DD: No, I didn't do any work. First of all, it was late when I got back, around 4:30.

DM: What was it like when the apology came? I'm assuming you were very interested when the NDP government decided to apologize and say publicly that not only the court case over, but, "We screwed this up, and you were never the guy."

DD: At the end of the day, Sophonow's life was ruined, notwithstanding the fact that he was compensated, and reasonably well. He probably didn't have to work a day in his life, which is the horrific part of it. It's also one of those cases where my wife will corroborate that, and say, "As I read through this stuff and took a look at it; this guy is innocent." As a lawyer, you train yourself not to...

DM: To say that "this is innocent; this is guilty."

DD: Yeah. Not to think in those terms. The question is, certainly on the defense side...

DM: "Can I get to not guilty?"

DD: Well, “Can the Crown prove it or not?” Sophonow was innocent. They just had the wrong guy. Period.

BPS: The responsibility you feel as a lawyer is enormous.

DD: Yes. I mean, that’s certainly part of it. I felt we had a strong case, but you get involved in the case, and I would have felt horrible if the...

DM: That’s what I was asking about. We talked earlier about walking up the steps of the Supreme Court of Canada with your head spinning around the case. This case, was it different? Did it spin differently?

DD: I was lucky because I’m prepared to say that I was in the background of the case; I didn’t argue it. I was going to argue a couple of points but Sophonow didn’t want it, he wanted Norm to argue at that point in time. I was sitting at the table. I would do some other things, like pointing out to Norm from time to time that this would be a good response to what the question was, but I was—I guess they say in the American TV shows now—second chair.

BPS: You mention Sophonow’s life was ruined. Was it because of the trauma of being sent to jail or was it because people will always think you’re guilty regardless?

DD: Well, no, it’s because—I can’t remember how many years he spent in jail. I mean, I don’t know if you’ve ever been in a jail, or been inside a prison.

BPS: I’ve found it extremely distressing just to talk to a client who’s in a jail, to see somebody, a human being, shackled and led back to a cage. That’s the closest I’ve gotten and it’s pretty scary.

DD: You can just go up to Stony Mountain to see what the cells look like.

DM: Now this is all pre-trial confinement because he was never actually convicted and sent to prison. He was always released on appeal, right?

DD: No, he never made bail.

DM: So it was all pre-trial confinement?

DD: Not pre-trial; he never made bail. He never got bail pending appeal. He had three trials, hung jury: conviction, reversal, conviction.

DM: So how many days did he spend in jail?

DD: I can't remember, but it was years.

DM: Like, we're talking two to three years?

DD: Oh, more than that.

BPS: Do you think people accept it in the end that once he's acquitted, once the government apologized, it was over in the public eye?

DD: I think with Sophonow, maybe. Then, of course, they turned around a number of years later and arrested someone else who was then convicted.

DM: But he died before they convicted him, right?

DD: Yes, there was never a trial. He died, or was killed, or whatever. That's the thing over this period of time.

BPS: This has been riveting, for me anyway. My last question is: is there something we should have asked or something that you want to say before we go?

DD: I'm still trying to figure out why I'm here. I'm just more than happy to answer questions.

BPS: No, this is riveting!

DD: I'm glad you found it of some use!

