

# COMMENTARY

## Interview with Donna Miller

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D O N N A J . M I L L E R , Q . C . \* W I T H  
B R Y A N P . S C H W A R T Z \*\*

### I. LAW SCHOOL: 1974-77

BPS: In your humble beginnings at Robson Hall, was that still a time when the program involved part-time work with a downtown firm or had we already become an academic law school?

DJM: We had already become an academic law school; in fact I think that transition happened around 1970.

BPS: And Cliff Edwards, who did the transition, was your Dean?

DJM: He was the Dean, he taught us Legal History and Contracts. Phil Osborne was one of our professors; John Irvine was another, as was Trevor Anderson. So some of the backbone of the law school was already part of the Faculty.

BPS: Most people now might only recognize Cliff as the bronze bust in the library. He was certainly the longest serving Dean and one who made a pivotal transition. Is there anything that you could tell us that could put some life to the statue? What kind of a dean and classroom teacher was he?

DJM: As a classroom teacher I think there were very few superior to Cliff Edwards. He was a fantastic teacher. He seemed to know all the students' names right from the get-go. A classic teacher, very much focused on case law, but also really wanting to see students acquire the art of legal thinking. I would put him as one of our best instructors. He was a very professional person and he certainly wanted to capture a certain kind of culture in the Law School, a culture of professionalism. Very serious-minded and for the most part I would say there was a strictness to him, a no-nonsense attitude.

BPS: In terms of student democracy, was there any at that point? Would students be consulted about programming or special guest lecturers, or did the

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\* Executive-in-Residence, Manitoba Institute for Policy Research; former Associate Deputy Minister of Justice for Canada (2005-2010).

\*\* Professor, Faculty of Law, University of Manitoba; Co-Editor-in-Chief, *Manitoba Law Journal*.

professional teachers and Dean determine the shape of the programming and you would be informed but not necessarily involved?

DJM: I think for the most part the faculty ran the school. There was an association of law students, who had some participation on some issues but generally it followed the culture of that day, which was pretty hierarchical.

BPS: In terms of what you would find in the classroom, were a lot of teachers using the Harvard model of case law and Socratic teaching at that point?

DJM: Very little Socratic teaching, very much a lecture approach. As we do now, the school relied heavily on practitioners from downtown to supplement the Faculty's teaching. I would say overall the full-time faculty were better at their craft and I guess one would hope that would be the case. I think that when I look at how law is taught today there is more of a practical, clinical approach overall. But there was not that much of a difference, Bryan, between how law was taught then and how law is taught today.

BPS: From your point of view as a lawyer who spent much of her time in the policy-oriented departments, would there be discussion of broader policies behind the law in areas like constitutional and family, or was the classroom more doctrinal and analytical? Or was it more like today, where you get some policy and some reflection?

DJM: I think the slant was somewhat in favour of the doctrinal approach, less questioning, less probing. There were definitely aspects of my public law work that were developed later in my career rather than in the classroom.

BPS: Another part of your career was doing a tremendous amount of writing with the Manitoba Law Commission. Did you get much practice at writing and research in law school?

DJM: It was pretty much hundred-percent final exams for all the courses. So the capacity to write clearly and those kinds of skill-sets weren't developed too much at the law school.

BPS: I am of such vintage that I started law school before there was a Charter, as you did, and in those days we didn't spend a lot of time talking about human rights and the balance between governmental interest and individual minority rights.

DJM: Yes, I don't recall a conversation of that sort [laughing].

BPS: Another revolution that came to the law school is that now you find close to 50% of the faces in the classroom are women. Were there women teachers at the time, women students? Or were you very much a minority at that time?

DJM: I started law school in 1974. We were the first law class to have a significant percentage of women in our class – I think something like 25-30 percent of the class were women. Two years before us I think there were around 7 or 8 women in the class. In terms of the Faculty, Linda Vincent was on the faculty, as was Janet Baldwin, but there were very few other women. We were just

on the ground floor of the notion that women had equal credibility in the profession, that we could become strong experienced counsel and an integral part of the profession.

BPS: To put it directly, why were you in law school? I was in law school because I was getting lonely in physics. I didn't know if I wanted to be a practising lawyer, I didn't know what I wanted to do with the degree. Did you have a sense of a career path when you went to law school?

DJM: I did, and the career I've had is nothing what I thought it would be. I went into law school because I thought I wanted to be a journalist writing on the law, but I never got into journalism. The best part of my legal education was my articling year. It helped to give me some sense of what I wanted to achieve and where I wanted to go in my pursuit of law and the practice of law. It helped develop my understanding of law, more so than what I learned within the classroom setting itself.

Don't forget in those days there was no real clinical practice of law within the three years of law school, it was almost all principles, all theory. That is an essential part of legal training, but it is not the exclusive component. So the articling year helped to bring all the principles into some sense of coherent whole for me.

BPS: In that year did the women in the law school feel that because there were now a significant proportion of women law students, that they were just law students like the rest, or was there still a sense of being pioneers who were facing special challenges as women in the practice of law.

DJM: We didn't think of ourselves as pioneers at all. I think in fact, looking back at the time of the early 70s, women were coming into their own across all of the professions, finally becoming not just an exceptional part of those professions but an integral part. We didn't think of ourselves as pioneers in law, we were part and parcel of the student body along with everyone else. And in those days we were very idealistic for the most part – I certainly was. If you asked why I was in law school, one reason as I mentioned was to pursue legal journalism, but another reason was because I had this great hope that I could help to make a more just society, and I think actually most of us had that aspiration.

BPS: Another difference you would see in law school today is a very significant proportion of Aboriginal students. Were there any Aboriginal students when you were in law school?

DJM: In fact two of my classmates were Aboriginal. One was Ovide Mercredi, who eventually became the Chief of the Assembly of First Nations in Canada, and another was Marion Ironquill-Meadmore, who I believe became the first woman of First Nation descent to be admitted to the bar in Canada. Ovide and Marion were pioneers, they were certainly among the first.

Years later, when Ovide was head of the Assembly and I was the Manitoba official on Senate reform throughout the Charlottetown Accord constitutional

process, he and I crossed paths many years after our law school days. I asked Ovide if he recalled a conversation that took place in the University College cafeteria, where one of our classmates turned to Ovide and said to him, “Ovide, I think you’re going to be the Chief Dan George of our generation, you are going to assume some fantastic role representing First Nations in our country.” And while Ovide didn’t remember that law school conversation, he and I had a bit of a chuckle knowing that it was a pretty accurate prediction of what would eventually come.

BPS: But while Ovide did become National Chief, he never got to do work in the movies with Dustin Hoffman. So it sort of worked out, and it sort of didn’t [laughing].

DJM: [laughing] Maybe that’s still yet to come.

## II. ARTICLING AND PRIVATE PRACTICE: 1977-1979

BPS: Now your time during the mandatory articling one year period, was there a bar exam before, during or after?

DJM: We had bar exams throughout the year. Friday was set aside for the bar admission course down at the Law Society premises on Carlton St. We had seven or eight exams throughout the course of our year.

BPS: Was it a tough process in those days? Was there a significant failure rate in the exams or was it more like modern times where pass rates are pretty high?

DJM: Pass rates were pretty high.

BPS: Did you find that the bar exam courses taught you stuff that was missing from your law school curriculum in terms of nuts and bolts and procedures and motions and that kind of stuff?

DJM: Yes, it was much more of a clinical approach, much more nuts and bolts as you say. It rounded out the legal principles we were taught here at Robson Hall.

BPS: So you articulated at Richardson and Company – the mega business here in Winnipeg?

DJM: No, this was a mid-sized firm with Reeh Taylor, Charlie Huband, Garth Erickson, Glenn Sigurdson and Richard Deeley, amongst others. It was a very good firm, which evolved into other firms later such as Taylor McCaffrey and Deeley Fabbri Sellen. I recall it was one of the most sought after articling positions because Butch Nepon, who was part of the faculty at that time, advised our third year class on articling positions. He was counsel to the firm and spoke very, very highly of it. I was called to the bar and spent a year there as an associate, and basically it was a good experience.

BPS: That would have been a general practice? You didn’t specialize as much in those days?

DJM: No, it was very much a general practice, a little bit of family law, a little criminal, a little commercial, a little general litigation. It was a good foundation. And there was still no *Charter*.

BPS: Nowadays when law students article the big thing is work-life balance. They say that the way you motivate and incentivize now is that you give employees a day off instead of more money. People want to have a life as well as work. Were you still at a time where the articling student was expected to be there at the crack of dawn and leave late in the evening and it was taken for granted you would work hard for apprentice wages?

DJM: That was pretty much the culture. You were expected to work hard and certainly not adhere to any kind of nine-to-five routine. It was very much expected that you did the work, you did it as quickly and as effectively as possible and you were on call. It wasn't 24-7, there was some balance, but we were expected to respond quickly and effectively to demands whenever these arose.

BPS: I would think one difference between then and now is that with the new technology of cell phones and the internet you can reach your lawyer at any time; and people think because of this that their lawyer can do the work and send it back almost instantaneously. In those days you couldn't be tracked down and when you were away from work you were away from work for a while.

DJM: That's right and one piece of advice I remember early on getting from my principal was that it was good performance to return a call the same day and to respond to a letter within a few weeks. Today, people expect an instant response 24-7. So in that respect it was a slower pace, but I think there was greater time to reflect then and perhaps more of a focus on the quality of the product as opposed to process.

BPS: In our internet and e-commerce course we read a book called *Digital Barbarism* about that difference.<sup>1</sup> The author, Mark Helprin, also gives us a hypothetical picture of a diplomat of the 20<sup>th</sup> century who only writes a few letters a week, spends hours on each letter and has time for deliberation. I guess it was very much a different time technologically. I suppose the culture of the law firm would have been very hierarchical in those days?

DJM: Yes, but also a sense of professionalism and camaraderie. The most senior counsel was Reeh Taylor and he was very hands-on; he would bring me into meetings with clients even as an articling student. I remember he had this initiative the year I was articling; he wanted to revise all of the wills and estates precedents the firm used for clients. He would organize breakfast meetings that he would chair that I would attend. There was very much a sense of passing on and sharing knowledge, and the notion that law was of a higher calling.

BPS: So in that style of practice and pace of life, even though you were very busy, people would make the time to do some real education and mentoring?

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<sup>1</sup> Mark Helprin, *Digital Barbarism: A Writer's Manifesto* (Harper, 2009).

DJM: Absolutely.

BPS: When I came to Manitoba a few years after that, the litigation giants still walked the land and this sort of adversarial, very theatrical approach to litigation still prevailed. You had very strong personalities, real performers, who loved the battle, though they weren't unfriendly to each other "offstage". But if you had a case you expected it would go to trial and the trial would last a couple of days. There wasn't an assumption of settling or mediation.

DJM: Very much so. The generation ahead of us defined their own style of litigation and included some of the all-time great trial lawyers in the life of our profession here in Manitoba. I'm not sure today if we have trial lawyers of that calibre because we don't get to develop the level of courtroom experience today that our predecessors had. But the Darcy McCaffreys, the Knox Fosters, these were lawyers that represented a different brand of lawyer – the honour was there but there was also an element of theatre.

BPS: I was involved with one of Darcy's last trials. Only a few big pieces of litigation go to trial anymore and you could see Darcy's charisma even at the end of his career. You had a sense you were almost watching somebody on stage. I don't have the sense that the modern litigators have that kind of approach and personality... and most of the time they aren't actually getting to court because most of the cases now are settled. One of the reasons most of the cases now are settled is a culture which emphasizes dispute resolution and mediation. Another one is that costs of discovery are often prohibitive. Were the rules as generous with respect to pre-trial discovery then? Did you go through that whole pre-trial process as they do now? I know the economics of that is one of the things that puts an end to a lot of the litigation. I always say that discovery is when you discover you can't afford it.

DJM: The level of pre-trial discovery certainly wasn't as high. What was also different then was the court's management of cases. The courts were just starting to really actively manage cases when I started. They were just starting to get into the pre-trial meetings to look to see whether or not cases could be resolved. Some of the old guard of the profession didn't adhere well to the new rules.

BPS: What about your experience in the courtroom? Legend has it that as a junior in Manitoba in the older days, you got yelled at a fair amount by the judiciary. You brought your motion and as a rite of passage you would get yelled at for missing a comma, or using this word when the Latin would have been more satisfactory. The Court of Appeal was quite famous and celebrated (or notorious) as quite a combative place. Did you experience any of that in court?

DJM: I wasn't in the Court of Appeal until somewhere around the mid-to-late 80s so I can't speak about the earlier days. In so far as the Queen's Bench or the Provincial Court is concerned, I found for the most part the judges were respectful. I think there might have been a couple of times where I felt I was unjustly treated because I was a junior counsel but I usually didn't respond well to

those occasions. I didn't normally give the judge too much room because I felt that it was my due, as it is everyone's due, to be treated with respect.

### III. LAW REFORM COMMISSION: 1979-1986

BPS: So you did litigation old-school as an articling student and as an associate for a year, and then you decided to do something very different, and went to the Manitoba Law Commission, where Dean Cliff Edwards was Chair at the time.

DJM: Yes he had just been appointed chair and he had been promised a much more developed staff at the commission. He was looking to hire and it was a good choice, and I'm glad I took that position on. I started as a legal research officer and when I left I was something called Chief Legal Research Officer. Essentially my job was to research and write but it was a little bit more than that, it helped to develop my analytical skills. I mentioned earlier about going into law school to try to create a more just society, and I felt we did some of that with the reports I helped to write. We weren't addressing the macro issues of poverty or some of the most significant social issues but I think our reports ultimately did have some impact on law and equity.

I remember helping to write a report on small claims, as well as another one on making the law more accessible to Manitobans. I wrote a report on the rules of practice and procedure for administrative tribunals, trying to enhance, again, access to justice. I wrote a report on organ transplant laws and how to enhance the capacity for Manitobans to donate organs and in what contexts; I also wrote on equity issues within the family, for example, on enhancing the rights of surviving spouses. It was a very active era for law reform. Cliff had so much credibility with the governments of the day and I think that was partly why we had one of the highest percentages of implementation of our reports anywhere in the Commonwealth, with something like almost 90 percent of our reports being implemented into legislation.

BPS: 90 percent would be off the chart in this province today. That's remarkable. Did Cliff and the board choose the agenda, or did the government say, "Wouldn't it be great if you had a look at this?"

DJM: It was a combination. The attorney-general had the right under legislation to refer issues to the Commission. Our report on administrative law, for example, was something the government asked us to look at, but many others came from either Cliff or the other commissioners. We had some tremendous commissioners. Aside from Cliff, there was Trevor Anderson, John Irvine, Knox Foster, Gerry Jewers, to name a few. These were people who really cared about law reform. Not only did they read the reports in draft but they really got involved and rolled up their sleeves. They were very passionate about law reform.

BPS: You mentioned at the beginning that you were interested in doing legal journalism. I'd think that being able to write for the law commission was almost perfect in terms of matching that aspiration. Law reports have to be written for the general public, they have to be clear, they have to be comprehensive yet concise, they're not written for a narrow audience of lawyers and litigants. I've read some of the reports from those days and they are very readable and clear. Did you find that there was a different culture of writing in private practice? Had the plain English movement made any traction in your practice of the day? Or was there an emphasis, on sounding lawyerish in practice as opposed to the Law Commission?

DJM: In fact, the year that I articulated, there was a movement toward plain English within the law firm led by Reeh Taylor, which focused on revising the firm's wills and estate precedents to reflect plain English. That was his passion, to ensure that the will resonated with the client, that it used the language that the client would understand and was personalized according to that client, as opposed to the language that was historically used in precedents. So the plain English movement had started by the late Seventies with that as an example.

I hadn't thought of the analogy between journalism and law reform, but there is one. Certainly one of our objectives in writing those reports was to enhance access to law and access to justice, trying to simplify, to distil law, so as to make it understandable.

BPS: You were six years at the Law Commission and it sounds like the reports are a palpable legacy of what you accomplished there. Were there any expectations that the Law Commission movement was peaking and that governments would be less interested in it in the years ahead?

DJM: I had none of that, for me it was just time to move on. I felt that when you looked at the spectrum of issues I had researched and written about, I had developed a skill set and it certainly had been a terrific experience, but that it was just time for me to move and try something else.

#### IV. PROVINCIAL JUSTICE – CONSTITUTIONAL LAW: 1986-1999

BPS: You've done that a number of times in your career, which is one of the reasons why this is so interesting. Your next stop was with the inaugural Constitutional Law Branch. Now there is a *Charter* and government is excited about it and thinks there is going to be a lot of business. How did you get recruited for that? Were you actively pursuing it?

DJM: There is actually a bit of a story behind that. I was first introduced to constitutional litigation as a result of my work in administrative law at the law reform commission. Because of that law reform work, I became quite knowledgeable about the kinds of tribunals we had in Manitoba and their rules of practice. And so I was recruited by the Manitoba Government to research and



prepare an affidavit for the second hearing in the Manitoba Language Rights Reference in November 1985<sup>2</sup> addressing the scope of the work to re-enact in both languages all of the rules of practice and procedure of administrative tribunals in the Province.

The following spring, the Constitutional Law Branch was created when Roland Penner was Attorney General. Up to that time, constitutional law issues had arisen but they were either dealt with by lawyers retained from private practice or by Crown counsel on the side of their desks. So when the Constitutional Law Branch was created in 1986, I applied for a position, was interviewed and hired. It was a terrific experience again. We were on the ground floor of *Charter* adjudication. My first day on the job, the Supreme Court came down with *R v Oakes*<sup>3</sup> which of course defined *Charter* adjudication not only then but continuing to today.

BPS: So out of that *Oakes* many saplings grew

DJM: Indeed [laughter]. There was *Charter*, s 7 litigation, fundamental freedoms issues – it was litigating all of the *Charter* rights as well as minority language rights. I continued to be involved in *Charter* litigation and minority language litigation at the Supreme Court and I was lead counsel on a number of those cases. The practice involved a panoply of constitutional law issues, not just litigation. We were the constitutional litigators, but we were also designing policy for the Government to try to adhere to the *Charter of Rights* protections, to try to adhere to constitutional values. The work that I had done at the Law Reform Commission obviously came in handy in designing policies and providing advice to governments with respect to public law. So it was litigation, it was legal and policy advice, it was constitutional reform. I had mentioned before that I was the Senate reform advisor for Manitoba throughout the constitutional talks leading to the Charlottetown Accord, and I was also involved in the final round of Meech Lake. Not directly, but we provided advice to Premier Pawley through our director at the time. So we were involved in many aspects of constitutional law.

BPS: You had mentioned that part of your task at the Constitutional Law Branch was to be a constitutional conscience. Not “we’ve got a *Charter* and we’ll get away with whatever we can unless somebody stops us,” but “there is a *Charter* here and we are going to try as a conscientious government to bring ourselves and our laws into line and review them.”

I think it was Chief Justice Lamer who once took governments for task for not defending their legislation. He basically said that it is the legislative branch’s responsibility to change the law, so if you’ve still got a law on the books and there’s a challenge, go in there and defend it, give the courts the benefit of good

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<sup>2</sup> Reference re *Language Rights Under s 23 of Manitoba Act, 1870 & s 133 of Constitution Act, 1867*, [1985] 2 SCR 347, 26 DLR (4th) 767.

<sup>3</sup> *R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 719.

arguments on both sides. On the other hand, you were trying to be *Charter*-conscious. How did your branch navigate those questions in those days?

DJM: They were very difficult issues. In the early days it was easier because you would from time to time make concessions that laws were unconstitutional, but that's because really there was no reasonable argument to sustain some of those laws. So those were easier cases to concede. Where it gets tricky is as the law develops and governments become more sophisticated in balancing legal risk, they want to balance legal risk with policy innovation and then that law is challenged. I felt that the governments both federally and provincially handled those issues pretty well.

Chief Justice Lamer was critical of the federal government conceding a breach in the *Schachter* case,<sup>4</sup> and I wasn't part of the federal government at that time. When I was with Justice we mostly took the approach that we were there to defend the laws not just of that government, but of predecessor governments, that it wasn't for the lawyer representing the Attorney General to concede the unconstitutionality of a law because they didn't like the policy of that law. We were very clear on that when we were advising governments. It was important that concessions be made only in clear cases for legal reasons.

So if there was a reasonable bona fide argument that could be advanced in the court to sustain a law's constitutionality, I was certainly amongst those that believed that this was our duty whether the government of the day liked that law or not. If the government didn't like the law it was its job as the government of the day to go before the Legislature and seek to revise it – it wasn't to look to the courts to strike down laws, unless those laws were clearly unconstitutional.

BPS: You've certainly been through some very celebrated constitutional developments along the way in your career. Your last comment brought to mind the debate over *Morgentaler* in Manitoba,<sup>5</sup> which was subject to very heated discussion. Many argued that the Attorney General's department should not enforce the *Criminal Code* prohibition against abortion; others argued it was the duty of the Attorney General whether he liked the law, or even if he very strongly opposed the law, to faithfully enforce it, which was the decision the Attorney-General here made. Do you have any views or recollections of your thoughts or perceptions of that discussion at the time or any thoughts in retrospect?

DJM: I can't comment on that case specifically and though I have done some prosecutions I was never professionally "a prosecutor". But I do think that in the context it was always my view, and that of my colleagues in prosecutions, that one should prosecute a case subject to two conditions. First there need to be reasonable and probable grounds that there will be a conviction, but the second

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<sup>4</sup> *Schachter v Canada*, [1992] 2 SCR 679, 93 DLR (4th) 1.

<sup>5</sup> See Roland Penner, *A Glowing Dream: A Memoir*, (Winnipeg: J Gordon Shillingford, 2007) at 209-213.

aspect of consideration is whether a prosecution is in the public interest. The public interest has always, at least to my understanding, been an important component of assessing whether a particular charge should proceed. Within prosecutions I think those two criteria have to be assessed case-by-case, you can't fetter your discretion across the board by saying you're not prosecuting certain kinds of cases.

BPS: One of the bridges to your going into constitutional law was the *Bilodeau* case here in Manitoba.<sup>6</sup> People might not recall it anymore – it was a traffic ticket that was issued in English and it went all the way to the Supreme Court. The issue was whether all of Manitoba's laws enacted since the province was created were invalid because they didn't comply with s 23 of the *Manitoba Act*,<sup>7</sup> which was part of the constitution, the supreme law, and which required bilingualism. Some said, "Well, let's treat it as directory, so even if we don't comply we get our fingers rapped but the laws are valid." Others said, "The law is the law and you're not following constitutional requirements, all your laws are invalid."

There was a huge public debate at the time – should we make Manitoba officially bilingual or should we risk the Supreme Court doing something draconian, striking down all our laws, and Manitoba becoming a federal fiefdom for a while? Others said the Supreme Court would never do that. I think the argument has been opened to the public now, and it was actually a pretty close thing. This all blew up when I came to the province and I specifically remember it as my introduction to the Manitoba political legal culture. Do you have any thoughts on what your views were or your perception was of what the Supreme Court was going to do at the time? Did you have a sense they couldn't do anything or everything? Or were you pretty confident they would come up with some sort of statesman-like compromise?

DJM: I don't think I had a very evolved sense of the legal issues that were before the Supreme Court in 1985. I do remember discussions at that time on the directory versus mandatory issue. I think for the most part the view that the government put forward that s 23 was directory was a credible position but most people thought that it wouldn't be accepted by the Supreme Court. So I don't think, frankly, that the Supreme Court's decision was all that surprising. My involvement came a few years later. We had the 1985 reference from the Supreme

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<sup>6</sup> *Bilodeau v Manitoba (Attorney General)*, [1986] 1 SCR 449, 42 Man R (2d) 242. The *Manitoba Language Reference* and *Bilodeau* were closely intertwined and the situation complicated. See also *Bilodeau v Manitoba (Attorney General)* (1981), 61 CCC (2d) 217, [1981] WWR 393 (Man CA), and *Bilodeau v Manitoba (Attorney General)* (1980), [1981] 1 WWR 474, 1980 Carswell Man 149 (WL Can) (Man Prov Ct).

<sup>7</sup> *Manitoba Act*, 1870, 33 Vict 1870, c 3.

Court<sup>8</sup> and we had the November '85 order telling us how many years we had to re-enact the legislation<sup>9</sup> – it was three years for the public statutes and five years for the private statutes. I was asked to basically take a role in implementing that order. I played an in-house role on that front, but we ended up going back to the Supreme Court twice where I was lead counsel on both of those cases.

The first time we actually made history, because we went directly to the Supreme Court pursuant to paragraph 3 of the November 1985 order of the Supreme Court, which gave the Court continuing supervisory jurisdiction over that order. It was very much unlike anything the courts in the Commonwealth had seen. The American courts had developed the notion of continuing supervisory jurisdiction, but not Canadian ones.

So we took the Supreme Court order at face value and went back directly to the Supreme Court to ask them specifically what they meant by the “acts of the legislature”.<sup>10</sup> We had some rulings from the *Blaikie* cases in Quebec<sup>11</sup> giving us some sense of the scope of bilingualism, but we did need some clarification. We went first to seek the Court’s concurrence that they would exercise continuing jurisdiction in the case, and the Court agreed 9-0 to retain jurisdiction notwithstanding the opposition of the federal government at the time.

Then we went back a second time to get clarification on the kinds of orders-in-council and the kinds of documents that had to be in English and French.<sup>12</sup> We were successful on both counts. It was an interesting area of constitutional law and quite a technical one – but an important field.

BPS: Personally, I’m rather in awe at the responsibility that you had. This material wasn’t electronically consolidated in those days, you had to go through paper versions of statutes and regulations going back over the whole course of Manitoba, you had to be concerned about missing something; you had to be concerned about tracking legislation without the benefit of computer consolidations and so on. As far as I know nothing terrible happened, which is quite remarkable.

I remember when the British Columbia government passed an act to repeal obsolete statutes,<sup>13</sup> and they discovered they had accidentally abolished a major company, and they then had to pass an act a few days later to reinstate it after

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<sup>8</sup> *Reference re Language Rights Under s 23 of Manitoba Act, 1870 and s 133 of Constitution Act, 1867*, [1985] 1 SCR 721, [1985], 19 DLR (4th) 1.

<sup>9</sup> *Supra* note 2.

<sup>10</sup> *Manitoba Language Rights Order*, [1990] 3 SCR 1417, 1990 CarswellNat 749 (WL Can).

<sup>11</sup> *Blaikie v Quebec (Attorney General)*, [1979] 2 SCR 1016, 101 DLR (3d) 394. and *Quebec (Attorney General) v Blaikie*, [1981] SCR 312, 36 NR 120.

<sup>12</sup> *Reference re Language Rights Under s 23 of Manitoba Act, 1870 & s 133 of Constitution Act, 1867*, [1992] 1 SCR 212, 76 Man R (2d) 124.

<sup>13</sup> British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)*, 32<sup>nd</sup> Parl, 1<sup>st</sup> Sess (2 August 1979) at 1153-1175 (Harvey Schroeder), online: <[http://www.leg.bc.ca/hansard/32nd1st/32p\\_01s\\_790802z.htm](http://www.leg.bc.ca/hansard/32nd1st/32p_01s_790802z.htm)>

stock market panic. None of that happened, so obviously you did a very good job, and it's the mark of great management that people don't notice – when you went into it, did you have a sense of how daunting this was going to be?

DJM: Well, I certainly don't want to leave the impression it was me alone, because it wasn't. There was a group of legal leaders – leaders within the public service including Shirley Strutt, who was Chief Legislative Counsel at the time, and Ron Perozzo, who later became provincial Deputy Attorney General, to name a couple. So I was amongst a team that faced a daunting task and we came through it. My understanding is that today there's pretty much coherence in what needs to be translated and we provided some clarity to that in the early days.

BPS: Were you involved in some of the detail work, like actually having to go through particular statutes and making sure there was a French language counterpart and it actually matched up semantically?

DJM: I wasn't involved in that. My involvement was broader, primarily at the delegated legislative level, and was involved mostly in issuing principles and rules that ultimately defined what needed to be translated, what needed to be thought of in a bilingual context. And also ensuring that notion of bilingual enactment – it wasn't just about the final product, it was also about ensuring the notion of equality of status between the English and French, both in process and in product. So there was a critical need for a cultural shift in the process and context of law-making.

BPS: My impression is that, from the reader end rather than production end, Manitoba lawyers tend not to treat the languages as authoritatively equal, in the sense that if we get a statutory interpretation point most of the times we just look at the English language version; it doesn't occur to folks to check the French language version for greater precision or clarification. Do you think we really appreciate the fact that one is not actually a translation of the other, but both are equally authoritative enactments in their own right?

DJM: I'd like to think we have evolved in our understanding because to me it's such an integral component of statutory interpretation. When I think of what I want a law student to learn, statutory interpretation is a core competency and knowing that the French is equal to the English is such an integral part of that. I'd like to think we've made further progress, hopefully we have. Certainly I would say within the Government of Canada and Justice Canada this is a core competency. The lawyers there I think very much see the English and French as a duality and there is equality of status between the languages.

BPS: I wanted to ask you: among the *Charter* cases going to the Supreme Court, there were some very major division of power cases, you argued a number of interventions on behalf of Manitoba. My recollection is the provinces were much more involved in interventions fifteen or twenty years ago than they are now. I think the enthusiasm for provinces to get involved is diminished and the

enthusiasm of the Court to listen is perhaps not what it was in the early days. Is that your sense?

DJM: I think there has been a bit of an evolution on the role of interveners, particularly when you look at the Supreme Court. I think the Supreme Court now gives more equal weight to interveners, whether they are representing an Attorney General or not. But in those early days, I think the public institutions were looking for help and I think they got, or I'd like to think they got, the most help from the public sector and from the counsel representing the Attorney General. After all we were really, at least in the early days, amongst the few lawyers practising exclusively in constitutional law.

I think the courts at all levels found those representing the Attorney General quite helpful to them on constitutional issues. I think they still do, but perhaps there is more of a level playing field because the development of constitutional law as an area of practice is less specific to the public sector than it once was.

BPS: There are a number of differences, more lawyers are comfortable with the *Charter* (like criminal defence lawyers) and there's more anchoring and precedent in case law. A *Charter* case is now largely decided out of earlier *Charter* cases. It's hard for people to put themselves back in the early days where you'd give everything from John Stuart Mill to Aristotle because the Court was looking for something to anchor their decisions because it was largely *tabula rasa*.

You look at something like liberty and security of the person – does it include financial security? Courts first said no, then moved more to yes in some circumstances, such as where health care is involved – but these questions were completely unexplored in the early days of the *Charter* and you certainly have the sense when they were writing the decision they wrote very long, one might say very diligent, one might say very laboured, decisions. They were really struggling to look at all kinds of sources because they didn't have their own precedents to work with in those days.

DJM: That's right. One of the cases where I represented the Attorney General as an intervener was *Pearlman v Manitoba Law Society Judicial Committee*.<sup>14</sup> It went to the Supreme Court primarily on the issue of whether the practice of law was a liberty interest under s 7 of the *Charter*. You mentioned the evolving role of Attorneys General intervening in constitutional cases – there were nine attorneys general on that particular appeal. Ultimately we addressed the Court on two issues: whether the practice of law was a liberty interest and also whether the law (which is still there in the *Legal Profession Act*<sup>15</sup>) that gives the disciplinary committee the authority to issue costs against members who are found guilty of professional misconduct was a violation of the principles of fundamental justice under s 7. The Court found that it did not contravene the principles of

<sup>14</sup> *Pearlman v Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869, 75 Man R (2d) 81.

<sup>15</sup> *The Legal Profession Act*, CCSM 2002, c L107, s 72 (1).

fundamental justice, so it didn't address whether the practice of law was a liberty interest. But as you said, those were cases where the attorneys general and the courts were dialoguing in the early days, giving primary definition to some of the principal clauses of the *Charter*.

BPS: You must have felt as lawyers that it was a unique time, a unique era.

DJM: I'm not sure we felt that at the time. But certainly looking back on it, it was very dynamic. I worked with some brilliant lawyers, amongst them Eugene Szach, Marva Smith and Shawn Greenberg, to name a few. Very, very capable counsel. We were also just grappling, as you say, with the fundamentals of law and policy. There was an idealism as well that the *Charter* would bring about a much more heightened sense of justice and equity in Canada. And we were there at the beginning of these issues.

BPS: When I was in law school I went to watch the anti-inflation case<sup>16</sup> and at the time it was considered the case of the century. Throughout my career I would see two dozen other cases of the century and nowadays when you mention the anti-inflation reference it's some technical thing you read in first year. It's hard for law students to look back at the history and relive what it was like not to know how it would turn out and what it must have been like in eras where huge questions were being decided without a lot of guidance. But I suppose this generation will have different pioneering experiences.

DJM: Absolutely, there will be. But I think one of the competencies that you still need in constitutional law is a capacity for public policy innovation combined with strong legal analytical skills. I think that those competencies were and still are necessary to practise constitutional law well. One of the cases I enjoyed the most was the *Quebec Secession Reference*.<sup>17</sup> The issues were outside, obviously, of the *Charter of Rights*, but when I look back on the cases I was involved with, I think the *Quebec Secession Reference* was the height of all those experiences, just because of the importance of the issues in front of the Supreme Court. It was five full days before the Court. It was certainly the longest appeal for me in the Supreme Court, but it defined issues of the nation.

You always hope as counsel that you can be of some help to the court and in that case I think we were of some help. When you look back at the record of our oral advocacy, we decided that where the Court needed help was with identifying some of the fundamental principles defining the Constitution of Canada. We felt that the Court would likely want to address the reference questions by applying these fundamental principles, as opposed to strictly interpreting the amending formulae laid out in the 1982 constitutional amendments. And so our oral advocacy was very much focused on what we defined as two of the constitutional organizing principles: federalism and the rule of law. As you know the Court

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<sup>16</sup> *Reference re Anti-Inflation Act*, 1975 (Canada), [1976] 2 SCR 373, 68 DLR (3d) 452.

<sup>17</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385.

ultimately did focus in its decision on the fundamental organizing principles, using those two (which we didn't create, they came from its decision in the *Patriation Reference*)<sup>18</sup> but building on those two and adding two others: minority rights and democratic values. That case defined the core organizing principles of the Constitution in a four-fold context. But I'd like to think that Manitoba played a role in helping the Court develop an opinion that has been deservedly applauded.

BPS: The Court came out with a compromise that was regarded as quite shrewd from the point of view of state craft. Legally I don't think they had much choice but to say, "If you follow the Canadian Constitution you can't unilaterally secede," at the same time they clearly didn't want to just tell Quebec, "you have no rights, we don't care," so they created some process rights for Quebec and so on. I'm just curious whether, witnessing the justices asking questions, you had any sense what dialogue was going on within the court, whether you actually watch them think it through themselves.

DJM: It was an unusual case in that normally in Supreme Court litigation you're dealing with a very "hot bench" – they are always polite, very respectful of counsel, but very activist, you get a lot of questioning. But in that case they had decided not to ask questions in the context of the submission to the court until the very end and so it was very difficult to see where the Court was going and of course the questions we had at the very end were quite structured and quite formal. I can't say that you left the five days of advocacy with a clear sense of where the Court was going.

BPS: I guess the Court must have been concerned that if they asked questions as they normally do in a free, open-minded way, what seems like just a challenging questions might be the next day's headline in some major political conflagration. Which would be a reasonable ground for concern. It was a very high profile case, there were a lot of passions associated with secession and I can see why the court would want to be very careful about providing fodder for controversy. The court is usually very active and very often you can't tell where they are going, they ask very hard questions on both sides. But I wasn't aware until you told me they were much more restrained and reticent in that particular case.

So, in line with your regular career changes, I'd like to ask you a bit about the difference between the political and legal culture of bureaucracy in Manitoba and Canada generally and see if your experiences match mine. I found the cultures very different. I worked for the federal government as an articling student; I did a lot of consulting over the years with various titles with the provincial government. The provincial government seemed much more small-d democratic. You would go to a meeting and there wasn't a sense that you couldn't say anything because you

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<sup>18</sup> *Reference re a Resolution to amend the Constitution*, [1981] 1 SCR 753, 125 DLR (3d) 1.



were just a junior person, it was pretty much a freewheeling discussion, and people didn't stand on titles and ceremonies as much.

I had a sense it was the larger bureaucracies that had a more developed sense of hierarchy. If you went to a meeting, the director wouldn't say much if the deputy minister was there and certainly the junior guy two years out wasn't going to say a whole lot of anything in the presence of his seniors. Federal law had a much more structured form of doing things and there was also much more division of labour – if you wrote a factum with the federal government different parts would be assigned and everybody had to get together and improve the components, whereas there was much more freedom of action at the provincial level: does any of that match up with your experiences?

DJM: Somewhat, yes. When I look back at my experience with both governments they were both terrific experiences, but different. With the provincial government I was essentially a middle manager, I was Director of Constitutional Law, but that didn't prevent my ability to meet ministers or even premiers, or advise ministers and premiers. So you're right – there isn't much of a hierarchy, at least there certainly wasn't when I was involved. Federally, there is more of a hierarchy. But of all of the departments in the government of Canada, my experience is that Justice Canada is the least hierarchical. That is because, I think, of the profession of law and also because of the kinds of deputies that Justice Canada has had, for the most part, have been much more democratic, less hierarchical, more egalitarian, more team-focused leaders, than what you might generally find in other departments across the government of Canada. So, yes, the workplace culture of the federal government was more formalistic than in Manitoba, but necessarily so.

I do remember thinking at the time when I changed positions from Justice Manitoba to Justice Canada, all I had to do was cross one side of Broadway to the other, my office for Justice Manitoba being on the north side of the street with Justice Canada offices on the south side. Physically it involved simply crossing the street, but in terms of the mind-set and perspective on issues it was just a monumental leap for me. Although I'd been involved in national issues for the province – I had done Supreme Court litigation – to be involved directly with the Federal government, somehow, it brought home to me the enormity of the country, the issues and the divisions we contend with, the need to emphasize process, so as to try to arrive at some form of consensus building. These are things that I really don't think I appreciated until I became involved directly with the Government of Canada. As I say, for me it was a monumental leap when I moved to the federal government.

**V. FEDERAL JUSTICE – MANITOBA AND PRAIRIE REGION : 1999-2005**

BPS: So you went from being a middle manager in a small provincial department in a small province, to being a senior manager. Not at the top of the hierarchy, but you had many employees and you had to deal with all the forms and paperwork and bureaucracy and accountability and all kinds of different policies at the federal level. Because you didn't have any formal training as a manager, were you influenced by what you had learned as a middle manager, or observation of other managers, or managers you had seen in your own life like Cliff? How did you find your feet at the federal level?

DJM: I think it was mostly through having certain role models. Provincially when I look back at the kind of people I respected, for the most part they didn't adhere to a hierarchical model. They were essentially leaders of a team and that's how I always approached management. You were a leader of a team, you didn't dictate what issues were or how issues would be resolved. I liked to do a lot of informal consultation – just knocking on somebody's door and chatting, listening carefully. I really believed, and continue to believe as a manager, in diversity and I mean diversity in its broadest sense. People with different backgrounds coming together with different life experiences. I think we have a tendency to hire in our own image. We have to fight against that and hire people who are completely different from ourselves, and then you get some really good dynamic discussions going.

I also believe very firmly that everyone contributes to the team, it doesn't matter what level or rank you hold, everyone's work is an integral part of the discussion and end-product. Obviously there are issues of respect, respect for diversity, respect for ideas. You also want to ensure that people are emboldened to speak fearlessly. For me, even in the senior management positions I held, I felt that my job was to speak fearlessly, whether it was to a minister, whether it was to a deputy minister, because my contribution was to basically try to bring my own perspective on issues and to feel the workplace was a safe environment to do so. Regardless of where I was, whether it was provincially or federally, that was the kind of workplace culture I was seeking to develop.

You're right; I had very little in the way of formal training. When I initially went to Justice it was to head up Justice for Manitoba, it was on an interchange, and it was essentially a middle-management position. From there I went to be head of Justice for the three prairie provinces. That was more of a senior management position because I reported directly to the deputy minister and I was a member of the Deputy Minister's national team. So it was my first insight into Justice Canada from a national perspective, being part of the senior management team nationally. So I did that job for three years with somewhere around 300

lawyers that I was managing here in the Prairie Region. But it was a good experience for me. We had four offices across the Region, the Region had just been created and I had some very clear goals of what I wanted to achieve.

BPS: Did you find that by having that openness and intellectual respect, that some of the other stuff was more easily resolved and didn't come up as much? By other stuff I mean things like, "I'm angry because they didn't allow me to take my vacation when I wanted." "So and so got the corner office," "So and so got to go to the conference." Did you find you had less trouble with those because the overall intellectual culture was more open and diverse and people got respect for their opinions and ideas?

DJM: You always have those issues. In fact, your talking about the corner office reminds me that one of the first issues I had in Justice Canada was to decide the size of the offices. Ultimately I decided - which was the right way to go - to give every lawyer the same size office. So the first decision I made was to reduce my office by essentially one-third of its original size. And I did that because I thought it was the only way to develop a sense of team. Also, I was the leader and it's for the leader to make those kinds of decisions to develop the values you're hoping that others will come to emulate. So the notion of "team", moving away from hierarchy, those were the sort of values I was trying to reflect in making one of my first decisions on office size.

BPS: A lot of people don't want to be managers because it is tough to say no sometimes. You know someone who really wants something but you have to say no, or somebody does something and you have to say no. Did you find that personally it was tough when you had a situation where you were the person who had to say no quite firmly?

DJM: Not really, because I think when you look at who are the best lawyers, they're not necessarily people that would win popularity contests. They are people you respect because they are adhering to some core values and principles. And so if you're consistent with those core values and principles, whether you are exclusively a practitioner, or whether you combine the practice of law with management, you're hoping in the end to be fair. So the people come to think of you as someone who dealt with them fairly.

I think that if you give people an opportunity to speak their mind, to have a process that is democratic in the sense that people have an opportunity to be consulted and they feel that their opinions are valued, at the end of the day when the decision is made, I think for the most part people are reasonable and they will respect that decision so long as they believe that their views were taken into account and given serious consideration. Not necessarily that the decision reflected their perspective, but that they were listened to. I think process, if anything as a manager from my many years of experience would tell me that process is as important as the decision itself.

BPS: It seems to me a lot of those values would be especially followed in academic environments, but aren't always: encouraging people to speak up freely, being a team and adhering rigorously to the process regardless of the outcome. If people think the process is fair, that the various considerations have been voiced and then balanced in an open-minded and responsible way, people can live with outcomes. I tend to agree with you that in practice what causes more bitterness than anything else is departure from procedural norms – people are more likely to accept the outcome if the process' values are respected and there is respect for the diversity you mention. You want that in an academic organization no less than in government. Government has all kinds of people with all kinds of backgrounds and ideas. I was reading an article recently where Alan Dershowitz is quoted that "we all tend to think that diversity means hiring somebody like ourselves," and unfortunately that can be a problem sometimes.

In any event, you were manager of the Prairie Region of Justice – another reason some people avoid management is they say to themselves, "I actually like the substantive thinking and the professional part of my job and I don't want my life to be taken over by the bureaucratic stuff to the extent I'm not keeping my professional skills sharp and organized." Did you find you were still able to keep your legal skills sharp even though you had all these managerial responsibilities? Did you feel some tension in that respect? Or were you able to live both lives?

DJM: In my role as head of the Prairie Region, I think when you look at the management versus the practitioner side, of all the jobs I've had, that was the strongest percentage of management work. However, I was still able to teach constitutional law here throughout the three years I headed up the Prairie Region and the Deputy Minister of Justice at the time knew of my interest in constitutional law and gave me some constitutional files from time to time to ensure that I kept my hand in. But one of the reasons I was attracted to the Associate Deputy Minister job was because it is such a terrific blend of legal leadership, the bringing together of law and policy, but also senior management and personal leadership issues. So that job I think, looking back on all of them, combined many of the competencies I had hoped to acquire in the positions that I had previously held. When I became Associate Deputy Minister I was able, I think, to use some of those prior experiences in that role. It was a combination of many of those various roles.

## VI. FEDERAL JUSTICE – ASSOCIATE DEPUTY MINISTER : 2005-2010

BPS: You spoke earlier of what a sea change it was just to go across the street and start working for the federal government and get this sense of getting connected to this whole enormous and diverse and sometimes conflicted country. And now you're right in the heart of it in Ottawa, as Associate Deputy Minister of Justice. Right there in the centre, where governmental people aren't an abstract

entity, they're down the street, and you actually see all these ministers. Was that a big change?

DJM: Absolutely, first of all, as you say, you are dealing more with the minister, you are advising the minister, attending cabinet meetings. I think the other important change for me in that role was the horizontality – as an associate deputy you are considered part of the deputy minister community. You are sitting on deputy committees and it gives you a glimpse into the whole Government of Canada, so that was a transition for me, because clearly the other roles I'd had in Justice Canada, even the role heading up the Prairie Region, you got a sense of national dimension of your work, but not the whole of government that you saw as an associate deputy.

BPS: It was my observation that very senior people in Ottawa, you can like what they do, you can dislike what they do, you can question political sharp elbows and anything else that goes in the culture, but they work extremely hard. Part of that is connected with that complexity – the federal government is extremely large, very bureaucratic, there are very formal accountability meetings. You can spend a year on a project and somebody at the Treasury Board goes “no” and that's the end of it. Things have to be negotiated at a very high political level and it's not like you can just bump into somebody at Assiniboine Park and talk it through. Did you find that the sheer hours of the work week were quite formidable compared to the provincial experience?

DJM: Absolutely. The associate deputy minister role is in many ways a 24-7 job. You are on call 24-7. So you are at the beck and call of the deputy and the deputy's at the beck and call of the minister. Ottawa is a 24-7 town. You start your day with ideas of what you will be doing, but more days than not, the kind of day you've had isn't what you planned to have. So you have to be ready to deal with the unknown. Your job is to try to anticipate the unknowns before the deputy and the minister do. It's hard to explain but how you described it, Bryan, comes pretty close, it is a tight-knit community, it's a professional community, it's a hard-hitting community, and you get to know people relatively well because you get to deal with them very closely on many different files across departments. But you also have to be a quick study and a Supreme Court decision could come down at 9:45 AM and you might find yourself in cabinet in forty-five minutes advising what the implications are.

BPS: My sense of Ottawa is that, while there is a “yes, minister” element as there is in any kind of career politics, trying to get ahead to get the next promotion, people actually take their policy quite seriously there. Sometimes you can say, “Why is this person so passionate and giving us such a hard time?” but they actually believe there is a policy or principle here they are prepared to fight for. It's not always about careers and looking good in the distance, people actually are very frequently quite committed to what they think is the best interest for the department, country, or the *Charter*. Did you find that?

DJM: Absolutely. When I reflect back on not just Justice Canada, but the public service, both provincially and federally, a vast number of people have passionate levels of commitment to the country. Plus, as I said, working in the public sector, I worked with some of the brightest minds around, people that were giving their all and had such a high sense of commitment to their roles.

BPS: Working in Ottawa you are not that far from Montreal or Toronto, where if you are a senior DM you could probably quite easily get a job at a private firm and make double or triple your income. Many people are there because the public service attracts them, not just the status and the prestige or the pay. So I actually think there is a fair amount of genuine dedication and intense belief in the principles and values of public services, which may not make people always easier to deal with, but I think in some ways it's gratifying. People aren't just fighting about jurisdiction and turf in the corner offices. Ottawa is a place where people often really are engaged and passionate about their principles and policies. At the human level, it seems the kind of job you had there was almost like being inside a pinball machine – you're going from situation to crisis to person day after day after day: do you have some sort of mantra to handle that sort of stress? How do you cope with sustained stress over a period of years?

DJM: Well, I think first of all you have to have a pretty good perspective on it all, you have to be there for all the right reasons, you have to have strong sense of commitment. But I also think perspective counts, I've always believed – even though people might question the days I was away from my family – I always felt my family came first. I think those kinds of perspectives and values give you some balance in your life. I also like to go to the gym to clear my head, doing that is an integral part of my day, so that has always helped. I don't think there is much of a secret to how you deal with these demanding positions; I think it is about commitment, balance and values.

BPS: I suppose you have to learn how to let some things go in that kind of high stress environment, you are going to have people that rankle and express themselves in very strong terms because they are exhausted, fed-up or exasperated. You have to take a step back and appreciate not everybody will be at their most measured and diplomatic all the time and not always get drawn into the emotion. You have to kind of say, "Eh, it goes with the territory, I'm not going to take it personally, everybody is going to have days in this kind of environment."

DJM: I think that's right. I think anyone in the practice of law comes across days that they just have to shrug off. I have certainly had a few of those, in all of my roles.

BPS: So then after quite a remarkable career, certainly a whole lot of firsts – right there at the beginning of the *Charter* branch, were you the first number two in the Justice civil service who was a woman?

DJM: I was the first female director of Constitutional Law, the first female head of Justice Canada for Manitoba and the first female head of Justice Canada

for the Prairie Region. In my role as Associate Deputy Minister, Mary Dawson preceded me as the first female Associate DM.

## VII. ACADEMIA

BPS: You were at the provincial level, at the prairie level, at the national level, now you're back in friendly Manitoba and you have become engaged to some extent in Manitoba in matters of academia. You have the Duff Roblin Visiting Professorship, you have been doing some teaching in the political studies department, you also were teaching some of our law students as well.

DJM: Yes I taught constitutional law and advanced public law this past year.

BPS: You were a student way back when in Manitoba, you can see what's happening with legal education now in Manitoba and you're in the classroom frequently. Any thoughts about what's different, what's better, what's worse, or what we should be doing?

DJM: I certainly am no expert on legal education, but looking at our colleagues here at the Faculty and the kinds of courses that are being taught, I do like the idea of having some clinical experience for the students. As I mentioned, it wasn't until articling that I felt that I really had an understanding of some of the principles. The study of law without the practice didn't distil some of those principles for me, so I like the fact that there is a clinical component to law school education today. I think that it makes the transition from law degree into articling so much easier for the students, but I also think it rounds out the formal legal education.

When I think about what it is that a legal education should do, what competencies a law student should have when they leave the faculty, it seems to me there are a handful. One would be that you have to know how to interpret law, statutory or common law; you have to know how to apply law, you've got to be able to distil and analyze concepts. I think you have to learn how to probe and question, I think you should have some capacity for problem solving and you have to be able to think clearly and write clearly. These are some of the competencies that come to mind that I hope we have developed here, that the law student leaves with at least the basics of those competencies.

When I talk to people in the profession that see the students graduating from Law School, where I think we may fall down, and I'm not sure why this is so, it seems that it's the analytical and writing skills that our students, generally, could be stronger at than they are when they graduate. I don't have the recipe today as to how we can further develop these competencies, but I think it's clear that the moving away from 100% finals in the second and third year courses toward the development of papers and defending papers and discussing ideas are changes in the right direction. So I have a mixed view – do I think that a law student today graduating from law school has a better legal education than what we had? I'd like

to think so. I think we had a solid legal education, but I'd like to think there has been progress. How can we make further progress? I think that is hopefully something the Faculty will have some really good discussions about, not only amongst the Faculty itself, but bringing in the members of the profession more broadly, maybe members of the broader academic community, to really probe those issues and come up with something that accommodates a student having some options, yet ensuring that the basic competencies are not only met, but that a student graduates with those competencies at a high level.

BPS: I think there are some issues now with many students writing papers; I'll just give you some of my observations or speculations in case you want to comment. I once had a student who was very upset that he only got a B on a paper. The student had not really given the reader a roadmap to follow his argument, in a single paragraph he would repeat a word in a different context and then he would use different words for the same concept. Stuff that you would ordinarily think wasn't really about writing legal papers, but was just about writing papers. I asked the student how much practice he had in undergrad and he said none. So one of my speculations is that, with the increase in classroom size that we tend to see in Canadian universities, professors with a class of two to four hundred cannot assign a substantial assignment, and students coming into law school haven't had the practice at the undergraduate level. So I find I have to teach students not just how to write a legal paper, but how to write a paper altogether, more so than I think I had to do in the old days. Although you never know whether that's because you are changing or because the students are changing and it's not quantified.

Another speculation I've heard is that the technology is changing the way students write – certainly changing the way the students tend to research, because I have to spend a lot of effort telling the students the web isn't enough, that you actually have to go to primary and secondary sources, they have to go to Quicklaw, Westlaw, or even hardcopy. It takes a lot of persuading with some students. Also I find it very easy to get information, you think that you've got enough, but it's not suited to the idea and you have to be deeper and more thorough. Also it has been suggested to me that students communicate in a very comic practical style – texting, sending emails in which the emphasis is on short and punchy communications, it's not grammatical, it doesn't have to be spelled right, it's just effective, quick communication- they ask why they have to go through all this formal process. So those are some of my speculations, did you want to comment on any of that?

DJM: It absolutely resonates with me. Just this past year in Constitutional Law, marking papers in the Aboriginal and Treaty Rights field, students said exactly the same thing – that they weren't writing papers in their undergraduate, or if they were, they weren't getting feedback from their professors along the lines of some of the painstaking work that I know that some members of the faculty do



here at the law school in terms of really vetting their work and trying to give specific feedback in helping to develop the students' writing. In other words doing a very time consuming edit of what students have submitted, that kind of teaching apparently isn't taking place everywhere. So I think you're right. These were first year students that I was teaching in Constitutional Law, who are coming into the Faculty, I think, with less of a skill-set on the writing side. I think it means that however we progress with legal education, we have to give further energy to developing that competency because it is so critical, regardless of what field of law our graduates decide to explore.

BPS: Talking about competency, we've talked informally outside of this interview and I gave a talk at Prairie Regional Justice about my sense that we should teach practice management. A student or graduate goes out to, say, a private commercial firm and they really don't have a framework to think about their experience there. You are likely to uncritically accept some of the values of the firm – some of which are very good, some of which are not so good. But the point is that you haven't read about what it is like to practice the law. Do I want to do whatever I can to make as much money as possible, or do I want to specialize in the work I really enjoy, but take a while longer for my practice to develop? Am I more comfortable in a little firm developing broad competencies or do I want to specialize? How many hours do I want? Am I content with being an associate or a non-equity partner or do I want to go for the whole enchilada?

I don't think students go in with any chance to have considered how they want to conduct their business life and collegial life as a lawyer. With Prairie Justice I specifically argued that because newly minted lawyers have so much power in government, especially if you're a prosecutor, it seems to me especially important that you have some chance at the academic level to think about what you are doing and why you are doing it, before you get acculturated. And we should be teaching practice management, and one of those practices is government. A long time ago everyone may have gone into private practice, but nowadays a great many people are working in government in various capacities. Your thoughts on all that? And if you were designing a course for the next generation of Donna Millers, the next group of people that are going to go and do a life of public service and want some training in law and want some education in law to prepare them for it, how would we go about doing that?

DJM: Well, some big questions there.

BPS: You can break them down, or you can not answer [laughter].

DJM: Well I think your idea of practice management makes a lot of sense, to do something on that front. Because I totally concur – I think law students leaving law school have little idea of the full range of their options and the expectations on the ground for each. They will have some sense, because some of them will have worked, for example, as summer students. But they need to be able to assess how that environment measures up to others and also to think in terms

of their own competencies and interests. I think many of the opportunities I had were just good fortune. But I think that I told myself it was important not to get too comfortable and to try new things. It was through that sort of experiential learning, adapting to different environments, that I was able to explore different kinds of work and be satisfied with those different experiences.

So if there is a way in which I think law students can develop a broader sense of a legal career and to have a much more defined and clear role for what they might want to do with a law degree. As of now I think it is very much happenstance in a way for many people, although maybe some out there have some solid, clear ideas while in law school about the kind of practice and workplace they wish to be part of. In the environment in which the students find themselves today, one piece of advice I give to students is the following: it doesn't really matter what area of law you pursue or where you pursue it, the most important thing is to find yourself working with the best that our profession has to offer. Wherever that is, private or public sector, it's the calibre of your practice as opposed to the kind of area you practice in that I think will be the greatest barometer of your satisfaction with the practice of law. When I look at my classmates, for example, I think the ones that had the highest level of satisfaction in legal practice are the ones for whom it the area of practice didn't matter; it was the calibre of the people that they worked under and with, that helped to define who they are as lawyers and their level of satisfaction with their careers.

BPS: I think I would give an amen to that one. When you're a law student and you want to do tax, you never think of working in construction law. But law in some ways is always the same exercise in the sense that there are always policy debates, there are always opportunities to be creative no matter what you're doing, there is always a way of performing a function that is cleaner, more efficient or elegant, and things that sound really tedious and uninteresting can be fascinating and rewarding if you get a chance to do them in the right context with the right people. You could be working in a Constitutional Law Branch, but if you're not working with people willing to be adventurous, or are just doing cookie cutter work, that's not going to be that satisfying. You could be doing stuff that you think is less enhancing for the soul, in commercial areas, that turns out is very satisfying because you can develop your skills and have a satisfaction of knowing that you are serving clients, effectively and ably and creatively.

That seems to me to be what we want in the practice management course, not just stuff like how to send out a bill, but thinking about what kind of practice I want to have, do I want to work in one area my whole life, or pursue a career like you had with the government and so on and so forth. It doesn't seem to me that we really have an opportunity in this law school right now to give students a chance to think about all these issues. Not that we want to preach any right answer to anyone. What kind of practice is meaningful and enjoyable depends on the individual and it depends on other ideas involved in change and response

with their encounters with reality. But giving people a framework to think about it, in the sense that yes there are a lot of options and ideas out there and the next time they want to think about what they want to do they can actually go revisit a whole lot of interesting material and read up on it before they make their decisions. All of that is something I think we can equip students with that we haven't yet.

DJM: I totally agree with the idea that if students can leave law school with a better sense of where their interests lie, and what the practice of law actually looks like in that particular environment, then I think that can only serve their needs. And it can only serve the profession's needs, because you end up with a better match between the interests and capacities of the particular person involved. I guess the other thing too, and I think this is also becoming the case more in the private sector: you cannot practise law in the public sector unless you know how to work in a team context. I can see that through moot court appearances and some of the more clinical work, the law school is replicating some of these team approaches to the practice of law, and I think that that's terrific. But I think it's important that students really understand that working in a team is the way law is practised. The old days of the "lone wolf" litigator certainly don't exist in the public sector and I don't think we see much of that left even in the private sector. So I think it's important for students to have some understanding of how law is practised and the importance of collegiality within the workplace and across the profession.

## VIII. CONCLUSION

BPS: Now you have been extremely generous with your time and very thoughtful with your answers, is there anything I haven't asked about, or would you like to talk about something that may interest our readers, before we wrap things up?

DJM: Well, I don't think there is, I guess if I was going to say anything it's that I have really enjoyed being here at the law school, I have enjoyed the work I have done in the political studies department, it has been a really good year and a great experience and I feel quite blessed having that opportunity.

BPS: And I'm sure both colleagues and students really appreciate your bringing in a wealth of experience and insight to us. I'll conclude with a thought that comes to mind, an episode of the Simpsons... [laughing]

DJM: [laughing] My son's favourite show.

BPS: Comic Book Guy is breathing his last breath, he says, "An entire life spent reading comics," then pauses and concludes, "life well lived."<sup>19</sup> And I would

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<sup>19</sup> *The Simpsons Movie*, 2007, DVD: (Beverly Hills, Cal: 20<sup>th</sup> Century Fox Home Entertainment, 2007) at 1h6m.

think anybody looking at your CV and reviewing your accomplishments would have to say that you've certainly had a professional life very well lived.