An Interview with Chief Justice Richard J. Scott

THE HONOURABLE CHIEF JUSTICE RICHARD J. SCOTT*

When the *Manitoba Law Journal* wanted to continue its series of interviews with legal luminaries in Manitoba, long-serving Chief Justice Richard J. Scott was an obvious choice. In a wide-ranging interview, Chief Justice Scott discusses his time at the Manitoba Law School, his years in practice and his more than a quarter century on the Bench. Chief Justice Scott reveals a unique perspective on the legal profession in Manitoba and more broadly as it was, as it is now, and perhaps where it may go in the future. The interview was conducted by Professor Darcy L. MacPherson in mid-August of 2011.

I. PERSONAL LIFE

DLM: Is there anything you want to mention about your early life before you went to law school?

RJS: Not really. I grew up in St. Vital, with wonderful parents. I was going to go take business at the University of Western Ontario, and then I met my now-wife, and decided that I didn't really want to go to London, Ontario. And way back in university I'd done an aptitude test and my aptitude had said "business or law", so my dad said "why don't you go down and talk to the Dean?" And so I did.

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* Q.C., LL.D (Manitoba), B.A., LL.B. Appointed to the Court of Queen's Bench June 28, 1985, appointed Associate Chief Justice of that court October 4, 1985. Appointed Chief Justice of the Manitoba Court of Appeal July 31, 1990.

DLM: And the Dean then was?

RJS: Pete Tallon.

DLM: So this is at the old Manitoba Law School?

RJS: Yes.

II. HIGHLIGHTS

DLM: What was the most interesting case you worked on as a lawyer? What was the most important?

RJS: The one that comes to mind, which may not sound all that interesting is a case called *Mida v Imperial Group.*[1] This was some years after I had been called to the bar, so I was handling the case myself. My client was an employee and he worked for Imperial Construction, which at the time was a major condo and high-rise developer, and he had an agreement where if he brought a project in under budget he got a percentage of the savings. And he really struck it rich; he was able to negotiate deals with contractors which brought this particular project in way, way under budget. As a result of which he earned hundreds of thousands of dollars, and this is going back thirty years ago, when a hundred grand was a heck of a lot more then it is today.[2]

So there was a lawsuit because the employer refused to pay. The issue was whether or not he had a fiduciary obligation to the employer to tell the employer, "Hey, this is coming in a million dollars under budget."[3] We won in the trial court with some strong credibility findings against senior officers of the Imperial Group. It came to the Court of Appeal, and the interesting thing in the case to me still is the behaviour of the Court of Appeal. In those days the view was that the Court of Appeal was the second trial court. What we now know as the standard of review—if it

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1 *G Mida Construction Ltd v Imperial Developments (International) Ltd and Cambridge Imperial Properties*, [1978] 5 WWR 577 (available on WL Can).

2 *Ibid* at 580. It apparently would have made him "one of the highest-paid executives in Canada."

3 *Ibid* at 579.

existed, they only paid lip service to it. I remember one of the judges saying to me, "Well, the trial judge called the wrong person a liar." They re-tried the case, they invented a *quantum meruit* basis to compensate my client to some extent and otherwise allowed the appeal.[4]

Now, it may not sound very exciting. But the thing that sticks in my mind is this: Sam Freedman was presiding and he was always phenomenal to appear before. But the other members of the court—I've always remembered how active the Court of Appeal was in just basically re-trying the whole case from beginning to end. I mean, I had really strong, powerful credibility findings and findings of fact from a very experienced judge, and the bottom line was that they really didn't care very much about that. That would never happen today, just because of the standard of review.

DLM: And the most important case you ever worked on?

RJS: Well, the case was called *Welbridge v Metro.*[5] This case went down fairly early on in my career (so I was still holding Archie Dewar's bag at the time). It ended up at the Supreme Court of Canada and the issue was whether or not the municipal authorities owed a duty of care to the developer, who had received a building permit only ultimately to have it set aside by the court on the basis that there had been a failure to properly advertise and consult, so the homeowners in the area that was affected were not given a reasonable opportunity to participate in the process.

The building permit and the zoning variation were set aside, and of course it was dead in the water when it came up again before council. So the developer sued, and it went to the Supreme Court, with Bora Laskin writing the decision holding that in those circumstances there was no duty of care owed (in negligence, obviously) to the developers.[6] Now bad faith would have been another issue, but there was no question of bad faith there.

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4 *Ibid* at 585.

5 *Welbridge Holdings Ltd v Greater Winnipeg (Municipality)*, (1970) [1971] SCR 957, 22 DLR (3d) 470, reversing (1970) 12 DLR (3d) 124, 72 WWR 705 (Man CA), affirming (1969) 4 DLR (3d) 509, 67 WWR 417 (Man QB).

6 *Ibid* at 966-967.

DLM: Which side were you on?

RJS: We were on Metro's side, so we were the winner. Clive Tallon acted for the developers, and it was a very interesting case for a young lawyer. I learned a lot, to put it mildly.

DLM: I should think so. Archie Dewar's name still reverberates around these halls.

RJS: He was my principal.

DLM: And he ultimately became Chief Justice of the Court of Queen's Bench.

What case that you decided would you say will have the most long-term impact?

RJS: Well, I'll give you two cases. The case that I think will have the most term impact is obviously the Métis land-claim, which I wrote, but we sat five senior members of the court and all members of the court participated very actively in the drafting.[7] It's in the Supreme Court, it's being heard now, in late December of this year.[8] Even if the Supreme Court differs with some or all of our conclusions, it still will have a lasting impact on Métis claims not only here, as a result of this case, but in other parts of Canada. And it was an extraordinary effort on the part of all of us. It took us fifteen, sixteen months to write it,[9] and it was a huge effort, so regardless of whether our judgment stands, and obviously I think it should (but I have a little bit of a bias there), it will certainly have a lasting impact on the law of the country.

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7 *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2010 MBCA 71, [2010] 12 WWR 599 per Scott CJM (Monnin, Steel, Hamilton, Freedman JJA concurring), leave to appeal to SCC granted (2011) 417 NR 400 (note), 2011 CarswellMan 27.

8 Heard December 13, 2011, judgment reserved.

9 The case was heard throughout February of 2009, and released on July 7, 2010—about 16 months.

DLM: Do you take a particular interest when they grant leave on one of your judgments?

RJS: You bet. You know we got reversed by the Supreme Court just recently on *Sinclair*,[10] and we all took and take a very intense interest, particularly when it's an unreasonable verdict case, as that was, and we always go, "Look at what the Supreme Court said here, where did they get that from?" And because our Supreme Court is so open on occasion we get a chance to actually say to them, "You know, how did you come to this conclusion?" which they're very good about responding to. We take a lot of pride in our work and we try to do the best we can, and when we get reversed, first of all we try to learn from that, "OK, what exactly was it the Supreme Court disagreed with?" We take it from there, and it's part of the process. Nobody gets annoyed at the Supreme Court, though at times we have our issues.

DLM: You do your best not to take it personally?

RJS: Exactly. The other case I was going to mention very briefly because it's not something that I wrote was the *Lavallee* decision.[11] I was a trial judge on *Lavallee*, and I was fairly new as a judge at that time. The issue came up of the battered woman's syndrome. Evidence was adduced by a well-known psychiatrist who was not exactly the Crown's favourite expert witness. And I remember consulting with a much more experienced Queen's Bench judge about the issue—Ruth Krindle. I got a lot of help from Ruth, as everybody did when she was in practice. So I gave it my best shot, got reversed 2-1 in the Court of Appeal, and of course Bertha Wilson wrote ground-breaking decision in the Supreme Court on *Lavallee* not just about the battered wife syndrome phenomenon but also about expert evidence and the relationship between the factual foundation for expert evidence and the testimony of the expert.

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10 *R v Sinclair*, 2011 SCC 40, [2011] 3 SCR 3, reversing in part 2009 MBCA 71, [2009] WWR 581, 245 CCC (3d) 331.

11 *R v Lavallee*, [1990] 1 SCR 852, 108 NR 321, reversing (1988), 44 CCC (3d) 113, [2007] 6 WWR 413 (Man CA).

DLM: Did you see that one coming?

RJS: Nope. I mean, I knew it was a unique issue, but I didn't see the gravity and the importance of the case until I got reversed by the Court of Appeal who had some firm things to say about how I should have stuck to the law and not gone off on an adventure of my own when it came to expansion of the laws of evidence. So it was very gratifying to have the Supreme Court of Canada unanimously agree with my charge to the jury.

DLM: Do you think that the public perception of *Lavallee* is different from what the Supreme Court actually said about it?

RJS: I think so.

DLM: Some people have viewed it as the battered woman case, whereas many in the legal profession have viewed it as talking about the relationship between facts and evidence.

RJS: Absolutely, and I totally agree.

III. LAW SCHOOL

DLM: So let's go back a little bit: law school. You've already mentioned it was different then than now: what was your overall experience like in law school? Was it more practical? More academic? More focused? More general?

RJS: Well, my experience was good, more due to luck than anything else. The law school then and now are worlds apart. The classes were here in this building, we went to school during the day, and articled during the afternoon and during the summer. The concurrent articling system. As it was, I started off being paid twenty-five dollars and a bus pass.

DLM: A week?

RJS: A month.

DLM: When was this?

RJS: 1959. Twenty five dollars and a bus pass—and then if you were really lucky, you worked your way up to a hundred dollars a month and a bus pass. Most members of our class were gofers, they got very poor training in their offices. They did conveyancing work, they did title searches, they did collections. But for those who were lucky (and I was lucky, I had good articles, ending up with TDS where I stayed for twenty-three years until I was appointed to the bench) we got good training for people who wanted to practice law. No question about it, it was very practical.

DLM: When it was done right?

RJS: When it was done right. But what made the class exceptional were the people who were in the class. Martin Freedman, Darcy McCaffrey, Perry Shulman, Peter Cumming, Jim Arnett, Richard Kroft, Mr. Justice Glowacki, the list goes on. We had an exceptional class. And to some extent we taught ourselves, particularly around exam time.

I was a loner and I studied alone, but a lot of the guys would study as a group. In the sense that "now we're looking at Conflict of Laws." Well, that's a bad example, because Cliff Edwards taught Conflict of Laws, and anything Cliff taught of course he beat you into submission in terms of making sure you understood it. But some of the other subjects, you know, "What exactly is this? What exactly is that?" And if there was some confusion we'd actually work it out ourselves and then everybody'd go off and study on their own.

DLM: How big was the law school at that point?

RJS: Well, permanently we had Pete Tallon, Cliff Edwards was in his second year, Dale Gibson was in his second year, Keith Turner had just come back from Harvard. That was it. And the rest were all practitioners.

DLM: Did the quality of instruction vary?

RJS: Hugely. Hugely. Roy Gallagher comes immediately to mind as a fabulous teacher, but a lot of them were... not very good at all.

DLM: A lot of trouble balancing teaching and the part you get paid for, since most of them did it for nothing?

RJS: Next to nothing. And just to give you a bit of perspective, my first set of articles were with a firm then known as Guy Chapel Guy Hall Wilson Coughlan, which then eventually folded into Pitblado's. And Vern Simonsen was the one who got me the job. When I arrived in April 1959, I discovered Vern had left to go over with what eventually became Scarth Simonsen. Vern was the gold medalist. He left because Al Scarth offered him three hundred and fifty dollars a month and Guy Chapel wouldn't match it. Three hundred and fifty dollars a month.

DLM: And he was a full-fledged lawyer?

RJS: Full fledged lawyer. Gold medallist.

DLM: Okay. So you decided not to go there, I assume?

RJS: I articled there for a year, and then I moved on. Very different from today, obviously.

IV. JUDICIAL CAREER

DLM: You've been a judge for quite a while now.

RJS: 26 years.

A. The Role of the Judiciary and the *Charter*

DLM: How has the role of the judiciary changed since you first sat down on the bench?

RJS: In some respects, not at all, and in other respects, incredibly. For the most part, the issues we deal with are the issues the judiciary has always dealt with in the macro sense of the word: we're dealing with criminal cases, the standard of proof is still the same (although constitutionalized); in civil cases, the standard of proof is the same; the problems (expert evidence, credibility, the rules of evidence) are essentially the same; family law is much the same. And yet at the same time, the role has increased. Of

all the questions this is the one I had the most difficulty with in the sense of trying to provide an answer that is reasonably short.

The simplistic answer is that it's because of the *Charter*. And I think that is simplistic. It's not just because of the *Charter* and its provisions and what it's done to the practice of criminal law (some of which is not good, in things such as the lengths of trials, and the complexity of trials), but what it's done to the public's awareness of the role of the judiciary. And it's permeated (as the Supreme Court said on a number of occasions) all of the practice of law. "*Charter*-think" is now part of the judge's DNA, even if it's not a *Charter* case, and your approach is different. You may think the connection is somewhat tenuous, but I think it's the whole *Charter* issue, the focus on the role of the trial judge, that has lead appellate courts and particularly the Supreme Court to put clear fencing around the role of the trial judge.

And this takes me back to the first question and the standard of review. It's not just because the trial judge has a superior opportunity to see and hear the witnesses. It's the fact that there is a role, a distinct role, for the trial judge, and there has to be some deference, there has to be some respect for the role of the trial judge. And appeal courts can now interfere only in a few circumstances: in the case of facts, where there's palpable and overriding error; discretionary orders; or if there's a clear error in the law. And I'm being a little simplistic in my answer, but to me the Supreme Court's appreciation and recognition of the role of the trial judge comes out of the enhanced role and responsibility of the trial judge in this, the *Charter* era. Yeah, that's a big question. The *Charter*'s the big thing, but it's more the *Charter*'s impact on the whole practice of law and role of the judiciary that's really had such a phenomenal impact.

DLM: Can I go back to something you said about the length of trials? In particular, the other thing that has always struck me, is that when you began law school there were not 17000 reporter series and every judgment wasn't available on QuickLaw and Westlaw and Lexis Nexis. Do you think that's had an impact either on the practice of law or on the judiciary?

RJS: I think it's had an impact on both, but for us, it's made our task, and now I'm talking specifically about the Court of Appeal—we're it for 98% of the cases and the level of scholarship, the level of research that's now

required for the highest court in each province is just worlds apart from the standards that existed years ago (and I'm not denigrating any of our predecessors). It's entirely different, and quite frankly we have a problem here, and you're fully aware of this, that we're in desperate need of additional research assistance. Our volume of work (and again, this is because of the standard of review) is half what it was when I came on the court 21 years ago, and yet we're busier, way busier than we were then because of the degree of difficulty of the kind of cases that we're getting.

Which is exactly the way the Supreme Court intended it to be—no more kneejerk appeals, no more trying cases a second time. We get some of those, but the other kind of cases we get, like *Manitoba Métis Federation*, like *Mabior*,[12] like some of the other decisions that have come out of this court recently, require a huge amount of research. And as someone who I think can say, not immodestly, has been around for a while and has some experience, I'm not sure I'm capable of doing the level of research that's required in one of these cases. We need the scholarship. The standard of excellence that's required by all levels of court, but particularly the appellate court and above all else the Supreme Court is so high, and that's totally different than it was 30 or 40 years ago. And I think it's a very good thing, but it's changed the way the courts do business. And it's so regrettable that we have two researchers for the nine judges in the Court of Appeal, none for the Queen's Bench or the Provincial Court. I think the level of jurisprudence suffers, particularly in the trial courts, because of it.

Sorry, I got on my soapbox a little bit there.

DLM: I think it's a very important thing to talk about, if courts don't have the resources to devote to every case the way they wish they could. When you look back at the *Charter*'s evolution, are you surprised at where it's ended up?

RJS: I think a lot of people, certainly I as a senior practitioner and junior judge, didn't appreciate the extent to which it would put the court in the

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12 *R v Mabior*, 2010 MBCA 93, 261 CCC (3d) 520, rev'g in part 2008 MBQB 201, 230 Man R (2d) 184, rev'd in part: 2012 SCC 47, [2012] 11 WWR 213.

spotlight. Whenever you get a case where you've got to go back to section 1 for the ultimate decision, or even a 24(2) case, I don't think we appreciated (and certainly I can speak for the bench in Manitoba) the extent to which it would thrust the judiciary into the small-p political arena. And so I think that's been a surprise.

Within a month or two either way of my appointment *Hunter v Southam*[13] was decided, which was the first really great *Charter* decision by Brian Dickson. I was at what we used to call "dumb judge school" when *Oakes*[14] came out, and so it was a really exciting time to be a young judge, and so in a sense we were learning, just like the judges who had been around for a while, this new ballgame. And so it was exciting, but at the same time it was a little scary for the first five years or so, until the Supreme Court began to establish patterns of decision that indicated that while the ground had shifted to some extent, but that things were not going to change in a revolutionary way.

DLM: Beyond those first five years.

RJS: Yeah, beyond those first five years.

DLM: You sat as a trial judge for those first five years—what was it like being a trial judge at that point? Was it difficult to decide *Charter* issues without much guidance?

RJS: I wasn't intensely uncomfortable or anything like that, and I don't think any of the other judges were. We were conscious of the fact that there was a new player in the room, and we weren't entirely sure exactly how the law was going to develop.

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13 [1984] 2 SCR 145, 14 CCC (3d) 97.

14 *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

DLM: When you talk about the small-p political arena, there have been some who have said, regarding impartiality, that judges can now put their own spin on the law in a way they could not pre-Charter. You've always seemed very much in favour of impartiality and objectivity of judiciary—why? How far should it go? Is it difficult to balance in the *Charter* era?

RJS: The public's confidence in our impartiality is critical. As a matter of fact at her annual address to the Canadian Bar, earlier this week, Chief Justice McLachlin spoke about three things, and that was the last, and she described it most important—the public's confidence in our impartiality. It's the old "justice must not just be done, it must be seen to be done", which is as true today as when it was uttered decades ago[15] and when we recognize (and we've done a lot of thinking about this on the judicial council) that the closer the judges get to the political arena the more risk there is that the public may start to wonder. So we've established some very firm criteria now for when judges should accept commissions of inquiry (for example).

DLM: Because it (at the least) starts in the political arena—

RJS: Yes. And basically, to see whether or not the terms of reference really are sufficiently similar to our day job so there's a role to play for a judge. And if the answer is no, then the recommendation is that the judge shouldn't accept.

DLM: Ordinarily before one accepts a commission appointment, one speaks to one's Chief Justice, is that correct?

RJS: Not wanting to tell stories out of school, I can tell you that wasn't always the case, though it certainly is now and has been for some time. But in terms of decisions on the bench, when we have a serious *Charter* case (well, all *Charter* cases are serious, but one that's on the frontier), and we do things like striking down legislation but delaying the implementation

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15 A line which was popularized in (if not first expressed in) *R v Sussex Justices, Ex parte McCarthy*, [1924] 1 KB 256, [1923] All ER 233 at 234C, 1923 WL 17943 per Lord Hewart CJ as: "There is no doubt, as has been said in a long line of cases, that it is not merely of some importance, but of fundamental importance, that justice should be both done and manifestly seen to be done."

of the judgment, or use many of the other tools that the Supreme Court has developed in order to try not to trench any more than is necessary on the legislative sphere, these are examples, I think, of the courts wrestling with this legislative issue. Anybody who reads section 1 of the *Charter* must understand that the judges are required, ultimately, to get into governance issues. I mean, that's what it says.[16] When you're talking about something that's consistent with the principles of a free and democratic society—

DLM: That's governance language.

RJS: That's governance language. And we do the best that we can, as respectfully as we can, but if the decision is that the particular provision is unconstitutional we have to say so. That's our job. The fact that some politicians and some others may not like it is unfortunate, but it's part of the job. And I must say I'm very gratified by the fact that, for the most part, when the public is asked what level of confidence they have in the judiciary, we still get pretty high marks.

B. The Judiciary and the Public

DLM: You seem to be getting into the public perception of the courts. What does the public not understand that they ought to understand about what you do and what your colleagues do, both in the courtroom and outside of it?

RJS: That is a very difficult question to answer briefly, but I think the public is becoming more and more aware of the fact that we are ethical, we are responsible, we are incorruptible, we are impartial, that we're doing the best job we can and that we have a role to play as the third branch of government. You know every once in a while politicians say, "Well who are you, you aren't elected, we're the ones who are elected," and, yes, that's true, but our constitutional regime, even before the *Charter*, assigned a role to determine the legal constitutionality of things to the judiciary. I think it would help, and I think we're getting there, for it to be realized that this is

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16 *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, s 1: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

not a role that we sought or coveted or asked for or created for ourselves. This is something that centuries of tradition and common law development, plus the *Charter*, have assigned to the judges, and we're trying to do the best job we can.

And as I said a moment or two ago, I'm comforted by the fact that the public continues to have, notwithstanding the controversies surrounding the political vs. the judicial sphere, a pretty high level of confidence in what we're doing, or more accurately what we're trying to do, which is to judge impartially.

DLM: Sentencing seems to be a big political issue these days. I won't ask you to comment on the politics, but should one of the court's responsibilities be to meet the public expectation in regard to sentencing?

RJS: The simple answer to your question, I think, is no. We all read the newspapers, watch TV, are aware of the whole debate about law and order. I never thought it was law and order vs. something else, it's what you mean by law and order. In terms of meeting public expectations—I don't want to quibble, but what <u>are</u> the public's expectations? Is it what the media reports, is it what the politicians think, or is it something else?

What we <u>try</u> to do, is adhere to principle—that's what we <u>try</u> to do. But in the end there are some serious constraints on an appellate court, for example, in terms of the extent to which we can interfere with a sentence, and I support that in terms of deference and the like. But we try to do things on a principled basis: to follow precedent if there is one, and if there isn't, to try to create a new rule or a new principle that will stand the test of time. But to simply say, "Well, we're going to sentence in accordance with the public's wishes," is simplistic and, I think, doesn't pay proper attention to the rule of law.

1. Judicially-Assisted Dispute Resolution

DLM: For better or worse, JADR seems to be on the rise in Manitoba. What are your concerns about it? Do you see it as valuable, do you see it as compromising in some way the impartiality that the court holds dear (playing judges against each other)? And what about how when one judge speaks, to some extent the entire court has spoken?

RJS: At the risk of sounding like a lawyer or a judge I think it's very important to define terms. First of all, mediation (in the broad sense of the word) is a wonderful thing, and 99 times out of 100 if the parties can genuinely settle a case, that's to the good. You know the old saw: a bad settlement's better than a good lawsuit. We're talking about the role of judges; judges being involved in active pretrial settlement discussions is, again, I think a good thing. My concern, which as you know is not shared by a lot of judges, has to do with one aspect of mediation which many experienced mediators say is the key to mediation and that's caucusing. Caucusing, of course, is when the mediator meets separately with the parties. And my concern, which is shared by some academics whose names you'd recognize (such as Judith Resnick, or Dame Hazel Genn from the UK) is the potential impact long-term on the public's confidence in our impartiality when judges are going off and having "secret" discussions with one of the parties in the absence of the other. That's my concern, and I'm not alone.

In Canada, people are all over the map, we have our own unique system here in Manitoba, which I won't get into because I'm not 100% sure of the details of how it works, but I know there's a list of judges and the parties can contact the Chief Justice or the Associate Chief Justice and they each pick three or four or whatever and they try to do a match and that judge will mediate. And I know some of the judges caucus. In at least one province in Canada, judicial mediation is compulsory, and that's Saskatchewan. I know many, many judges will not do mediation and absolutely will not caucus, they will actively pre-try a case, they will actively try to settle a case, but they will not caucus. In some courts, the official position of the court is that they will not mediate, and by "mediate", they mean caucusing. Every court in the country, every trial court, is involved in active, hands-on pretrial settlement efforts—that's not at issue. The issue is this final step in the mediation process, which is meeting separately with the parties. The courts are all over the map on that issue, but everybody's

involved in doing everything possible in persuading the parties to settle. This is crucial, of course, in family cases.

DLM: Typically, many litigants don't have the money for it.

RJS: And it's often the case, when you're dealing with families with children, the children end up being the cheese in the sandwich.

DLM: Or the rope in the tug of war.

RJS: Yes. And that's my view—and ten, fifteen years from now quite frankly I hope I'm wrong. I teach a lot to the judges about judicial conduct and ethics and I tell them "Look, I'm not asking you to change anything, just—be aware, every time you're involved in active settlement discussions (and particularly, if you're doing mediation, if you're caucusing) just be terribly aware, terribly careful about what you're saying to the party and their counsel in the absence of the other party.

2. Self-Represented Litigants

DLM: You brought up family cases, and that does seem to raise two issues. First, self-represented litigants and whether the justice system is doing enough to meet the expectations of its participants (particularly in self-represented cases). Second, how do we do it better, so we don't have kids stuck in the middle of the sandwich, as it were?

RJS: Well, the first question is the easier one to answer: are we doing enough? Depends who the "we" are. If you ask "is the court doing enough", I think the answer is that right at the moment we're doing about all we can do, because of the impartiality necessity—you can't run the case, you can't give them legal advice. In a funny sort of way this is the worst scenario for a judge: where one party is represented by a lawyer and another isn't. And we have a whole set of guidelines that have been developed by the judicial council (and Chief Justice Marc Monnin, as he then was, when he was on the council, led that particular program). We need to help and we want to help, but there's a line, and you can't cross the line, where the assistance you're giving can cause the other side to say, "Well, wait a minute, why did I hire a lawyer? The litigant's got the best lawyer in the room, the judge. The judge is on the side of the litigant, the judge is giving the litigant help and assistance, but I'm paying money to my

lawyer and I'm having the sense and the impression that I'm being disadvantaged because I got a lawyer."

When you've got two or more parties, both or all of whom are self-represented, that's a nightmare for a judge, particularly when they have no appreciation of what they're doing, but from the standpoint of an ethics thing there it's easier because you're providing the same level of assistance to both parties.

One of the things we get in this court every Thursday are applications for leave to appeal in residential tenancies cases. They have a right to appeal to the Court of Appeal, with leave, on a question of law alone. Well, I'd say 1 in 100 have the capacity to know what a question of law is.

DLM: There's a number of lawyers who wouldn't.

RJS: And I tell them that—I say, "This is a difficult concept." And we can explain to them, and we all have a pattern that we say every time, a little cheat sheet, and we give them some information at the front office with their application—doesn't matter. It doesn't make any difference. They just don't get it. And almost inevitably, when the application is dismissed (because as you might expect with the Residential Tenancies Commission, almost without exception the decisions are fact-based, fact-driven), the self-represented litigant doesn't understand what's happened. In chambers yesterday, I had four applications of that kind, and one for leave from the small claims court.

One guy just kept arguing with me. I kept saying over and over and over again, "The trial judge didn't accept your evidence." It said so in the judgment. Didn't accept your evidence. Therefore, he concluded you had not proven your case on the facts. I approached it every way I could.

"The judge got it wrong on the facts," was his submission, "and therefore I want to appeal." He was just incapable of understanding it, and in a lot of instances, that's the experience the trial judges have.

DLM: How does that work?

RJS: There's an appeal mechanism in the residential tenancies board, they go from hearing officer to commission. And that's a *de novo* hearing. But

the commission consists mostly of lawyers, and an appeal to the Court of Appeal from the commission is on a point of law alone.

But that's our experience in the Court of Appeal with self-represented litigants, and you come away...and you just feel so sorry for them.

3. Speed of the Justice System

DLM: The modern justice system appears to be slowing—prisoners clear remand in forty days instead of forty hours, trials can take years to begin and multiple trials are not uncommon. Should we try to fight this trend? If so, what should be done?

RJS: It is a problem. Part of the problem is the access to justice issue that we just talked about. Self-represented litigants abound everywhere, including in criminal cases. And we didn't talk about this a few moments ago, but if you've got a trial with a self-represented litigant it takes a lot longer. Sometimes a lot longer. But in looking at the broader issue, some if it has to do with the complexity of modern society.

In the appellate sphere, as we've discussed already, the necessity is to try to craft our judgments to a very high standard. But at the trial level it's just a combination of so many factors. The downside to the *Charter* era (and we're talking about criminal cases now) is the length of time that it takes now to bring a criminal trial to conclusion. And we know there has to be a solution. Because you look at what goes on just sixty miles to the south of here, and you look at the Conrad Black trial in the US. As the joke goes: in Canada, he'd still be at preliminary hearing. There he's been convicted, it's been up to the Supreme Court, and he's been retried, and re-sentenced. In Canada, he would have had a trial, but it'd still be somewhere in the judicial process. There are procedural ways to push these cases along, by the imposition of time limits, the addition of judicial resources (more specifically administrative resources), but in criminal law it will require a cultural change.

Because now, the culture is—if you're acting for an accused charged with a serious criminal offence, you're going to have *Charter* motions. There will be an issue about wiretaps, an issue about the voluntariness of the statement (which isn't a specific *Charter* issue, of course), an issue about the warrant, and it just goes on and on and on and on and on.

When I was at "dumb judge school", we were lectured to by a grizzled veteran from the BC Supreme Court who said, and I remember it so well, "You should never ever have a jury trial that lasts longer than two weeks." Well, I'd say that's the norm now, and you get a high-level jury trial (and we see the appeals), it lasts weeks and weeks and weeks because the culture has set in where everything gets challenged, there are prehearing motions, and the trial lasts forever. That's the downside of the *Charter* era. And I think we can do something about it. It'll require a lot of will on the part of a lot of people, including defence counsel, but I think we have to because the delays are just getting longer and longer. There are areas in Manitoba where if you're looking for a trial date in the Provincial Court you're looking at a year and a half from now.

DLM: When they had the riots in London, the judiciary started to work literally around the clock—will that be part of the solution? Will we have to hire more judicial officers of some description to deal with pretrial issues?

RJS: That may be part of it. I think we in the judiciary can probably do a little bit more to limit the scope of some of the pretrial applications and so on that go on (and we're still talking about criminal law, of course). So yes, I think things can be done, but I'm not one of those people who says, "Oh, we've got a problem, let's go out and create more judgeships." I think it needs a coordinated effort. Administrative assistance helps, an intelligent high level of administrative assistance, where you're dealing with people who aren't judges but who have some understanding of what's going on and will enjoy the confidence of the profession.

4. Costs of Litigation

DLM: One of the things we haven't touched on is cost. The cost of a trial is going up.

RJS: Is it ever.

DLM: And the cost of going to the Supreme Court—I think just getting leave costs $50,000. Is there a disconnect between the people the law is supposed to be for and those who can access it? Do lawyers have to do more *pro bono*?

RJS: This is all tied up in access to justice, which was one of the other topics dealt with by Chief Justice McLachlin in her remarks. It really requires a concerted effort. First of all, it requires changes in the process (and now I'm talking essentially in the civil area). We've started with rule changes in the Queen's Bench. I think it used to be for lawsuits up to $50,000, and now for lawsuits up to $100,000 there is a speedy process that limits discovery and sets timelines for things to be done so you get into court quickly.[17] That can be expanded. In other words, for the vast number of run-of-the-mill cases that involve John (or Jane) Q. Public, you can simplify the process, get away from the endless process of pretrial discoveries and that sort of thing, and get the people into court quick.

When they introduced the Woolf initiatives in England some years ago, one of the phrases they used was that "perfect justice can turn out to be no justice at all."[18] So if you can speed things up a little bit, you may not leave no stone unturned, but you'll come pretty close to it. It comes a point in time where doing things expeditiously, in many instances, particularly in small disputes, is at least as important if not more important than getting it absolutely right. And for Dame Hazel Genn, who was here at the Pitblado Lectures last year, this is her thing, this was her message. They picked this up in British Columbia—they just introduced some really significant changes in the trial process in order to try and just move the lion's share of cases through the system. So the bottom line is that there's less work for lawyers, and if there's less work the cost is going to down, not because we're trying to take work away from lawyers but because this is the way the system should work best for the public at large.

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17 *Court of Queen's Bench Rules*, Man Reg 553/88, s 20A.

18 "In our day we have come to realise that if we insist on perfect justice, for many people there will be no justice at all.": Lord Hoffmann at the debate of a defamation bill. United Kingdom, House of Lords, *House of Lords Debates*, Vol 571 (2 April 1996) at 244 (Lord Hoffmann).

In bigger cases, GM (now that it's solvent) and governments can afford the best. We're now into lawyers doing *pro bono* and the legal aid crisis. And I can talk at some length, but I won't (because of time limits), about the legal aid situation here. I never thought I'd see the day where on a regular basis legal aid is denied to people convicted of murder. It's happening in our province. And of course you've got *Rowbotham* applications in the trial court,[19] and we have a statutory provision in of the Code, section 684, for courts of appeal and we're getting these kinds of applications—we have one on review right now.

Legal Aid—the joke used to be that the middle class can't afford to litigate. The poor can because they get Legal Aid, and the wealthy can because they can afford it. Well that's no longer the case. The poor are now being turned away. I'm trying to stay away from "let's throw more money at the system" but there really is a crisis in Legal Aid, and there has been for some time. I'm not being critical of our hardworking Legal Aid board here; they get a finite amount from government, one really big drug conspiracy case with multiple accused can blow the budget for the entire year. So they have to ration, they have an internal process—their internal process is "I don't think this case has much of a chance in the Court of Appeal," so they deny it. Well, maybe they're right. On the other hand, when someone's been convicted of first degree murder, you'd better be careful before you say no.

So Legal Aid's an answer, lawyers doing *pro bono* is definitely an answer, and you know we have a terrific system that we can be proud of here in Manitoba. Simplifying the process is an answer, as well as changing the culture in criminal law. They're doing the unthinkable now as a pilot project in some jurisdictions—they're requiring defence disclosure. As you know, there is an evidentiary burden, a presumption now, if the accused is going to raise an alibi defence. For example, you can't sit in the weeds, walk into the trial, and say, "I wasn't there, and I've got six of my buddies willing to testify we were playing cards some other place." You have to provide some notice. And what they're doing is they're expanding that concept to "if you're going to run a positive defence, you've got to give the Crown some measure of indication of what it is that you're intending to

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19 *R v Rowbotham*, 41 CCC (3d) 1, 63 CR (3d) 113 (Ont CA).

accomplish", in order to level the playing field a little bit. I'm not recommending that necessarily, but I'm saying there are initiatives out there, even in the criminal law field. Access to justice is Chief Justice McLachlin's major project, something she believes in very strongly. There is a lot of work being done nationally on this. My bottom line, I think no one thing is going to fix it, I think a whole lot of things have to happen at more or less the same time.

DLM: The Supreme Court, I believe it was in *BCE*,[20] they very clearly recognized that if they didn't hear it in an expeditious way it was going to be moot. So they actively expedited the process. Would judges taking the power to impose limits and such be good?

RJS: My answer to you is yes, and the living proof of that is that in the American federal court at the trial level, judges case manage and there are time limits imposed in not all cases but almost all of the cases. There is a time schedule, boom, boom, boom, and you are going to trial on the 13th of February. As soon as the defence is in, there's a meeting (and it may be before a Master) and this is it—these are your timelines, there's your trial date, and unless somebody drops an atomic bomb, that's when you're going to trial. And they do it and it works.

V. PRACTICE AT LARGE

DLM: Let's talk a little bit about how the practice of law: How has legal practice changed in the years since you were called to the Bar?

RJS: You have to remember that I haven't been part of a firm for twenty-six years. We try to keep connected with lawyers, particularly those who practice in the Court of Appeal. It's a difficult question. My impression is that the practice of law, whether at a big firm or a small firm, has become much more complex—the information explosion, in-house research, the cost, the overhead of running a law firm, big or small, but particularly a big and full-service law firm, is more substantial. In that respect, law has

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[20] The Supreme Court did indeed expedite the process, after application by one of the parties. *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69, [2008] 3 SCR 560 (SCC Docket #32647), online at: < http://www.scc-csc.gc.ca/case- dossier/cms-sgd/dock-regi-eng.aspx?cas=32647>.

become more like a business—and law is a business, I mean, people become lawyers or doctors or whatever because they want to earn a decent living. But more attention is being paid to business. Just about the time I got appointed to the bench big firms at least were talking about budgets for lawyers: OK, next year you're expected to bill X hours, and that's your target. Obviously there's some consultation, it's not something that's imposed from on high, but ultimately that's your target, that you're expected to bill two hundred thousand dollars next year. That's what was just starting, and it's become even more like that. The firms have glossy brochures, and there's a fair bit of promotion that goes on including with clients. The fact that Firm A used to act for a very major corporation doesn't mean they're going to continue to do so, so that aspect of the profession has changed.

I think there's still room obviously for the general practitioner, but we don't see very many lawyers in the Court of Appeal, with one area as an exception, who are general practitioners. That exception is, for one reason or another, that there are a number of very good commercial lawyers who do their own court work. Half a dozen or so. And they're good counsel, they do an excellent job (certainly before us) and they're commercial law practitioners, now I can't give you the history to that, but that's an exception.

DLM: Are they people of your generation or the newer ones?

RJS: More of my generation.

DLM: So before the big firm practice kicked in?

RJS: Yes.

DLM: So if they've been to court, they stay in court. If they've never been to court...

RJS: They don't go. But, in the big firms, for the most part, you pick one side or the other—if you go to court, that's what you do, and if you're a commercial lawyer you hope you never see the inside of a courtroom.

DLM: I used to tell people that if I saw the inside of a courtroom as a commercial lawyer it was because I'd screwed up. You'd mentioned

carrying Archie Dewar's bag—are law firms still doing that as well as they used to?

RJS: No. If we had a whole gaggle of judges in this office and you asked the judges (those who think about this a lot—like we do) what's the one thing that could be done to improve the level of practice in the courts, the answer's one word: mentoring. I had a mentor: Archie Dewar. Al MacInnes had a mentor: Archie Dewar. And you go down the list of judges of my era and some distance younger than that, and you will find out that they worked with—for initially, then with, and then eventually on their own. They were mentored, they were brought along.

Now, other than in the really big firms, and in the Attorney General's department, it's just dive into the high end and hope you learn how to swim by the time you get to the edge of the pool. That's the one thing we see above all others, even in the Court of Appeal. I'm happy to say that though for a little while the provincial Crown was doing that, they now have an excellent group of senior Crowns who do the appellate work. But people come into our Court, and it's a bit of an exaggeration to say they're clueless. But they are still learning, and baptism under fire doesn't work very well in the practice of law.

DLM: You make a particular effort to be at involved at the law school whenever possible (heard cases there, etc.). Why do you think they're important from the Court's perspective?

RJS: Well, we like to stay connected with the law school, most of us are products of the Manitoba Law School. I certainly am, and we feel a connection with it. We feel it's our law school, we feel a connection, and we think that we owe a lot to the school. Notwithstanding some of the frailties of the system that existed fifty years ago that I described, the fact of the matter is that those of us who were lucky and had good articles and were in a good class got a pretty decent education from the Law School and we feel that we owe a lot to our school and think we should help.

DLM: And we appreciate it. There is much talk of work-life balance in the profession. Does the average lawyer seem to work longer than when you began practice? Would the profession benefit from a slower pace? Does the

profession need to evaluate how it is spending its time, both for lawyers and for clients?

RJS: I think so, but I don't know. I mean, it's not something that we see, and when we do (and I'm talking in particular about the Court of Appeal)—when we see a lawyer who's off his or her game or seems to have lost perspective, or just really is not properly focused, we recognize that that's happening, but we really don't know why. But anecdotally, my sense is that there's still a divide between the lawyers who are married to their job as well as their family, and those who strive for a better life balance and intellectually, I'm in the latter camp, having been in the former camp for quite some time.

DLM: You must have a very understanding spouse?

RJS: I most surely do.

DLM: You've been married to your wife for?

RJS: Fifty-one years.

DLM: That's a really long time.

RJS: [smiling warmly] Yes it is.

We're starting, but I think the profession has a long way to go to adapt, and I'm speaking particularly of women. I was reading an article just the other day about how women who get married, who have families, find it is very difficult for them to come back into practice. I think ways have to be found within the legal community for that to happen because it's a win-win situation, if you have someone who's a good lawyer who for family or personal reasons leaves the practice for a while, wants to come back, maybe wants to work his or her way in gradually, it's an asset for the firm, it's an asset for the practice of law. We just have to organize things a little better to encourage that kind of reintroduction into the profession. That's just an example. So I think that the practice of law as a whole needs to do more to encourage people who graduate from law who practice for some time to stay in the profession and to make it a more welcoming profession in those kind of circumstances.

DLM: Even though you talk about budgets being new when you left the profession, the idea of the billable hour and the idea of only having time to sell wasn't new when you left practice.

RJS: I can't remember what it was now, but I had had an hourly rate in the last few years of my practice. And, by the way, one of the things that's happening now in government and with major corporate clients, there's a move now away from the hourly rate—quote us a fee.

DLM: Do you think that would serve clients better? Perhaps even with smaller clients? And it'll provide the security that they can throw as many people as they need at it?

RJS: Yes.

DLM: When you talked about the very practical education that you got and how you were educated by a small group of professional teachers and a large group of practitioners—do you think we need to move back to a more practical education? Or is there a benefit to a more academic education? Or do we need a different balance?

RJS: We certainly don't want to ever go back to the system that I was educated under. I've used the word luck quite a few times—I think more than anything else Lady Luck played a role in who my classmates were, and the fact that people like Cliff Edwards and Dale Gibson (who were both in their second year) were there, both excellent teachers, and that I ended up with good articles—all luck.

My view, for what it's worth, is that the superior intellectual content of the modern day law school is absolutely essential. And it's really the job of the Law Society to provide the practical training. Now, having said that (and this is some blue sky thinking) there might be some level of better coordination between the law school and the Law Society at the third year level.

DLM: That is a very interesting concept. So you're talking about starting, at least in some precursor to articling, the practical training?

RJS: But at the law school, and perhaps partnering with somebody who was talking about "the real world of commercial law." He would be there

with you, and the two of you would sort of be doing it together. I've thought a bit about this, but not much, and it may turn out not to be a good idea at all, but sort of a transition.

DLM: So there'd be certain courses that you'd take if you wanted to practice in a certain area.

RJS: Exactly. But absolutely not in the first year, and probably not in the second year. I think that the one area where, broadly speaking, young lawyers are better or more capable than they were in my era or the eras that followed for a few decades is in their knowledge of the law and legal thinking and legal analysis. Where they're not better, I think, is in their performance in court, particularly in the early years. So if you can get a little bit more of a balance...

DLM: And would you perhaps have figured out some of that at the side of your mentor—you would have seen him in court, you would have—

RJS: Exactly.

DLM: You've obviously seen every conceivable type of advocacy—the gregarious and outgoing, the slow and thought out. Is there one type that works better across the board, or is it more based on what works best for the individual?

RJS: It's more the latter. First of all, let me take a step back—the best advocates (and again I'm thinking mostly about appellate work) are not necessarily the people with the gift of the gab. The best advocates, generally, don't yell and scream and pound the table and make a lot of noise. The Archie Dewars, the Roy Gallaghers, the Frank Allens, the Peter Morses and the Charlie Hubands—they were on top of their game, and it was a dialogue with the court.

Of course, this is now the standard, people who come to court, particularly the Court of Appeal, realize pretty quickly you don't just get to stand up and go through your brief while we sit and listen—we ask questions, and the good advocates welcome them. They know their brief well and they respond and it's almost like a conversation—and they can be very persuasive. But at the same time, they're riding the wave with whatever way the court is going, and then bringing themselves back to

whatever point they were trying to make when the court diverted them onto something else. They're persuasive because of their mastery of the subject and their confidence in their ability to convey what it is they want to say to the court. Not by being loquacious or any tricks of the trade or any histrionics—and this applies to trial court, too. These are the best lawyers. Really good counsel—they don't raise their voice, even when they're cross-examining a hostile witness they're polite. They're lethal, but they're lethal because they know their subject, and they've got a game plan.

DLM: Is there anything particular about this generation of lawyers that's different about the way they approach it than when you did?

RJS: We don't see much of this in our court, but a constant refrain on the part of the trial judges is the lack of respect for the institution. And they see it particularly in the Family Division—they see a lot of it. It is seen in simple things, such as in a series of pretrial conferences. A case will be settled and the parties don't phone the trial coordinator, or they have a motion at three o'clock in the afternoon and the thing gets settled and they just don't show up. We see next to none of that in our court. Maybe it's because there's three of us. But they see that a lot in the trial court, and in the General Division as well. I'm glad you asked, because if you hadn't I would have wanted you to bring it up. It is a problem, and I don't know where it comes from.

DLM: Is part of it that people are intensely involved in their matters (especially in family matters)?

RJS: I'm not talking about incivility. That's an issue, but not much, not like it is in other jurisdictions. We get some of that, but not a whole lot. I'm talking about little things. I gave you two examples but there are many others where lawyers just don't seem to have respect—and I'm very deliberately talking about the institution as opposed to the individual judge. Personally, if the lawyer doesn't respect me, well, that's unfortunate, but I insist that they respect the institution that I serve. And that's the way I'm putting the issue. I don't know what the cause of that is—theories abound amongst the judiciary, and of course I'm not the only one who goes out to the Law School from time to time. It may just be the lack of practical knowledge, it may be a lack of appreciation of the role of the courts, it may just be today's society, where respect for institutions is at an

all-time low, whether it's the Cabinet, the Parliament, the Legislature, the judges, or senior civil servants. There is a general lack of respect and appreciation for some of our most ancient institutions, and it may just be the times we live in, but whatever it is the judges in the trial court really this is a big issue for them.

DLM: And it's the newer counsel often—it's not that older ones are changing as well.

RJS: Oh no, it's the newer ones—the ones that are being thrown to the wolves.

DLM: Are just going "I'm done, I'm out of here." Or "I forgot."

RJS: "Oh, I've got a motion at three o'clock, but I don't need it any more, or we've settled the case, or we've decided to put it over and start proceedings over again." They don't phone the trial coordinator, they don't phone the judge's secretary, they just don't show up. Judges may be guilty about being a little overly sensitive about this—some judges.

DLM: I'd have thought some judges would be quite happy. "I have nothing to do for the next hour! I can write a judgment!"

RJS: Exactly. But I've heard it so often around the judges' coffee table and such, from some of the judges I know are not thin-skinned. So it's an issue.

DLM: What question haven't I asked you that you wish I had asked you?

RJS: None.

DLM: Really?

RJS: Yes.

DLM: Thank you for this, Chief Justice. This has been quite an experience.

RJS: Thank you.