

# Interview with Murray Sinclair\*

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B R Y A N P . S C H W A R T Z

## I. INTRODUCTION

**Bryan Paul Schwartz (BPS):** I share this sense, which I think comes very strongly in your writing, about preserving the past and preserving voices, and making sure that people are not lost to memory. The last forty years, between the time I went to law school and now – the transformation in the way the mainstream community in the legal system looks at Indigenous issues, the way Indigenous communities are starting to create their own systems, the change in legal education – who would’ve foreseen it forty years ago? It has been an incredible period of time to go through. I also want to get your views on going ahead – the TRC<sup>1</sup> called for changes in legal education.

To begin at the beginning, this idea of preserving the past and keeping peoples voices alive and hearing from them directly, I look back and realize I’ve been doing this stuff for twenty or thirty years. For some reason, I’ve found oral history fascinating from the beginning. The next generation is going to look back at you the same way you look back at the previous generation, and you’re going to be the elder; someone needs to preserve

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\* Interview conducted by Bryan P. Schwartz.

Senator Murray Sinclair is a First Nations Lawyer. Senator Sinclair graduated from Robson Hall, Faculty of Law at the University of Manitoba in 1979 and was called to the Manitoba Bar in 1980. From 1988 to 2001, Senator Sinclair served as a judge at the Provincial Court of Manitoba. He was the first Aboriginal judge in the province. In 2001, he was appointed to the Court of Queen’s Bench of Manitoba. From 2009 to 2015, Senator Sinclair served as the Chairman of the Truth and Reconciliation Commission. In 2016, he was appointed as a Senator from Manitoba.

<sup>1</sup> The Truth and Reconciliation Commission’s mandate is to educate and inform Canadians on Indian Residential Schools, and to help promote reconciliation. The TRC’s final report consisted of 94 “calls to action” regarding the legacy of the Indian Residential Schools and the process of reconciliation.

your oral history. So, let's begin with that, Murray. You've had an extraordinary career, you've been involved in so much – as a judge, as a lawyer, advisor to governments, with the Truth and Reconciliation Commission, as a senator – what are your thoughts about preserving your own story? Are you going to do an autobiography? Are you going to do a full-length oral history? What are your thoughts about preserving your story, which has been so remarkable?

**Murray Sinclair (MS):** I have started writing it. It was something I started before the TRC, actually, because I was getting ready to leave the bench and I thought that it was important to leave an awareness for others. Awareness not just for me, and not just for Indigenous students, but for non-Indigenous students too. One of the unfortunate aspects of oral history in Canada to this point in time is that it has largely ignored the history of Indigenous peoples, and Indigenous peoples themselves are not aware of their own history. This is largely because the means by which oral history is transmitted from one generation to the next is one group to the next within communities of people, which was either outlawed, or discouraged, or prevented. As a result, people grow up in their families without actually even knowing their family history, without knowing their ancestors. I knew from a young point in my life that I needed to learn some of that history, get to know it, and figure out the importance of it. As a result, that's been a large part of the work that I've been doing, both as a lawyer as well as a judge, and the work of the commissions that I've been involved in. It's been oriented toward bringing that sort of information forward. In terms of my own story though, I started writing aspects of my own history, my own story, mainly because when my first grandchild was born, I realized I wouldn't live long enough for them to know me. They would be in their late teens, early twenties, by the time I was in my late seventies, early eighties, and there was a good chance, given the medical history in my family, that I wouldn't live that long. I wanted them to have a story. I wanted them to know. So, I started writing letters to them. I started with my granddaughter, and I write letters to my grandson too, because in our teachings there are different teachings for each of them. Since probably 2007, my granddaughter was born in 2006, I've been writing these letters to my granddaughter and also to my grandson.

**BPS:** One of the things about the transmission of history is the ability to bring alive people from earlier generations who didn't directly leave their own histories. When I read the interviews and the stories about you, your grandmother seems to have had not only an impact on your life, but through you a tremendous impact on Canadian history. She seems to have been one of the figures that encouraged you and gave you self-confidence. You tell a story in your interview with Shelagh Rogers<sup>2</sup> about it – she is the one that wanted you to be a priest?

**MS:** Yes. Well actually, it was a commitment that she had to make in order to leave the residential school. I don't know if I shared this story with Shelagh in the interview or not. My grandmother was placed in a residential school but on the convent side, so she didn't actually live with the students, she lived with the nuns, because my great-grandfather, her father, was from Quebec, and he was a French Catholic. It was a tradition within French Catholic families at the time – this goes back to the early 19<sup>th</sup> century and into the middle part of the century – of dedicating one member of the family, or more, to the church to become a nun or to become a priest. He had a brother who was a priest, so when he had a family, it was expected of him that he would dedicate one of his children to the church, so he dedicated my grandmother to the church and placed her in a convent. The condition of her placement in the convent was that she had to go to school with the other students at the residential school, but she also had to live with the nuns and become, in effect, an initiate, be raised to become a nun. So that was her role in life from the time that she was a little girl. She told the story much later on, of course, but in my presence, that she decided when she was a young teenager that she didn't want to be a nun – she didn't like the way that nuns had to live. One of the conditions of her being placed in the convent side was that she was not allowed to see her mother, or her sisters. So, she missed them, of course, she was only a little girl when she went there. She was probably six or seven. She missed them, and she never forgot them. Her sisters were still in the residential school, so she would see them when she went to classes, but she was never allowed to spend time with them. Her mother regularly came to the convent to ask permission to see her daughter, my grandmother, and was denied permission. Her mother

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<sup>2</sup> Shelagh Rogers is the host of CBC (Canadian Broadcast Corporation) Radio One's "The Next Chapter."

would camp outside of the convent for the whole summer in the hopes that she would be able to see her, and maybe talk to her. She did that until her mother died, and so that part of that aspect of being a nun was not something she enjoyed seeing, she didn't like it, and probably resented it, although she never talked about it in those terms. As a young teenager, she didn't have the right to say that she wanted to leave. Under the *Indian Act*,<sup>3</sup> of course, all students had to stay in residential school until they were released by the Indian agent to return home. Because she was dedicated to the church, she also had to get permission from the church, because it was her father who signed her in, and he wouldn't sign her out. So, she had to get permission or had to wait until the Mother Superior of the convent allowed her to leave. Although they knew that she didn't want to become a nun, they kept her there until she was nineteen. There was a practice at that particular residential school, as it was with most catholic schools, that they wouldn't allow the young women to leave until they married another boy from the school, or a Christian boy from another school. This was because they didn't want children to go home and have pagan children. So, they kept the children in the school until they were ready to marry, and then they married them off in the schools. That was a common tradition. If there were not enough boys in the school, they would allow the men from the communities, or adjacent communities, who were looking for wives to come to the convent and pick a young girl who was ready to get married, as long as the men themselves were Christians. That regularly occurred at that particular convent school. Once a month, men would come looking for wives, or somebody would get married in order to leave the school. When my grandmother was nineteen, she saw a man come into the yard, who was my grandfather, looking for a wife. She says that she told all of the other girls not to agree to marry him, that she wanted to marry him, and they agreed. She was, therefore, allowed to marry my grandfather. My grandfather tells a slightly different story, that it was more his choice than hers, but nonetheless because she agreed to marry my grandfather she was allowed to leave.

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<sup>3</sup> The *Indian Act*, RSC 1985, c I-5 was passed in 1876. It served to define the term "Indians" and regulates band governance, Indigenous land-use, administrative structure relating to education and healthcare among many other things. It is a controversial piece of Canadian legislation whose provisions have been constitutionally challenged several times in the courts.

My grandfather's aspect of that story was that he went to a residential school in Elkhorn.<sup>4</sup> He was an Anglican, Elkhorn was an Anglican residential school.<sup>5</sup> He was married twice, when he married the first time, he had two children – his first wife died giving birth to their third, and the child died too. He was a young man who was left with two little children to raise, and he couldn't do it and work. He didn't have any family support, so he went to the Anglican minister in his community to ask if the Anglican minister could find him a wife. The minister asked around to all the families in the congregation and none of the families had a young girl who would marry a man that already had two children, and none of the families, I guess, who did have such a potential bride wanted to agree to that. So the Anglican minister introduced him to the catholic priest in the community, and the catholic priest did the same thing, and couldn't find anybody to marry my grandfather with his children. But the catholic priest gave him a letter of introduction, because of the practice up at the convent. A letter of introduction would allow him to go to the convent and ask the convent to provide him with a woman who would marry him. When he got there, he was interviewed by the mother superior and had to agree to a certain number of conditions in order to be allowed to marry a young girl from the school. One of the conditions was that they had to dedicate somebody to the church. He also had to convert, which he couldn't he said, so they said as long as he was a good Christian, they would overlook that one. They also wanted him to convert his two other children to the Catholic faith and he also said that he couldn't do that because his in-laws wouldn't agree to that. But he did agree that all of the new children born to him would be raised as Catholics, and he wouldn't interfere with their education, and so he agreed that he would send them all to residential schools run by the catholic church. So, when they had children – they had thirteen children between them – they tried to convince one of my uncles to become a priest, and he almost did, I guess, but it never happened. When my mother died after my younger brother was born, we were taken to live with my grandmother, she decided that I was a good candidate for the priesthood, even though I was only a year old, so she dedicated me and told all of my aunts that I was being dedicated to the church. So I was raised in

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<sup>4</sup> Elkhorn, Manitoba is located approximately 290 kilometres west of Winnipeg.

<sup>5</sup> The Anglican Indian Resident School in Elkhorn first opened in 1888 and closed permanently in 1949.

the family that I was going to become a priest, and I lived my youth that way until I was a teenager.

**BPS:** Throughout your life, you've been called upon to do some very difficult things, not just intellectually, but emotionally. You've been asked to take on things like the cardiology deaths inquiry, and the TRC after its initial problems in getting started, and apparently you are still taking on a task like this. One of the things that has motivated you is that you had to commit to making something of your life if you weren't going to be a priest?

**MS:** Well, when I was in high school I wanted to go to university. In our family, because my grandmother was so elderly when I went to live there, she was sixty-three, even though she was our legal guardian we actually weren't raised on a day-to-day basis by her, we were raised on a day-to-day basis by our aunties, so her daughters took care of us. The daughter that I was assigned to, or was assigned to me, was a teacher. Whenever she would go away and teach, I would go with her and be like her son. I would be responsible for cutting her wood, carrying her water, taking care of the place. She inspired in me a love for reading and education, so when I was in high school, I wanted to make a choice and I knew that it would not be a popular one, but I thought I could make it work. I met a priest who was a teacher and so I wanted to become a teacher, I thought I could combine them. I told my grandmother that I wanted to go to university and that I wanted to become a teacher. She said that she didn't want me to go to university, she wanted me to go to the seminary, and she had already picked out which one she wanted me to go to. They didn't combine professions and priesthood, you were just a priest, a community priest is what she saw me becoming. I had to get her permission because she was my legal guardian. At the very last minute, she actually agreed to sign the necessary forms and paperwork for me to go to university, because she saw how determined I was. This was on the understanding that I would not waste my education. I promised I would not become what she called an educated bum, and that I would do something with my education; I would always remain true to our commitment to help people.

**BPS:** You did sociology at university?

**MS:** I studied sociology and history; those were my two majors.

## II. HIGH SCHOOL

**BPS:** Let's go back to high school for a moment. It was basically a day school experience?

**MS:** Yeah.

**BPS:** You seem to have emerged a lot of respect and recognition from your peers – you were the valedictorian, you were the athlete of the year – and you did that even though you were a couple years younger than most of the students?

**MS:** Yes, because my aunt was my teacher most of my life, she advanced me more quickly through the system. By the time I started high school I had already skipped two grades; from grade three I went into grade five, and from grade six I went into grade eight. By the time I started high school I was thirteen years old, I think, maybe twelve. When I graduated from high school, I was sixteen, and going to university I turned seventeen. High school was actually a good period of time, I learnt a lot, but I was always hanging out with older kids, learning things that my grandmother probably didn't want me to learn.

**BPS:** I was going to ask you about that. So, you come from a very religiously oriented background and experience, were there things you read, or authors that you read, enlightenment authors or skeptics or Roman or Greek classics that challenged traditional Christian belief?

**MS:** When I was twelve years old my aunt, who was, again, my teacher, gave me *The Book of Knowledge*;<sup>6</sup> the complete set of *The Book of Knowledge*. She told me she wanted me to read it in one year, so I read *The Book of Knowledge* completely in one year. There is nothing that is more intellectually stimulating and challenging to your concepts of knowledge than reading an encyclopedia. So, I read it, and I was fascinated with some of the things that

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<sup>6</sup> *The Book of Knowledge*, written by Arthur Mee, is a children's encyclopedia.

it talked about. It included a lot of information about other societies around the world and it introduced me to a number of other writers and writings. In my early high school years, I became aware for the first time in my life that there were Indigenous authors, people who were actually writing. There were not a lot, but there were some who were writing things. It wasn't really until the late 60's early 70's, when I was in my latter high school years, though, that I got into people like Vine Deloria,<sup>7</sup> reading about his intellectual growth, his own growth, and others that he associated with. At university I was also introduced to sociologists like Franz Fanon<sup>8</sup> and his study of colonization in Africa. The colonial experience was something I became aware of more toward the latter part of my high school years. During high school I spent a lot of time reading about historical events that were more closely associated with our family, such as the history of the First World War and the Second World War, because we had veterans in our family; my dad was a veteran. Understanding why we needed world wars and how world wars occurred was an interesting part of my life. That is one of the reasons why I lost connection to the church, because as part of that reading I became aware of what the Catholic church had done during the Second World War, and its contribution to the extermination of Jews and its failure to uphold its own Christian teachings in that field. That I wouldn't say drove me away, but it led me away from the church. I started expanding my awareness of other teachings; I read a lot about Buddhism, I read a lot about other religious faiths, as well. I just found it to be a really interesting intellectual exercise.

**BPS:** When you went to high school there was a mixed demographic; there were local kids from Selkirk,<sup>9</sup> and there were Indigenous kids. Did everyone treat you like Murray, or did people have a perception of, "I have to see you as Murray through the lens that you are an Indigenous person?"

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<sup>7</sup> Vine Deloria Jr. (1933-2005) was a Native-American author, writer, and lawyer from South Dakota. Through his writing Deloria became an activist for Native-American rights.

<sup>8</sup> Franz Fanon (1925-1961) was a philosopher and writer who wrote on decolonization post World War Two.

<sup>9</sup> Selkirk, Manitoba is a city located approximately twenty-two kilometres north-east of Winnipeg.



**MS:** The Selkirk area was initially an Indian reserve, Treaty 1<sup>10</sup> was signed in 1871. The northern part of the City of Selkirk, what is now the City of Selkirk, at the time it was the town of Selkirk, was the southern part of the reserve. St. Peters reserve went, at that point in time, all the way up to the mouth of the river in the northern part of reserve, near Matlock, just South of Gimli.<sup>11</sup> On both sides of the river two miles, that was all St. Peters reserve land, that is where I grew up. When the government moved the Indians off, they left behind ninety families, and they moved about two hundred-twenty families to what is now Peguis.<sup>12</sup> Peguis is the largest First Nation population-wise, and membership-wise, in Manitoba. It was a huge First Nation at the time of treaty signing, and it was probably the largest reserve, despite the fact that it never got all its land. But, as a result of that, and also as a result of the fact that there were a number of Metis people driven out of Winnipeg in the 1880's and 1890's further up the river onto the lake, there were a lot of Métis communities on the east side of Lake Manitoba and the east side of the Red River, there was a large Indigenous population. When I started high school, it was a regional school, in other words they brought people from as far away as thirty kilometres, and it expanded its population. In the era that I was there its population grew significantly, I would say that probably 25-30% of the school population was Indigenous. So, there was a large Indigenous population, but I would say that most kids dropped out by grade ten, because they had streaming. Streaming was a practice by which they encouraged children to either go into University entrance or go into occupational training. Almost all of the Indigenous were streamed into occupational training. I was, in fact, streamed there originally. I was told that I couldn't go to university and I wouldn't be put into the university stream, even though I was in the elite class of students that was constantly scoring in the high nineties and getting good grades. I was told in grade ten that I was going to be placed into the occupational entrance program in the next year. It was only when the principle, who later became a very good friend, but at the time saw some of my potential, I think, intervened on my behalf and said that I was allowed to go into the university

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<sup>10</sup> Treaty 1, entered into at the historic Lower Fort Garry in Manitoba, covered the province of Manitoba as it existed at the time of signing.

<sup>11</sup> Gimli, Manitoba is located approximately seventy-five kilometres north of Winnipeg.

<sup>12</sup> Peguis, Manitoba is located approximately 145 kilometres north of Winnipeg. With a population of around ten thousand individuals, Peguis is the largest First Nation in the province of Manitoba.

entrance program. Almost all of the Indigenous kids were placed into the occupational entrance program; my brother was, and he was much smarter than I was. His story is probably similar to many others. He was placed into an occupational entrance program in grade ten, and by the middle of grade ten he had been assigned to an industry that he was working at. So he went to work for a sheet metal company in Gimli, Manitoba as part of his education. When he finished working there, he had a certificate in sheet metal trade. That was his work. Many others were streamed into automotives, into carpentry, into wood working, into physical labour kind of work. When I moved into the university education stream, I was probably one of five or six Indigenous students, even though we had 140 students in our graduating class. I would say there was probably only five or six of us who were Indigenous at that time, even though when we started off there were probably 150 students in our grade nine class, 25% of them were Indigenous students.

**BPS:** What was the thinking or the prejudice or whatever about streaming Indigenous kids into the occupational stream? Was it an assumption about relatively less intellectual ability? Was it about language skills?

**MS:** A couple of things, I think. First of all, it is a systemic belief that we need people to do those things and provide those kinds of services to society, and therefore one of the responsibilities of the educational system is to produce students to do that kind of work. The easiest students to move into that kind of stream are the students and families that didn't resist. The families that resisted the least, and in fact participated the least in the educational system, were the Indigenous families. This was largely because of the residential school experience. Despite all of my successes and all of my activities in high school, my grandmother, for example, never came to a high school activity that I was involved in. I was in plays, I played on just about every sports team, I participated in every track and field event, and I won numerous awards at each of the annual student days. My grandmother never came to any of those school events because she didn't like schools.

**BPS:** Right.

**MS:** It was not necessarily because of her experience, incidentally, she actually had a good residential school experience, largely because she lived

on the convent side. But, in the residential schools three of my uncles were sexually abused, and she found out after my father was sexually abused. The only reason she found out was because my oldest uncle told her what had happened to my father. So she pulled all of the kids out of residential schools and moved away.

**BPS:** I just want to talk for a moment about the difficulties of conveying the past to the next generation, because all families when you really look at them have issues. On the outside families look like they are in fine form, but in every family there are issues; there are people with addictions, there are people who have health issues, sometimes mental health issues. There are always stories behind the stories, whether it is in the Indigenous community or any community. When you are writing these letters to your children, in terms of telling your stories, do you find that a challenge trying to balance candour with the painfulness or the embarrassment of some of the history? How do you talk to the next generation and balance telling the whole story with preserving honour and reputation? Is that a challenge when you are doing this around recanting or editing the unpleasant parts?

**MS:** No, because they need to know that. They need to know why things are the way they are. That is one of the mantras of the two major inquiries I was involved in – the AJI<sup>13</sup> and the TRC. The people need to know the bad with the good. It is interesting that you say that all families have their hidden history that people don't necessarily talk about or share, but when they do the difference between Indigenous families and non-Indigenous families in society is the level of support and acceptance and validation that they receive from the telling of it. Until very recently, Indigenous families who shared the past painful experience got no support from society for sharing that past and were never given any sense of validation that this was wrong. In fact, the opposite occurred. When efforts were made to talk about what happened in residential schools, or to talk about what was happening in society, such as being the victims of racism, to share that publicly was to be rejected by the dominant society, in fact to be told that this is something you deserved, because you are not equal. That is why my grandmother never went to the school where I was participating in something, because she saw

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<sup>13</sup> The Aboriginal Justice Inquiry (AJI) aimed at examining the relationship between the social justice system and Aboriginal people.

the school as being some place that would not, no matter how hard we tried, accept us. That is true for just about every Indigenous family, it wasn't true just for mine. I've made a number of presentations to teacher's societies, and teacher's groups, and school boards across the country, and without any difference among them, they all agree that the Indigenous community is largely unrepresented when it comes to parent teacher nights' activities within the school. It's only recently that it has begun to change, it's changed in the last two generations, I guess. But, it's because the earlier generations didn't have a good educational experience, didn't have an educational experience that they were proud of, or that they felt validated by. Even when I went to school, as successful as I was at it, I was largely immersed in an educational system that denied who I was, denied the validity of who I was. As a young person you don't really know that, but as you get older you realize that. I realized that in my high school years, and at university. There is a period of time where you feel totally betrayed not only by those who did that, but also by yourself, by your own sense of purpose, and you lose faith in it. Those who succeed are the ones that find a way out of that, and a lot of people haven't succeeded.

### III. UNIVERSITY

**BPS:** You were going to university when there were still very few Indigenous students?

**MS:** I started university in 1968, initially here at the University of Manitoba. It was always going to be a challenging experience because I'd moved from a smaller community into a larger setting like this. Educationally speaking, I went from a school that had a population of about eight or nine hundred students, maybe, then I was here at a place that had a population at that time of 20,000 students. My first-year classes were one hundred-fifty to two hundred students in a class. Nobody notices you, and you don't know who to talk to, so that sense of being lost is going to occur to everybody. Being an Indigenous person in a place like this is a deeper hole. Even though they had student advisors, Reverend Cuthand and Doctor Bruce Seely, who were assigned responsibility for assisting Indigenous students at that time, I wasn't even aware that they had that until I was leaving. I'd come here on a

sports scholarship and I was in the Faculty of Physical Education, but I quit university in my second year. I left, I just couldn't handle it anymore. The other aspect of it for me was that I was so far away from family.

**BPS:** When we've spoken to a number of our own students from that generation loneliness is a constantly reported experience, just the sense of isolation and loneliness. I think from what I've read you had to leave university for a while to look after an ailing relative?

**MS:** My grandmother, yeah.

**BPS:** You did eventually go back. Where along the way did you think that maybe you should go to law school?

**MS:** It was when I came back. I had already decided when I came back that I was going to go into law school. That came about because when I left here the first time, and that would have been about 1970, I started working at the Friendship Centre<sup>14</sup> in Selkirk as a student sports organizer, organizing sports for Indigenous kids. Then, I became the administrator of the Friendship Centre, and then I was asked to become the assistant manager of a hostel in Kamloops, BC.,<sup>15</sup> which I did for a year. Again, it was too far away. When I came back, I came back because my grandfather took ill, and I came back to support my grandmother who was feeling his loss even though he was in the hospital. She was home alone a lot, so I came back to support her. When I was here I went back to work at the Friendship Centre, and became quite involved in community activities. It was through that work that I became connected to Howard Pawley,<sup>16</sup> who was then the Minister of Municipal Affairs and Northern Affairs. During that period I became involved with the Manitoba Metis Federation,<sup>17</sup> the political organization, and was elected their vice-president for a period of about a year, I guess.

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<sup>14</sup> The Selkirk Friendship Centre is a non-profit which aims to assist Aboriginal peoples adjust to living in an urban society.

<sup>15</sup> Kamloops, British Columbia is located approximately 255 kilometres north east, by air, from Vancouver.

<sup>16</sup> Howard Pawley (1934-2015) was premier of Manitoba from 1981 to 1988.

<sup>17</sup> The Manitoba Métis Foundation (MMF) is a political representative for Métis people in Manitoba.

**BPS:** Can I ask you a bit about that, because nowadays I think we are seeing an increasing sense of distinct consciousness of identity between Metis people and First Nations people. Showing up in the courts there has been case law about whether Metis communities in Alberta could exclude people from citizenship because they are First Nations citizens. So when I read that you were senior official at the Metis National Council I thought, “Well, how did that work?” Was it a problem that you were a First Nations citizen, or was that not an issue in those days?

**MS:** I wasn’t First Nations at the time. It was through Bill C-31<sup>18</sup> that we regained our status. When my grandmother pulled all of the kids out of the school in the 1920’s, in order to avoid the Indian Agent they enfranchised, my grandfather signed out of treaty and took all the kids out of treaty. Also, one of the reasons that he enfranchised was so he could take title to his land when they moved all the Indians off of Peguis. So we were not status under the *Indian Act*. At that time the Manitoba Metis Federations membership was open to people of Métis ancestry, so at that time they distinguished between the Metis people who were connected to the French Métis of the Louis Riel<sup>19</sup> era and the half-breed population who were the Scottish half-breeds, and also non-status Indians. So we were sort of in the category of the non-status Indian group. We didn’t feel a connection to the Métis culture, we didn’t feel a connection to the Scottish half-breed culture. We were very close to First Nations culture, but we had no status under the *Indian Act*, so that group was also included in the Metis organization at the time. That has since changed, of course, since the development of other organizations that represent the non-status Indigenous population, they call themselves the Congress of Aboriginal Peoples<sup>20</sup> now. The Métis National Council represents almost exclusively the Métis and there are probably fewer non-status Indians than there were at that time because of the *Indian Act*. But, I became their vice-president, and in that capacity I was constantly in communication and attending meetings with government officials. I was

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<sup>18</sup> Bill C-31, *An Act to amend the Indian Act*, 1st Sess, 1985 (first reading 28 February 1985).

<sup>19</sup> Louis Riel was a Canadian politician, a founder of the province of Manitoba, and a political leader of the Métis people of the Canadian prairies.

<sup>20</sup> The Congress of Aboriginal Peoples (CAP), now known as the Indigenous Peoples’ Assembly of Canada (IPAC), represents off-reserve status and non-status Indigenous peoples in Canada.

a bit of a thorn in the side of Howard Pawley, because he was, in addition to everything else, my MLA.<sup>21</sup> Whenever there was a problem that I felt needed to be solved, I would contact his office. He did what I thought was a particularly smart thing, he hired me to work for him, and basically said, “Now you handle all of those things that you used to talk about.” So I went to work for him for four years as his special assistant.

**BPS:** One thing that fascinates me is the capacity of comparative studies to tell you more about yourself. Everybody thinks that whatever they are doing is naturally the only way to do it, and they don’t realize that there may be things they do naturally in their own culture that other people would regard as eccentric, odd, irrational. You had a sort of sociological perspective, you’d read widely, were their things about the so-called mainstream culture or non-Indigenous people that struck you as funny, odd or hard to understand?

**MS:** I was totally immersed in mainstream Canada growing up. In fact, it was the opposite, and it’s true with everybody in my generation and other generations that followed me and preceded me – we were raised in the belief that we were not Indigenous, that there were no longer any Indigenous peoples. Even though all around me there were people who I knew were Indigenous people, we all were told to see ourselves as Canadians, and to see ourselves as part of Canada, and part of the British Empire. Because of that, that was the level of our commitment, that was the nature of our commitment. There were aspects of it that we didn’t understand, but there were many non-Indigenous people that also didn’t understand it, so we didn’t feel particularly left out. Who could explain the monarchy, for example? Who could explain what the governor general was? Who could explain how Parliament worked? So those kinds of things were just one of those mysterious give-ins that we just lived with. But, it’s when as a young Indigenous person you realize that you have an Indigenous identity. That awareness came about more strongly than ever in the late 60’s and early 70’s with the political activities of the American Indian movement, and other groups in the United States who were resisting government actions. It caused us to have an awareness that there were aspects of our history that we just did not know, and that we should know. People were telling us that somehow we were connected. It was that intellectual exercise initially that

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<sup>21</sup> Member of the Legislative Assembly (MLA).

we were challenged by, and found a bit strange initially, but felt probably a great deal more comfort towards and about than we could explain. We had to work to be able to gain a sense of validation around it. In the TRC report we talk a great deal about the fact that reconciliation is about mutual respect, it's about Indigenous and non-Indigenous people respecting each other and each other's differences. But, before you can have reconciliation of that nature you have to ensure that Indigenous people are provided with every opportunity to gain their self-respect back, and that includes their sense of self, and sense of self-awareness. Without that, the reconciliation that you will achieve will always be a false reconciliation, because we are trying to be the same thing. It's like we are being told that you can relate to us if you assimilate with us, and that is not what reconciliation is about anymore; it was all that reconciliation was about in the period before the 1970's.

#### IV. LAW SCHOOL

**BPS:** So, did you decide that you wanted to go to law school because it was an intellectual adventure, and by nature you were an intellect?

**MS:** Oh no, I didn't see it as an intellectual exercise at all. This was a stepping stone, this was a career. Not to be a lawyer actually, I went into law school to get into politics.

**BPS:** Was it to do politics with a legal background, or was it to advance political reform through the courts?

**MS:** Neither. I didn't see the legal connection with politics as being a necessarily useful part of being a politician, other than this - I saw it as a stepping stone to becoming a politician. It was because the analysis at the time - it was an American analysis, but, it wasn't true for Canada, I quickly determined - was that the largest group of people represented in political elected circles in the United States were people with law degrees. So, that led me to think that if I wanted to become a politician, I had to go to law school. I wanted to be a politician partly because Howard Pawley became a very close friend of mine and very influential in my life. I wanted to be the



kind of person who practiced his philosophy of life in that kind of way. And so I thought that I would go to law school, and in fact he encouraged me to go to law school, saying that a law degree is like a sign of instant credibility. There is nothing that people don't think that you know. As a result, if you have a law degree, they think you can answer all the questions. Whether you can or not doesn't really matter, it is just your ability to give that impression, that is really part of the training that we engaged in at the time. Dean Edwards<sup>22</sup> encouraged me to go to law school, as well, and to get into politics. So, I came into law school with the express purpose of getting a law degree, so I could get into politics. That was my ambition right at day one. But, law school seduced me into law.

**BPS:** Cliff Edwards, I think, was, along with Dale Gibson, the most influential figure in moving us from downtown to the campus. To me, Cliff Edwards was a case study on why people shouldn't stereotype. A lot of people would hear his accent and know that he was born in colonial India and know that he was a fundamentalist Evangelical and make all kinds of assumptions. Yet, Cliff did a lot – he brought the first Jewish professors to the law school, he brought women professors into law school, he encouraged folks like you to come to law school. Can you tell us a bit about your encounters with Cliff in those days?

**MS:** He was in an era where there were some really interesting law deans all across Canada. Roger Carter<sup>23</sup> at the University of Saskatchewan was another one. These were people with a totally different background than you'd expect would be supportive of Indigenous efforts, but intellectually, and I think emotionally, they had a great deal of understanding of the importance of Indigenous people finding their way to solutions through the law. After I had graduated and was involved in my work as a lawyer and as a judge, Cliff Edwards would come and talk to me about some of the work that I was involved with, I think he was the head of the Law Reform Commission at the time. The one thing that Cliff Edwards used to say when we would have a discussion was that the importance of Indigenous people coming to law was not so that the law school could claim them, it was so

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<sup>22</sup> Clifford Edwards served as Dean of the Manitoba Law School from 1969 until 1979.

<sup>23</sup> Roger Carter (1922-2009) served as Dean of the University of Saskatchewan Law School from 1968-1974.

that they could claim the law. In other words, this law does not belong to white people, we talked about that a lot. If the law was going to be representative of people, then the people who it represented had to be here. He saw that as important, but he also saw it important that the law school have a social responsibility to the community, that it needed to work to overcome the history of law. The history of law is the history of racism – he knew that. I don't think it was necessarily one that he lived in shame about, but what he said was that if we were going to change the law we had to recognize where it comes from, and it's come though that history. Now that it was entering a different era, we were going to fix it.

**BPS:** So you came to law school, there were very few Indigenous students at the time, is that right?

**MS:** There were three or four of us in my first-year law school class. But before me, of course, Marion Meadmore<sup>24</sup> had been here, Ken Young<sup>25</sup> had been here; I think they had both graduated by the time I got here. Ovide Mercredi<sup>26</sup> was two years ahead of me, he was a third year when I was first year. When I was here, Rhonda Doe was in a different section, but the same first year class; Chris, a guy from Cross Lake, he dropped out after first year and never came back; Sheena Reid was the other Indigenous law school student who started out with us. Sheena actually stayed in law school right up until third year exams, and the day before final exams she quit and moved back home to Flin Flon; she is now a senior social worker up north. I was the only one out of those four that graduated; actually, Rhonda Doe failed first year and then went back later.

**BPS:** When you were going to law school there would have been very little taught about the mainstream legal system and Aboriginal people. There would be nothing taught about the Indigenous legal traditions in and of

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<sup>24</sup> Marion Meadmore is the first woman from a First Nations community to graduate from the Faculty of Law at the University of Manitoba in 1977, and the first First Nation woman to be called to the Bar in Canada.

<sup>25</sup> Ken Young was the first Indigenous graduate from the Faculty of Law, University of Manitoba. He graduated with his LL.B. in 1973

<sup>26</sup> Ovide Mercredi, a member of the Cree First Nations community, graduated from the Faculty of Law, University of Manitoba in 1977. He is the former National Chief of the Assembly of First Nations.

themselves. The only way that Indigenous people would show up as Indigenous people in your courses would be in regard to what the mainstream system has to say about the Aboriginal rights, section 91(24), but there would have been no sense at all, in my understanding, of the Indigenous legal traditions in and of themselves. Is that correct?

**MS:** I started law school in 1976, graduated in 1979. Butch Nepon<sup>27</sup> was the constitutional law professor, he probably spent a significant amount of time talking about section 91(24) and the issues of Indians, and lands reserved for Indians. But he didn't get into a lot of detail. A lot of that was work that I did later for myself. The historical development of the *Indian Act* stuff, for example, which I delivered lectures about, was all stuff that I did after I finished law school. But, he was very sure to put the laws treatment of Indigenous people into the context of the laws treatment of minorities generally. Because it was 1976, there wasn't a lot of case law that wasn't pretty racist – *Calder*<sup>28</sup> was probably the biggest decision of the day. People will remember it because it was the first time that the Supreme Court of Canada, and essentially any court, kind of gave a signal that Indigenous people had legal rights that needed to be respected, even though they ultimately sent it back for a new trial. The shot across the bow had been leveled, and the discussion really was about whether it really meant anything, or whether it would just go down the tube as other commentaries had. At that point in time there had been a number of studies that had been done in Canada, particularly in Manitoba with the Legacy Report, but across Canada the Hawthorn Report which looked at treatment of Indigenous people generally and the state of social conditions for Indigenous people.<sup>29</sup> Not a lot of which led to change. The 1969 White Paper<sup>30</sup> was also a significant document, but not a lot had changed coming out of that. There had been a lot of action in the sense of protests. People forget that in the era from 1970 to 1975 there was probably one large annual

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<sup>27</sup> Butch Nepon was at the Robson Hall Faculty of Law from 1969 to 1998.

<sup>28</sup> *Calder et al. v Attorney-General of British Columbia*, [1973] SCR 313, 34 DLR (3d) 145.

<sup>29</sup> The report by Harry Hawthorn found that Canada's Aboriginal peoples were the most disadvantaged and marginalized in the country.

<sup>30</sup> The 1969 White Paper, proposed by then Minister of Indian Affairs and Northern Development Jean Chrétien and Prime Minister Pierre Trudeau sought to eliminate "Indian" as a legal status. Met with strong opposition, the White Paper was withdrawn in 1970.

protest every year. There had been a takeover of an Anishinaabe park in Kenora,<sup>31</sup> the American Indian movement had taken over Wounded Knee<sup>32</sup> in the early 70's. So when I came into law school there was kind of this political boiling that was going on out there. In law school it was like we were immune to a lot of that in terms of what it was doing to the law. It is because law is slow to react to those kinds of social pressures and social activities unless it is triggered in some kind of litigious or legislative way. Ultimately, it was triggered in the era that I was in law school. We started to look at some of the other cases that were beginning to come through the system, but not a lot of which were having a lot of influence. But, beginning in the early 80's when I was starting to practice – I graduated in '79 and was called in '80 – constitutional patriation dialogue started, which led to the *Constitution Act* of 1982. I was involved in some of those community activities that lead to that. I was involved in a practice of law and involved in a number of interesting community activities during a very interesting year of our society's history.

**BPS:** You mentioned that you originally saw law as a stepping stone to politics, but while in law school you started to fall in love with the practice of law itself. You won the prize in advocacy in second year and started to get excited about the actual practice, the art of lawyering. You were doing criminal law when you graduated?

**MS:** When I was called to the bar, I went to a law firm that was primarily a litigation firm. They didn't have room for me after my articling years, so I went on my own and did primarily litigation. I did any kind of litigation that would come through the door, but I did primarily litigation and the usual small-town sort of work: real estate transactions, writing wills, separation agreements, divorce actions. But it was primarily going to court, and that's why I stayed in the practice of law. I loved court work, I loved being in court, I loved going to court even when I wasn't in law school. I used to go to the court house and just watch trials and watch how lawyers did their work, because I loved the courtroom environment. And so, that is what I wanted to do, but within my first year I was hired by the First Nations Confederacy, which was the precursor to the Assembly of Manitoba

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<sup>31</sup> Kenora, Ontario is located in western Ontario, near to the Manitoba-Ontario boarder.

<sup>32</sup> Wounded Knee is located in southwestern South Dakota.

Chiefs.<sup>33</sup> They hired me as their lawyer to represent them on a number of files, but the most important of which was about the repatriation of the constitutional process. I was asked to design and deliver a number of community workshops on what repatriation of the constitution meant for First Nations communities. And so, that was a lot of the work I was doing at that time. That led to becoming involved in land claims negotiations and specific claims negotiations and so, within two years of graduating law school, I was doing primarily negotiations, but still doing some litigation.

**BPS:** The TRC report talks about sports as being one of the positives of the whole residential school experience. I don't know if positives is the right way to put it, but a countervailing source of consolation in a generally miserable experience. You were a very successful athlete. There is some commonality about the court room as a competitive game.

**MS:** I don't want to over blow that, but there is that. There is the competitiveness of the courtroom environment. I think that was one of the initial appeals, but I think it was more the teamwork aspect of it that really drew me in. I loved working with other people, the client, with other lawyers, including even the lawyers on the other side to put together an understandable case so that the issues that the judges were called upon to decide were neater, cleaner and understandable. I really believed a lot in a more collaborative approach to the practice of litigation than most lawyers did, although, I could be as uncooperative as the best of them. But, I really did try to approach the practice of litigation from the collaborative perspective because we were engaged in some really thorny, complicated, hard to understand issues. Sometimes I didn't understand some of the issues we were dealing with, but we had some good advisors working with the chiefs of Manitoba. Dale Gibson<sup>34</sup> came on board with the First Nations group to help us understand some of the constitutional challenges we were dealing with and how to shape them. But, there's no question that the cross-examination aspect was really what being a litigator was all about for me. I used to do it in such a way that sometimes people would thank me afterwards. I still remember, in fact, that the 'black rod,' as they called him,

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<sup>33</sup> The Assembly of Manitoba Chiefs represents 62 or the 63 First Nations in the province of Manitoba.

<sup>34</sup> Dale Gibson is a Distinguished Professor Emeritus at the University of Manitoba.

the Sergeant of Arms at the senate right now, is a former RCMP officer who use to be stationed in Pine Falls.<sup>35</sup> When I went to the Senate, my first day in the senate, he was the guy giving us tours of the place. We were doing the tour and he said, “You don’t remember me, do you?” I said, “No actually, I don’t. Did we meet before?” He told me that he was a young RCMP officer on a file in Pine Falls and I was a lawyer representing an accused up there. His words to me were, “You undressed me on the stand and then you gave me back my clothes in a very neat pile.”

**BPS:** I want to go back for a moment to when you said that some of the reasons you left university the first place was because you were lonely, your grandmother was ill, and you were struggling with a lot of personal issues. What caused you to decide that you wanted to go back?

**MS:** It was a commitment to an ambition. As well, my grandmother had passed away, so my family ties were not as strong. I had found a sense of purpose that really connected to what she had made me promise her when I agreed to go, that I could go to university if I actually did something with my education, and did it well. And so, because I saw political solutions as the answer to the issues that were plaguing Indigenous people at the time, I thought that by getting into politics I was also fulfilling her ambition for me. I also just liked the field, and I had lots of emotional support, too. Dean Edwards, at that time, was just developing a relationship with the summer law program at the University of Saskatchewan that Rodger Carter had established. I was encouraged to go there, but I chose instead to work there for the summer and come straight to law school out of university. But, I went back to university just to get a feel for learning and studying again, I didn’t come to the law school when I went back to university at that time, I went to the University of Winnipeg first. It’s a smaller faculty, I knew a few of the professors personally, and there were more Indigenous students.

## V. PRACTICE OF LAW

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<sup>35</sup> Pine Falls is a small town in the province of Manitoba. It was a former paper mill community and was amalgamated with the town Powerview. It is referred to as Powerview-Pine Falls.

**BPS:** So, you were enjoying the practice of law, and as I understand it, you resisted the initial request that you join the provincial court. Were there things you still wanted to do in practice before you went into the judiciary?

**MS:** Yeah. The legal requirement is five years; when I was out six years and was asked by the province if I would accept an appointment to the bench and my response at that time, perhaps half facetiously, was. "You don't pay enough." Salary for judges at that time was terrible and I was making a lot more as a lawyer than I could have as a judge. In addition to that, I saw being a judge as being a pretty isolating experience and lifestyle, and I was enjoying the process of work that I was involved with at the time. This was in the mid 80's, so at that time I was representing the chiefs in front of the government, commissions, I was inquiring into child welfare - I was developing child welfare legislation with the Province of Manitoba to establish Indigenous child welfare agencies - I was involved in litigation over some significant claims, the Treaty Land and Entitlement committees were just starting or were part way through and I was involved, all of the bands who had never gotten all of the land they were entitled to under Treaty. I was involved in some really interesting work that I didn't want to leave behind. On top of all of that, I still was involved in some community organizations that I didn't want to disengage from. So, initially I turned it down, three times, until finally in 1988 I could resist no more.

**BPS:** I should probably ask when you joined the Court of Queen's Bench, but any recollections of Sam Freedman?

**MS:** As a lawyer, he was not there when I was appointed to the court. Initially, I went to the Provincial Court, and thirteen years later I went to the Court of Queen's Bench, so he was long gone by then. But, as a lawyer I appeared in front of him a few times. It was a different era of judgeship actually, so it was that that caused me to think that in order for them to be able to maintain their credibility they had to stay uninvolved from the community, they had to be above the fray, they had to be able to distance themselves and be totally independent not only from the parties before them, but from elements of society that would be bound to be involved in litigation. I didn't want to be that.

**BPS:** Is that your reason for saying no to the judgeship originally?

**MS:** That was one of the reasons, yeah. I saw it more as an ivory tower than being an academic.

**BPS:** Yeah, it seems to me that it's a form of cloistering, maybe less so now than it was. But, you have to watch what you say, you have to watch who you associate with and that can be difficult. When you were a Provincial Judge, I suspect that a lot of the work was sentencing?

**MS:** Yeah.

**BPS:** How tough was that? You'd been on the defence side, and so were far more aware, I would expect, than most judges on the backgrounds of offenders, the systemic issues, and so on and so forth, and now you're put in a position where you've got to dole out a certain amount of retributive suffering to offenders. I'm just putting the question there: is that really difficult?

**MS:** That was also one of the reasons why I didn't want to become a judge. It was like I had already joined the dark side by becoming a lawyer, and now I was jumping into the dark side by becoming a judge. The last time I was approached and convinced to be a judge, I had moved from the law firm I was with into a singular practice again, but in association with a couple of other lawyers. When I was approached the last time and I indicated that I was still not ready to become a judge, they offered me the associate chief judgeship, which I actually accepted, but it was still with some reluctance that I said I would consider it. What persuaded me were two things. One was that Phil Fontaine,<sup>36</sup> Eric Robinson,<sup>37</sup> Elijah Harper<sup>38</sup> and one other chief came and saw me and said they wanted an Indigenous person on the bench and they wanted me to do it. I saw some merit in that idea as long as

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<sup>36</sup> Larry Phillip (Phil) Fontaine is a prominent Canadian Aboriginal leader.

<sup>36</sup> The Assembly of Manitoba Chiefs represents 62 of the 63 First Nations in the province of Manitoba.

<sup>37</sup> Eric Robinson is an Aboriginal politician from Manitoba. He announced earlier this year that he has hopes of forming a new political party, after leaving the New Democratic Party.

<sup>38</sup> Elijah Harper was an Oji-Cree politician who played a role in the ultimate rejection of the Meech Lake Accord.



it was somebody capable, and then their point was there was nobody else who was capable of doing this. But, the other issue is that when I spoke to Laurie Allen and Lawrie Cherniack,<sup>39</sup> my law partners at the time, Laurie Cherniack had the most important point, “Why don’t you do it for a year, quit and then come back and practice law, say that you’ve done it, make your mark and leave.” So I thought, “Well, I could do that too.” Initially, I went to the bench not to stay but to leave. The crazy thing is that I was sworn in on March the 3<sup>rd</sup>, which was a Friday, I sat on March the 3<sup>rd</sup>, and then the following Tuesday, J.J. Harper<sup>40</sup> was shot, the following Wednesday, the Pawley government was defeated in a vote of non-confidence, and the following Friday, they appointed the Aboriginal Justice Inquiry Commission and they called me and asked me if I would be one of the commissioners. So, within a very short period of time, things took a dramatically different turn, but one of the considerations I had in taking on the role of being a judge was understanding that in doing sentencing, that the harshness that was involved in that could be ameliorated. I was aware enough of the sentencing process to know that judges often went overboard and often said things they didn’t have to say, and often were very unhelpful in their approach to assisting people that deal with very complicated social problems by the nature of their sentencing, and that most judges fail to take responsibility for the ultimate outcome. They fail to look at the long-term impact of what their sentencing was going to do to that person and to the community. There was a better way to do sentencing and that’s what I thought I could do. When the associate chief judge position was rolled into my appointment, I thought in that capacity I could help change the system to ensure that it did address a more appealing approach in sentencing. So, after the AJI, that distracted me a lot in the early years, that’s one of the aspects of being a judge that I worked on – trying to change the sentencing process. It was facilitated in 1996 when the government changed the *Criminal Code*<sup>41</sup> to establish what we now know are the Gladue principles<sup>42</sup> in sentencing. That was part of our work in the AJI, talking about the

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<sup>39</sup> Laurie Allen is a judge of the Family Division of the Manitoba Court of Queen’s Bench and Lawrie Cherniack is a prominent Winnipeg lawyer.

<sup>40</sup> John Joseph Harper was a Canadian Aboriginal man who was shot and killed by police. His death was one of many that sparked the Aboriginal Justice Inquiry.

<sup>41</sup> *Criminal Code*, RSC 1985 c C-46.

<sup>42</sup> The Gladue Principles require courts to consider the backgrounds of and alternatives to incarceration for Aboriginal offenders in matters of criminal sentencing.

importance of taking into account the proper history that Indigenous people had come through.

**BPS:** Regarding the AJI, was there part of you that wanted to say, “Listen guys, I haven’t figured out where the washrooms are yet, it’s my first week, what are you doing to me here?”

**MS:** Actually it’s interesting, it was the opposite. The first phone call I got was not about being one of the commissioners; the first phone call I got was who I would recommend as a commissioner. I think it was an unintentional reflection of the bias of the system that we had to have a senior white judge who had instant credibility among the Indigenous people to be able to head this inquiry. My response at the time, when I was asked, was, “Why don’t you ask me,” and they were taken aback by that. They said they wanted to think about that, and I told them to go ahead and think about it. But, there was an immediate hesitation at the very beginning, and partly because I was such a new judge. As I said, I was only out a week when they were putting together this commission. But, it wasn’t about who had status as a judge, it was about who had knowledge of the issues they thought was most important. And as it turned out, I think it probably shaped the process of the inquiry along much different lines than it would’ve been if it had been somebody alone.

**BPS:** You were later asked to do the cardiology inquest, and you were the sole commissioner in that one. This inquest was not a tapestry of good and bad news stories, it was just one grim, soul wrenching story after another. It seems to me that you would’ve had the least support on that one being the sole commissioner. How did you cope with the demands?

**MS:** Every inquiry has its challenge and with each one I still took the same approach, and that is to ensure that I was in a good place to begin with and that I had proper health supports, spiritual supports, and intellectual supports. But, there is nothing that prepares you for an inquiry where you are listening to stories of children dying... nothing. I finished it in 2001, when the report came out. In 2005 when they asked me if I would be interested in doing TRC I said no. When they asked me in 2007 I said no, and so they appointed the other commissioners. The reason I said no was because of the impact of doing the pediatric cardiac inquiry. The emotional

toll it that it took upon me was very, very difficult. It was later on that Pat LeSage<sup>43</sup> and I had a discussion about it, because he did the Bernardo case. He had to listen to the Bernardo Tapes where they videotaped the murders of the two girls.

**BPS:** I can't imagine. The jury was traumatized by it.

**MS:** Justice LeSage had to actually view the tapes probably thirty to forty times before he could rule on them. People don't know it, but he only allowed certain portions of the tapes to be shown to the jury. He had to watch the tapes in order to find out which portions the jury could watch and which ones they couldn't watch. The impact on him from watching the murder of those two innocent girls was incredibly difficult, it probably led to his early retirement. When he and I talked about it, we talked about the fact that there's nothing that prepares you for that and there's nothing that gives you the means to deal with it immediately afterwards beyond your own individual capacity to cope. Understanding what those coping capacities are, and what those means are, are important.

I wasn't assigned the pediatric cardiac inquiry; I was the one who was doing the assignment. We actually surveyed all of the judges in provincial court with a full briefing about what the process was going to be about, what the case was about, because it was a fatality inquiry under *The Fatality Inquiries Act*.<sup>44</sup> We asked every judge who was interested in doing fatality inquiries whether they wanted to do it and nobody wanted to do it because they all knew it was going to be that difficult. So, almost by default, it ended up in my lap; somebody had to do it and I said I would do it. I think in the end that is was probably something that I did rather well. I don't think that any suffering I had showed up in the process, but the difficulty of doing that case certainly inspired me to turn down the TRC. It was only because the TRC stumbled so badly, and that they came back and asked me again if I would do it, that I agreed.

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<sup>43</sup> Patrick LeSage, former chief justice of the Superior Court in Ontario, presided over the Bernardo trial in 1995.

<sup>44</sup> The Fatality Inquires Act, CCSM c F52.

**BPS:** Can you talk about the role that your family played through these very difficult times in sort of giving you a base of normalcy in what must have been a very abnormal situation?

**MS:** Well, most people never have to go through this, or if they do, they don't know that they're going through it. And so, it's about preparing them for what they might see and what they might hear, and what they might not see and what they might not hear. Everyone is triggered differently by these very emotionally challenging experiences. Some days you go home and you don't want to talk to anybody about it, some days you just can't stop talking about it. And so, it's about just preparing them for whatever it is that they're going to see. It's also about insuring that there's proper diversion and that there's proper normalcy in everyday life. There are a number of coping mechanisms, and we had experts who pulled that all together for us. So, it's not like I had all the answers, I didn't. I brought in people to help us through that.

Going back to the pediatric inquiry though, based on the experience I had at the AJI, which was emotional in some way, I made sure I had proper personal supports. I had an elder who would sit with me whenever I needed to do a sweat or needed to do a ceremony. He took care of that for me. My family was also prepared to know what happened and they would be open to hearing what I wanted to say and not ask me about what I couldn't talk about. Working as a single commissioner was, in some ways, much easier than working with a team of commissioners, because you can come to a decision much faster, but in other ways it's a lonelier experience because you can't share it with somebody who shared the same experience as you.

**BPS:** Another issue I wanted to explore with you about becoming a judge, and particularly in cue with becoming a commissioner, is the issue of patience. We spend a lot of time listening and listening, and listening can be difficult for many people, perhaps for most people. It's a challenge for judges, as we know that some judges get quite impatient, like, "Get to the point, I'm busy here," and as their careers go on, they don't necessarily maintain their status as patient listeners. When you're the commissioner of an inquiry, you're talking about listening for years. Specifically, the TRC went for years through dozens or hundreds of communities and listened

and listened and listened. Is it an individual thing, something in your upbringing? What equipped you to be a patient listener?

**MS:** It's something you can train for, it's something you can teach, it's something you have to be ready for. We engaged the commissioners in the discussion early on about the work we were going to do as commissioners. In the TRC, for example, how to listen and the importance of listening was the first lesson that I wanted them to understand. But, I would say I came about it relatively easily because of the way I was raised. I was raised in a large family, and I was one of the two middle children in our family. It was the two on the outside who got all the attention, the younger one and the elder one. So, as the one in the middle I was always the one that mediated and ameliorated situations. Also, growing up there was an emphasis on studying to be a priest and learning about what that meant. I was put into contact with people who were priests and who were good at it and who taught about what that meant. No matter how naturally inclined you are to be patient, you are always faced with those days in which your patience is less than it would be on other days. You have to learn how to get through that day because while you're having a bad day, the people you are talking to may not be, or they may be having a worse day. So, it's about insuring that the process compensates for those kinds of foibles, and that's what I learned to do. I learned how to establish a system for listening that contributed to the process. I would say that we succeeded at it largely because we had anticipated going in that it was going to be that difficult. We compensated for it by ensuring we had the proper supports in place for us as commissioners and for the people who were talking to us so that we didn't end each day only on a painful note.

**BPS:** That's quite intriguing to me that listening can to some extent can be trained for. We tend to think of listening as passive, or as something that you're just good at or not. Could you tell us a bit more about some of the systems you had in the TRC for this?

**MS:** First of all, we developed three simple principles to begin with and one overall principle applicable for commissioners as well as for staff. First of all, you had to take care of yourself health wise. You had to take care of your spiritual, mental, and physical health. For everything that you did as a commissioner or as a staff person we would ensure that we would have in

place systems that would support you, people that would support those elements of your system so that you had the necessary intellectual support. You had people who would prepare you with proper briefing notes and proper answers to questions about where you were going, who you were going to meet and what you were going to hear. So, we had advance teams, for example, who went into the communities and recorded the stories of people who were going to talk to us, so we had an awareness of what we were likely to hear, although every day was filled with surprises. It was not only about being prepared going in, but also making sure that when you left the at the end of the day that you got proper supports. You had to be able to relieve yourself of the burden of what was heard so that you weren't carrying that with you when you left so that problems you were learning of didn't become your problem. That was also answered by not having to remember everything that you were told - having support people who would facilitate the recording of the events, so you could go back and check on things that were said. There were staff people who were also making notes, and at the end of the day we would do a debrief with the staff and the other commissioners to ensure that we would remember what each day was. At the end of each day, as a commissioner, we would articulate back to each of the presenters what it was that we had heard them say so that they knew and we knew that we had gotten it right, at least as much as we could.

And so, while the process involved a lot of pain, we tried to turn it into as positive an experience as possible. That was because first of all, you had to take care of yourself and then you have to make sure that your family is taken care of, too. That was the second important principle - because we were travelling so much, we were leaving our families behind. We didn't want the families to feel like they had to walk on egg shells when we came home because they didn't know what we'd gone through. So, part of that was to ensure that the families were also kept informed by our staff of what it was we had heard and what it was we had done and where we had been. So, our spouses and our children, adult children, were all informed of what we were doing and were given regular briefings every week and materials. Sometimes it would be an audible briefing, a recording, or sometimes it would just be a written brief that went back to our families. So, when we got home they knew what we had gone through that week. And so, the families were taken care of and they knew and felt that they could share that experience with us even though we weren't there. And that's true for the

staff as well, so all of the staff who were traveling with us had the same benefit.

The third principle was to make sure that we had good writers, good legal counsel, and good people on staff who could take everything that we had learned from the day and put that into a format that we could work with. We tried to make it as easy as we could for ourselves, but at the end of the day, the end of the process, it was always emotional, and we were never ashamed to cry when the moment called for it or laugh when the moment called for it.

**BPS:** A senior lawyer once told me that a mentor told him, “Well, the first thing you’ve got to look after yourself, because if you don’t look after yourself, you can’t be any good to your clients.” That’s a whole other issue about modern practice, it is very emotionally stressful now.

**MS:** There was recently an article in the Free Press about a crown attorney with PTSD from having to work a long term with difficult cases. I commend it to the reading of all lawyers. It’s an aspect of the practice of law that people need to understand, because it’s one of the things that we constantly run into. We have developed this belief that we have to accept it and put up with it and move on, that we have to somehow get past it.

**BPS:** I guess part of being a lawyer is projecting, “I’m confident, I’m in charge, you can trust me.” You don’t want to project, “I don’t know what I’m doing, I lack confidence.” Maybe the whole nature of the profession makes it especially difficult for people to acknowledge their vulnerabilities and to get help.

**MS:** Well, it’s understanding the wide range of things within those two extremes. It isn’t just one or the other, there are, in fact, elements within there that we all carry, that we’re all capable of, and that we all need to be able to figure out how to utilize. They’re tools. They’re tools that we can use ourselves, and that was part of the success of the TRC, part of the success of the AJI, as well as our work as commissioners. Thomas Berger<sup>45</sup> talks

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<sup>45</sup> Thomas R. Berger was the Winnipeg Lawyer for the MMF in *Manitoba Métis Federation Inc. v Canada (Attorney General)*. He was a politician and a judge in the British Columbia Supreme Court. He stepped down from his judicial career to be a practicing lawyer.

about it in his work that he did with the Berger Inquiry and the Mackenzie Valley Pipeline Process and I've delivered lectures to judges about the importance of being able to understand the impact of long-term hearings are going to have upon you.

**BPS:** One of the ideas I have is that we should introduce a course in practice management.

**MS:** Yeah.

**BPS:** We teach the code of professional responsibility, but that doesn't teach you stuff like how to bill, how to deal with clients, how to deal with stress, how to balance your existence as a human with your professional role, and so on. So the emotional stresses associated with various kinds of proceedings is, certainly that's one of the things I think we should address when we finally create a course in that respect.

I'd also like to get your advice on how to facilitate an Indigenous People in Oral History course. For the oral history course, I was thinking that students could learn about oral history, and look at different folks that have done it, like your commissions. I would want to have a comparative perspective, because there are lots of other exercises that have been done in oral history and writing. For example, African oral history is the primary source of history, Australia, the Christian-Jewish scripture in their original oral origin before they became written scriptures.

**MS:** English Common Law is another example.

**BPS:** Yeah, absolutely. Common law was this kind of oral tradition passed down until the case reports came along and it started to be codified. I think the best way to learn something is to do it, so I was thinking that the course assignment would be to do an oral history. The student would go out and do an oral history on somebody who's been involved in an Indigenous community, etcetera. Any thoughts on how you would equip students to do that? Do you think it is a good idea to ask the students to do an oral history? Or is that asking too much?

**MS:** I don't think it's a bad idea, but I don't think it's one that you're going to get a lot of success with initially. This is mainly because there are not a



lot of sources out there. Most Indigenous people, even of my generation, are not familiar even with their own history. We're still learning as we are going. Part of the exercise of learning is to engage in dialogue with others who have an aspect or know an aspect of Indigenous history; a lot of it now is developing along tribal lines. So, you've got Anishinaabe history which is Cree and Oji-Cree and some Cree, but even within the Cree community you've got different Cree cultures as well: woodlands Cree, you've got prairie Cree people. So, understanding what the traditions are today and what the traditions have been historically is always a challenge. There are more and more students now who are beginning in academics who are beginning to look at that and document it. John Borrows<sup>46</sup> is probably the best example of someone who is writing about traditional laws – traditional laws of marriage, traditional law of property –and from their perspective what that comes from and what the teachings are around that. But probably when you approach the people at the community level most of them don't really know. It's because, until relatively recently, the processes of the law's transmission that existed was denied to people, but also the validity of them was undermined by the influence and confluence of Christian religious teachings. So, for example, I've been to gatherings in which I've heard elders say that they talk about a particular belief around grieving for example, that there is a process and a means by which grief is allowed. There are traditional teachings that I've heard from tribal people who have a more traditional background who talk about the importance of ceremony around grieving. Then I've heard elders, on the other hand, who are Christian elders talking about, "You cannot do these kinds of ceremonies as they go contrary to the community." And so, you still have this conflict within Indigenous communities between Christianity, Christian teachings and traditional teachings. Many are not even aware that conflict is there. They're trying to sort through the reasons for why there's conflict, why people are saying one thing on one hand and another thing on the other hand. I would say that to ask students to go out and find someone who can give them those kinds of teachings is probably to assume that there are people out there who can give them. I don't think that's a good assumption right now, only because, I think, the sources don't have that knowledge. It is not yet clear even to someone like me. If you were to ask me, "Who are the people you

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<sup>46</sup> John Borrows is a Canada Research Chair in Indigenous Law at the University of Victoria Law School.

would go to learn of the teachings of the Sioux people or Dakota people around marriage,” for example, I’d know maybe one name, and then see where that leads me, but I don’t know what the teachings are.

**BPS:** As I understand it, there is a sense among some communities that your secret teachings should be kept oral, and kept within the community, and should not just be put out there by being recorded and made available to everyone. Is that so?

**MS:** It’s a common belief that Indigenous people will not allow their traditions to be recorded, but it’s not true. They will and they do. It’s the manner in which it’s done now that concerns people. It’s only because they can be presented almost biblically as this source-able truth when in reality there’s just a version of that moment from that particular source or even at that particular time. So, it’s the manner in which they’re presented and the manner in which they’re gathered that really will determine the openness of the people who share. But, there are some people who will absolutely not share, will not allow you to record their song, will not allow you to record their story and their teachings, and that’s fine. There are limitations in what you can do in ceremonies, just as in a synagogue or a church, you can’t go in there with recording equipment and kind of stick it under the priest’s mouth while he’s giving a sermon or giving a teaching or doing the work that he does as part of the ceremony. But, you can have people who know about that ceremony talk about it and what it means, even though the ceremony might not necessarily be done the same way next time. What the ceremony is about is the transmission of knowledge which leads us to understand.

**BPS:** In terms of codification, that raises some really interesting challenges, precisely because what you said. Often in the oral tradition there are different accounts and different recollections, in codifying it, you’re trying to crystallize it into one official version. How are they managing that?

**MS:** Well, it’s the traditional way by which those traditional rules, knowledge, laws and history are transmitted, through circle format. I was at an event one time with elders who were brought together for the express purpose of sharing with young people of different areas the teachings of marriage and relationships. Before they began, one of the elders – he was

an old, old man, he didn't know how old he was, but they estimated he was one hundred years old – got up and talked about things that occurred in his life time that went back to the beginning of the century. He talked about being a young boy and the way that knowledge was transmitted back then. At that time, all the elders would gather together, and they would invite the community in, and one-by-one each of the elders would talk about what the teaching was. One senior elder would talk first, and the next elder would talk, and he would add something to what the first elder had said, and then the first elder would be invited to agree or disagree. So, they would have a conversation in which they would finally settle upon what they had talked about. Then the next person would contribute, and then the three of them would agree upon what the version should be. This whole process could take days, but by the end of it, you knew everything you needed to know because they had come to an agreement about it. Sometimes it worked faster if they had those gatherings more frequently. I experienced that one time with the Dakota people. I talked earlier about doing that exercise of repatriation of the constitution with Indigenous communities. I went to Sioux-Valley<sup>47</sup> and they invited all the Dakota elders from the various seven Dakota communities in Manitoba to come and listen and participate in that dialogue. Originally, it was supposed to be a half day workshop and it ended up lasting four days because they did that very same thing to me. They said, "Before you talk, we want to tell you something," and then they started telling me their history as a people. It was a general history as a people, where they came from, and their creation story, milestones in their advancement as a civilization over the years, including their first contact with white people and their battles and their leaders. Each time somebody spoke and finished, the next person would acknowledge what he had said, and would either add to it or build upon it. By the end of that exercise, the last person who spoke adopted everything that had been said before him or would add to it, and again, they would all agree whether it was correct. This is a seminar I did with judges; I don't do it with judges anymore.

People sometimes think that there is one person in the community responsible for protecting history, but it doesn't work that way in Indigenous societies. I don't know any Indigenous community where that is the case. Every Indigenous community has a number of people who are

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<sup>47</sup> The Sioux-Valley Dakota Nation is located approximately 30 minutes west of Brandon, Manitoba, and is home to 2,557 people.

given that responsibility and who accept that responsibility. The true expression of their oral history will be when they all gather, and all share and they all have that dialogue in consensus. Once they develop that consensus that becomes their knowledge history. That presents great challenges to a court. For example, the judge in *Delgamuukw*<sup>48</sup> was very challenged by the fact that he would hear one elder testifying on the stand about something, and then the next witness would come along and would say something different because he wasn't in the court room when the first elder testified and they didn't have that dialogue and consensus. So, the judge was confused by what appeared to be inconsistency in their histories, but in reality, that inconsistency was just a lack of a development of a consensus. And so, any judge who wants to know the oral history of the people needs to gather all the elders in one circle and listen to them all in that way. And that's almost impossible for courts to do.

**BPS:** Yeah, it seems to me that's an unfortunate part of history gathering in general and certainly with Indigenous people. We tend to compile histories in the litigation context. For example, with many First Nations, the most elaborate exercise of history gathering will be in the context of filing a specific claim. Which is fine in itself, except it's confining the preservation and re-experiencing the history in that particular focus and it's not recovering, restoring, revitalizing and transmitting all the other aspects of the society that are not related to the particular litigation problem. It takes a lot of positive energy, it seems to me to, to find resources, like time and human resources, to sit down with people and to do the recording, the preservation of history outside of the litigation context. It takes a really conscious effort and a lot of positive energy.

**MS:** In the 1880's the government of Canada banned gatherings of Indigenous people, which were precisely aimed at doing that. For example, in the prairies, a sun dance ceremony was a place where elders gathered together during the course of the day while the ceremony itself was going on and would share the history of the people with all the people who were there. Those large ceremonial gatherings in the west coast were also outlawed, and the outlawing of those ceremonies inhibited, and in fact, interfered with the transmission of that knowledge from generation to

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<sup>48</sup> *Delgamuukw v British Columbia*, [1997] SCR 1010, 153 CLR (4th) 193.

generation and within the community, as well. It was never intended to be that only in the process of the law or with some kind of outside interference that you would engage in that. It was always understood that you had to gather the people together regularly and explain to them what the history was in order for that to be worthwhile.

I was in Split Lake<sup>49</sup> when we were doing the AJI back in the 1990's. One of the interesting aspects of Split Lake is that it was a large community of about 2000 people in Northern Manitoba and yet its crime rate was relatively low. This was until the road was built from Thompson,<sup>50</sup> and then things changed. Outside influences became what they were. When we got there, they talked about the relationship between the RCMP and the community and the justice system and the community. They talked about a time when, even into the 1960's and 1970's, the crime rate within the community was relatively low, people were responsible, people took care of their children, the community took care of their people and they had a very low child apprehension rate and a very low criminal conviction rate. And so, we asked them, "Why do you think that's the case?" They didn't really have an answer for us initially, but they described for us a process where every month they had an elders' feast, in which they invited all the elders to come together and they fed them. The primary purpose was just to honour the elders. But, at those elders' feasts, what would happen is that the elders one by one would stand up and lecture the community about them, about themselves, about their identity as a Cree people, and the elders would talk about the importance of mothers, the importance of fathers, the importance of taking care of children. If there was something going on in the community that they were concerned about, the elders would talk to the people about not doing it, about stopping it, about doing something about it. And so, those monthly elders' feasts were, in fact, their process of historical transmission - they talked about how they came to be located there and what the name of the place traditionally was and why it was there. This process ensured that the children had a better sense of who they were.

Hollow Water<sup>51</sup> was also an event that I witnessed in New Brunswick. They had this ceremony at their school in which they brought

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<sup>49</sup> Split Lake, Manitoba is a community located on the north shore of Split Lake, approximately 883 kilometres from Winnipeg, Manitoba.

<sup>50</sup> Thompson, Manitoba is located approximately 738 kilometres north of Winnipeg, Manitoba.

<sup>51</sup> Hollow Water, Manitoba is located approximately 190 kilometres north of Winnipeg,

together all the elders of the community that were alive at the time who had been to residential school, and they put their pictures up on the walls of the hallway to honour them. They had somebody in the community do a bit of a bio-sheet on them, listing the names of all the children at the school who were connected to that person. They said the immediate impact was that children stopped misbehaving in the hallways. It was like they were walking past elders every day. The children would stop and talk to each other about the pictures, and how they were connected, and then they would share stories about how they were connected to other people. So that sense of history and that simple process of transmitting it has given a sense of validation, a sense of connection, and a sense of self respect to those young people. I witnessed the same thing in New Brunswick when I went to a public-school event there; they did the very same thing when they were doing a memorial event for residential school survivors.

## VI. LAW SCHOOLS GOING FORWARD

**BPS:** You mentioned earlier in the interview we have a long way to go in terms of our law school. What's your very general, overall sense of what we have to do?

**MS:** You have more Indigenous law students from Manitoba who are going to law schools elsewhere than go here.

**BPS:** Why is that happening and what should we do about it?

**MS:** Part of it is recruitment; there's very little effort made to recruit Indigenous students to come here for law school. Of course, everybody here in Manitoba who wants to go to law school immediately thinks of going to a Manitoba law school, but when they talk to Indigenous students who've been elsewhere, they get attracted to those other locations. So, universities like University of British Columbia and University of Saskatchewan are seen as more attractive law schools to go to. At those universities there are more faculty and staff who are Indigenous, and there's more scholarly and

academic work that is being done around Indigenous topics that are attractive to young Indigenous students and potential Indigenous scholars and practitioners. There's a sense of connection to what the law school is committed to doing within Canadian society about the Indigenous community, perhaps more properly put, that makes them feel that they will be more welcome there than is the case here. And so, changing the perception of this law school among young Indigenous students would not be a big jump, but it's an important one you haven't made yet. It needs to be made.

**BPS:** How do you operationalize that? Do you have professors from this law school or students from this law school going to high schools, going to communities? How do you do the outreach?

**MS:** Part of it is just outreach generally. The law school needs to be seen as a haven for those who want to learn in a place about topics like this. So, part of it is not just talking to Indigenous students, but talking to the wider community to say, "this is a place of excellence when it comes to Indigenous topics or Indigenous issues." It's a conversation I've had with the president of the university. University of Manitoba is particularly well positioned to be an institute of excellence when it comes to Indigenous issues generally, which is why at the TRC, we were very supportive of putting the national center of the Truth and Reconciliation Commission here. Geographically, I think our wish was that it would give a boost to the status to the university and the overall academic community as a place where people would turn to and look for knowledge, information, and scholarly work around Indigenous issues. The law school should do the same thing and the law school should communicate that desire, that commitment, and that effort to other students. It is not just Indigenous students that you want to attract here, its non-Indigenous students, as well, that want to do work in Indigenous areas. UBC is successful that way because most of their sound academic work when it comes to Indigenous issues is probably done by non-Indigenous students; they have faculty in place who are encouraging that. University of Victoria is starting to develop that reputation with the work of John Borrows and Val Napoleon,<sup>52</sup> who are working at understanding

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<sup>52</sup> Dr. Val Napoleon is the Law Foundation Chair of Aboriginal Justice and Governance at the Faculty of Law, University of Victoria.

what Indigenous law really is; they will also attract Indigenous and non-Indigenous students to them. So, it is not just about increasing your numbers of Indigenous students, it's about increasing your capacity as an institution to teach and understand how Indigenous issues permeate all of law and how Indigenous law still exists and is still functioning out there. Jack London<sup>53</sup> was the dean here for a while, wasn't he?

**BPS:** Yes, he was.

**MS:** Jack and I had a conversation a while back and I said very little effort was made back in my law school days and subsequently, to try and expand the knowledge base here or make an effort to teach practitioners about how Indigenous issues permeate everything that we do in society. So, I said that one of the things we failed to do was we failed to get those who were going to do tax law, for example, to understand how tax law and Indigenous issues and Indigenous people interplay. People studying insurance law should have a part of that insurance law course be about insurance contracts on reserves. People who are studying banking law should understand how banking laws and Indigenous communities work. People studying labour law should understand how labour organizations would function on a First Nations community, and what the jurisdictional and complexities of all that is. Having those sorts of issues as a part of every law course, instead of it being simply part of the constitutional law course, was the real challenge. That wasn't done in many law schools at the time. When I graduated from law school and started practicing, I would get phone calls from just about every classmate who was working for an insurance company or a banking company or doing litigation for somebody who was suing or being sued by a corporation who was on reserve or not on reserve, but somebody who was representing people from a reserve, and they would ask me to tell them what they needed to know and what they should've studied at law school. And they would ask me to do it for free. (Laughs)

**BPS:** So, part of it is outreach, and part of it is a more pervasive approach to Indigenous issues.

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<sup>53</sup> Jack London received his LL.B from the University of Manitoba in 1966 and his LL.M from Harvard Law School in 1971. He is senior counsel at Pitblado Law in Winnipeg, Manitoba.



**MS:** There's probably no area of law that doesn't have an Indigenous component to it. People are not understanding when they leave law school, they will run into it when they do practice. Marital property law on reserves, for example, what should people learn at law school about that regime? People need to understand how divorce works, and why divorce on First Nations community is not just about law but also about ceremony.

**BPS:** I just want to discuss practically how you operationalize that. Frankly, people teaching a typical doctrinal course don't know anything about precisely what we are talking about. I'm not saying it critically, it's just a reality. So, if you ask them to do a module on this issue, they could probably do it, but it probably wouldn't show a very deep understanding of the issues and the practicalities. So, do we train the professors to do this? Do we have a special guest lecturer for each of the courses? What has been shown to work in this regard?

**MS:** You build on the scholarly work that has been done and is being done. We have to reach outside of the country to understand the scholarly work, which also includes scholarly work in the United States, where they've done a lot of this work already. Understanding how other universities includes within its field of study the understanding of Indigenous law would help our development of that here, with some modifications. So, building upon the existing scholarly work is really what is key. John Borrows, as well-known as he is and well published as he is, was, for a long time, the sole voice in the dark. Nobody else was doing that kind of work of intellectualizing about things that other people were thinking about but did not know how to articulate. Now that he's done it, others are starting to build on that.

**BPS:** There are a limited number of people who have that expertise so maybe you can connect people at other universities. Now that we have distance technology, if for example, you're doing a course in Indigenous oral history and the law, you can have John Borrows do a lecture for our own students as part of the program. Maybe that is one of the ways to overcoming the resource challenges in the terms of human capital. That way, you can have people who actually know what they're doing lecture.

When I was preparing for this interview, I was reading up on teaching Indigenous issues at university, and one of the things that seems to become controversial is whether a non-Indigenous person should be

teaching Indigenous studies. So far, a number of our major scholars in the Indigenous area have been non-Indigenous. Is there a problem with non-Indigenous people teaching core courses about Indigenous issues? Should it be done by somebody who is Indigenous themselves and has the cultural background? Seems to be subject to some controversy right now. Do you have any thoughts about that?

**MS:** There's no problem with a non-Indigenous person doing it as long as they don't screw it up. (Laughs). That's the problem for the most part. Most of the academic and scholarly work that has been done has been pretty superficial and has been pretty 'pan-Indianism,' where they're trying to take teachings from one tribe and apply them across to others. So, there's that failure of an intellectual challenge that I think we need to understand has resulted in institutions, academic institutions largely, giving people authority who don't have the authority, don't have the capacity, don't have the knowledge and awareness to be able to do what we're asking them to do. There is an overuse by institutions in our government to hire people and call them elders. They put the name on the door and put a sign under their name saying 'elder' even though they are not elders in the classic sense. They don't have the traditional knowledge, they don't have the community support, they don't have that recognition of their worthiness, and yet they qualify through a process that is totally driven by the institutions' processes and needs. And so, now, just about every jail in Manitoba has got an elder in residence, just about every university now has elders in residence; many of whom are being hired through processes of hiring that fails to recognize that those positions are not classic employment positions, but are positions of stature different than others.

**BPS:** The people who are screwing it up, is it a question of them not knowing what they don't know?

**MS:** Partly, but partially because they don't care. The focus within academic institutions is to advance through the process and be advanced through the process because of circumstances that are not necessarily compatible with the transmission of Indigenous knowledge. My son, who was acting head of the Department of Native Studies, would say that whenever they'd have a professor position or teaching position come open, they would always get dozens and dozens of applications from people who had taught courses from

various universities from around the country. And I would say, "Well, that's understandable because the ambition of people who go to work at universities is to become full-time professors, and the way you get that is that by having a résumé showing themselves and the work that they've done." Nobody who is incapable of doing the work is ever going to admit their incapacity. They are going to, in fact, say to themselves that they can learn the stuff before they have to deliver it.

**BPS:** I find that generally in academic work there is so much pressure now in the terms of career advancement. What did you publish this year? What did you do this year? So, I think for example the textbook is going to largely disappear because that can be a ten; fifteen-year undertaking and institutionally you want to show, "This is what I cranked out this year." To do really good work in an area like Indigenous oral history, you've got to have years of experience. First, you've got to establish a relationship, you have to establish trust, you may have to consult with a whole bunch of other people. Then you may take a whole series of processes where you very patiently develop the information before you can start writing. We're under pressure, so it seems to me that the institutional imperatives might be inconsistent with doing high caliber work when it comes to Indigenous oral history.

I have a larger concern about all of this which is that learning involves dialogue, it involves open-minded, open hearted dialogue. You've got to be willing to ask hard questions and you've got to be willing to answer hard questions and not feel like somebody is going to think that you are racist or ignorant. So, for example, Murray you've a number of times publicly responded to the question of, "Why don't you get over it?" At universities now, I think there is a genuine problem with people feeling inhibited by the sense of political correctness. "I can't raise this question, if I say the wrong thing I'll be slapped down." It seems to me that if a student wants to ask, "That was a long time ago, why don't you get over it?" they should feel free to ask that question and they should get the answer. If they don't ask the question, they won't get the answer. If people are going to be walking on eggshells because they are scared what people will think about the questions they ask, we're not going to have the environment where people can learn. Any thoughts or concerns about that?

**MS:** The point you're making is right, and I'm not terribly impressed by the attempt on the part of some people to shut down conversation. I think that we should have conversation. We should be willing and open to discuss issues and to understand that just because somebody asks the question doesn't necessarily mean that they're challenging the validity of your view; they simply want to understand the validity of your view. But, in addition to that, there's a difference of opinion that people can have over certain things that we need to be prepared to accept. And so, it's part of a pendulum process that's going on. I think that the history of oppression has given rise to a significant amount of resentment on the part of Indigenous people with the way they have been treated and there is coming out of that, I think, a sense of sensitivity about challenges that come from what appears to be that ongoing oppression of the past. And so, to say to somebody, "Why don't you get over it?" can be an intellectually valid question to ask, but often is not asked in an intellectually valid way. It's asked in a way which says, "You're wrong, we're right, and we were right because we are now in control." So, in that sense, it's the way that the question can be put that often becomes the issue. At the same time, if it is in an intellectual conversation that people want to have, there is a way to respond to it, and there is a conversation you can and should have about it. I haven't met a lot of people who have asked me that question who were asking strictly from an intellectual perspective. It's usually because they have wanted to make a point, and that is, "Stop bugging me about this, get over it, and let me live my life as I have in the past." So, it is often about wanting to make a point as opposed to wanting to have a conversation.

I think that we also need to understand that we are not yet ready to have that conversation on a completely intellectual level, yet. I think that the conversation is a conversation right now between people who are feeling the hurt and damage of the past and those who don't understand that hurt or damage or don't care to understand that hurt and damage. And as a result, that conversation is often on the verge of a yelling match and it almost always leads to a confrontation of some kind. Students, and really anybody, should feel free to ask questions and have a conversation about anything, keeping in mind the manner in which the question is asked. Sometimes, there is no way to ask it but to ask it in a way that sounds like it's an inappropriate question, but the way in which its responded to can be the issue. We have to be prepared to accept sometimes the validity of the

question and respond to it and give as reasoned an answer as we can without feeling that we are put upon each time.

**BPS:** In terms of long way to go at this law school, we talked about creating a chair in Indigenous studies at this law school. Any thoughts about what we should be trying to do with a chair program?

**MS:** Well, you go back to the thoughts that I expressed to you about the university developing its own efforts to become an institution of excellence when it comes to academic work in the area of Indigenous people and Indigenous issues in Canada. You should draw on a community of academics and scholarly work in creating a body of scholarly work that would reflect well upon the university and the province. You could start with a focus on one main topic, which would quickly expand you to a variety of other areas, as well.

When it comes to the whole process of reconciliation, as I said earlier, you cannot have a relationship of mutual respect until the Indigenous people are given the opportunity to develop their own sense of self-respect. My view is that any work that institutions do in the area of contributing to that relationship and mutual respect should also include an aspect of adding to the knowledge base that would give to Indigenous youth and Indigenous people and Canadian society, as well, an awareness of who Indigenous people are, what Indigenous people stand for, what they believe in, and what they practice and live. Failing to do that is to create an artificial relationship. It's like marrying somebody you only met for the first time and assuming that you will always have a good relationship going forward. You need to have that proper relationship of understanding, at least in general terms, where you each come from, and we don't have that here. Our public schools have failed to give to our children, my generation, including the leaders of today, and generations before me, a proper foundation of Canadian history when it comes to Indigenous people and how Canadian history and Indigenous people relate to each other. So as a result, our leaders – our Indigenous leaders on one side and non-Indigenous leaders on the other – when they're communicating about some very sensitive and important issues, are having two different conversations. They're talking from two very different levels of issues and two different perspectives. That's why it's so intellectually easy for the Prime Minister to say, "I support the nation-to nation-relationship." But, when you ask what that really means,

he is thinking in terms of better programs for Indigenous people, but that's not what a nation-to-nation relationship is actually about. A nation-to-nation relationship is about two equals sitting at the same table, talking to each other about issues of commonality that might affect their relationship. So, again, I go back to the marital relationship comparison I gave. When you're not married and you're relating to somebody, it's a different relationship than when you commit to a marital relationship, you commit to a life time together. Then you have to change certain things. Getting married is a process of reconciliation. People don't see it that way, but it is. (Laughs) It's a process of reconciliation, because you're giving up your sovereignty in order to have that relationship together. We've already made that commitment through the treaty process. We haven't completed the treaty process, but the process of reconciliation was started at that time, and now what we need to do is to complete the process of reconciliation. People think that reconciliation is sometime in the future, and I say reconciliation is in the past. We're in the process of putting into place what we committed to back at the time of confederation.

**BPS:** We tend to think in this box that Indigenous studies will be taught in one of the mainstream Indigenous law schools. Why can't you have a distinct Indigenous law school? You could imagine the Indigenous nation of Western Canada pooling their resources and actually creating in one of the land bases, an Indigenous law school. Is that something that people are already actively working towards? Do you think it's a good idea?

**MS:** There are two universities in the United States that have Indigenous law schools now. Their focus is on understanding Indigenous law, but also about graduating people who can practice law in a western way, as well. The Navajo Tribal Court, for example, requires that everyone practicing in the Navajo Tribal Court should be able to practice in the Navajo Tribal Court system - they have to know Navajo, they have to know the Navajo tribal traditions - and the western legal system, as well. And so, it's not that farfetched an idea, but it's still in its early stages of development. I think that the challenge of establishing any kind of a law school with that kind of orientation is to ensure that you don't create a box that does not allow outside in or inside out. There has to be a way to make the two systems meld intellectually as well as academically. Most law schools have had a history, and I don't want to suggest its happening everywhere today, but most law

schools have a history of excluding Indigenous understanding, Indigenous beliefs, and Indigenous people to an extent from their hallways of power and knowledge. That's done deliberately so, but unconsciously deliberately so in the sense that we create these rules of inclusion, these rules of entry, that systematically exclude certain kinds of issues from coming in. So, it's like saying, "Only people who are six foot five inches can go to law school." That would deliberately create a very tall group of lawyers, but at the same time unconsciously perhaps would exclude all females except six-foot five-inch tall females.

**BPS:** Well, one of the things that's happening in law school is increasing the insistence that everybody have a doctorate in law to be a professor. I think I might have been the first person in this law school with a doctorate in law, but, I never thought you needed one, it's a cool thing to have. But, the effect is that it does tend to exclude a whole bunch of people who might otherwise have a lot to contribute in terms of knowledge and understanding. I think that's one of the unconscious barriers.

**MS:** One of the things we don't do is challenge our own thinking of why we make these rules of entry. I've delivered lectures to employers in employer and employee institutions and union groups about the fact that we have constantly increased our educational requirements for certain positions. Why do people need to have grade twelve in order to get certain employments which a grade twelve education doesn't benefit you. You know, if you're a custodian, and they say that in order to apply for a cleaning position in a mall at a particular shopping center you have to have a grade twelve education, why do we need that? It really is about excluding people and reducing the pool of applicants. The rules of exclusion are developed for the purpose of facilitating the institutions' processes. Why do we need to ensure that everybody coming in has a doctorate? Not everybody who has a doctorate is smart.

**BPS:** There is a difference between intelligence and credentials. I wrote a little book on credentials.<sup>54</sup> Foreign trade individuals have a problem in this country. People coming from different countries may not have their

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<sup>54</sup> Bryan Schwartz, *Admitted but Excluded: Removing Occupational Barriers to Entry for Immigrants to Canada* (Winnipeg: Frontier Centre for Public Policy, 2012).

credentials recognized even though they're substantively competent. As well, we may have this internal problem with people who have capacities who can't do things in a 'credentialized' world.

Murray, your career is too big, and the time is too short. But, I did want to end by just asking you whether this is something we should be asking you? Is there something we should be exploring?

**MS:** Well, it's not that I just can't think of something, it's that I'm thinking of too many things.

**BPS:** Well, then I will finish this off by asking why go to the Senate? Why was that important?

**MS:** You know, you hit upon a topic I actually expected you to begin talking about at some point, which was going from the bench to the Senate and why that was so important. Becoming a senator is not everyone's ambition in life anymore like it was earlier on, everybody strived to do it. But, it was because the importance of the institution, and the fact the institution has warped into something it should not have been allowed to be warped into. The senate was not intended to be a partisan institution built along the same line as the House of Commons. It was intended to be different, but it didn't have the capacity to develop its own rules about how it should look. And so, I saw this as an opportunity to try and change that. I also saw it as an opportunity to try and advance the work of the TRC and try and keep that conversation alive.

**BPS:** Oh there's so much more to talk about. This has been so interesting.

**MS:** This was interesting. No question of that. It's always good to have these opportunities to reflect. I appreciate that.