

# Interview with Kris Saxberg\*

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BRYAN SCHWARTZ & SHIRA BRAND

**Shira Brand (SB):** To start off, could you describe your practice for us, generally? We have an idea, but I want to hear more about what you do.

**Kris Saxberg (KS):** I am a civil litigator who also practices administrative law. I am an advocate for our firm's clients in whatever venue is out there, depending on the matter. If it's a civil matter, it means advocating in the Court of Queen's Bench or Court of Appeal or all the way to the Supreme Court [of Canada]. If it is an administrative matter, then we're dealing, for the most part, with arbitrators or tribunals and it's much the same process, but with more flexible rules. Generally speaking, I do oral advocacy whereby there is a finder of fact who's going to determine the ultimate outcome of the case.

**SB:** Is there a specific area you do more of? We saw on the website it said that you do labour and employment or stuff like that.

**KS:** Yes, our firm is very involved in child-protection work. A lot of that work relates to Indigenous child-welfare agencies. So, in that context then, I do child-protection hearings and child-protection appeals. There are also administrative procedures, like foster-parent appeals and related work; for instance, inquests or inquiries. The child-protection realm is very complicated and there are a lot of different sorts of procedures and venues to resolve disputes and that is going to proliferate as the system grows and expands. We also represent many Indigenous communities in advocacy

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\* Interview conducted by Bryan Schwartz and Shira Brand. Kris Saxberg is a partner at Cochrane Saxberg Johnston Johnson & Scarcello LLP. He studied law at the University of Manitoba and was called to the Bar in 1999. Kris is an experienced trial lawyer who has argued at the Supreme Court of Canada, the Federal Court of Appeal, the Alberta Court of Appeal and in all levels of court in Manitoba. He has acted, and continues to act, on behalf of many Indigenous organizations, including indigenous CFS Agencies, advocacy groups and political organizations.

work. It's probably easier to just explain the bigger cases that I've done. I've done inquiries: the first one was the Monnin Inquiry<sup>1</sup>, way back when, about the vote-rigging allegations in the Interlake. After that, we did the Phoenix Sinclair Inquiry<sup>2</sup>. In terms of big Indigenous cases, for many years, I handled the Kapyong Barracks<sup>3</sup> litigation and then negotiated a settlement, ultimately. I was one of several legal counsel for the different Treaty 1 First Nations that negotiated a Comprehensive Settlement Agreement regarding what was formerly referred to as Kapyong Barracks in Winnipeg. One of the biggest cases I did was a civil case against MTS<sup>4</sup>, which is now Bell MTS.<sup>5</sup> That case was a case about pension surplus, which surplus ultimately wound up being worth \$140 million award by the Supreme Court of Canada after a fifteen-year litigation. Those types of big cases tend to occupy much of your practice for a long time. I have another one like that right now: it's a big case against the Province of Manitoba relating to children's special allowances and that is going to be one that could go all the way to the Supreme Court. It's a fight over about \$250 million of money that was purloined by the province out of the hands of Indigenous children who are in care. I know I'm missing tons of different cases. I've done Canadian Human Rights Tribunal cases. My longest-standing client – one of my favourite clients, although they are all my favourites – this one, particularly close to my heart, is the “management union” at Bell, which is Telecommunications Employees Association of Manitoba, now known as TEAM. I do their labour work, so we have lots of

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<sup>1</sup> Manitoba, The Chief Electoral Officer, *1999 Annual Report Elections Manitoba*, by Alfred M. Monnin, (Manitoba, Elections Manitoba, 1999) at 55 – 59.

<sup>2</sup> Manitoba, Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair, *The Legacy of Phoenix Sinclair Achieving the Best for All Our Children*, by The Honourable Edward N. Hughes, O.C., Q.C., LL.D (Hon), Commissioner, (Manitoba: Attorney General, 2014).

<sup>3</sup> *Brokenhead First Nation v Canada (Attorney General)*, 2011 CAF 148, 2011 FCA 148.

<sup>4</sup> MTS stands for Manitoba Telecom Services Inc. It was a telecommunications company in Manitoba. The company was originally owned by Bell Canada Enterprises (BCE) but was acquired by the Manitoba government. BCE eventually reacquired the MTS assets and in 2017 became Bell MTS. See “Bell MTS: An early history of Bell in Manitoba” online: BCE <<https://www.bce.ca/about-bce/history/bell-mts-an-early-history-of-bell-in-manitoba>> [<https://perma.cc/2S2X-F8SC>].

<sup>5</sup> *Telecommunication Employees Association of Manitoba Inc v Manitoba Telecom Services Inc*, 2014 SCC 11.

labour arbitrations there and then also, sometimes, that can wind up in civil litigation as well.

**SB:** Before COVID hit, I am curious to know how much of your practice was online and how much was in person.

**KS:** To give you some background, our firm – which now has about twenty-two lawyers – arose out of the split-up of a previous still-existing firm: D’Arcy & Deacon [LLP]. When that happened, it was 2016, and when our firm started – we basically started January 1<sup>st</sup>, but became an official separate firm on June 30<sup>th</sup>, 2017 – we thought about these things: should we be a firm that is more technologically savvy and a firm that is not traditional? We really liked the idea of having an office place where you don’t have permanent offices, you have hoteling. That would mean you might have, say, twenty lawyers, but ten offices and they all share those ten offices and the boardrooms, but they’ll work from wherever otherwise. So, we had that notion and that was something that we wanted to aspire to. So, we set up as being a firm that was set up on the cloud. Rather than having what a lot of firms had in the past, which was remote access to your server from home, we became one of the first firms – at least that we’re aware of – to have all of our files on the cloud. So, when all of your files and servers are on the cloud, then you can work from anywhere that you can access the internet. That’s quite different from the old system that we had under D’Arcy & Deacon [LLP], where it was this private remote in-line, which was very unfriendly in terms of its interface; it was very difficult to use. So, when we set up this new firm, we went to this idea of using the cloud and having hoteling. We bought a business condo on Bannatyne [Avenue] that had about twelve or thirteen offices. At that time, I think we were twelve lawyers. When we talked to our lawyers about the hoteling, there were many lawyers who were just absolutely against it; they didn’t want it. They wanted their own office, they wanted their own place to go, they wanted to get away from their houses, they wanted to get away from distractions, and they also wanted to be around their colleagues. There were some very firm individuals who said, “I need an office.” It wound up that when we started the firm, everyone had an office, but we had this cloud system. I think what happened is that gradually people were spending a little bit more time at home, but that the regular routine was to go to work. Then, when COVID hit in March of 2020, we were able to very quickly move everyone to working from home,

including our assistants. What we did was we bought everyone – including our assistants and paralegals– a laptop and then they could easily access the system from home almost seamlessly without there having to be any training or any hiccups and the only delay was getting those laptops. For the lawyers, we had already had that, and they were already familiar with the system. So, for them, it was nothing. So, basically, COVID did have an impact in pushing us towards a place that we had originally envisioned being, and now we are there.

**Bryan Schwartz (BPS):** You have a very different clientele, I imagine. For example, your management union probably has a lot of access to technology, so no great challenges for Zooming them for consults or anything. What about when you are dealing with child-protection issues and you may have to communicate with families who may have very limited means, or you may have challenges communicating with reserve-based communities and so on and so forth. How does that work out?

**KS:** I'm not the best person to answer this one because the type of cases I do are usually specialized and they're not the regular sort of day-to-day interactions on child-protection work – that's referred to as docket work. Child protection is a very unique area of the law, and, in some regards, I think that lawyers – or even just regular people – if they were sort of made aware of the system, they'd be quite surprised about how it works and the sheer volume of cases that come to court on a weekly basis. Whenever an agency takes that huge step of intervening with a family and apprehending a child, it triggers constitutional rights, and part of that is the right to a very speedy appearance before the court, and then that has actually developed over time to the right to a speedy ultimate hearing of the matter, although that was definitely not the case before. Many cases in child protection would take years in the past, but now – because of a decision of the Court of Appeal and administrative decisions made by the Chief Justice and others – child-protection cases get heard a lot quicker. But, regardless of whether the case is heard on its merits ... and of course, just like all civil litigation, most cases don't get heard on their merits, there isn't an ultimate trial, but there is a process underway as soon as an apprehension occurs. So, we have probably ten lawyers who do primarily that docket work for various agencies – and this is all, by the way, unique to Manitoba because Manitoba has a very unique child-protection system compared to other provinces: it's been

devolved to Indigenous child welfare agencies. There are essentially twenty-two agencies that work concurrently in Manitoba; they all have jurisdiction across Manitoba. The determination of which agency will be on a long-term basis dealing with a family is based, in part, on the family's decision to pick a culturally appropriate authority and then that authority assigns the work to an agency. So, for those ten lawyers that are working docket, after March [2020], the court system went remote and all of those docket appearances were either conducted by telephone, which is something where there is good connectivity wherever you are in the province, as opposed to Zoom or something Internet-based. So, for the most part, my understanding is that those dockets took place over the phone and continue to, for now, for many manners, but I suspect that because of the loosening of restrictions that was just announced, that that is going to change. I know it is still going on, however, because if you walk around our office, you see the doors closed with a sticky note on them that writes, "in court, do not disturb". So, that is what you see in our office as lawyers are appearing in court over the telephone. Now, I'll talk candidly about this [laughs]: from my experience, the courts are usually very far behind when it comes to anything technological. If you looked at the judges as being a law firm, they would be fifty to sixty in size, which would be in the top six or seven in size in this province. But if you looked at that group then as a law firm, you would shake your head at how far behind the times they are when it comes to new technology. They probably even like fax machines, you know, that kind of thing [laughs]. Many judges don't have access to assistants who are familiar with the new technology. We had court hearings by Zoom; I did a Court of Appeal hearing by Zoom. I did motions by telephone, though, in Queen's Bench. I'm trying to think if I did a Queen's Bench trial by Zoom - I don't think I did, but I know that that happened with other firms in the civil branch. In the child-protection branch, I had trials, but they were sort of right in between waves, you know, they were in September of 2020 and October. After that, when we went into the next lockdown, we didn't have that. Anyway, my whole point is that, in the courts, telephone was the best method that they could come up with based on their government restrictions and I would have to say that it was very unsatisfactory for me when I was dealing with matters by telephone. I felt like that was a disadvantage to my clients because I didn't feel as comfortable being able to communicate our position and our case to the court. I didn't feel as confident to know that the court was understanding our case primarily

because you can't see the judge, and you don't know what they're doing. A major part of doing advocacy is paying attention while you are in court to the judge. If the judge isn't engaged, that tells you a lot, and you can't tell that if you are on the telephone.

**BPS:** You did the Court of Appeal by Zoom, was the camera on the panel while you were presenting?

**KS:** Yeah, it was hilarious! I actually have a couple funny Zoom stories.

**BPS:** That's what we live for!

**KS:** The Court of Appeal hearing turned out to be a very important case. It was a very, very strange in many regards too because it revealed a very stark contrast between two of the judges in terms of their positions. There was a very strong dissent written in that case and it was rebutted in the majority decision, believe it or not. Quite an interesting case, but there were not that many fireworks during the hearing. However, what was interesting about it was seeing, for instance, one of the judges sitting in her kitchen [laughs] – which was a beautiful kitchen – and you see it in the background, and you can't help but be struck by that while arguing a case. You are watching someone, sort of, sitting comfortably in their kitchen and there's sometimes some things going on in the background. So, yeah, that was pretty interesting. All three of the justices were at home, so they weren't together – at least as far as I can remember – but, as I say, one of them was definitely in her kitchen. So, that was very interesting, but it was ten times better than the motion that I had done and argued in Queen's Bench before that which was just over the telephone. That is where I had been very frustrated. But, the Court of Appeal, of course, is a completely different beast than a trial. So, a Court of Appeal by Zoom is something that I don't feel uncomfortable with in any way and if that became a permanent feature – to do appeals by Zoom, you know, and you could consider Supreme Court of Canada could do that so people wouldn't have to fly to Ottawa – I think it is far more workable than a trial. A trial is just a different thing. Most of the problems with a trial, and doing it by Zoom, arise from the use of exhibits and trying to exchange documents. That's probably the biggest issue, but any little thing that comes up during a trial that sort of distracts you is very bad. You've got a million things on your mind. You've got all kinds of witnesses

lined up. You're trying to, you know, remember what's happened with the last witness. You're trying to have all your documents organized. So, if technological difficulties arise and you're right in the middle of a great cross-examination and you've just got to show them that one document that impeaches the witness and proves that they are a filthy liar, but you can't get it on the screen and you can't, you know, get it over to the other counsel, or it takes a while, it takes the wind out of your sails. So, trials, I don't see being done electronically, except where it's absolutely necessary.

**BPS:** Creative technology hasn't caught up with the forensic demand in the case of trial advocacy, I totally understand what you're saying. I don't know if anybody's working on the technology. I guess you could imagine a future in which precisely the concern that you identified was actually addressed by the technology. I teach classroom stuff using Zoom and screenshare is my nightmare. Things are always going wrong and, "Can you still hear me?" I don't know whether you can hear me when I am on screenshare. Screenshare puts things on the screen that I was working on before that have nothing to do with the class. I find it very clunky and it's a challenge. So, it would be orders of magnitude worse if I were trying to do a trial. My long way to the question is: are there intrinsic problems that could not be overcome by technology, in terms of being there in-person and experiencing the majesty of the courtroom and getting this vibe that you're supposed to be truthful? Or, theoretically, do we overcome the technological challenge, like have the technology permit you to just show the document and instantly be seen by the witness in the Court and so on and so forth? So, how much is the clunkiness of the existing technology and are there elements of the actual in-person courtroom experience that technology will never be able to match?

**KS:** That is a great question. I think that the technology was surprisingly good because I'd never used Zoom before March of 2020. I had never heard of it. I had not heard of Microsoft Teams and using it that way. I had not done many video conferences. The Canadian Industrial Relations Board – I recall in one hearing – required, for preliminary matters, doing it through their video conferencing system, and I remember, at the time, absolutely hating it and thinking it was just really cumbersome. It wasn't like Zoom. So, when Zoom came to be, I was absolutely shocked at how easy it was to use and how seamless it was, say, for meetings, or especially, like,

partnership meetings or internal meetings with lawyers and many of the meetings with clients. It just completely eliminates the need for that face-to-face, I agree, but when it comes to court, I don't know how many additional improvements could be made to that software that would make it as good as being in the courtroom in person. I don't know if that is possible: that there could be improvements that would make Zoom a true substitute for being in the courtroom in person. I will say flat out, that there are just intangibles related to being in the courtroom for a trial that will never be able to be duplicated by software.

**BPS:** I was just trying to think about the intangibles. So, one of them that I alluded to before ... let's say I am cross-examining somebody, one of the things that should be happening – according to the theory – is the person being cross-examined is in the courtroom, it's got the marvel, it's got the majesty of the law with the judge typically elevated, wearing the fancy outfit and you're in physical proximity and kind of feeling the pressure of your skepticism, you know, just by your body language and this puts a kind of psychological pressure, perhaps, on someone to be more uncomfortable about being untruthful. I guess the question is: if you were Zooming, would you feel more comfortable being evasive because you've got your own space, you've got your coffee cup over here, you're surrounded by familiar accoutrements rather than the marble and the highchairs and so on and so forth. Is that an example of how you can't reproduce the intangible?

**KS:** Yes, I'll tell you, the worlds are completely separate. The Zoom trial versus the in-person trial, they really are completely different worlds and, as I say, the in-person is so much better, one reason being what you just described, which is the interaction between the various individuals in that ornate courtroom. So, you're right, during a cross-examination, there are all kinds of little tells that the witness will do that inform you as the cross-examiner in terms of your approach. I mean, cross-examination is all about preparation, but not preparation in terms of the questions, preparation in terms of knowing the case and the documents and where they are. Then, you have a dialogue, a controlled dialogue, with the witness where you as the cross-examiner, you control every single answer. There should never be a situation where you don't control the answer, which doesn't mean you don't ask an open-ended question every now and then, because sometimes you do when you know exactly what's going to come out and where that's

helpful. But, for the most part, cross-examination is about control. You can put your entire theory of the case to that witness. So, looking at the witness and how they act and seeing the judge looking at the witness, and seeing how the judge is reacting to how the witness is reacting. This is outside my expertise, that's for sure, but there are things that go between people – I don't know what they're called, whether they're hormones or whatever it is – and, you know, they say people can smell fear or you can tell when somebody just doesn't like you or doesn't want to be around you. There's something that you sense, and I don't know what that is, but I know that in trials, it is very palpable, and I don't think that can be conveyed electronically. It's those kinds of interactions. Then, it's also the huddling with your client, you know, in-between or the other lawyers that you're working with, or even conferencing with the lawyer opposite, and/or the judge. All of those kinds of things are very easy in person; they're much more awkward electronically. But, here, I'll tell you one little anecdote. I just did a labour arbitration at the beginning of July and this was a three-day hearing, which we worked desperately to try to get to be in person – everybody wanted that to be in person – but it was going to be held in Brandon. The rules at that point, in the beginning of July, were that you couldn't have more than five people indoors in a room and that wasn't going to be enough to accommodate the hearing. So, we had to switch, at the last minute, to the Zoom hearing and the critical part of that case – as is always the case – was the cross-examination of the complainant. I mean, that's usually where cases are won or lost. So, in that cross-examination, this particular complainant was a liar, and I knew that, and I could prove that. I would love to have been able to do that in person. Witnesses also get angry and when you are in person it's a lot easier to get someone angry and then that reveals a lot about the witness. But in this particular case, I had a really good cross-examination because I had some really good evidence to support the cross-examination and I was doing a great job; the witness was falling apart. It would have been a lot better if the adjudicator had seen that in person, but this is the funny part – [laughs] and I don't know why, but it reminds me of the Trailer Park Boys and a very funny episode where they were in court and they were demanding the right to be able to swear when they gave their presentations. I think they were citing the People's Choices and Voices Award Act that would give them the authority to be able to swear while in court, so they could get their point across and smoke and drink, of course, so they could get their point across. So, anyway, I am cross-

examining this woman, and she is getting very, very frustrated and very angry, and then she just bursts out, “I can’t take it! I have to have a smoke!” and then she just pulls the ashtray in front of her and lights up a smoke while I’m cross-examining her. She was in her house, right? She can smoke while being cross-examined and it really struck me as one of those interesting COVID changes. I wondered what it was like back in the old days. I wonder if witnesses were able to smoke while they were in the witness box and/or lawyers, while they were cross-examining the witnesses. That’s way before my time, but I got to experience that [laughs] because she just pulled out a cigarette and, while I was cross-examining her, she was smoking away. But I thought it was also a pretty important tell for the adjudicator. Like, for a witness to say, “Okay, I admit I am getting killed here, I need a smoke,” and to start smoking right there was a powerful signal that was helpful to our case.

**SB:** We spoke about the effect it’s had on lawyers, but I was curious, especially when you said, the judge that was in the kitchen in the middle of the case, have you seen an impact on your clients? Do they feel like they’re maybe not being taken seriously when they see a judge sitting in their kitchen hearing their case? Has there been some sort of resistance to doing their cases online?

**KS:** Well, you know, every case is different, and it all depends on the type of case. I can tell you that my experience with child protection is that no social worker wants to go to court. They hate court, absolutely hate it. And they have good reason to hate it because they are people who are working their tails off, trying to do the best they can in a very difficult circumstances about a child’s safety and when they come to court, they get grilled. They’re not just grilled by the lawyers for the parents, but also by the judge, and it just turns out – in our family division in Queen’s Bench – you know, everybody has a history, and everybody carries that history with them every day in terms of the day-to-day decisions they make, and I think judges are the same as everybody else. For whatever reason, the instinct in child protection is to be very distrustful of the agencies and their work, and part of that is fueled by the media because the media only has one story ever when it comes to child protection. The editor will tell the reporter to go out and do a story on the child protection system and it’s always the exact same story, which is: “Can you believe how bad the child welfare system is and

what they did and how they let this kid fall through the cracks.” That’s the only story they do; when of course, there are also many success stories. Child protection workers often save families and prevent harm to children.

**BPS:** A non-intervention is the high risk.

**KS:** Yes, and that is what we have seen. This is a long-winded way to answer your question, but the bottom line was that in the child protection realm, I found that the witnesses and the clients were more than happy to do this over the telephone or remotely. They don’t want to go into that court and into that pressure cooker where the judges are sitting up high to their left, and fairly close to them, and they’re getting their character attacked or their competence or professionalism questioned. It’s very difficult to not take that personally. So, to suffer that in person is far worse than if you’re just listening over the telephone and you can roll your eyes. By the way, if the judge is yelling at you, you can roll your eyes over the telephone and no one will see it, that’s fine. If you do that in the courtroom, then you are going to face some severe consequences from the judge for rolling your eyes in the courtroom.

**BPS:** I’m not an expert in this area at all, it’s not one of my practices, but it looks to me that during child-protection hearings – as a social worker – you could be more torn in different directions if you recognize that over-intervention is terribly damaging; removing children from their surroundings. On the other hand, it can be one of those occasions where it turns out very badly after the fact. Then, the perception is that you are a horrible professional who didn’t intervene. But when it comes in the aftermath, people don’t appreciate a lot of stuff, one of which is: why be careful about taking a child not only out of their situation, but away from their other relatives and out of their communities? It may be that there are a lot of non-ideal things in these circumstances, but you’re comparing painful alternatives. It’s not like the social worker could have magically produced some ideal non-problematic outcome. Of course, in the high-profile cases, where things went badly – with the benefit of hindsight – I’m not saying that social workers don’t make mistakes. All of us do. It’s just, you get twenty cases where you decided something to not apprehend a child or said, “Okay you’re not going to become famous,” in the one of twenty cases, you made a decision, and it worked out very badly. No matter whether

it was the right decision at the time, you're going to look terrible. It just seems to me – from a distance anyway – that it's just a terribly difficult job. I'd be more empathetic here.

**KS:** It is a very difficult job and, I'll tell you, it's made far worse by the very unique circumstances that we face here in Manitoba. There is racism in the system; there's no question about that. I've seen it over and over again, and you have to appreciate this. On April 1<sup>st</sup>, 2019 – I know this because we just spent two weeks doing examinations of the province in relation to this major lawsuit about children's special allowance – there were 10,200 kids in care. So, let's just say 10,000 – on April 1<sup>st</sup>, 2019 – 88% of them are Indigenous children. Just think about that for a second. In part, because of the media story – which is the same story over and over again that a child fell through the cracks – because of that story and because parents and children can sue, and do sue, we're involved in many lawsuits defending agencies against parents that are seeking civil remedies for the negligence and other causes of action relating to what happened when their children were in care. Of course, you know about the Sixties Scoop settlements<sup>6</sup> and Residential Schools.<sup>7</sup> So, there's a lot of that going on which produces the instinct of caution. It's far better to be safe than to be sorry. So, let's apprehend that child and let's leave it up to the judge and the system to figure it out. Then, it won't be our responsibility. So, that pendulum switched when the child welfare system was devolved in 2005. Devolution is a big, big deal that some people in Manitoba don't understand – and should understand. But devolution actually happened in Manitoba and

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<sup>6</sup> The Sixties Scoop settlements are the outcome of the Sixties Scoop Class Action. The Sixties Scoop occurred between 1951 and 1991, where First Nation and Inuit children were taken into care and placed with non-Indigenous parents. This meant that children were being raised without their cultural traditions or traditional languages, causing significant harm to the children due to the loss of their cultural identity. See "Class Action Sixties Scoop Settlement Frequently Asked Questions" online: *Sixties Scoop Settlement* <<https://sixtiesscoopsettlement.info/faq/>> [<https://perma.cc/EHC4-E8VN>].

<sup>7</sup> Residential schools were religious schools funded by the Canadian government. The purpose of the schools was to educate and assimilate Indigenous children into Canadian society. The children at residential schools were isolated from their culture, community, friends, and family. Students were often abused, and many died due to poor conditions. See "Residential Schools in Canada" in Tabitha Marshall & David Gallant, ed, *The Canadian Encyclopedia* (online: The Canadian Encyclopedia, 2012).

didn't happen anywhere else in Canada; it was a first step towards giving Indigenous people and communities self-determination with respect to the care of their own children. This was all flowing from a recommendation from the Aboriginal Justice Inquiry.<sup>8</sup> The devolution was devolution from the Provincial Government to Indigenous people as structured in a new organization created by the government, though, as opposed to just going directly to the First Nations themselves. They created these authorities that are separate and arm's length and run by Indigenous people for the most part. This system was set up, but there was a lot of skepticism from various people. I say there's racism in the system, there's racism broadly speaking in society, and the skepticism was that those Indigenous agencies weren't going to do as good of a job as the prior, mostly non-Indigenous, agency structure. What happened after devolution was an increase in the number of children in care. You had the Phoenix Sinclair inquiry<sup>9</sup>, which was, you know, reported on TV news most nights and in the press for a long time. No matter what was said on the witness stand during the Inquiry, the reporters can only report the same thing, which is, "Today, we learned something more terrible about child welfare." The irony about that is it had the opposite effect of what the Inquiry was to do, which was to improve children's lives in Manitoba and children who come into care; improve their lives, improve the working of the system so that less children are brought into care. The goal there is always accepted as: "Let's have less intervention. Let's have more prevention work done to avoid having to bring kids into care. If kids are in care, they better be with their extended families or communities, and you better be working to get them back home with their parents and be the least intrusive as possible." Those were the laudable objectives of the system from the beginning, but it doesn't mean that that's where the system was going. Because of these things – the media, the Phoenix Sinclair Inquiry and the related attention, a very cautious approach to social work resulted and ironically more children came into care than before devolution or the Inquiry. Now, having said all that, there are changes afoot. We are moving out of the existing system because of what Canada has done. The federal government has enacted new legislation, which is the first step towards First Nations creating their own laws and enforcing and adjudicating those laws

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<sup>8</sup> Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba: Final Report*, (Manitoba, 2001).

<sup>9</sup> *Supra* note 3.

with respect to child welfare. So, that's that next step from what Manitoba has done with devolution. And with that, you will find – at least this is my hope, and I've talked to executive directors of these Indigenous agencies about this matter, their view is that there will be a lot more ability to be flexible, to work with parents, instead of taking the overly cautious approach I spoke of because there are a handful of horrific cases like what happened with Phoenix Sinclair. You know, the mother and her boyfriend murdered the child.<sup>10</sup> So, are you going to try to do everything you can to avoid that by taking kids away from Indigenous parents, because of that one case and how exposed it was in the media? Then, through that process, damaging hundreds and hundreds of children who are coming into care when they maybe ought not to have come into care, and had to go through that terrible experience of being pulled from their homes, and their parents, and their friends, and their school – it's something unimaginable. So, the new system, I believe, is going to take us away from this old system and, who knows, down the road, you might see some class action about how bad the old system was for over apprehending children; like the Sixties Scoop class action.

**BPS:** A lot of things to say about, in the broader sense, from my own observation, during my experience, not only in this area, but generally, about community health, and so on, done way better by communities, not by outside, well-meaning people. So, I was just wondering on a very specific systemic point though, ultimately, these cases still filtering up to the court system, where anything that goes wrong, you're pilloried for, how will that not continue to happen? I'm just asking this informationally because maybe they'll figure out a way around it. You're still going to have situations where Indigenous Child and Family Services had a bad outcome and it ends up in court with exactly the same thing happening, which is the external court system looking at the one bad outcome, not appreciating that there are risks and balances in trying to do a systemic overhaul, not seeing the risks of over-intervention, right? You're disproportionately going to see the bad outcomes from non-intervention. You don't see all the harm that's done by over-intervention. You made the point that was really interesting about how filtering up to the court system tends to skew everything that happens before. Under the new model that the Federal Government is taking the

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<sup>10</sup> *R v Kematch*, 2010 MBCA 18.

lead on, how will that limit – if it will limit – that same phenomenon of the cases ultimately ending up in the expected court system with all of the tragic, bad outcomes somehow driving the system.

**KS:** Sorry, how do I think what?

**BPS:** You talked about the existing system. Despite the reforms – the reforms were limited in their impact – at the end of many of the day, you end up in court and the court system, which doesn't live in the community, doesn't appreciate all the risks and trade-offs in the system, will tend to be very condemnatory of the decisions you make with the benefit of hindsight. So, you're saying, "Okay, we're going to move more in the direction of autonomy now." But, how do you limit that phenomenon in a new system, all the condemnation and limited understanding, with the same problem repeating; that rather than the system reforming effectively, it's just wash and repeat.

**KS:** That is an excellent question. Our firm is working tirelessly day and night on that very question. We are assisting our clients – many First Nation communities – with drafting laws for child protection. Part of the laws being drafted will include dispute resolution mechanisms and many of those mechanisms will switch from a "docket system" to a more culturally appropriate traditional system. Ultimately, will the Supreme Court [of Canada] look at that and reflect on its previous decision which said that in order for the legislation to withstand constitutional scrutiny, there has to be an immediate court appearance and opportunity for the parents to challenge the apprehension? When that issue arises – which of course it will – the Supreme Court will be looking at a completely different system, completely different legislation. By the way, I don't know what that legislation will be; it will be different for many of the Indigenous communities. So, it's going to be a legislation-specific analysis. If our firm does its job properly in helping our clients draft the laws and the ultimate system, a court down the road – a superior court – will have to show great deference to the Indigenous tribunal that's been set up to ultimately determine the fate of the Indigenous child. Now, just so you know, it goes beyond that. Obviously, our clients want to move to complete self-determination – self-governance. The UN Declaration<sup>11</sup> on Indigenous

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<sup>11</sup> "The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for

rights requires least interference. A new Act has been passed by the Federal Government<sup>12</sup> requiring Canada to look at all of its legislation and make sure that it's compliant with that UN Declaration. The last case I did, I argued that point, to say deference to any decision of an Indigenous government is absolutely essential and necessary not just based on legal precedents, but based on Canada's commitment to reconciliation. So, I hope that after these new child-protection laws are established by each First Nation and there is a dispute resolution mechanism set up, that if decisions are challenged, I am hopeful that whatever judge is hearing the case, in whatever court, they will be extremely deferential to the Indigenous laws and dispute resolution mechanism. The number of cases then that go forward to Court of Queen's Bench, where there are not many, if any, Indigenous judges, are going to be far less frequent than they are today. That's my hope, but no one has a crystal ball [laughs]. We've seen cycles of that pendulum swinging from being overly cautious to not being cautious enough and going back and forth. Child-protection work is something that has an instinct element to it: you have to make decisions based on the specific facts of every case, and there will ultimately be difficult decisions that are made. Then, those difficult decisions could be challenged and ultimately, of course, there isn't going to be locked doors to the courtroom because of new Indigenous laws for child welfare, so there will be cases. But my point is: I think they will be far less in number and the court will have to impose the deferential standard one way or another, even if it's just a good, old-fashioned judicial review of the Indigenous tribunal that's set up under the Indigenous child protection laws.

**BPS:** Right, thank you for that, that was exactly the question I was trying to articulate. One other thing: you mentioned that your firm was involved in drafting laws for the Indigenous community. I have a special interest in the process, as I started this new course called Indigenous People, Oral History and the Law. I've brought in people like John Borrows to talk about how sometimes when Indigenous communities develop their laws, they consult their elders and try to figure out what the historic practices were, and so on,

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National Human Rights Institutions" (August 2013), online (pdf): UN Human Rights Office of the High Commissioner <[www.ohchr.org/documents/issues/ipeoples/undripmanualforhris.pdf](http://www.ohchr.org/documents/issues/ipeoples/undripmanualforhris.pdf)>.

<sup>12</sup> *United National Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

and use oral history as a way of generating their new codes and in developing the legal system. Has that been an element in Indigenous legislation, in your experience: trying to figure out what was done historically and traditionally, and try to incorporate those values in some way in these new laws?

**KS:** Yes. This child-welfare initiative is massive and unique for a couple of different reasons. Theoretically, every single Indigenous community, every First Nation in the country, is ultimately going to have its own set of child-welfare laws and those laws – you simply have to take a look at the CFS Act<sup>13</sup> to know – have to be comprehensive. They have to cover all kinds of circumstances and situations. Remember, it's not like the CFS Act is going to go away either. It's going to be out there and it's going to be in place for non-Indigenous children. This is the part that's unclear because the province and the Federal Government didn't come together and design this program, the Federal Government just dropped it on the provinces, from what I understand. I just know that they didn't design this initiative together. So, it's very difficult to foresee what the ultimate system is going to look like at this point, but your question is: how do the First Nations go about drafting their laws? I'm not taking the lead on this at our firm, it's Harold (Sonny) Cochrane, Q.C.<sup>14</sup> – who is definitely, in my view, one of the top child-protection lawyers in Manitoba and, certainly in my eyes anyway, the top Indigenous lawyer in Manitoba and likely Canada. I'm biased. [laughs]

**BPS:** We interviewed Sonny in our collection of Indigenous jurists and policymakers in Manitoba. I don't know if you've seen it, but I really enjoyed talking with him. I thought he was great.

**KS:** Yeah, I did see that, it was excellent. I, actually, haven't seen him [laughs] because of COVID and because of how busy he is on this very issue in the last 6 months. I barely get to see him and talk to him because he literally has been in non-stop meetings working on that issue of developing the laws and it's very different for every community. Some communities are doing it one way, others are far more traditional. We also, of course, have

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<sup>13</sup> *The Child and Family Services Act*, SM 1985-6, c 8, CCSM c C80.

<sup>14</sup> Harold (Sonny) Cochrane Q.C. is a partner at Cochrane Saxberg Johnston Johnson & Scarcello LLP. He studied law at the University of Manitoba and was called to the Bar in 1996.

Murray Sinclair at our firm and he's a big resource. He's helping out and providing all kinds of guidance in terms of how he envisions the system, but the first thing he'll tell you is: every community is unique, and you have to listen to the elders and incorporate that. That's a time-consuming process because it's never been done! Also, I guess, it's like translation. You know? If you're translating a book from one language to another some things get missed. It's really the skill of the translator that's going to determine the success. So, I think that's what we're trying to do: be a translator. Because you've got to translate from those traditional ways, but you have to write it into a law that a court may very well dissect and interpret, and they may interpret it differently than the community intended it. So, you've got to be very, very careful. So, that has occupied a huge amount of our time and I think it's going to be a process that's going to take time. But when it's done, then there's going to be the judicial interpretation part and then that's also going to determine how the system ultimately unfolds.

**BPS:** Yeah, it's a whole extra challenge. It's not just from an Indigenous language into English or French, there can be a whole lot of experience and cultural expectations associated with a word or a concept that doesn't translate easily into the lives and experiences of other people. When I interviewed Diane Kelly, for example, she educated me to some extent about the fact that there are lots of resources in the reserves that we underestimate. For example, there are an awful lot of family connections that are not only parents, right? There are cousins, aunts, uncles, and so on. So, before you think about removing the child from the community, we should realize that even if their community isn't materially prosperous, there are a lot of human resources there that the court system overlooks. If you're coming to a community and you don't know about that – you haven't been informed about it – well... A kid is in a bad situation, so for a while an auntie is looking after them. Well, you might not appreciate how important that is or the depth of the connection between an auntie and a nephew in a traditional community because you're looking through your own experience. On my end, an aunt is somebody who sends Christmas cards, not necessarily an aunt who lives in the same small community with close-knit connections going back hundreds and hundreds of years. Then, you try to write something that is actually comprehensible – something somebody can read – and the more you try and explain stuff when you're drafting, I find, the more tangles you can potentially get into. So, there are just so many

trade-offs. If you try to draft for every possibility, it gets too convoluted, and you accidentally confuse what you want to say. If you try to anticipate all the cross-cultural confusion, you may be creating more confusion. So, my guess is that you get some feedback from the mainstream, and it'll go back and forth, but you can't get there unless there is a big beginning, and it sounds like the big beginning is happening.

**KS:** Yes.

**BPS:** That's encouraging! Wow, that's quite a letterhead you have there, by the way. You've got Murray Sinclair on a letterhead with Sonny and then all you other folks, that's quite a firm.

**KS:** Yes, we're pretty proud. There are a couple ways of looking at it, I mean, Murray and Sonny are two of the best Indigenous lawyers in the country, which is fantastic, but the problem is, there's not enough of them. With Murray; for instance, he was one of only a few Indigenous lawyers in his day, and he was, I believe, the last First Nations judge in the Court of Queen's Bench in Manitoba. But what we are seeing is more and more Indigenous lawyers graduating from law school, which is really good, and I think the biggest strength of our firm is that – because of Sonny and because of Murray – we've attracted, I think, the next generation of really important and successful Indigenous lawyers. We've been able to recruit some of those rising stars to our firm and I think that if you were to fast forward twenty years into the future, I think there'll be a lot of names that people in the legal community will be very, very familiar with at our firm and it will be a much higher percentage in the Manitoba Bar of Indigenous lawyers, which would be a very good thing.

**BPS:** Yeah, we, Sonny and I, had this whole other conversation, and I did that interview as a part of that conversation. We need – at the law school – to do a much better job at making the law school a comfortable environment for people to get interested in Indigenous law. Indigenous and non-Indigenous students might be potentially interested in providing the recruiting talents that firms like yours can use to build that next generation. As you might know, at the Law School, we have many challenges and we haven't met all of them yet, but hopefully conversations like this will help us along the way because we have a lot of work to do. I'm not being critical

of anyone or any generation or anything. But yeah, there is a higher demand for people who are culturally competent in Indigenous law – whether they are Indigenous or non-Indigenous – with UNDRIP<sup>15</sup> being adopted at the executive level by Canada’s legislative and being this overarching international norm and all the practical developments towards Indigenous self-government. Yeah, there is a tremendous practical need there. My view is the culture shift – it used to be that an Indigenous lawyer was fighting the mainstream. “What is this person doing? They’re making specific claims and then fighting the mainstream.” Now, we’re in a new stage where a lot of what an Indigenous lawyer might be doing is aiding an Indigenous community in achieving self-government. It’s a very different kind of task that needs a whole bunch of additional training and education and tracking people. So, that I see as a challenge ahead. We are partly shifting from a mode where we think that Indigenous law is about a community fighting the mainstream versus Indigenous law increasingly exercising self-government and we need to educate people to feel equipped to be of service to be doing that. Does that sound approximately right? That’s a leading question [laughs].

**KS:** It certainly sounds approximately right [laughs]. Yes, I agree, there is a shift: there’s positive momentum toward Indigenous communities achieving true self-determination. As opposed to, you know, in the past, where it really has just been apple pie sort of statements and lip service. Now, there’s actually... under this new legislation that we’ve been talking about, that was formerly Bill C-92<sup>16</sup>, when you have a situation where you’re going to have Indigenous laws that have the same force and power as federal laws, that’s pretty substantial! We haven’t seen anything like that before. We believe that the Indigenous child welfare laws will not just be applicable on reserve, these will be federal laws that are applicable throughout the province. If someone identifies as Indigenous, we’re not going to go through a process of proving aboriginality, that would be an extremely cumbersome and unnecessary approach. So, my strong suspicion is that that is going to be treated in the way that the current system treats it, which is: let the family decide. So, if the family decides they want to go down that

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<sup>15</sup> *Supra*, note 12.

<sup>16</sup> Bill C-92, *An Act respecting First Nations, Inuit, and Métis children, youth, and families*, 1st Sess, 42nd Parl, 2019, (assented to 21 June 2019).

path of being associated with their community, then the laws of that community will apply regardless of where they live. That's a big deal, that's a huge step forward. The Supreme Court of Canada has decided that child protection is a provincial undertaking. However, "Indians, and the Lands reserved for the Indians"<sup>17</sup> is federal. I think that it's going to be accepted that when it comes to Indigenous child protection – notwithstanding, you know, that I said it's a provincial jurisdiction – that the province will allow people to make the determination as to where they fit and that those laws will apply and they will be written by the Indigenous communities and they will have the same force and effect as a federal law.

**BPS:** Just to circle back to our original subject, there are many Indigenous communities in Manitoba where most of the members of the nation live off the reserve. Potentially, it is going to be a positive step forward, in the context of child protection, to dissolve some of the barriers between on-reserve and off-reserve communicating and cooperating and maintaining some sort of continued national shared life. Is technology going to be useful in that respect? In the sense that something happens in Winnipeg and you want to consult with relatives on the reserve, now we have the developing technological capacity so that, even though someone is in Winnipeg and someone might be in Berens River<sup>18</sup>, or something, it can still make the system work because – to some extent anyway – we can use the technologies and overcome the distance barrier that might have otherwise been intractable. Thoughts on that?

**KS:** Well firstly, technology can solve a lot of problems; there's no doubt about it. I think, if we were to presume that internet in Winnipeg is available in the same way in these remote communities – if we were presuming that – then I would definitely say that technology is going to assist with this new system because it will allow, for instance, that on-reserve tribunal or circle of elders – whatever it is – to be able to intervene with a family when the sharing circle is on reserve but the child is in Winnipeg. So, if technology was equal, that would be helpful. The problem is, some technology is not available outside of major urban centres; I mean the availability of the

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<sup>17</sup> See s-s. 91(24) of the *Constitution Act, 1867*, 30 & 31 Vict., c. 3

<sup>18</sup> Berens River First Nation is a town in Manitoba approximately 331km north of Winnipeg.

internet. Now, maybe Elon Musk is going to solve this problem with Starlink<sup>19</sup>, but as things go right now, Internet in rural areas is not optimal or doesn't even exist! It's been a major problem in child welfare. The province put in place a new funding system back in 2010 for Indigenous agencies, but they said to those agencies, "We're not going to give you your funding increase that we've promised and that we've determined is necessary for you to adequately care for children until you agree to sign up for CFIS." CFIS is the CFS information system, which is this antiquated, old technology for sharing of information within child welfare, which has, in numerous reports, been recommended to be thrown out and replaced with a better technology. But the biggest issue, always – which has stopped that from happening – is that there's still no connectivity in a lot of rural communities. So, I think that you could do those sharing circles and that communication over the phone, and, as I say, the child protection docket was being done over the phone, but that is an unsatisfactory technology to do court work. Telephones just don't work. So, I think a lot of this will depend on Starlink coming to fruition as imagined by Elon Musk. By the way, I'm no expert in this, but I have actually used it. I've used Starlink because it was available at my parents' cottage; they just got it this summer. My brother has a cottage in northern Ontario by Thunder Bay and he had Starlink set up and we probably had 20 people there all on their phones and computers and it was seamless; it was like being in Winnipeg to use the internet. In the past, we didn't have internet at the cottage. So, if Starlink works out and connectivity is improved, then the answer to your question is: yes.

**BPS:** This is like a circle coming together for me in terms of what I do in academics; I teach Internet and e-Commerce Law and I am also working on an Indigenous Peoples Oral History [course]. It may be extremely obvious to you because you're working in the actual field, but these two worlds should be overlapping. One of the biggest challenges to effectively proceeding with self-determination, self-government, and reconciliation is that, actually, there is a technological problem which has to be

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<sup>19</sup> Starlink is a high-speed, low-latency broadband internet that provides satellite Internet access to most places on Earth. It advertises to be ideal for rural communities where Internet access has been limited in the past. See "High-Speed, Low Latency" and "Ideal for Rural & Remote Communities" online: *Starlink.com* < <https://www.starlink.com> > [<https://perma.cc/9TTE-R73D>]

acknowledged and overcome. Everything can't disappear into some bureaucratic hole from which it never returns. Ontario tried to go to eHealth, spent \$2 billion, and ended up with nothing. I suspect it's not about expecting one central national bureaucracy will figure it out for you. Experience tends to teach you, I think, anyways, that focusing on communities and decentralizing actually has a lot to be said for accomplishing a big national goal. Is what we're talking about, is this on the radar screen with Ottawa right now? Are they aware that a lot of the ambitious objectives about self-determination is being hampered by the sheer communications problems, or are different bureaucrats working on different files and they don't see the overlap?

**KS:** No, I think they know about it. I mean, at the Phoenix Sinclair Inquiry, this was one of the topics that was discussed about improving child welfare. One of the lessons in that Phoenix Sinclair case was that the family history that the system should have had, wasn't recorded properly and if it was recorded properly, it wasn't available to the social workers who were re-involving themselves with that family. There were more than ten interventions over a lengthy period of time by different agencies and different workers - and that is something that is unavoidable - but if you have a central repository of information on that family and it is available to you, then you're not going to repeat the mistakes that the last social worker made and/or you're going to carefully review the history and say okay, "With this history, I see this very minor incident differently now. In the Phoenix Sinclair Inquiry, the incident that was seen as the culminating incident involved a complaint from a source of referral about a child being locked in a bathroom; that was what the last CFS agency involved was investigating. What the workers didn't have was an accurate history of the involvement with that family, and they didn't have information about the partner. There's a lot more to it than that, but the bottom line is that an information system that's user-friendly, that works, where people will put the information into it because it's easy to do so... Remember, if a system is clunky and difficult to use, it means that all the information doesn't necessarily get on there because you have to scan in documents, you have to identify them properly so that they can be found, and it's got to be an appropriate system. I know that the current CFIS system is complete garbage relative to new technology. You won't need to edit my comments, if this is ever used, I don't care who hears it. The bottom line is: it is antiquated and

the fact that it isn't good hurts children in Manitoba. Then, you add that to the connectivity problem. It's not just Indigenous people affected, but Indigenous people are probably over-represented in terms of the negative impact. I mean, just go back twenty years ago; we are in the middle of a technological revolution that is in hyper-speed. Twenty years ago, you didn't have smartphones and now you can't function without a smartphone. You can't even be away from it for ten minutes without becoming physically ill; it's a part of who we are now. So, when you go away to a place that doesn't have the internet, you feel it. That's the permanent situation of many people and professionals working in child protection where they don't have that same level of connectivity. So, it's an enormous hurdle, and that's why I say this Starlink or other technology that allows internet to reach the entire world is going to transform everybody's life.

**BPS:** This has been very thought provoking for me Kris, and I am sure for Shira. I have learned an awful lot of things from this interview. Just one thought, I just want to identify something that will need a lot of thinking which is: the maximum use of technology will be seen as problematic in its own way, in a sense, right? So, when you're participating in a family consultation, very sensitive and sometimes embarrassing stuff might come to light, but you might be inhibited if you think this is recorded. You might be inhibited if you think somebody in Winnipeg that you don't know and don't see and you don't have that physical intimacy that might establish trust in the way is in the same room. Sometimes, you think, "Yeah, the lack of technology is clearly a radical problem here," but as we use the technology, we will have to think very carefully about the cultural and individual sensitivities associated with using it. You don't want the system to fail because everything has to be recorded in case it goes to court and maybe that inhibits people from actually wanting to use the system. "We're going to have to discuss some embarrassing family history," because everybody has their family issues, "and what you're telling us is we have to record this in case some court later wants to know that we documented everything." I don't have the answer to anything, it just occurred to me that these are questions that will have to be thought through as we move forward. Am I right about that?

**KS:** The exact point that you're making came up in a recent case I did. In the case, the court asked the agency about why they do not record interviews

with children. Everybody has a cell phone, and everybody can push record and tape all conversations. Then, you can take that, and have it automatically become typed – there are programs that do that. You would think that would make a social worker’s job a lot easier. But the agency had a policy not to record and the reason related to the premise of your question, which is that people who are being recorded are inhibited in certain ways. One, it just might make them nervous. Two, it might make them less candid for various reasons. There are all kinds of other reasons. The other thing is it might be a child that you are recording. In that case, there are all kinds of different dynamics as to why the child may not be able to communicate what has happened; when you show up and you are a stranger recording the conversation. During this hearing, the judge who heard this case was very critical of that policy. “Well, if you just recorded it, we wouldn’t have any issue”. So, yes, that is definitely a very good point you are making that technology can create its own hurdles for the service being provided. A lot of social workers say they will not take notes while they’re interviewing the child because it’s not a supportive type of interaction, rather, it’s a reporting type of interaction. The social workers’ job is far more nuanced than just “tell me what happened”; they’re trying to help kids deal with trauma. I’m talking about cases involving child abuse, and that’s what this case was about, by the way, it was child abuse. Therefore, technology, in that regard, however it’s developed, may never replace face-to-face human interaction.

**BPS:** Very, very interesting, yeah. It’s backend versus frontend, right? If you’re a social worker, you’re very aware that you’re dealing with a suffering little human being and you have a partially therapeutic role. Roll it forward months or years, and I’m a judge or something and I’m coming at the issue in my forensic accountability mode, right? “Everything should be recorded, everybody should be accountable, why wouldn’t you?” Most judges spent their lives as lawyers, and you know how stressful documenting everything is and making sure you record everything, and so on and so forth. So, with the best of intentions, the two systems don’t necessarily interact very well unless there is real communication to bridge the gap. What might just be a taken-for-granted, ordinary, over-assumption from one world to keep proper records, keep people accountable, override confidentiality in order to get to the objective truth; those values don’t always coincide, in fact, they can outright conflict. with a community-based system. It’s really good to talk

openly about this stuff. One of our challenges overall – it comes up in a lot of the interviews – is having open conversations where people don’t feel afraid to say things and get it out there. Maybe I’m wrong and you can have a chance to correct me, but that can’t happen unless there is a space to have open conversations. But I digress. Shira, was there anything in the plan that we haven’t gone over?

**SB:** Yeah, so we just talked about the issues with things moving online – have you experienced any security, confidentiality, or privacy type issues?

**KS:** That’s a great question. We have had lawyers at other firms who will not use Zoom because of a concern over confidentiality and the possibility of someone randomly joining the meeting. At our firm, we haven’t had any experiences like that, but we have had people joining the meeting at the outset who were not intended to join – it wasn’t a photobombing<sup>20</sup> type of thing, it was more of a “the link was sent to the wrong people.” Our main concern about technology and a cloud-based firm is with ransomware. We’re very much afraid of that, and we have done, I think, all we can do to address it, which is to hire the most competent IT person we can find. We happen to have one of the all-time best at our firm. This fellow’s name is Darian and we have put our trust in him to put in every measure possible to avoid being subjected to ransomware.

**BPS:** It’s a hard reality to accept. The bottom line is that there’s no invulnerable person. It’s not just super-technology beating you, we’re all humans who can get suckered by a phishing email even if you have a million screening programs, and so and so forth. Somebody may not recognize something in an unfamiliar email, it may be a really slick phishing hack. You hear about law firms patronizing their staff, “Why weren’t you more careful,” but it can happen to anybody.

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<sup>20</sup> Zoombombing is a form of cyber-harassment where an individual or group interrupts a video call. These individuals will usually share lewd, obscene, racist etc. material without the host’s permission, causing the video call to shut down. See Corinne Bernstein, “Zoombombing” (September 2021), online: *Techtarget* <<https://www.techtarget.com/searchsecurity/definition/Zoombombing>> [<https://perma.cc/8R4D-Z4HD>]

**KS:** Well, yeah, one of the things that we seem to get a lot of are scam emails. They look like they come from one of the partners and they are asking for an associate to do a favour. “Can you go to the store and get me these coupon cards.” They get sent and they look really like they’re real. Now, we’re a very open and non-hierarchical firm, so at our firm, people reach out and say, “Is this really you? Do you want me to go to the store for you?” [laughs] So, we didn’t get sucked in, but I could see how others could.

**BPS:** I got one myself: “The managing partner from Pitblado wants you to go get something from 7-Eleven.” “...No.” [laughs] Anyways, Shira, have we covered the ground?

**SB:** Yeah, I think so.

**BPS:** So, without any attempt at flattery, I found it tremendously informative. Many, many thanks for doing this. I just learned a whole lot of new things. I am really glad you are doing this, for our readers as well. I’m so glad you found the time to work with us.

**SB:** Yes, thank you. It was awesome getting to listen to this. I learned a lot too.

**KS:** Awesome. Thanks a lot, I really enjoyed it.