

Interview with Dave Wright^{*}

BRYAN SCHWARTZ &
NATASHA ELLIS

Dr. Bryan Schwartz (BPS): To start off with, what brought you to law school?

Deputy Minister Dave Wright (DW): I was coming up to my thirtieth birthday and realized it was time to consider a career change. So, I called the law school and was connected with Art Braid.³⁴⁸ I told Art I was thinking about going to law school.” He said, “Well you’ve got five days to write the last LSAT to qualify for admission next year.” I bought a book, tried a few puzzles, and wrote the LSAT. I was at law school the next year. Bit on a whim, I guess. Is that a good answer or a bad answer?

BPS: I always tell people not to go to law school when you’re young because then when you don’t know what to do, you can’t go because you’ve already gone. So, you played it exactly right.

DW: And I showed up and there was this young professor – the guy looked like he was 16 – teaching constitutional law.

^{*} Interview conducted by Bryan Schwartz and Natasha Ellis on February 25, 2022. Dave Wright, KC was appointed Deputy Minister of Justice and Deputy Attorney General of Manitoba on August 17, 2017, and served in that role until his retirement in January 2023. He was a member of the law firm Aikins, MacAulay & Thorvaldson (now MLT Aikins Law) from 1994 until 2011. Mr. Wright joined Manitoba Justice as a legislative drafter in 2011 and was appointed Legislative Counsel and Assistant Deputy Minister in 2013. In that role, Mr. Wright also served as Law Officer to the Legislative Assembly. He has also held many volunteer positions within the community, serving on local, provincial and national boards of directors.

³⁴⁸ E Arthur “Art” Braid earned his L.L.B (Manitoba) in 1960 and his L.L.M (London) in 1967. He was a professor of law at the University of Manitoba from 1964-2000, and served as Dean of Law from 1994-1999. He was a Senior Scholar up until the time of his passing on February 27, 2020.

BPS: What year was that, Dave?

DW: 1991.

BPS: Yeah, so I was 25.

DW: I remember you asking Jerry Patterson in class whether his mother knew he smoked?³⁴⁹ [laughs] Jerry responded: “Does your mother know you’re at University?!” [laughs]

BPS: [laughs] That sounds like me! You were in litigation practice at Aikins first, right?³⁵⁰

DW: Yup.

BPS: Just general, all-around litigation practice?

DW: I was primarily a commercial litigator. For the last number of years, my practice included administrative law, media law, securities litigation, insurance litigation and other commercial disputes.

BPS: Okay, you had a background in commercial law. I’m wondering why you made the switch from one of the big firms we have downtown doing commercial law to the government. You have a background first in non-profits, right?

DW: That’s right. I was working with non-profits – primarily in services and advocacy for persons with disabilities – before I went to law school.

BPS: [laughs]

³⁴⁹ Jerry Patterson, Q.C. [now K.C.] earned his L.L.B from the University of Manitoba Faculty of Law. He is a Partner at Dentons LLP (Calgary) and has been recognized by *Best Lawyers* in Canada as one of Canada’s leading lawyers in the areas of Corporate and Commercial Litigation (2015-2020) and Energy Law (2016-2020).

³⁵⁰ MLT Aikins LLP is a full-service law firm with offices in Winnipeg, Regina, Saskatoon, Edmonton, Calgary, and Vancouver.

DW: I did not expect to article at Aikins but through the interview process my mind changed. Jonathan Kroft³⁵¹ and Kate Craton³⁵² interviewed me. They impressed me and convinced me of the opportunities Aikins would provide. They got me thinking in a different way. I am very glad they did.

I was extraordinarily fortunate to get to work with Eleanor Dawson³⁵³ and her junior Ted Bock³⁵⁴ at the beginning of my career. They were extraordinary mentors. Both focused on doing things the right way. Their no-nonsense style of practice fit perfectly with my approach to the practice and, frankly, shaped that approach.

BPS: Right.

DW: I had four or five years with Eleanor before she was appointed to the Federal Court. It was a fantastic introduction to the practice, for which I am extremely grateful.

³⁵¹ Jonathan Kroft, Q.C. [now K.C.] was called to the Manitoba Bar in 1984 and the Ontario Bar in 1991. He articulated with Aikins, MacAulay & Thorvaldson, continued as an associate from 1984-1989 and was a partner with the firm from 1991-2006. Between 2006 and 2011, he served as Chief Legal Counsel and Executive Vice President of Risk Management at Wellington West Holdings Inc., before returning as partner at Aikins, MacAulay & Thorvaldson (now MLT Aikins LLP) in 2011.

³⁵² Kathleen Craton was called to the Manitoba Bar in 1987 and practiced as an associate lawyer with Aikins, MacAulay & Thorvaldson from 1986-1995. She currently works as Claims Counsel and Liability Fund Professional at The Law Society of Manitoba.

³⁵³ The Honourable Eleanor Dawson, Q.C. [now K.C.] served as a judge on the Federal Court of Appeal from 2009 to 2020 and is also a former judge on the Federal Court of Canada. She was called to the Manitoba Bar in 1977, practiced with Aikins, MacAulay & Thorvaldson and was a sessional lecturer at the University of Manitoba Faculty of Law from 1986-1992.

³⁵⁴ The Honourable Theodor (Ted) Bock was appointed a judge of the Court of Queen's Bench [now King's Bench] on February 5, 2020. He received his law degree from the University of Manitoba, articulated at Aikins, MacAulay & Thorvaldson and was called to the Manitoba Bar in 1991. He worked at MLT Aikins for nearly 30 years before his appointment to the Court of Queen's Bench [now King's Bench] for Manitoba.

BPS: What made you switch career paths? Of course, that's a great background for then going into government because you've actually experienced the gritty realities.

DW: I was at Aikins for about 17 years. It was a great place to practice. I approached my time in practice as, "I'm going to stay here doing this until I feel like I really know what I'm doing." I thought that might be five, or six, or ten years—it turned out to be 17. By then I was approaching my 50th birthday, so it was again time for a career change. Every 20 years, you've got to switch. So, there you go.

BPS: And you started at the government in drafting legislation?

DW: Yes, and it is a fantastic job!

BPS: Interesting, did you know Norm Larsen?³⁵⁵

DW: Yes, Norm was a very close friend, a mentor. I am not the only lawyer I know who asks the question "What would Norm do?" when faced with an ethical or moral dilemma. I had lunch with Norm to tell him I was going to article at Aikins. Norm was a Zuken guy; he used to comment on the A-to-Z difference in perspectives. However, once I had explained my reasons, he said "that's fine, but you are buying lunch."

Norm loved legislative drafting. He was an extremely talented drafter. Norm had retired by the time I started in the Legislative Counsel office. But I was aware how much he loved the work, and it was clear when I got there that everyone in the office respected him as I did.

I miss Norm a lot.

³⁵⁵ Norman "Norm" Larsen was called to the Manitoba Bar in 1969 and articulated with Joe Zuken. He practiced law at Zuken, Penner & Larsen from 1968-1972. In 1972, he was the first staff lawyer hired by Legal Aid Manitoba, starting as the Senior Attorney at the first of six Neighbourhood Law Centres, and held several other positions, ending as Executive Director (1977-1979). He spent his last years in practice as a legislative drafter with the Office of Legislative Counsel in the Department of Justice (1987-2000).

BPS: If you haven't seen it before Dave, we did an interview with Norm Larsen and called it "Draftstoevsky."³⁵⁶

DW: Yes.

BPS: Norm was an amazing guy. I think he mentioned in an interview that he used to wake up at night in cold sweats for years after he had to draft the City of Winnipeg Act in 6 months.³⁵⁷

DW: [laughs]

BPS: He never fully recovered from that.

So, you had a background in private practice. Drafting legislation is a very different exercise. Did you draft prospectuses in private practice?

DW: No, I was a litigator.

BPS: Oh, okay.

DW: It was a real change. But it's a fantastic area of law. It's so conceptual; there are many factors that a drafter considers. It is highly intellectual and conceptual. In a way, it is the purest area of law. It's a beautiful area of law; you need to be articulate, elegant, precise, and comprehensive. I loved the job.

BPS: I think it's probably under-appreciated. Very few people have had to do it, and if it's done well, you don't notice it. When you read a statute, you're thinking, "Yeah, yeah, yeah, okay, I know what they're saying. How hard was that?" Well, that's the hardest thing to do. It can't be casual. You have to be thinking of the people who are going to litigate it or have a problem with it. You try to make it really direct and simple and clear. The irony is that if you do a really good job people will say, "I could have done that, my kids could have done that!"

³⁵⁶ Bryan Schwartz & Darla Rettie, "Norm Larsen: Draftstoevsky" (2001) 28:2 Man LJ 201.

³⁵⁷ *City of Winnipeg Charter Act*, SM 2002, c 39.

DW: To give you an example of that, a colleague and I worked on what I thought was a brilliant piece of legislation – it probably wasn't. There was one provision we had worked on; it started out paragraphs long. We worked on it, we turned it around, turned it upside down, we figured out how to express it, and got it down to two lines. It was so clean, so complete, so unambiguous – it was perfect! When the clients were going through the next draft of legislation, they skipped past our provision with “Yeah, that's good.” Our response was, “Whoa, whoa, whoa. Hang on, we're going back to this one! [laughs] Don't you see how beautiful this is!”

BPS: [laughs]

DW: So, you're right, you don't notice it.

BPS: The phrase that keeps coming to mind is, “Art conceals art.” If you're very artful, people don't notice the art. It's like being a lighting director; if you come out of a plane and you didn't notice the lighting, it's probably because the guy did a really great job. I know some people think it's just this tedious thing of translating stuff into legalese, but it's really a beautiful piece of engineering. You take pieces and they all fit together; it's simple, it's clean. I have great admiration for the people who do that.

DW: We've been blessed in Manitoba. Norm was a beautiful drafter. Val Perry, who was a very close friend [of Norm's], was Manitoba's chief legislative counsel for years, and everybody's mentor. She has taught generations of Manitoba drafters.³⁵⁸ She is a brilliant drafter. She does work that is so complex, so clean, so elegant, and so articulate. She can also work quickly. She is remarkably thoughtful about the legislation she writes. So that's my pitch for Val – who very-deservedly just received a Queen's Counsel [now King's Counsel] appointment!

³⁵⁸ Valerie Perry, Q.C. [now K.C.] was called to the Manitoba Bar in 1977. She is currently a consulting counsel with the Legislative Counsel Office within Manitoba Justice. She was previously legislative counsel and assistant deputy minister with Manitoba Justice and served as legal officer to the Legislative Assembly of Manitoba.

BPS: I didn't know that! Well, my joke has always been to say that this is a joke, it's all political. So, either abolish it or give one to me! [laughs] Well, I don't expect to make the cut but when John Myers³⁵⁹ got that big service award... is it the Dick Scott service award?³⁶⁰

DW: Yes.

BPS: After he got it, I said to him, "John, they actually gave an award to somebody who deserves it!" And, he was pretty close to tears, he was very touched by that.

DW: Well, we were thrilled here because Heather Leonoff received The Richard J. Scott award this year and for Manitoba Justice, that's fantastic.³⁶¹ Heather's been a fantastic mentor for many of us; she is a fantastic lawyer and civil servant

BPS: Yes, she is. I didn't notice that, but that's great.

Now, were you Deputy Minister when the plague started?

DW: Yes, I've been Deputy Minister for almost 5 years this summer. So, almost half of it during the pandemic.

³⁵⁹ John Myers was called to the Manitoba Bar in 1991. He is a partner with Taylor McCaffrey LLP and was awarded the Richard J. Scott award in 2017 for his long-time commitment to public interest advocacy on behalf of persons living with disabilities, and his outstanding work as a civil litigator, practitioner and teacher in the area of intellectual property.

³⁶⁰ The Richard J. Scott Award is presented annually by the Law Society of Manitoba to an individual who advances the rule of law and contributes to a strong and independent legal profession through advocacy, litigation, teaching, research, writing or mentoring. The award honours former Chief Justice Richard Scott, who served as Manitoba's Chief Justice for over 20 years and is a Past President of the Law Society of Manitoba.

³⁶¹ Heather Leonoff Q.C. [now K.C.] [now K.C.] was called to the bar in 1979. For the first 20 years or so in law, she worked in private practice with Wolch Pinx Tapper Scurfield. In addition to the practice of law, Heather taught at the University of Manitoba Law school for 25 years. In 1998, she joined the government's Constitutional Law Branch and became director of the branch in 2003.

BPS: People have been talking about online this and that for a very long time. But I don't think we made much progress in this province, or pretty much anywhere. I don't want to suggest that somehow, we were retrograde compared to the rest of the world, but my sense is, law reform is tough. People are conservative, they have legitimate concerns about fairness and how this is going to work. We're not big experimenters in the legal system because the real-world consequences of a failed experiment are highly problematic. Now, when COVID started, if I recall—somehow it seems a long time ago—my sense is that everybody thought this was temporary and we were on “just get through” mode, and then we would return to the old ways. Is that what happened from a government point of view?

DW: It's pretty interesting. I would say, going back to where we were before the pandemic, B.C. was quite a bit ahead of everyone else with their justice technology. They were doing online dispute resolution in a number of areas. They had developed a platform for that work which seemed to be working very well. So, we were all jealous of them.

That said, in Manitoba, there was lots of adaptation and technology improvements before the pandemic. For example, video link court appearances were becoming more and more common. In each of the correctional facilities, we had video rooms from which folks could appear in court by video link. This was beneficial from a number of perspectives.

When COVID arrived and changed everything, it required many changes to the court processes, including rapid expansion of technology. There was also a new level of openness to change. For example, defence counsel, who may have previously insisted on in-person meetings with their clients, were now demanding better opportunities to communicate electronically with their clients in correctional facilities. In a way, certain demands flipped. That's just one example.

The Manitoba courts did a pretty good job, compared to others, of carrying on with their work. So many changes were made to keep courts operating, including bail courts and “in-custody trials.” My sense is that Manitoba kept more going than other provinces.

The changes required incredible collaboration across all sectors of the justice system – police, prosecutions, courts, defence counsel, sheriffs, corrections, and many others. So, we were making all these changes, and everyone was just adjusting day by day. One example: judges were doing some bail hearings by phone, as a matter of necessity given the pandemic-related downside of transporting folks around the province and in-person attendances.

Pretty early on, we knew that we needed to increase capacity for remote court attendances, so we started doing everything we could to get another camera: we expanded the cameras in correctional facilities, we started using the phones in RCMP stations rather than transferring people to Thompson, and then started doing more on the phone.

It is impossible to list all of the changes that were made to enable the justice system to continue to operate as efficiently and effectively as possible. What I will say is that they required a spectacular level of cooperation and commitment across all sectors.

Again, judges, police, defence counsel, prosecutors, court clerks, all of the infrastructure of government that supports the justice system, northern and Indigenous communities – in every one of those sectors, there were leaders that were incredibly adaptive. For example, Gerri Wiebe who is the head of the Criminal Defence Lawyers Association of Manitoba³⁶² was unbelievable throughout this process; in my view she's one of the pandemic heroes. She was engaged, largely voluntarily, in working through how the system would continue to work – how it would work for their clients. Just incredible leadership on that front. Similarly: senior prosecutors, who every day are trying to figure out how to make it work. As well as some judges, the administrative judges for sure. Everyone has been deeply engaged.

³⁶² Gerri Wiebe was called to the Manitoba Bar in 2004. She began her legal career as a summer student with Killeen Chapman, where she later articulated, worked as an associate, and joined as a partner in 2009. Gerri left Killeen Chapman to join the partnership that is now Wasyliw Wiebe (2012-Present). She is also the president of the Criminal Defence Lawyers Association of Manitoba.

There were a bunch of changes made. Pretty early on, though, there was a broad recognition that some of the changes being made would continue to benefit the justice system. Long before the pandemic, justice officials were struggling with concerns about the efficiency of the court process. There were many things we have been doing that may not make much sense from either an efficiency or effectiveness perspective. For example, we have had an issue with the number of court appearances an accused is required to attend. Related to that is the challenges of transporting accused persons around the province and the need to minimize unnecessary movement of those folks.

There's been a recognition for years that we need to keep adapting and changing our approaches. I think early on in the pandemic there were a number of folks across the country, in every country, that recognized that some of the changes being made by necessity would continue to be beneficial after the pandemic. You can look to Chief Justice Wagner's committee on COVID response.³⁶³ That group, very quickly, under the leadership of the Chief Justice, seized on this idea too. They recognized the importance of preserving many of the changes being made, because they improved the effectiveness and efficiency of the justice system.

In my view, it was very helpful for the leaders of the judiciary to say, "This isn't only about government's money, this is about better court service." So, I think if you look at the leadership, that's an important element of what happened and is part of the reason why we will be able to sustain some of the changes.

BPS: It sounds to me that the ground, to some extent, was pretty prepared. When COVID hit, people had been thinking for a long time that this system is slow, its expensive, huge resources are being put into remand after remand. So, why didn't we do something earlier? What do you think the resistance was before COVID?

³⁶³ "Action Committee on Court Operations in Response to Covid-19" (updated 25 August 2021), online (pdf): *Government of Canada* <fja.gc.ca/COVID-19/pdf/Terms-of-Reference.pdf>.

DW: A bunch of factors, and I don't know how to order them. I'd have to give some thought to what's most important. One of them is: technology is hard for governments because processes are careful, as they should be with government money. Governments are somewhat risk-averse because politically, mistakes are painful in a way that they may not be for the private sector.

A second thought is that lawyers may not have traditionally been taught to think in revolutionary ways. We learn to work from precedent, we learn to make incremental changes to the law; unless you're Gerry Nemiroff who says you should challenge whether or not you need an insurable interest.³⁶⁴ That's a law school flashback. But anyways, we're incremental, we're trained to be incremental thinkers, and so, are we really adaptive to changes?

Switching gears a bit, one significant and important impetus for change at this time is the need to advance reconciliation and serve Indigenous communities in a more meaningful and useful way. Coming out of COVID, there was a shift in focus from "How do we dispense justice?" to "How do we ensure public safety in northern communities?" The latter, from my perspective, that's what we're trying to do on the criminal side. We're trying to keep people safe. We don't want to fly people all over the place, we don't want to waste time and resources. The reconciliation lens inspires us to listen more carefully to the members, and leaders, of the communities about how they want the justice system to operate in their communities. Instead of showing up with a bunch of people getting off the plane with their briefcases and their ties, and their suits, and their skirts, and then just disappear. Or we could ask the people living in these northern communities, "What do you want to do?" And one of the things we hear is that they have some serious safety issues that require a better justice response. They know what their communities need from a safety perspective. We heard requests for more restorative justice, they want government to support them to do this in a different way. That lens leads

³⁶⁴ Gerald Nemiroff received his L.L.B and L.L.M from the Faculty of Law (now the Schulich School of Law) at Dalhousie University and was called to the Manitoba Bar in 1972. He was a law professor at the University of Manitoba from 1968 to 2008 and the Associate Dean of Robson Hall from 1977 to 1982.

to some really different thinking about how we continue to shape the justice system as we leave the pandemic.

We have communities in Manitoba that didn't have a court hearing in their community for 18 months because they were locked down. Strangely, that reality requires us to think differently. Perhaps, the time is right, now, to really move forward on a restorative-justice perspective, on a community-justice perspective. And I think that's a huge opportunity for the jurisdictions with significant northern communities. So, I started talking about things that delayed us beforehand and now I've shifted into the next thing, which is: why I think we're going to maintain a change mentality.

BPS: It seems to me that when you're in the system you think, "How do I process this case from beginning to end?"

DW: Yes.

BPS: But if you're in the community, it's not about the case; it's about how do we process a relationship that's going to last from generation to generation? So, it's a totally different perspective. We don't think about it much living in Winnipeg, but physically moving people in and out, it seems instinctively entirely contrary to the whole concept of restorative justice, which is grounded in maintaining the fabrics of a community. Physically wrenching people out, moving them away, moving them back – that doesn't really fit into the concept. It's kind of paradoxical to me because you think of technology as somehow soulless; that's one of the arguments made in relation to the judicial system. It's the idea that the magnitude of the law is better conveyed by physical presence and communication is better sustained by physical presence. Good theory, but in practice we were physically wrenching people out of their communities.

BPS: In terms of the willingness to change and adapt, from what you're telling me, the judiciary was actually quite adaptive. The stereotype expectation would be that judges are older, judges come from another generation, they would be the last people to buy in. From what you're saying, the judges were actually among the leading edge of adapting to the circumstances.

DW: Here's what I'd say, in every sector – you can talk about judges, defence counsel, prosecutors, court clerks, civil servants – in every one of those sectors, there were leaders that were incredibly adaptive.

BPS: In the northern communities, there have been studies done about problems with broadband access. The material deprivation in some of those communities causes the members of those communities not to have the same familiarity with electronic toys and so on and so forth. How much has that been a practical obstacle in the northern communities? Obviously, the physical transportation has been a colossal problem, which was overdue to be addressed. In terms of getting the technology working in some of the communities remote from Winnipeg, were there problems with internet connection, people not being familiar with the technology, or was it more of people welcoming the change because the other system was so bad?

DW: Absolutely, internet connection in many of the northern communities is problematic. Video feeds in a number of the communities were really difficult to sustain, which has a few implications. One, it is hard to run what you need to run or to do the process. It also makes the judge or the counsel less willing to continue with it. The closer we are to smooth technology when the other options present themselves, the more likely the judge is to say, "I'm okay with that." If it's choppy, if you lose video connection with the person and if everyone's frustrated with it, then you're going to want to go back to normal pretty quick. I mean I know I do when I'm on calls and people are dropping off and I'm thinking, "Why can't we just be in person?"

BPS: It sounds like we're in a virtual circle here. People are hesitant, and then there's bugs, but you have no choice, you wanted to fix the bugs because you didn't have a choice. This was COVID, there was no "I don't want to try this anymore," and just go back. There was no going back. You were forced to make the technology better, the technology gets better, people are more comfortable, and when people are more comfortable, they're more willing to work with the technology. So, it sounds like it was kind of a positive snowball.

DW: I think that's right. The fact that it went on so long was beneficial from the perspective of how much can you do and keep.

Let me talk a little bit more about some of the mechanical stuff we've done. From the court perspective, we were able to get very quick approvals for the technical process – for example, getting cameras in – so we extended more court rooms out. We talk about video attendances and virtual courtrooms, so we're moving not only to more attendances, but also some virtual courtrooms. One of my favourite days was when somebody called me and said, "Hey, I just did a remote courtroom: the judge was in Portage, the clerk was in Winnipeg, the prosecutor was in Winnipeg in their office, the defence lawyer was wherever they were, and the accused was on his commercial fishing boat!" He pled guilty to some administrative offence – probably fishing out of season or something – did his plea, got his sentence, and went back to work. It makes you think, the purpose of the system is not to punish you by making you spend a whole day sitting around watching a bunch of stuff go on in the court and forcing you to be away from work. That's not the system. The fine was the penalty, he got his fine, he's going to pay his fine. That sort of situation wouldn't have happened before COVID, but that's spectacular, and the conclusion was pretty obvious in that case: you're going to get a fine. It's an interesting way to do things.

Anyways, we started installing cameras, we increased capacity in correctional facilities, we started putting things like iPads in correctional facilities, so we didn't have to move people around as much.

The police were very engaged in all of the changes that were made to address COVID. They had a whole bunch of roles in this, including facilitating bail hearings from cells in the North and so on. When you get arrested in one of the northern communities and the community is locked down, essentially, if you leave the community, you may not be coming back while it is locked down. So, police are arresting somebody and saying, "Hmm, we're going to drive them to Thompson now and then what?" That person can't come back. They will likely be released, perhaps within 24 hours. So, police were facilitating conversations with judges, and from the communities, so that people weren't being unnecessarily removed from their communities. Another example of a change, amongst many.

BPS: What do you think surprised people about the actual experience of doing stuff online? For example, there's a theory that it's easier to assess credibility in person.

DW: My sense is the extent to which judges were able to make decisions on bail, for example – either on the phone, sometimes on video – they were able to make those decisions based on the information in front of them and what they heard. The Court of Appeal, at one point, was entirely online. I don't know if people would find that surprising. But it would be interesting to find out, and I'm not the person to tell you, to get some examples of trials that were conducted virtually. I bet you would find some significant trials that were able to proceed virtually, or with mostly distance communication.

BPS: My guess is that we've acculturated to some extent. People may feel that this is a really stressful issue, that they need to have a face-to-face interaction. Well, we haven't had face-to-face for two years with the implementation of Zoom, and my sense is that we don't miss it that much. It's not that there isn't stuff missing, but it's not as problematic as we thought.

DW: I'd be surprised if research supports the idea that a judge needs, in each case, to look into people's eyes and discern their true nature before a decision is made. And if that is the case, I think there is a risk that we may misconstrue cultural differences and turn that into a conclusion; we've seen the result of that a lot. So, are you better without looking into someone's eyes and making a cultural evaluation of what they're thinking? I don't know.

BPS: Yes, and it's all incremental values and incremental losses. If you're doing stuff on the phone, it's not like there is no information – you're listening. If you're doing stuff on Zoom, you're seeing. Maybe you aren't getting every vibe that you would get if you were in person, but you've got to weigh that against the cost, time, and delay. Before COVID hit, I thought the in-person thing was kind of overrated for other reasons that people were thinking about: the delay, the cost, the inconvenience, the one-sidedness. It sounds like we were forced to innovate, and it sounds to me, maybe your expectations are different, but all this stuff is going to stick. We were forced

to try it, we had to make it work because there was no alternative, and some of these changes will be enduring. Is that your sense?

DW: Yes, I think so. I think absolutely there is an enduring piece to it, in part because people expect it. You can do everything else online, but it wasn't until COVID that we started to move away from the model where you had to get in line, show up before whoever the judging person is and then be processed. The court system was kind of the last to make the shift to online. Maybe the healthcare system as well – but you know, I've had a few doctor's appointments on the phone from either my desk or my dock and that's pretty efficient. I want to keep doing that.

Let's shift to some of the family-law and administrative-law changes.

BPS: Yes, absolutely. There's been some major changes in policy and law during this period: a new emphasis on ADR and access to online information.³⁶⁵ Could you tell our readers about that?

DW: When COVID came along we weren't letting anyone in to 363 Broadway to do small claims.³⁶⁶ So, what can we do? Well, we've got these small-claims hearings people, they've got computers, and we have technology such as Zoom. Given the relatively small amount at stake in many cases, why don't we bring people up on the screen and have each side tell us their case and make a decision. Okay, so we started doing that.

Family law was an interesting one.

We were in the midst of modernizing certain aspects of the family-law process before the pandemic. Government recognized that Manitoba had to do something different because the court process for resolving family-law disputes is expensive, slow and conflict-oriented.

³⁶⁵ Alternative Dispute Resolution “ADR” refers to any means of settling disputes outside of the courtroom. The most common types of ADR for civil cases are mediation, settlement conferences, neutral evaluation, and arbitration.

³⁶⁶ Courts Administration Service, 363 Broadway St, Winnipeg, MB.

First, changes were made to *The Arbitration Act* to allow for private arbitration more easily, and primarily change the back end of that to allow for arbitration awards to be enforced as if they were orders.³⁶⁷

Second, changes were made to enhance the Maintenance Enforcement Program. Significantly, the changes allowed the program greater administrative discretion to make or recognize changes to the orders it enforces. For example, *The Family Maintenance Act* did not allow the program to enforce consensual, non-judicial, changes to maintenance support orders. So, families needed to return to court to get the order amended before it could be enforced. Then their lawyer says, "That's great, send me \$3500, each of you, and in six months, we'll give you a new order." So, we decided that we don't want to do that anymore. We don't want to send people to court unnecessarily when there are a whole bunch of areas you can change outside of a courtroom. Then, if you need to go to court, someone will challenge the new order and you'll go to court. So, we made that change, this was before COVID, but it was a COVID-like change because in COVID, you didn't want to go to court for useless reasons. That was one of the first things.

Another aspect of the changes to the Maintenance Enforcement scheme was to allow the program to set, not just amend, child support orders in about 90% of cases. That reduces costs for families and eliminates unnecessary court appearances.

There were a couple of other pieces in the 2019 legislation, but those were some of the critical pieces.

We were also planning to develop a number of services which would support consensual resolution of family-law issues and provide clear information to families about family-law processes and the decisions that need to be made. One thing that was really clear in discussions with families was that there was a need for clear, free information about the family-law process. Prior to the pandemic, we were working through the technological and system issues to establish these services. The pandemic moved up the implementation by at least 6 months.

³⁶⁷ *The Arbitration Act*, SM 1997, c 4, CCSM c A120, s 25(7).

I think there were a number of good ideas that were in the works and COVID pushed us to do them. From our perspective, it really accelerated some interesting and useful changes on the family-law side.

BPS: Yeah, in law school, we think alternative dispute resolution is progressive. But you don't need alternative dispute resolution unless you have a dispute.

DW: Exactly!

BPS: Why do you always need it? Very largely because people don't know what their rights are in the first place. And there's a whole lot of areas – family law, child support, employment standards – where there are presumptive or binding formulas. So, what do you need to get into a dispute for? A lot of times if people just had an accessible means of knowing what their rights were, the dispute doesn't have to arise. It's when people have different understandings of what the rules are. I don't know if we talk about that in law school.

DW: Greg Evans³⁶⁸ and Maria Mitousis³⁶⁹ are two of our go-to counsel for out-of-the-box thinking about family law. At an event in June 2020, Greg told me that he was teaching an online family law course in Vermont. His comment was that if it weren't for the pandemic, he wouldn't have had that opportunity.

³⁶⁸ Greg Evans, KC is a lawyer and Principal at Evans Family Law Corporation and Evans Mediation & Arbitration practicing primarily in the area of family law. He is one of the founding members of Collaborative Practice Manitoba and is a member of the International Academy of Collaborative Professionals. He taught the Clinical Family Law course at the Robson Hall Faculty of Law (2006-2019) and continues to be a frequent speaker.

³⁶⁹ Maria Mitousis is a lawyer and Principal at Mitousis Lemieux Howard Law Corporation practicing primarily in the area of family law. She is a member of Collaborative Process Manitoba and the International Academy of Collaborative Professionals. She currently co-teaches Advanced Family Law at the Robson Hall Faculty of Law (January 2022-present).

BPS: Well, let's go back to that point because it's really interesting from the point of view of change and resistance to change. Some lawyers are anxious about making a living. We've seen some areas of practice which used to be very lucrative like real-estate conveyancing, which used to be a money-winner in private practice, it isn't anymore. The technology and the land title system simplified it.

I think the future of lawyering is not about using routine cast as your cash cow. Increasingly, a lawyer is somebody who has to deal with an open-ended problem that requires judgment experience, which isn't being cross subsidized by making a lot of money doing routine stuff. To me, what endurance is, it's not the black-letter stuff, it's how to think, how to problem solve. If we're doing it right, it's not how to just think legally, because there are a lot of options besides suing. You can advise your client to forget about it if it's not worth it, talk it out, write a politician; there are a lot of ways to solve a problem. The future of law school to me – the economic future of lawyering – is top-end stuff. It's where you actually need to think, it's about judgment and experience. There's no future for lawyers, as a basis of their personal autonomy, in doing the routine stuff. Lawyers get used to it. Lawyers find ways to add value to things, but there's no future in trying to think you can make money by telling people what's in the standard schedule.

Tasha Ellis (TE): This is similar to some other fields too, like accounting, where artificial intelligence is taking over. We're talking about the advantages of online accessibility, and wouldn't it be great if law school was accessible to people in their communities? We would have more lawyers trained in the home communities that could take over, who could be the access points in those communities. Right now, there are so many barriers to coming to law school in the first place.

DW: I heard a neat thing yesterday; it was on a call with a bunch of the federal and provincial ministers of justice. A colleague from Nunavut said that they've got their first class of, I think, 23 Nunavut-based grads from the Saskatchewan school graduating this spring. They're going to triple the number of Nunavut-based lawyers in one graduation. I think that's what he said. That's pretty exciting! Also, I don't know how much of it is distance

learning, but the University of Saskatoon has a really interesting approach to educating Indigenous lawyers.

BPS: I've asked my students this, Dave, and I'd be interested in knowing your views, Tasha. Now that we were forced to teach two whole years of law school online, are we just going to go back to having relatively small classes and an in-person experience? Or will policymakers or students realize that we could do this without physically attending school and we could be much more efficient. You could potentially have your course taught by anybody in Canada, not just by those who happen to be here. I think we will resist it because we're like the lawyers, right? We, as law professors wonder why we would want to do that; we've got a nice little oligopoly going. Will we go back to normal after? Same question I was asking you about the real world, what's going to happen in the education? My sense is that we will probably go back to the old model, but what do you think, Tasha, what's going to happen?

TE: Based on the loudest, strongest voices at the law school – which are the typical law students – they want to be back in person because they like to find friends and make social connections.

DW: It's a tyranny of the extroverts.

TE: I think, sometimes, too, with students who are more of the traditional age for a student, they do well to have the external reminders of structure and reminders from classmates to study.

DW: Well, part of going to university, including law school for traditional younger students, is to learn how to be a professional. It's to learn how to act in a professional way, it's to learn how to interact.

BPS: Well, what we sometimes hear from judges and lawyers is – I don't know if it's a grumpy old guy “get off my lawn” thing that everybody says about the next generation – we hear things like, “These young people have no social skills. They don't know the proper way to talk to people and they're not polished socially.”

BPS: Yeah, another thing I hear the older generation say is, “Well, the young people are learning how to communicate on iPads, iPhones, and email, so they have a very succinct, unpolished way of communicating.” However, it might be very pragmatic and effective when you just tap in three words, right? You can actually get a lot of information from an emoji and three words, but it’s not working in the courtroom; you’re supposed to have this more elegant, organized way of communicating. So, there’s something, I’m told anyway, of a generational divide there.

BPS: I always thought “despite” seemed in your face. “Notwithstanding” says, “I know where you’re coming from, a little exception here.” “Despite” was more aggressive. And “must,” “must” is so imperialist, like, “the minister must”; who are you ordering around here?

DW: One of my colleagues used to say, “Where you stand depends on where you sit.” I have a different view of things as a Deputy Minister than I did as a legislative drafter. As a Deputy Minister, I am more sensitive to the view that legislation may be unnecessarily directive, particularly when it is directed to public officials.

BPS: There’s also the statute book and you’re a public official, so you’re “must-ed” all over the place. If I were a public official, I would feel as if I was being bullied by the statute book.

DW: I could talk about this stuff all day. When I started at the legislative counsel office, I went home after our day retreat and I said to my spouse, “It was a great day, really interesting. We spent about 45 minutes on the proper use of ‘must’, ‘may’, and ‘may not.’” Gail looked at me and said, “You found your people.” [laughs] Language is important.

BPS: So, you folks were putting ‘his’ and ‘her’ in the statute book before the transgender movement, right?

DW: Yes, I believe that’s true.

BPS: Not saying this in any facetious way, there was a move in gender – what was thought to be gender impartial language – to putting his and her in the statute book. Have you heard yet that that’s a problem? I anticipate that it will be a problem.

DW: It’s interesting, the debate in 2016 was about the use of the plural, using “they” when clearly referring to an individual. My guess is that we’ll use “they” and “them,” to the extent that it’s possible and clear.

BPS: It’s a legacy drafting nightmare because you’ve got some statutes now that have the old-fashioned language, then they put in the amendments using “his” and “hers”; “they” seems acceptable to me for whatever it’s worth. But, then there’s the same legacy drafting problem.

DW: Yes, the question will probably go to the Supreme Court to determine the difference between “his,” “her” and “they.”

BPS: There are two more things I wanted to cover. You mentioned them earlier today: collections and corrections. We’ve been talking about dispositions in terms of the use of technology but winning a court case doesn’t mean much if you can’t enforce the ruling. If it’s in the civil-law side, can you actually collect this? Can you enforce it? In criminal law, it’s potentially the correction system. On the civil side, I understand you’ve come up with some innovative stuff with respect to collections and orders using technology.

DW: There’s private law and there’s public law; we tend to focus more on public law. I used to be a civil litigator, so my primary concern was recovering my client’s money: that’s the private piece. But when you say collections, I immediately think, “How do we collect tickets?” [laughs] Technology and legislation now allow for a much easier process to pay fines. You don’t have to go in front of a judge and take your scolding.

BPS: Just quickly on corrections, I would think there was considerable anxiety all around to minimize the number of people who were close-together in physical confinement. Did we learn anything about potential for electronic alternatives, like, wearing an ankle brace, or having to appear in

front of a video screen once a day, or once a week to verify that you haven't left?

DW: Yes, incarcerated populations across the country declined. The first change was in respect of intermittent sentences. In the midst of a pandemic, it wasn't desirable to bring people into jail for a weekend. Across the country, many folks serving intermittent sentences were ordered to serve the remainder of their sentence in the community. Even before the pandemic there were security and safety concerns with intermittent sentences. People serving weekend sentences can be pressured to bring in drugs or other contraband. From a corrections perspective, a pandemic-inspired reduction in intermittent sentences might not be a bad thing.

BPS: It sounds like we realized it was a bad idea already, but it's not like we had, or we didn't make use of, new technology.

DW: In Manitoba I'm going to guess and say in March 2020, we had 20-25 people who were in the midst of one of these sentences. Most, if not all of them, were ordered to serve the rest of their sentence at home.

It is not hard to surmise that crowded prisons are not optimal during a pandemic. Also, it is necessary to ensure that new arrivals are isolated for the "infection period." That requires space and resources.

The pandemic inspired additional focus on release processes to ensure that people leaving facilities have pandemic appropriate options. We determined that we should use a reintegration program that allows early release under supervision. Provincial prisons in particular, sentences are less than two years, and the average sentenced time is much shorter than that. So, we could use an early release, up to 30 days or 60 days depending on the sentence, and focus on getting them set up during those times, finding a place for them to stay, etc.

BPS: Now, when I think back on this interview, David, I think COVID forced us to implement changes that will be positive in the long run on two longstanding issues: access to justice and making the legal system generally fit much better with the practical, cultural realities of First Nations and other Indigenous people and groups. We should've been doing more on

that anyway, but COVID looks like an odd fit in making progress on those two grounds. It sounds to me that nobody welcomed COVID but one of the consequences of the adaptation to COVID was to make some pretty significant reforms which are positive with respect to access to justice.

DW: I think one of the things COVID taught us, if it hasn't just exhausted everybody, which is possible, is that we can make changes, and we can think differently, and there are different ways to do things, and I hope we'll maintain that awareness. We all knew we could make changes, but we also were aware how long they could take. I think we got used to the slow pace of making changes. COVID taught us that we can do this faster, we can be more aggressive, we can be more assertive. Constant improvement – with the collaboration and hard-work it requires – has become a state of being that is both exhilarating and exhausting. I hope we can overcome the exhaustion and maintain the exhilaration.

BPS: So, there's a balance between being more open to change versus a period of consolidation where we deal with the new realities before we're ready for the next big adventure.

DW: Someone told me the other day that the election platform of the U.S. President after the last pandemic was, "Back to normal." So, you might get that. Maybe people will say, "I'm tired of change." We have driven people harder than they should have been driven. But my colleagues are highly self-motivated, so it feels like a collective piece. There's a sense that we need to refine the technological and process improvements as much as possible before people want to go back to normal. The smoother things work, the less likely the system participants will reject them.

I hate the pandemic, I'm sick of the pandemic, I'm so glad in the last couple of weeks to see my parents in person. But on the other hand, the pandemic has presented unbelievable opportunities to push forward, to do some things that needed to happen.

BPS: I found this extremely informative for me, I got a lot out of it.

TE: I think this was fantastic. Back to the idea of change and change management; some people are invigorated by change and some of us people

just want stability, just want everything to be the same. Incorporating the new generation, the young folk are so adaptable, and they're so collaborative. So maybe, the older ones, we're worn out and have put in a good effort, and you can inject some young blood and let them handle some of the new changes.

DW: I think you are right. I know a number of folks in government who are highly energized by the transformative spirit that the pandemic demanded. If they are in the right place, get a chance to make a difference in a place where people are innovating, thinking and excited about the change – it's a super place to be.

BPS: Just a little pitch for some of the opportunities in Manitoba, sometimes we think that we're the minor leagues, but when you work in a government position in Manitoba, you get responsibilities and opportunities at an early age that you wouldn't get in the bigger provinces. For example, Ontario or federal civil servants are very stratified, very structured. In Manitoba, we have smaller departments that are asked to do big things, and you often get to do things, and have opportunities that you would rarely have in other environments. I know sometimes people think that there isn't a lot of action in government, but there are opportunities at a young age to do things you wouldn't get in other places.

DW: I think the government here is a lot like business here and the law firms here; there's a huge opportunity if you're sharp, enthusiastic, and excited.

In recent years, governments have – by necessity – been focused on transformation. Speaking for myself, I'm not really a caretaker. I don't want to keep the justice system the same way it's been going as always, I'm not here for that. I have loved the opportunities that the government has presented for me.

BPS: Yes, well, all of my experiences with Kelvin Goertzen gave me the impression that he is really, really smart and just a reasonable person. I don't know how he managed to get through the filter that long in partisan politics. I only have positive things to say about Kelvin. I have a very funny story about Kelvin, I'll tell you, at least I think it's funny. He did a guest lecture

in my class once, and he was talking about life in politics. He said that he was trying to get somebody in a neighbouring constituency to run for his party. So, the guy's asking questions like, "How many hours a week do you work?" and, "How much do you make?" Kelvin said by the time he finished his persuasive exercise, he was asking himself, "Why am I in politics?! This is brutal!"

DW: [laughs]

BPS: He pretty much convinced himself that what the other guy was doing made a lot more sense as a lifestyle choice. I really enjoyed this, so thank you so much, Dave, thank you so much, Tasha.