

Interview with Cynthia Lazar*

BRYAN SCHWARTZ & JODI
PLENERT

Jodi Plenert (JP): Hi Cynthia, nice to meet you. To start off with, can you describe your practice in general, just to get a brief idea as to what exactly you do.

Cynthia Lazar (CL): I practice primarily labour and employment law, almost always, but not exclusively, management-side. There are certain areas of law that come along with labour and employment, like human rights, defamation, privacy, and accessibility. I do workplace investigations, as well. That's probably about it.

JP: So how much of that would have been, prior to the pandemic, online?

CL: Well, if you consider online to include telephone and email, tons. There are very few employment-law cases, wrongful dismissals, that end up in trial; I mean for the whole province, not just my practice. That means I don't go to court very often. The costs of litigation and the costs of arbitration on the labour side have become very high and so, settlement is much, much, more common

* Interview conducted by Bryan Schwartz and Jodi Plenart. Note that this interview was conducted on August 3, 2021.

Cynthia Lazar was called to the Manitoba Bar in 1995 and has been practicing in all areas of Labour and Employment ever since. Her practice includes human rights, privacy, defamation, and accessibility. Cynthia has the designation of AWI-CH (Association of Workplace Investigators Certification Holder) and brings extensive experience in conducting workplace investigations. She also taught the Labour and Employment Relations course at the Asper School of Business for nine semesters and is a very accomplished speaker in the areas of collective bargaining, basic employment law, workplace investigations, human rights, and accessibility.

than actually going to arbitration or court. I believe in the last year I had one arbitration that went through and one Court of Appeal matter on the employment side. The rest resolved. Most of my work is by telephone and email.

However, I do a lot of collective bargaining and that's almost always in person. I have in the past attended virtually for not-for-profit companies in rural Manitoba where they just don't have the money to pay me to drive or fly out there. I have a charitable group in the North for example, they can't afford to pay me twelve hours for driving round trip, so I've always attended virtually for that one, but now, of course, all the negotiations are virtual. So, that is a change and workplace investigations which I've always done in person, I've now been doing virtually. Those are the two areas that impact me the most.

Bryan P. Schwartz (BPS): Just an observation from me, you can tell me how it coincides or doesn't with your own education and experience. My general observation is the original theory of labour arbitration would be fast, accessible justice. It wouldn't necessarily be all lawyered up. You didn't necessarily have to be a lawyer to do it: you could be a union representative; you could be a management person. That is my understanding of what the original conception was, but historically it became very, very lawyered up and legalistic and technical. Of course, with that, the costs have become almost unmanageable to actually follow the whole thing through to the end. The other thing I wonder about though is whether it is changing culture. With the era of these larger-than-life, charismatic giants who used to be the top labour lawyers – you know, Mel Myers and so forth – they loved litigation, and they loved the combat. Was it your law school experience, Cynthia, that we expose you and encourage you to think about negotiated settlements and so on and so forth? Is that a cultural shift that was occurring anyway? Just curious whether anything we did in law school has been part of that cultural shift from fighting to the bitter end in a flamboyant litigation style as opposed to settling almost everything.

CL: The Labour and Employment Law course – well, there was no Employment Law course at the time I was in law school. The Labour Relations course was taught by Grant Mitchell, who I later worked with, for twenty-three, twenty-four years?¹ I articulated for him and worked very closely with him for a couple of decades. [The Labour Relations course] [d]id not really touch on that. It was more substantive learning—what the law is—and did not touch on those more practical aspects of how to conduct an arbitration, how to prepare for an arbitration, and negotiating settlements. I'm not criticizing that because the course was quite full; there's a lot to learn. So, it was focused more on the substantive law. There was a moot arbitration, which was very helpful, but it was just the one, and you are not navigating how to deal with clients at the same time.

BPS: Yeah, I took over teaching that course after Grant and did it for many, many years and might go back to doing it again. But yeah, there's a lot of substantive law to teach. I was just hoping somewhere in the law school experience, as a whole, we're getting people more acculturated to the fact that civil matters almost never go to trial in the end, on the merits.

CL: Well, and wrongful dismissals less than other kinds of litigation because there is almost never enough at stake. The average industrial wage in Manitoba now is about \$45,000 or \$50,000. If the absolute maximum that someone is going to get in the most managerial, long-term, old-age, hard to find a new job is – well, it's supposed to be two years, in Manitoba it's more like eighteen months. At the average industrial rate, you're looking at \$75,000. The cost of taking a wrongful dismissal case to trial can be

¹ Grant Mitchell, Q.C. [now K.C.], was admitted to the Manitoba Bar in 1978, joining Taylor McCaffrey in 1979, and retired after 37 years with the firm at the end of 2016. He served as President of the Law Society of Manitoba and has played a key role in the success of several professional associations including the Employment Law Alliance and the Canadian Association of University Solicitors. Additionally, Grant served as a Sessional Lecturer at the University of Manitoba from 1983 to 2005.

about \$75,000, from just one side. And if there's an offer on the table, it narrows the gap. So, it is virtually almost never worth it.

BPS: Yeah, and in wrongful dismissal cases, both parties might think that it's not a great idea to continue the relationship regardless. So, litigation is just intensifying engagement in a way and finding some honourable way to part company might actually have its emotional appeal, as well.

CL: Well, I think when you get to that point, [the parties] aren't concerned with burning bridges. It's not like labour law. I should explain, labour law is a unionized environment and employment law is a non-unionized environment. So, when you're in a unionized environment, the relationship is really important and that plays an important role in [the parties'] willingness to resolve and to negotiate. In employment law, where it's a non-unionized environment, if you're already at the point where you're filing a statement of claim, [the parties] often don't care about a continuing relationship. The damage is done.

BPS: There's that other dimension when there's a collective agreement: there's the ongoing relationship between the union and the manager, which has its own existence independently, to some extent, of the particular individual and the particular supervisor. So, managing the overall relationship is one of the things that would come into play in the unionized environment. Anyway, just curious because I teach Labour Law. I'm always curious with respect to the impact law school actually has on practice, and practice in your area has changed quite dramatically.

CL: Yeah, I can tell you that I do the Year in Review every year for John Youngman's program.² I present the top Manitoba cases from the previous year and, for a number of reasons, the last several years

² John Youngman is the President of the Centre for Labour-Management Development (Canada) Inc. Since 1988, the Centre has kept unions and employers informed and up to date on the law and its impact on the unionized workplace in Canada.

it has been really difficult to locate the arbitration decisions to present. There have been a few issues there. Arbitrators often do not submit their decisions to the publishers or to the Labour Board – which they're supposed to do pursuant to the LRA. The Labour Board has indicated that decisions should be anonymized before they are released, but they don't have the staff to anonymize them, and they are understandably hesitant about changing the wording of decisions in order to anonymize them. So, it's not being done. If you go and search recent years Manitoba arbitration decisions on Westlaw, for example, you come up with almost nothing. So, we have to reach out to individual arbitrators.

BPS: Interesting. OK, so back to regularly scheduled programming, Jodi.

JP: You had mentioned that prior to the pandemic, workplace investigations were in-person and now they've moved online. How has that changed things? How was the effectiveness of that changed? How has the process changed? Can you speak on that, at all?

CL: Well, there's a little bit more that I need to do in terms of asking witnesses: “Are you alone?” “Where are you located?” “Are you alone in this room?” “Is there anyone who can hear you?” “Do you feel comfortable in talking to me?” “If anyone does come in, can you please let me know?” Those kinds of issues.

JP: Confidentiality-type issues?

CL: Well, they need to feel comfortable and secure so that they can speak freely to me.

JP: I see.

CL: As well, with workplace investigations, everyone has a different practice. It's not that regimented, as other parts of law are – in fact, many workplace investigations are done by non-lawyers – but my personal practice is that when I meet with a witness, I tell them that I'm taking notes. I tell them in advance that they will have an

opportunity to review [the notes] and revise them if they think I've not got it right. Then, once they are comfortable with [the document], they can print it and sign off and I have it. So, I'm questioning them, I'm taking notes as I go, I give them [the document] to read, they can suggest changes and I will make those changes. Once they're comfortable, I print [the document] off and I get them to sign it. Well, that's a little bit more difficult now. I have to email it to them. Normally, I would never give them a copy to keep, but now that I have to email it to them in pdf form, and they have a copy. That has changed things somewhat.

BPS: Just a couple of questions from me. In the case law, one of the objections that's made to using distance technologies is that you can't be sure that the witness isn't being tampered with, if there's no one coaching them, so on and so forth. My own opinionated view is I think that objection is exaggerated, and you can get people on the camera, you can ask them, and so on and so forth. So, that's one objection and it may be interesting to hear whether you think that's valid.

CL: There have been cases... There is one – I think you can actually see it on YouTube or something now – where it was in the U.S. and a woman was testifying from, what was supposed to be, her home about a domestic-violence situation.³ Something tipped off one of the lawyers and they asked what her street address was and asked the accused where he was coming in from and they were coming from two rooms in the same house. They immediately stopped [the hearing] and dispatched police.

BPS: So, in that case, the fraudulent way of testifying was detected. Recently, the confidence, Cynthia, is that between asking questions and the Zoom technology, is it a significant objection to using distance technology that somebody might be holding up signs and

³ Hannah Knowles, “A Zoom Hearing for her domestic abuse case went viral. Now people are blaming her, she says” (12 March 2021), online: *The Washington Post* <[washingtonpost.com/dc-md-va/2021/03/12/mary-lindsey-coby-harris-zoom-hearing/](https://www.washingtonpost.com/dc-md-va/2021/03/12/mary-lindsey-coby-harris-zoom-hearing/)> [perma.cc/N27D-D82E].

telling the witness how to testify or managing them and so on and so forth? Like I say, my intuitive view is that it's kind of exaggerated, the concern.

CL: In a workplace investigation, I am not as concerned because it's not a trial. Even if we were in the same room, I know that I don't have two experienced counsel putting things to the witness or prying out evidence that I might have missed. I only have the investigation that I do with the questions that I ask. If an employer acts on my report and is then sued, they have to prove their case with fresh evidence, and not just with my findings. If the employer has acted in accordance with my findings, it can indicate that it acted in good faith, but not that they were correct.

BPS: Right. The second question – and I think you might have kind of pre-empted it with your last answer – but one of the objections that's made to distance technology is that, somehow, we're better at picking up non-verbal cues if we're there in the room. First of all, I don't think non-verbal cues are really all that important in assessing credibility. Secondly, I don't actually think that you miss a whole lot of non-verbal cues on Zoom versus in person, but I'd be interested in your views on that.

CL: I pay almost no attention to demeanor. It's just not a good practice, in my view. There's a huge body of literature and tests that show that even people who are supposed to be really good at telling who is lying, and who receive training to be really good at it, are actually not.

BPS: Yeah, that's what I teach in one of my courses, the social science literature that...

CL: Do you use the Malcolm Gladwell book?

BPS: I don't use the Malcolm Gladwell book, but I use a lot of other social-science stuff on just about how bad people are at assessing credibility.

CL: *Talking To Strangers*.⁴ It's a really good one.

BPS: I might be using that now, though!

CL: It's a very easy read and it makes the point really well.

BPS: I mean we all think we're really good at picking up, "Oh, you're sweaty," or, "You're avoiding eye contact." The social-science literature is that our common-sense view is just wrong. It's very, very hard to stand by in the light of the social-science evidence.

CL: That being said, I have not done anything requiring a cross-examination for judicial purposes online and I would be very hesitant to do so. I have an exam for discovery coming up and we specifically booked it for later in the fall when I knew for a fact that I would be double vaccinated, plus two weeks, so that I would be able to be present because, in a case like that, it's not about me picking up nonverbal cues at all. More so, when you're in person, it is much easier to see what the other lawyer is doing or saying and it's easier for them to control their impulse to jump in, to present a document, to pass a note, to say something, to use their body language to convey something to their client. But I think on Zoom, it's a lot easier to forget that, because you can't be there to put a document in front of them, so the tendency might be to interrupt a little more and say, "Oh, but wait a second. Shouldn't you look at this?" To me, it was important to put that off until I could be there in person. Not because I need to see their demeanor, but because I think it's easier for the lawyers involved to remember the distance they're supposed to keep.

BPS: So, it's not that you want to be there so you can interfere more, you want to be there so that you can be a check and balance on opposing counsel.

⁴ Malcolm Gladwell, *Talking to Strangers: What We Should Know About the People We Don't Know*, (London: Penguin Books, 2019).

CL: Oh, and I think it would also be very easy for me to forget and cross that line inadvertently. I'm not blaming opposing counsel; I think it's just human nature. When we're at this distance anyway and we're trying to communicate in such a way that we help people get to places because we can't be there, I think it's just easier to jump in with them.

BPS: Yeah, so it's just the fact that you're more aware there's opposing counsel there, keeping an eye on you. So, it's not actually the question and questionee dynamic, it's the fact that there's the other side's counsel there, who's off screen. I had never thought of that.

CL: I think I would actually feel more comfortable if everyone was separately on screen than if they were in a room together and I was in a room with my client.

BPS: Right.

CL: It's very easy to put something in front of [the client], or make a motion, or if they're saying something that's just disastrous, just going, "Ah!" You know?

BPS: Seeing their counsel looking appalled and saying, "Hmm." Yeah.

CL: Well, then, if someone did that in person, and I saw it, I would put it on the record, "Oh, I see that your counsel has just done this."

BPS: Right. Got it.

CL: But I can't - I can't do that.

BPS: What if, though, if we did have this split screen so that you could see opposing counsel while this was happening. Would that mitigate the issue?

CL: Yeah, it would.

BPS: Okay.

CL: It's having the two of them in the room together and me – even if I'm with my client – I would find it hard. I would find it hard sitting with my client and asking questions... It is hard to restrain yourself when they're going off script.

BPS: Right. Interesting.

JP: And without having the screen or the video on the lawyer, they don't feel, maybe, as accountable either. They feel like they're kind of in the background and in the shadows.

CL: Yeah. I think you forget yourself.

JP: So then, moving forward, post-pandemic, do you think that type of thing will remain in-person or there will be changes to the system online? How do you see that happening?

CL: You know, there's continual change and we just buck up and get used to it. I come from a labour arbitration background, so you have to understand that it's as close to the Wild West as you get in law – at least when I was coming up in it. By that I mean, you can be in the middle of an arbitration and it's like, “Oh, the other side is tendering a document.” “Oh, I'm sorry. I just found this document.” “Ok, can we have a two-minute recess?” Hand it to opposing counsel. You read it. Okay, continue. If that happened in a civil trial, hell would break loose.

BPS: Lawyers actually used to enjoy an arbitration practice because you'd have a little bit more of a ratio to actually being on your feet and in the action.

CL: Well, it's a little more hardcore.

BPS: Yeah, civil trials in Manitoba, like I said, my understanding is almost none of them get to trial on the merits. By the time you finish discovery and everything, first of all, you know the other side's case and secondly, somebody discovers they can't afford this anymore. So, that's what I think discovery is: you discover that you can't afford this process.

CL: Even the cost of transcripts. It's ridiculous.

JP: Sure. So, it sounds like labour and employment, pre-pandemic, a lot of it was already online.

CL: Well, what's online for me is the client relations. The arbitrations were not online. Negotiations were not online, other than where I have, for example, a poor charity in Northern Manitoba. Otherwise, it's not. Most of my work is talking to people and responding to emails because I'm advising clients, if they listen to me. Keep in mind, I'm working for the employer, right? So, it's a continuing relationship. I know their business. They know me. They consult me about, "should I do this and should I not?" If they listen to me [laughs], there's usually very low chance of grievances going forward. So, a lot of it is that consulting work, which is by telephone and email.

JP: Right, so how well-versed would you say labour and employment lawyers are in technology? Do you think there is room for improvements or for education in terms of technology? Or where would you say that you and your colleagues are at?

CL: Depends on the person. I wouldn't even say by age because a colleague of mine is very tech savvy and he's older. Another practitioner, who is older, is one of the most popular arbitrators in the province, and he does a great job and so unions and employers agree on him, but he is not very proficient at all in terms of tech.

JP: So, were people like that able to educate themselves enough to manage online?

CL: I think he's keeping busy, and in fact has acquired new tech skills.

JP: Fair enough. Then, another question is – going back to when you were talking about having your witnesses in person versus online – what about privacy and security of the process? Have you had any issues with that?

CL: So, for a significant period, we were prohibited in my office from meeting with clients on Zoom. Zoom was considered not to be sufficiently secure. We could, for example, attend a webinar or something of that nature, but we were not allowed to give clients advice on Zoom. Our office was using Skype and then apparently Zoom made some improvements, so we are now allowed to use Zoom, but I think they are working at implementing Microsoft Teams. The Labour Board has now switched to Teams.

JP: Okay, so there were some initial concerns, but sounds like Zoom may have adapted to the situation, as well.

CL: So I'm told.

JP: Are there changes that you think should be regulatory changes to adapt to these situations, as well?

CL: Well, for example, the Manitoba Labour Board requires a signed Form A which is a statutory declaration basically setting out who you are. It basically says, “I’m this company; I’m the employer; I’m responding on this application which is an application for unfair labour practice; here’s my address and phone number and email,” and it’s signed before a commissioner for oaths or notary. They require that on every file and, during the pandemic, they issued some guidance saying that you still have to fill out the Form A because they need the information, but it doesn’t have to be signed because you can’t go to a commissioner or a notary. Although, they reserve the right to ask you to provide a properly witnessed one at some point in the future. They have now been calling meetings – I don’t think this is secret – but they’ve

strongly indicated to the community that they're considering discontinuing use of the Form A.

BPS: And on the civil trial side – and nothing ever actually gets there on the merits – but if you're doing discoveries, are the rules sufficiently flexible in your view to continue using distance technologies when counsel litigants think it makes sense? Or do we need to actually change the Court of Queen's [now King] Bench Rules or any of the other overriding legal apparatus to be more flexible?

CL: Well, like I said, I'm rarely in court. I did do an appeal in January 2020, when everything was closed. The appeal was online and that was very smooth, but that's just argument, right? I have not examined witnesses online. I think that would be more difficult, particularly if there's something contentious there. I mean, sometimes you have a witness and you know what they're going to say and it's not really contentious. That wouldn't be so much of an issue. But if you know someone is lying or that there are completely divergent stories, I would be trepidatious about that. It may be that after I'm in the position to do it a few times, I'd be more comfortable. I haven't done it yet. I would not at this point be comfortable.

BPS: Do you think, in terms of other arguments made against online proceedings, is something like this – and just to get my own bias in, I think we should make justice more accessible, I'm pro-technology – but one of the arguments made on the other side is that there's a psychological impact of the physical trappings that go with the traditional system. You go into the huge marble building, and it impresses upon you, “Oh, this is serious business.” The fact that opposing counsel is giving you the death stare when the opposing counsel thinks you're lying could have a chastening effect, and so on and so forth. Is it... Well, let me try to put it bluntly. Is it easier, do you think – or maybe we don't know yet – is it easier for a witness to stretch the truth or outright lie in a Zoom environment than it is when they're in the marble mausoleum? Do

we know anything about this? I don't know of any systematic studies of this, by the way.

CL: I don't know of any studies on that. I do think that most of the time that you are catching a witness in a contradiction, it's because you have a document. Usually, you have a document, or you have a contradictory statement, or you have a transcript, or you have something. It's not *Legally Blonde*, where they just crack and say, "I did it!" [laughs] I did have that once, but that was once in twenty years.

BPS: You actually got somebody to go, "Okay, okay, you got me!"

CL: Well, I was in an arbitration. This woman had a problem: she had a personal issue with her supervisor. They were both from the same cultural community and they kind of had an issue in the community outside of work. One complaint she had about the supervisor was, "Oh, she's following me around and checking my work." So, she's harassed – I mean, she's her supervisor. Anyway, she got very, very frustrated and in the end went to talk to someone and said, "What do I need to do? Take a knife to work!?" So, the person freaked out – this was not long after the incident at Grace Hospital – and called the union and the union called the employer.⁵ Then, they fired her. The truth is that the termination would never have been sustained if she had come to the arbitration and said, "I was just really frustrated, of course I wasn't going to take a knife to work. I didn't have a knife on me. I never took a knife to work. I wasn't going to do anything. I was just really frustrated. I'm very sorry." The termination would never have been upheld. So, I had to get other stuff, right? So, I asked her "Did you ever apologize?" Her answer was "Why would I apologize? She should apologize to me!" I asked, "Did you ever go to anger management, or would you consider anger management?" She said "Me!? Anger management!? What do I need with anger management?" It went on like that for a while.

⁵ "Man gets life for Grace Hospital killing" CBC (18 April 2001), online: <cbc.ca/news/canada/man-gets-life-for-grace-hospital-killing-1.293847>.

BPS: [laughs] “Bring up anger management and I’m going to kill you!”

JP: Wow! [laughs]

CL: Yeah, it was a pretty interesting cross-exam.

BPS: Yeah, I mean – even ordinary folks would know that – but we know, doctrinally, that one of the things that’s going to hurt you in in any proceeding is, yeah, there’s the original offense and then there’s a cover-up because arbitrators and judges tend to say that we all make mistakes, right? We’ll give you some slack over that, but if you break through the relationship of fundamental trust, you know... Okay, so you had a bad moment, you blew up. Admit it. Move on. You snaffled some office supplies or something, whatever. You know, it’s one thing to do it. It’s another thing to then lie about it afterwards.

CL: Remorse. The role of remorse is not to be understated, but she didn’t show any, so her termination was upheld.

BPS: Yeah, and then if you caught her actually lying that she ever said it, yeah, that would not help in in terms of the substantive legal doctrine.

CL: Oh, she admitted it. She said the supervisor deserved it.

BPS: Oh, but she admitted what she said?

CL: Oh, that she wasn’t sorry, that [the supervisor] deserved it, and that the supervisor should apologize instead.

BPS: Was this person represented?

CL: Yes.

BPS: Okay.

CL: But Bryan, we can't always control our witnesses.

BPS: Yeah, that is true.

CL: Especially the troubled ones.

BPS: And there are ethical limits to how much you really can control your witness.

CL: Right, and she had very good counsel. She did not have bad counsel. She had very competent counsel.

BPS: Yeah, but it is certainly true that there are ethical limits to how much you can control what a witness says. Also – no matter what you say – not everybody listens, that's for sure.

CL: True enough.

BPS: Although, it's probably easier for you on the management side.

CL: Usually.

BPS: I would guess, because they are pros, they're used to doing this. Secondly, you may be taking instructions for somebody who is not as emotionally invested as the employee, right? "OK, I've got 200 employees. This is another problem, but it's not my life. It's not existential for me," whereas for the employee it may be fundamental to their dignity, their sense of right and wrong, and so on and so forth. And they're not used to doing this, right?

CL: Not all the employers are big employers, Bryan. Some of them are small and some of them take it personally. "How could they do this to me? We had a deal!" You know?

BPS: Yeah, of course, you're right. Most business in Manitoba is small.

CL: “I was so nice to him and then he did this.”

BPS: Yeah, that is true. I was thinking more about how I was excessively patterned from my own experience as a long-time employee of a mega-institution. So, the University of Manitoba has approximately 1200 faculty and hundreds of other staff. It's very bureaucratized and institutionalized. It's certainly not the same as, say, a long-time employee in the service industry, a restaurant or something. There's a lot of trust, a lot of testament in the employee/employer relationship. I can easily see a small-business owner being very invested: “how could you do this to me?” Yeah, absolutely. I've seen that, now that I think about it. Okay, back to you, Jodi.

JP: So, just speaking on that – the small-business owner versus big-business owner – are there any issues with access to justice? Having things online and the difference in hardware, software, technologies, or technological education in terms of your clients – have you seen anything that you can speak about?

CL: Yeah, I have a client who had to call into court because they just didn't have the right set up. It wasn't actually the court; it was the Labour Board. So, they were there on audio but not video because they just couldn't be.

JP: So, would you say – in terms of access to justice – for the most part, being able to have [proceedings] online makes things more accessible? Or would you say the opposite is true?

CL: Sometimes it goes one way and sometimes it goes the other. For example, people in rural Manitoba might have a real issue getting a good enough connection. On the other hand, it also means they don't have to come to Winnipeg and that makes things much easier for them. In another Labour Board matter that I had, I was acting for the company, but it was literally a father and his son managing the operation. It was a very low-tech company; they don't need any tech for their work. So, they just couldn't attend by

video, unless I would have gone to meet them and set something up. Anyway, it wasn't necessary for that purpose; they didn't have to give any evidence, but that would have been an issue.

BPS: If I can go back to the type of question I was asking earlier, how do lawyers educate themselves, and what is our role as the law school? At law schools, one of things we should be teaching is equipping you to be a lifelong learner because nothing we can teach you while you're here [at Robson Hall] is possibly going to anticipate everything that's going to happen in your world, once you're out there. How did lawyers during COVID learn about the technologies? There were controversies with Zoom. You had to educate each other and adapt to the online environment and so on.

CL: Yeah, but adaptation is something we do by virtue of being a lawyer. There are constant changes to the statutes. There are new cases coming out with new precedents. There are new interpretations. There are new documents you're dealing with. I mean, we're constantly evolving. That's part of our job, right? If you learn the law and you stop, you become incompetent very quickly. So, you have to keep up on the law. This is just another aspect of learning how to do something else. Lawyers, by their nature, must continue to evolve, or else, what are you doing?

BPS: Right, there's just this response because, you know – I work for a bureaucracy, the Law Society has a bureaucracy, obviously, and so on and so forth – there's a tendency to think, “Well, we've got to institutionally respond to this.” So, what you're saying, and correct me if I'm wrong: lawyers by their nature – whatever we did at law school – once you're out there, you'll learn and adapt or die. So, when something big comes along, lawyers are pretty used to the fact that, “Hey, I have to learn this.” And there are many ways to learn that are not necessarily institutional: ask other lawyers, read up, read blogs, read the literature, read cases. There are all kinds of ways a lawyer can bring themselves up to speed that don't necessarily involve, you know, continuing legal education seminars or the law school holding an event for you. Am I interpreting that correctly?

CL: Look, even before the Law Society put in the CPD requirement, every time you get a new case – even if it's something you've done a million times – you're still going to check the case law to make sure there's nothing new.⁶

BPS: Right.

CL: So, for every case you have, you're constantly learning more things about the law or maybe you're looking into some part of the employment standards. I've practiced for twenty-six, twenty-seven years and I just found something new in the *Employment Standards Code* within the last year and it wasn't new to the *Code*.⁷ It was new to me. I had just never noticed it. When I went back to my department – we meet periodically, depending on how much is going on, at least every month, for a while there, it was every week because they kept changing the *Employment Standards Code* at the beginning of this – I took it to them and said, “Hey guys, I just noticed this. I've never seen it before,” and they're all like, “What!?” None of them had noticed this either! We're always learning new things. If you fire someone and there is a statutory holiday within thirty days of the termination, they get a percentage of the stat holiday pay.⁸

BPS: Okay, I didn't know that. I didn't expect that.

CL: No, and Manitoba is the only province that has that.

BPS: Yeah well, my joke is – when this stuff comes up in practice – “Well, we could always actually read the statute, but that would be cheating.” It's amazing what you can learn by closely reading the authoritative texts.

⁶ The Law Society of Manitoba, Continuing Professional Development (CPD) requires lawyers to complete 12 hours of professional development activities per year (or one hour per month or partial month of active practice).

⁷ *The Employment Standards Code*, CCSM c E110.

⁸ *Ibid* at s 29(1).

CL: We had it come up because a client asked us to do a cross-country comparison and we are the only province that has that. I've never seen that come up anywhere, ever.

BPS: Interesting, and it came up because the client asked you to do a review, otherwise you might have laboured on – no pun intended – another twenty years without ever knowing.

CL: Yes, as would have my colleagues because none of them knew about it either.

BPS: Right.

CL: So, we keep learning new things and whether it's new law, new statutes, new case law, a new way of communicating – that's what we do.

BPS: Yeah. I was reading the literature on lawyer retirement over the last few years. It's an interesting question because the boomers are getting older. Do they retire? Don't they retire? There's been litigation about forced mandatory retirement policies in law firms. Some of the lawyers who said they retired, they said, "I just can't keep up anymore." Then, you think of the old-fashioned model of, "Hey, I've been doing this for thirty years, so how hard can this be?"

One of the lawyers in *Canadian Lawyer* magazine said, "It's just too hard to keep up." He was saying this in an honourable way, not "I've become stupid" or anything.

CL: It is hard to keep up – it's work, and it does get more difficult with age, but there is also a lot to be said for the effect of experience and the judgment that comes with it.

BPS: Yeah. By the way – just an observation – emotional stamina: I don't know if people appreciate this about lawyering, but it's an emotionally draining thing. You frequently internalize your clients'

perspective on the world and it's a question I've asked many times of myself and other people. I don't know the answer to it. Is it better to internalize the client's struggle or not? I mean, you could argue, you could be more objective and then you won't wear yourself out. On the other hand, you can argue that you're going to do a better job if you're emotionally committed to the client's cause. I don't have the answer to that, but I know, empirically, a lot of us do get emotionally engaged in the case. We really want to win one for our client.

CL: Yeah, that is difficult, but there's also – even separating – if you can separate the emotion out, there's still just a lot of stress. I have one right now where I'm acting for a not-for-profit. It's a good organization. They do good work in the community. It's an important group. They've got an employee that they just fired. His contract provides for a certain amount of notice. They say, “Okay, we're giving you that much notice. Done.” He's retained a lawyer who – I'm sorry, Jodi, we're not all great [laughs] – but someone who is really overly aggressive and filed a wrongful dismissal claim. Eighty paragraphs! They're usually fifteen. It's very difficult to navigate this because on one side, my client has very limited resources. I've got an unreasonable person on the other side who is taking forward a case that is absolutely without merit. I can see that there's going to be no settlement here because they are absolutely getting overly aggressive advice, and they're not managing expectations. The stress of doing a competent job while knowing that the resources are scarce and that you're in that squeeze is very difficult. It is my greatest source of stress in work.

BPS: Yeah! In law school, I try to tell students that one of the demands you have in the profession is: how much justice can you afford? Like, you could always look up another case, you could bring in twenty cases rather than ten, but your client's paying for it.

CL: And you pay more when the opposing counsel is not reasonable.

BPS: That's a paradox. That's certainly my own observation: you wouldn't think so, but it's way easier to deal with a case when the other side –

CL: Is a reasonable person.

BPS: Yeah, and the other counsel is competent. Intellectually, it's way easier to respond to a good argument than it is to a weird argument. It's so hard, sometimes, to respond to off-the-wall arguments; first I've got to wrap my mind around how this might possibly make sense, which is a rabbit hole because then I'm actually doing them a favour by bringing it into the realm of the actual, known universe. Then, you've just taken up all this time and headspace. Yeah, it's actually very stressful. So, I would much rather be on the opposite side, whether it's a transaction or litigation, of a really good lawyer.

JP: Let's go back to a COVID question and the online legal system, if you could look into a crystal ball, what would be your utopian future of labour and employment law post-COVID?

CL: I'm at home. I like working at home. It has been a very easy transition for me, but I would think I would find anything where I had to cross examine a witness remotely to be very difficult. That being said, I haven't done it yet. So, maybe it's not as bad as I think it's going to be.

BPS: Maybe this is too obvious a question, but my guess is the forced acclimatization we had under COVID to doing things more by distance, and trying to do things by distance that some of us didn't do before, my guess is it will lower some of the apprehension about doing this going forward.

CL: I was in a particularly lucky position because we moved our office in August 2019, after thirty years in the same location. We knew that we would be moving about two years in advance because we were doing all kinds of renovations and everything. So, for about two years in advance of August 2019, we had our assistants using

every spare moment to scan every piece of paper in our office into a document management system. We had a wall in our department of filing cabinets filled with historical collective agreements, other briefs, other precedents that we had saved; everything went into our document management because we didn't want to move it. Also, we closed a zillion files. Everything went into document management online. When we moved into our new premises, everybody was issued a new laptop or notebook. We switched to our phones. So, here's my phone now [shows a small earpiece]. It's my office number. It rings here, straight through the computer. So, on March 13th, 2020, I put my notebook and my earpiece into my purse and walked out of the office, and I have my entire office here. I was particularly lucky because the timing worked out for us. Had this happened before we made that transition, it would have been much more difficult.

BPS: Yeah, there's been surveys of employees that found that many of them would actually take a pay cut to be allowed to continue to work at home, once they actually got used to it.

CL: It goes both ways. I have a client who's a very large institution and they're basically all office workers. They sent everybody home and they have been bringing in only those who really, really essentially must be in the office, but they've been getting requests and medical notes saying that certain people need an accommodation of attending at work because, for mental health reasons, they can't be at home anymore. Either they don't have a proper space, or it causes them too much stress, or they just need the company, or whatever. It ranges. They have one employee who has a hoarding disorder who manages at work just fine but cannot work in their house because it's full of things. Somebody else has a mood disorder and really needs to be around people. So, they're getting medical notes for people requesting accommodation by returning to work. So, it goes both ways.

BPS: Yeah, and there's some subtle psychological stuff. For example, if you're stressed out doing your work at home, you can't

go home to unwind. If you're stressed at work, there's that separation, right? "Okay, I've had it. This is nuts. I'm going home."

CL: When I get stressed out at work, I get a fudgsicle from the freezer and sit on my planter outside [laughs].

BPS: [laughs] That sounds good.

JP: [laughs] Are there any final comments you would like to make or anything you want to talk about that we didn't ask you?

CL: I would say that the biggest obstacles are technology, so we were very fortunate. I mean, I spent the first seven months working on my notebook [computer] here until my husband finally said, "This is stupid," and got me these dual monitors - which is what I have at the office - which is way better. Our support staff is all working from home, as well. So, we are, again, very lucky that our firm was able to set up support staff with workstations at their homes. That's really important. We see, from a workplace safety and health perspective, that the employer has a requirement to ensure that it's a safe workplace and that includes a home workplace. So, if an employee is required to work from home but needs an ergonomic chair, that needs to be addressed. There are all kinds of things that we are now telling our clients with regard to making sure that employees have a safe workplace; that they're not working in a bridge chair - which I worked on for seven months; that they have the proper setup; that it has to be a safe workplace. You have to have the technology in place not just for your lawyers, but for your staff. That is super important. The only big issue I have is - and this is a personal preference - there are certain things that I do not like to read online. If I've written an article, I can proofread it on the screen a million times, but not catch everything. If I print it and read it on paper, I will find my mistakes. If I'm reading a complicated contract or if somebody is asking me to review an employment contract, I usually want to print it and read it on paper. It works better for my brain, anyway. Someone asked me to look at a couple of new files that are document heavy. My assistant is in the office one day a week to do that kind of stuff. So, I asked

her to print it off and courier it to me; I probably get a courier once a week. That is what helps me to continue to work here.

BPS: Yeah, there's a question I've been exploring for years – I'm not like the leading intellectual on this one – but it's really interesting to me what the different psychology is of learning and retention on print versus electronic. Some studies have found that people retain and understand things better in print. I mean, my completely amateur theory is that the physicality of the text gives you a certain mental map to it. Like, if I read a book, I remember there was a beginning, a physical middle, and an end, and it helps place it all in context.

CL: There was a study where they gave young people entering university – so these are technology natives – a full set of textbooks online, virtually, and a full set of textbooks in paper and tracked what they did. After a few months, they abandoned the online texts and they were using the textbooks – the hard copies – because it's a different kind of reading where you can go back and forth and bend the page over or highlight. It's a different kind of reading and it accesses your brain differently. Technology natives were using the physical textbook.

BPS: Yeah, there's something in terms of synthesizing and understanding how everything fits together – just the fact that there was a physical layout. I find if I read a whole bunch of cases on the Internet and I am just jetting around and looking at keywords, it's not the same as actually having the physical embodiment.

BPS: Well, thank you so much, Cynthia. This was a very informative interview.

JP: Yeah, thank you so much.

CL: My pleasure.