Interview with the Honourable Richard J.F. Chartier

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PART I

Darcy L. MacPherson (DLM): You grew up in St. Boniface[1]. Tell me a little bit about your early memories of St. Boniface.

Chief Justice Richard Chartier (CJRC): This is going to sound bizarre. I grew up thinking the whole world spoke French. I remember, when I moved to St. Norbert[2] at a fairly young age – then I came back to St. Boniface – our neighbours were English-speaking. I remember their last name: Repchinsky. That's how I started learning English – through the neighbours who were English-speaking. They were my age, so we hung around. But I was still shocked when I figured I had to learn another language, because in St. Boniface, it was just a totally different environment. My early childhood memories are very pleasant. Nothing unusual

* Interview of The Honorable Richard J.F. Chartier was conducted by Professor Darcy MacPherson and Dr. Bryan P. Schwartz in 2022. This oral history is composed of a single interview conducted over two separate days.

Richard J.F. Chartier was called to the Manitoba Bar in 1983, appointed to the Provincial Court of Manitoba in 1993, and elevated to the Manitoba Court of Appeal in 2006. He became Chief Justice of Manitoba in March 2013 and retired in October 2022. Before his judicial career, he was a partner at Aikins, MacAulay & Thorvaldson and presided over several commissions.

1 St. Boniface is a city ward and neighborhood in Winnipeg. It is one of the largest francophone communities west of the Great Lakes.

2 St . Norbert is a bilingual neighbourhood and the southernmost suburb of Winnipeg, Manitoba.

to report. As I said, our family moved to St. Norbert when I was five or six, and so I went to school over there.
St. Norbert is the southern part of Winnipeg – still Francophone, but probably not as Francophone as St. Boniface. Then, when I was 12 years old, my parents sent me to a private seminary boarding school in St. Boniface (Le Petit Séminaire de Saint-Boniface). Students were able to go home for certain weekends. I would say, every second month, I would go home for a weekend. Other than that, we were staying there. It was run by Catholic priests and the goal was to become priests – I say this with a smile. Only one person in my class became a priest. Most of the others became doctors, accountants, lawyers, or went into other professions.

DLM: So, good training, but not for the seminary, necessarily.

CJRC: Exactly. But you know, there were four components to the schooling at the seminary. Education, sports, service to the community, with the fourth component being culture. This included activities like playing in bands, participating in plays, singing, things like that. Those four facets were the primary focus.

DLM: Which sports did you play?

CJRC: I played soccer, football, hockey, tennis, and baseball.

DLM: Oh, my goodness. So, you kept busy.

CJRC: They kept us busy. And you know the rule – we were all teenagers, right? Keep them busy.

DLM: So, they don't get into trouble (laughs).

CJRC: Exactly.

DLM: What, from this period, do you think were the markers for going into law? Or were there any? Because, in our earlier interview, you'd said your first idea was medicine.

CJRC: Right! I was going to say there were no moments in my early years where I even thought of going into law. Nothing, absolutely nothing. None of my immediate family or extended family were lawyers, let alone judges.

I started a pre-med track with a Bachelor of Science to get into the Faculty of Medicine. That did not work well because, in the second year of my Bachelor of Science (pre-med), when dissecting animals, I would faint. It turns out that I faint at the sight of blood or at the sight of a needle. It became clear to me at that point that medical school would not be an option.

I therefore had to go to Plan B. While I was completing my undergraduate degree, I was involved in all kinds of organizations in St. Boniface, including a youth organization called *Le Conseil Jeunesse Provincial*.[3] There's this well-known photo that appeared on the front page of the Winnipeg Tribune [he retrieves the framed photograph]. I forget what year this was. But that's when the Pépin-Robarts Commission came to Manitoba[4] (reads caption: "Tonight: National Commission on Bilingualism). So, I guess this was in the 70s. They came to Winnipeg, and I happened to be the President of *Le Conseil Jeunesse Provincial*, which was a youth organization for French-speaking Manitobans. When the Pépin-Robarts Commission came to town, our gesture was to bring a wheelbarrow full of previously published reports on bilingualism. Keep in mind that this is a national commission, so there's media from across the country at this hearing. Our point was that "*tout a déjà été dit*" (everything has already been said) – stop talking, time for action. So, I was supposed to take that wheelbarrow and dump it in front of the Commision's dais and make a scene. I didn't do it, I chickened out. t would have been disrespectful for me to dump it. Instead, I wheeled it to the front of the dais and left it there, while a representative of our group stated "Tout a déjà été dit". Our point

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3 Conseil Jeunesse Provincial was formed in 1974 to encourage francophone youths (aged 14 to 25) to engage with their francophone heritage.

4 The Pépin-Robarts Commission was established in 1977 by the federal government (Co-chaired by Liberal minister Jean-Luc Pépin, and the former conservative premier of Ontario John Robarts) with the goal of gathering opinions about the problems of unity in Canada.

was simple: here are all the studies that have already been commissioned on biculturalism and bilingualism in Canada. Stop talking, need action. And so, while I didn't do the dump, that photo received national attention and you can find it in history or constitutional books that followed the constitutional crisis brought about by the threat of Quebec separation in the 60s and 70s.

What happened in those years certainly had a impact on me. I got involved at the national level and became President of a national organization called – *La Fédération de la Jeunesse Canadienne-Française*[5]. That's where I met the President of the Acadian Society of New Brunswick, who happened to be a guy named Michel Bastarache,[6] who was a lawyer and a professor of law, and who become Dean of the law school that I ultimately went to – Université de Moncton – and later a Supreme Court of Canada Justice. When I was at a national meeting, he asked me about my future career plans. At that time, I was still uncertain as to whether I would continue in medicine and try to overcome the fainting spells. But, he said, "Look, you're a natural orator. You obviously like the political aspect. You're a good advocate. Why don't you go into law?" and a bell, a ding, rang in my head.

It's funny, when I was in grade 11, the school made all students take the "The Strong Interest Inventory test" which assesses the interests of students with potential career choices. Interestingly, I scored particularly high in law and politics, public speaking, and mathematics. When you look at the examples of occupations that score high in law and politics, they include judges, legislators, social-science teachers, public administrators, policemen, and salesmen. I was in grade 11 at the time, but even then, it hadn't clicked that I should be going into law. But when Mr. Bastarache spoke with me,

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5 La Fédération de la Jeunesse Canadienne-Françoise is made up of members from French youth organizations across Canada. It has the goal of encouraging and developing the French identity of young Canadians (aged 14-25).

6 Justice Michel Bastarache was appointed to the New Brunswick Court of Appeal in 1995, and then to the Supreme Court of Canada in 1997. He served as a Justice on the Supreme Court of Canada from 1997 – 2008.

that's when I said, "I should consider a law degree." So, I applied to go to law school, and the rest is history.

DLM: You answered my next question: it was really the intervention of Justice Bastarache, or then-lawyer Bastarache, that seemed to direct you toward attending law school?

CJRC: Yes, that's 100% correct. He encouraged me to go to the Law School where he taught, at the Université de Moncton. Université de Moncton Faculty of Law was, at the time, the only law school in the world offering a common law legal education taught entirely in French. It was a great experience. I would encourage everybody that can study outside of their province to do so. It's a good time to get to meet Canadians from other parts of the country. What I found striking – and I had never previously been to the Maritimes – was the natural affinity between people from the Maritimes and Manitoba. I felt at home right away. Moncton is similar to St. Boniface, it's a bilingual city. My three years there were fantastic. I met students from across the country that were also studying there and I got to explore much of the Maritimes. To this day, I have very close friends from there.

DLM: Well, you're talking to a transplanted Maritimer, of course.

CJRC: Oh, there you go. Well, I didn't know that. Wow! I was just with the new Chief Justice of Prince Edward Island, who replaced David Jenkins[7], James Gormley[8], just a few weeks ago. He's the newly appointed Chief Justice.

DLM: I remember Jim Gormley.

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7 Justice David H. Jenkins served as Chief Justice of Prince Edward Island from 2008 – 2021. He was elected as supernumerary Justice of the Prince Edward Island Court of Appeal in 2021.

8 Justice James Gormley has served on the Supreme Court of Prince Edward Island since October 2017. He was appointed as Chief Justice of Prince Edward Island in May of 2022.

CJRC: Yes, great guy. I spent two or three days with him. He'll do a great job there.

DLM: So, the best part of going to the Atlantic provinces was what?

CJRC: There were all kinds of things. In addition to the people, the golf. I golfed a lot and there are great golf courses there. There are also a lot of universities over there that are in close proximity to each other. We played hockey against Dalhousie Law School. They would come to our law school and play against us and vice versa.

DLM: There's a lot of camaraderie among the universities in the Maritimes.

CJRC: Yeah, and isn't that strange? I mean, I think that's great. I didn't realize that. While there are rivalries, they remain healthy. In the end, everything about the Maritimes, in my time there, was fantastic. Fond, fond memories. My wife and I even had our honeymoon over there.

DLM: So, you were married around this time?

CJRC: No. I returned to Manitoba in late April 1982 after law school. I met my wife here in 1983 and we got married in 1985. My wife comes from Quebec City. My wife had decided to learn English when she was 19. She and her best friend came out West to learn English. I think their goal was to go to Vancouver, but they ended up in Winnipeg. They could hardly speak a word of English, but someone was able to explain to them that if they crossed the bridge into St. Boniface, they would meet people who spoke French and who would be able to help them get oriented.

Long story short, that is how my wife and I met. A quick anecdote, the friend who came out west to learn English: she met a guy named Bryan Toews. Their son, Jonathan Toews, would become the captain of the Chicago Blackhawks[9]. Jonathan Toews

[9] Jonathan Toews (born April 29, 1988, in Winnipeg) is a Canadian professional ice hockey player .

is fluently bilingual, he was born in St. Boniface and went to French-language schools.

DLM: My next question revolved around the timing of when you graduated law school, in 1982. That was just as the Charter[10] was coming in. That must've been quite the shift from what you learned in school. I mean, constitutional law, while you were in school, was just "who can do what?", not "nobody can do this!".

CJRC: Yes.

DLM: What was that like? There's not that many people that are still practicing that went through that shift.

CJRC: Yes, you're quite right. Law school did not prepare us for that, because we didn't know exactly how the Charter was going to look like when we graduated. Everything changed when, in 1982, the *Charter of Rights and Freedoms* became part of the constitution. The Charter significantly expanded the power of the judiciary. When I speak to students or other groups, I always make the point – and this is important: the judiciary did not ask for this additional power. We're not the ones who imposed it on the legislative or executive branches of government. It was the executive and legislative branches that agreed to give these new constitutional powers to the judicial branch. With power comes responsibilities and obligations. The adoption of the Charter forever changed the court system by significantly expanding the role of lawyers and judges in the court system.

I think of Brian Dickson[11] who became Chief Justice of Canada. Before becoming a judge, I was a partner in the same law firm where Chief Justice Dickson practiced: Aikins MacAuley &

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[10] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* being Schedule B to the Canada Act 1982 (UK), 1982.

[11] Justice Robert George Brian Dickson (May 1916 - October 1998) was appointed to the Court of Queen's Bench of Manitoba in 1967 and the Supreme Court of Canada in 1973. In 1984 he was chosen as the Chief Justice of Canada, which he served as until his retirement in 1990.

Thorvaldsen[12]. The legacy he left in the area of Constitutional law is immense. Imagine being a Supreme Court of Canada justice in the early 1980's, after the *Charter* came in, and being called upon to decide one case of "first impression" after another. Chief Justice Dickson's decisions were always easy to understand, because he was a pragmatist with a clear writing style. That is the reason why we still apply many of his decisions to this day.

Now, obviously, courts are not called upon to interpret the Charter as often as before, but when a case does present itself, I try to emulate Chief Justice Dickson's writing style.

I recently had occasion to write on a Charter question, which required me to expound on the need for a "constitutional dialogue" between the courts and the legislative and executive branches of government: M*anitoba Federation of Labour et al v. The Government of Manitoba*[13]. It dealt with *The Public Service Sustainability Act*[14]. I ruled to overturn the judge in the first instance — not with respect to UMFA[15], but with respect to another aspect to the *Public Service Sustainability Act*. Yes, the Charter is supreme, the Constitution is supreme, but if Parliament of the Legislative Assembly is acting within the constraints of the Constitution, it is supreme.

So, I put pen to paper in this decision to review the respective roles of the court and the Legislature in relation to a constitutional dialogue to ensure that laws conform to constitutional norms. That's why I wrote 'the role of the court is to interpret the Constitution and determine whether legislation or state conduct meets the *Charter* standards', or, put another way, meet certain constitutional minimums. If they do, courts cannot intervene. In that case, I held that the *Public Service Sustainability Act* passed constitutional muster. If it had not, the court would have had a constitutional obligation to intervene.

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12 Aikins MacAuley & Thorvaldson =, now MLT Aikins, is a large law firm in Winnipeg. It is also referred to in this article as Aikins.

13 *Manitoba Federation of Labour et al v The Government of Manitoba*, 2020 MBQB 92.

14 *The Public Service Sustainability Act*, SM 2017, c 24.

15 UMFA stands for the University of Manitoba Faculty Association.

DLM: You're right there. So, for some of us who came up 10 years later when we were steeped in it from day one of law school, that's sort of a given that there are these things you can't do. But, I'm always amazed at the people who had to say, "it's not my job to tell the legislature what to do". And then suddenly, that's part of your job now. Now, I do think that we've seen – and I think we've seen this more in other countries very recently, particularly the US – some judges who say, "I'm going to do some social engineering through court decisions". And sometimes that's a good thing, and sometimes it's not.

CJRC: There are ways of doing certain things. The case that comes to my mind is *R v Mabior*[16], on viral loads where someone was sleeping with different partners, not telling them that they had HIV. The Supreme Court of Canada had set out the test for the degree of risk and harm. When we had to deal with *R v Mabior* at the Manitoba Court of Appeal, we of course knew we were bound by *stare decisis*. We had to write that decision – which was masterfully written by my colleague Justice Freda Steel[17]– based on what the Supreme Court of Canada had previously set out as being the test for the degree of risks and harm. [18] We knew it had to be modernized, but we couldn't disregard the *stare decisis* set by the Supreme Court of Canada decision. We wrote it in a way that the Supreme Court of Canada had to take notice that this was a live issue that it was going to have to address. And what did the Justices of the Supreme Court do: they overturned us, but agreed with us that it was time to modernize the test.

DLM: One thing I find interesting is that you started your career as a corporate commercial lawyer. That's relatively rare. Although, it happens more often in Manitoba than I would've thought; that

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16 *R v Mabior*, 2010 MBCA 93, appeal allowed in part, 2012 SCC 47.

17 Justice Frida M. Steel was appointed to the Manitoba Court of Queen's Bench in October 1995. She was appointed to the Manitoba Court of Appeal in 2000. She recently retired from the Bench, after spending some time with supernumerary status.

18 *R v Cuerrier*, [1998] 2 SCR 371.

people start as corporate commercial lawyers, spend their legal careers doing deals, and then say, "Judiciary! That's what I'll do".

CJRC: Yes, it's a strange path. I was a tax lawyer at Aikins. Then, because of the way my client base developed, my practice shifted from tax to corporate commercial law. At the same time as I was doing that at Aikins, I had been appointed to what they called at the time, the Disciplinary Court Judge at Stony Mountain Federal Penitentiary[19]. As we know, in the military, there's a military court. What we might not know is that for federal inmates, there's a whole court system. Every Wednesday afternoon, I would drive to Stony Mountain to hold court. Inmates, who were charged with diciplinary infractions inside of the institution, would be brought before me for a hearing. There'd be Legal Aid lawyers representing them. I started doing that in 1986. So, when I was appointed to the Bench, I had been doing criminal law every Wednesday afternoon, or every second Wednesday afternoon, for sevenyears. That role forced me to read up on criminal law and all *Charter* rights.

DLM: When you became a judge, what was your biggest fear? I would suspect that going from being a lawyer to being a judge, there must have been moments where you thought, "what if I get this wrong"? What was the biggest thing you had to get over, other than blood, right? (laughs)

CJRC: So, I go to the Provincial Court. In those days, this is 1993, it was a fairly old bench. I beleive the average of the bench was 62. I was 34. It was completely different from what I had anticipated. The number of cases that you had to deal with each day was simply astonishing. In those days, there'd be docket courts. It waslike a New York court that you see on television shows, where everything is happening at once. People are talking or yelling to other people. There are hundreds of people packed in the courtroom. There are 20-30 lawyers waiting to address the court, talking to clients, or clients wanting to get their lawyer's attention. At the same time, I'm

[19] Stony Mountain Federal Penitentiary is a federal multi-security institution located in the Rural Manitoba, about 24 km from Winnipeg.

focusing on how to deal with it all. I'm a Type-A person, I don't like surprises. I like order – and here I am, thrown into "volume, noise and uncertainty".

It was completely different than the calm and serenity of the 30th floor of the Aikins offices. It was certainly a wake-up call, but the training I had from the previous six or seven years at Stony Mountain certainly helped me with working in that kind of environment. I'm a disciplined person. I started reading all of the books on the law of evidence and criminal law. *Sopinka on Evidence*[20] was on my nightstand.

Soon after I arrived at the Provincial Court, the Chief Judge established the Case Flow Management Committee and asked me to become its chair. The goal of the committee was to modernize systems.

With fresh eyes, coming from the corporate commercial world, I thought there might be ways to improve existing systems. I noted that nearly half the time I was in court was to adjourn uncontested matters. It did not make sense to me to pay someone a judge's salary to do so. In my view, the judge should be in court to only deal with "meaningful events."

So, the Case Management Committee defined a "meaningful event" as one of four things: sitting on a bail hearing; a preliminary inquiry; a trial or at a sentencing hearing. For the docket or remand court, pre-trial coordinators, who were people that had worked within the court system, would operate those courts, under the guidance of the judiciary. These were given clear instructions that after three remands the case would have to go before a judge for a plea. This ensured that matters proceeded in a timely fashion.

DLM: Thank God for that after *Jordan*[21].

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20 Currently, this book is in its third edition. See Alan Bryant *et al*, *The Law of Evidence in Canada*, 3rd ed (Ontario: LexisNexis Canada 2009). It is notable that despite dying suddenly in 1997, The Honourable John Sopinka is still listed as an author of this volume, though no longer its lead author

21 See *R v. Jordan*, 2016 SCC 27

CJRC: Exactly. The goal was to leave only the meaningful events to judges. Since then, in a process that was led by the judges of Manitoba, the federal government amended the Criminal Code to restrict preliminary inquiries to offences where the maximum penalty is 14 years or more. Other than that, there are no preliminary inquiries.

So, what's happened more and more, and what we're observing at the Court of Appeal is that criminal appeals are originating from the Provincial Court. This has effectively positioned the Provincial Court as the *de facto* criminal court in Canada. Of course, the murder trials and the jury trials remain with the Court of Queen's Bench.

DLM: You're talking about the offences referred in s 469 of the *Criminal Code*, where the offences are to be heard solely in the Court of Queen's Bench?

CJRC: Yes, they have sole jurisdiction. The Provincial Court would not have jurisdiction to try those matters.

DLM: One of the things you mentioned in your response was the respect that Provincial Court judges weren't getting at that time. I always find that quite amazing, because with all due respect for the higher courts in the court of Queen's Bench and the Court of Appeal, they all have time. They have the luxury of time and preparedness. It seems to me, if you're looking for somebody who has a lot of law in their head and is able to deal with matters quickly and sort of, "off the cuff and get it right" – it's like the umpire in baseball, they only get one shot at it and they get about three seconds to decide. So, it always amazes me when you say there were people back then, and even today, who think there's a lower brand of justice coming from the Provincial Court. It seems to me that those are the people who have to get it right so many times, despite having so little time to get it right.

CJRC: I agree 100%. The volume that occurs there, requires you to deal with these situations so quickly. You would have seven sentencing hearings in the morning, and seven sentencings in the

afternoon. Whereas in Court of Queen's Bench, you'll have one sentencing for that day and then you'll reserve – not all the time, but most of the time, you'll reserve. In the less serious cases in the Provincial Court, you hear the case and you then immediately render the decision. If the accused is found guilty, the lawyers make their submissions on sentencing and you give your decision right there and then.

I came to the Court of Appeal directly from the Provincial Court. I did not sit in the Court of Queen's Bench.[22] What I found when I came here was that my colleagues at the Court of Appeal were very respectful of the decisions given by Provincial Court judges. They were aware of the volume, the stresses and the contexts in which these decisions were given. If we had to overturn a Provincial Court judge, we were mindful that this was given in the context of maybe five, six, or seven other decisions that they were giving that afternoon. I was pleasantly surprised by how much my colleagues were aware of what was happening in the Provincial Court.

Manitoba operates differently than many other provinces in regard to the working relationships between the three levels of court. It's the same thing with respect to how the courts work with the Law Society[23], the Manitoba Bar Association[24], and Robson Hall[25]. We hold regular meetings and try to work closely together on matters of common interest. The reason the Supreme Court of Canada visit to Winnipeg in 2019 was such a success is that everyone worked together. When I called the Dean of Robson Hall to discuss the possibility of inviting the entire Supreme Court of

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22 This court is now known as the Court of King's Bench, following the death of Queen Elizabeth II in September 2022, and the ascension of King Chales III as the British monarch.

23 The Law Society of Manitoba is an independent organization that regulates the legal profession in Manitoba.

24 The Manitoba Bar Association is a non-profit organization that functions to enhance the professional and social interests of their members.

25 Robson Hall, part of the University of Manitoba, is the building that houses the University of Manitoba's Faculty of Law, Manitoba's only law school. Robson Hall is also a name that is used colloquially to refer to the Faculty of Law itself.

Canada to the law school, Robson Hall graciously opened its doors, hosting all the Justices for an afternoon visit.

Another example of cooperation, the Manitoba Court of Appeal is hosting the Saskatchewan Court of Appeal in September, and our guest speaker is Supreme Court Justice Russell Brown[26]. I suggested to Justice Brown that if he arrived earlier in the day, he could visit the law school before the banquet. He thought it would be a great idea. So, at 2:15 pm this afternoon, I'll be having a meeting with Dean Jochelson[27] to discuss how to bring Justice Brown to the law school.

This special relationship also exists amongst the three levels of court. We have regular meetings – the three Chiefs of the three levels of court – and have discussions. When I became Chief in 2013, it was the first time in the history of Canada where the three Chiefs had worked together as Provincial Court judges. Chief Judge Ken Champagne[28] of the Provincial Court, Chief Justice Glenn Joyal [29] of the Court of Queen's Bench and I all sat together in the Provincial Court. So, here you have three judges of the Provincial Court, colleagues who worked together at the Provincial Court, who were the Chiefs of the three different levels of court. This was in 2013, when I became Chief Justice of Manitoba. One of the first things I said to my two other colleagues, "We all know each other

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[26] Justice Russell Brown practiced as a lawyer from 1995 to 2013. In 2013, he was appointed to the Court of Queen's Bench of Alberta. The following year, he was appointed to the Court of Appeal of Alberta He was then appointed to the Supreme Court of Canada in August of 2015. He retired from the Supreme Court of Canada in June of 2023.

[27] Dr. Richard Jochelson is the Dean of Law at the University of Manitoba, Faculty of Law.

[28] Judge Kenneth Champagne was appointed a Judge of the Provincial Court of Manitoba on April 13, 2005. He served as Chief Judge of that Court from July 10, 2009, to July 9, 2016. On April 4, 2018, he was appointed a Justice of the Court of Queen's Bench.

[29] Chief Justice Glenn D. Joyal was appointed a Judge of the Provincial Court on November 25, 1998. He was appointed a Justice of the Court of Appeal on March 2, 2007. Effective July 10, 2007, he became a Justice of the Court of Queen's Bench. He was appointed the Associate Chief Justice of the Court of Queen's Bench (General Division) on January 22, 2009. Finally, he was appointed Chief Justice of the Court of Queen's Bench on February 3, 2011.

really well. Let's sit down, the three of us, and see if there are three things" – because I always talk about the Rule of Three – "not five, not 12, three major changes that we can bring about together."

After discussion, we had decided on three things. First, to bring about preliminary inquiry in Canada. Second, to move away from an adversarial system in family law and child-protection matters. Regarding child protection specifically, can you believe that in 2013 and 2014, when a child was apprehended because an agency believed the child was in need of protection, it would take 15 to 18 months — not weeks — before a judge determined whether the child was indeed in need of protection?

DLM: That's shocking.

CJRC: It is shocking. I go with the golden rule: treat others the way you would want to be treated. If someone took away my child –

DLM: Good reason, bad reason, doesn't matter.

CJRC: Doesn't matter. And then you're told, "You're not going to have custody of your child until there's a determination as to whether the child is in custody. We'll give you access to come and see the child from time to time, under supervision, and under our rules, and under our terms, but 15 to 18 months is unreasonable. There's no way that that's an acceptable time frame. So, that's why we had to address that.

Also, on family law and child protection, we all remember the Protestant Reformation in the 15th century, when, for the longest time in Europe, it was the clergy who dealt with issues of family and child welfare. With the Reformation, this responsibility shifted to the judiciary. So, 500 or 600 years later, maybe it's time to review that, and perhaps move away from the timely and costly adverserial system in the courts to a quicker and more conciliatory way to settle family disputes and child protection matters. This was the second element of what we did.

The third change we wanted to bring about was to bring cameras into the courtroom. Those were the three things we wanted to have a discussion about in Manitoba.

Another thing, the three Chiefs if the three levels of court decided to do, and this was unheard of at the time, was to hold press conferences to announce these three reforms.

Since then we have held a few more. We held one when COVID-19 hit, another when the Supreme Court of Canada came to visit. I remember like it was yesterday, Courtroom 330, the Manitoba Court of Appeal courtroom, all the media were there. We made a presentation, in terms of what we were wanting to do, we opened the floor to questions, and then the rest is history.

The preliminary inquiry reform had its ups and downs. Complaints were filed against myself and Chief Justice Joyal by the Ontario Criminal Trial Lawyers Association, saying that we had not respected our role as judges or the separation of power, that we had crossed the line into the executive branch or legislative branches' role by writing to the Attorney General of Canada to ask for preliminary inquiry reform. Our response was, "No, one of our roles is to examine ways to improve the justice system. Since *Stinchcombe*[30],the need for preliminary inquiries had been greatly reduced. The Supreme Court of Canada had also said that there was no *Charter* right to a preliminary inquiry. The Supreme Court of Canada had mentioned on at least two occasions that it was time to consider reforms with respect to preliminary inquiries. Justice Michael Moldaver[31] was the one leading the charge on that front.

In the end, the complaint filed against us was dismissed by the Canadian Judicial Council holding that Chief Justices can provide suggestions on how to improve the justice system.

DLM: It wasn't like you guys changed the law by yourselves.

CJRC: No, but we were taking a position by saying, "Why do we still have preliminary inquiries? We have *Stinchcombe*, there could be a better process in place that would be quicker." We had

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30 In *R. v. Stinchcombe*, [1991] 3 SCR 326, the Supreme Court of Canada held that there was a constitutional obligation on the Crown to provide all relevant evidence with respect to any criminal case.

31 Justice Michael Moldaver served as a Justice on the Supreme Court of Canada from 2011 until his retirement in September of 2022.

proposed eliminating preliminary inquiries and replacing it with some examination process, *à la* civil law, which would be quick and wouldn't take up the courts' time. You know, you have to wait 18 months to get a court date in Provincial Court for your preliminary inquiry hearing. The test for committal to stand trial is so low: the test is if there's one scintilla of evidence that is believable on each element of each offence, the judge is required to commit. We all know that for a Crown attorney to lay a charge –

DLM: They need more than that.

CJRC: They need more than that! The test to lay a charge is whether there is a likelihood of a conviction. Whereas, the test on whether to commit the accused to stand trial is so much lower – one scintilla of evidence on each essential element of the offence. So, as a Provincial Court judge at a preliminary inquiry hearing, you don't make credibility findings and you can't make Charter rulings. It came down to: "what was the purpose of the preliminary inquiry to begin with?" It was to make sure you weren't caught off guard, to make sure you had all the information that you required to put a full and complete defence forward. But, with *Stinchcombe*, that element had been addressed. Long story short, the federal government went further than what we had proposed. They simply eliminated preliminary inquiries for all infractions that call for a sentence of less than 14 years. We had suggested replacing preliminary inquiries with a simpler and quicker r examination process, but they went farther than what we had proposed. But I digress.

DLM: – I think that's part of the dialogue between the legislature and the judiciary that you talk about in constitutional matters. You were essentially taking on that role in a criminal law case that wasn't likely to gain much attention, as it seems there was some advantage for the defense, correct? They could test the evidence twice and then maybe get mild contradictions that they could use at trial.

CJRC: You're 100% correct. Don't get me wrong, I understand the Criminal Trial Lawyers Association's position. I always understood

it. But they have a specific role to play, we have a different role to play. It is always difficult to amend a federal law when both the federal and provincial governments have section 91 and 92 jurisdiction. The Criminal Code is one example. *The Divorce Act*[32] is another example.

To move away from an adversarial system in family law, there have been reforms that have been put in place here in the Manitoba Court of Queen's Bench which streamline the process, so that people are able to get through the system more quickly. Same thing on child protection. The Manitoba Court of Appeal held that a finding of whether a child is in need of protection has to be done within three months of apprehension Those were successes.

The last element was cameras in the courtroom. The government didn't have the funds to put in a permanent system, so we set up meetings with CBC, Global, APTN, CTV, all the major broadcasters. They pooled their resources together and said, "One of us will each take our turn, we'll set up our equipment, we'll have a satellite feed, and we'll broadcast the hearings live". At the Court of Appeal, I simply said, "Look, there are no witnesses at our hearings, so it is easy. You can film everything that you wish, unless it falls into private law types of situations in terms of child protection or family law".

DLM: Where there are serious privacy concerns.

CJRC: What happened was after broadcasting three or four cases, t viewership remained relatively low. I forget the numbers; I think 30,000 people tuned in. The media were hoping it would have been a lot more. We did three of them over the next few months, and the numbers, instead of going up, started going down. The private broadcasters said, "We can't justify the cost". So, unfortunately, they decided not to broadcast these hearings anymore.

Our protocol regarding cameras in the courtroom, is still in place. We said to the broadcasters, if you want to broadcast in any of the courts, you can still do so, as long as you meet the criteria set out in the protocol. Unfortunately, that has not occurred .

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32 *Divorce Act*, RSC 1985, c 3 (2nd Supp).

DLM: Now, you were a Franco-Manitoban lawyer in 1985, when the *Manitoba Statute Reference*[33] occurred. What was that like, as somebody who spoke this language and knew you were in a bilingual province, but having to deal with English-only statutes? Then suddenly, the Supreme Court of Canada saying, "Okay, hang on people", to the legislature of the day, "You've got to fix this". What was that like, as a proud Franco-Manitoban, for you?

CJRC: Manitoba is sort of odd in the sense that the Francophone population is concentrated along the Red River, along the Seine River, in the city of Winnipeg, St. Boniface, and St. Norbert. It's a very politicized community, with a small "p", like most minorities. People don't understand that when I grew up, it was illegal to be taught in French. So, when I started kindergarten in 1963, even in St. Norbert, all the students were Francophones, teachers were Francophones, but all the teachings were in English because it was illegal to teach in French.

DLM: What?

CJRC: I know.

DLM: Under provincial law?

CJRC: In 1916, Manitoba had passed a law saying, "From now on, the instruction in Manitoba will be only in English"[34]. So, when I went to school, it was unilingual English [retrieves file]. When I look at this – 1966, my teacher, Ms. Anne Labelle, the principal is M. Jean Beaumont. – this is St. Norbert school. Everything was in English. Then Duff Roblin[35], the conservative Premier in 1967,

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[33] *Reference Re Manitoba Language Rights*, [1985] 2 SCR 347, SCJ No 70.

[34] In 1916, *The Thornton Act* was passed, abolishing Manitoba's bilingual school system and making English the only language of instruction in the province.

[35] Dufferin "Duff" Roblin (June 1917 – May 2010) was a Canadian politician who served as Premier of Manitoba from 1958 to 1967 and on the Senate from 1978 until 1992.

said, "From now on, we're going to amend that law of 1916 to allow in francophone communities for 50% of the schooling to be taught in French". Obviously, French classes, to learn French, were taught in French. Arts and crafts, social studies, and history, were taught in French. But, mathematics, Language arts and all of the sciences, continued to be taught in English. So in 1967 it went to 50-50. In 1969, Ed Schreyer[36] became our new Premier. He was ledthe first New Democrat Government to be elected. In 1971, he passed a law that allowed schools in the Francophone community to have 100% of their schooling in French. I graduated from high school in 1976.

DLM: You went through it all.

CJRC: Yeah, all the different variances. Most of my schooling was in English, and then it switched when I went to high school. But, it's all relatively recent events. I'm not talking about 100 years ago. I'm talking about when I went to school. In 1985, the Supreme Court of Canada ruled that all laws that had been passed were unconstitutional, because they hadn't been passed in both languages[37], as was required by section 23 of *The Manitoba Act*[38], which is the constitution of our province. That decision sparked panic. The Supreme Court of Canada, in its wisdom said, "We'll give you time to have these laws translated, so our decision will be held in abeyance" – I think it was for five years, and then that was extended to seven years and nine years, to get all the laws translated, to ensure that there wasn't going to be chaos in Manitoba. But that created a backlash against the Francophone population.

In those years, the Franco-Manitoban Society offices were burned down. In St. Boniface, graffiti saying "French go home", "No more French" were sprayed on buildings regularly. Those are things that were happening in the mid-1980's, when I was growing up.

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36 The Right Honourable Edward Richard Schreyer served as Governor General of Canada from 1978 to 1984. He served as the Premier of Manitoba from 1969 to 1977.

37 *Reference Re Manitoba Language Rights*, *supra* note 39.

38 *Manitoba Act,* RSC 1870, Appendix 2, no 8.

A few weeks ago, the Law Society was offering a course in French, and it was attended by 40, mostly young, lawyers.I started off in English, saying, "You lost the war, speak white". I was there with Chief Justice Joyal and a judge from the Provincial Court, Judge Huberdeau[39], and both of them looked at me, like, "Where is he going with this?". Things like that were comments that you would hear regularly in Winnipeg. For example, I'd be in an elevator at Eaton's with my mother. She'd speak to me in French, I'd answer to her in French, and someone in the elevator would say "Speak white". That was a reality. I was telling the lawyers a few weeks ago, "Don't react harshly or negatively when you hear things like that, because a lot of people don't understand the history of our country. Many do not even know that Canada was at one time a French colony, and if they do, all they will remember is that the French lost the war in 1763. For many Canadians, they ask, "If they lost the war, why is there still French civil law in Quebec? "Why do the francophones still have language rights in Canada?".

Those are great questions and they, as well as many other questions will soon be answered. I'm going to diverge a bit – there's a gala evening that's being planned for me on October 27th, and there's also an educational session earlier in the afternoon. They asked me, "What would you like the educational session to be?". I said, I would like it to be on "Context Matters - The Impact of Historical Events on Manitoba Laws", so that people understand why certain laws are in place. Once you understand why they are there, and their purpose, everything becomes clear.

Which brings to mind Chief Justice Samuel Freedman[40].I was at Aikins MacAuley when he reached the age of 75 and retired as Chief Justice. He came to the firm as counsel. Just by happenstance,

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[39] Judge Alan Huberdeau was appointed as a judge for the Manitoba Provincial Court in 2014.

[40] The Honourable Samuel Freedman was born in April 1908. He was appointed to what is now the Manitoba Court of King's Bench in 1952. He was elevated to the Manitoba Court of Appeal in 1960. He served as Chief Justice of Manitoba from 1971 to 1983. He died in March 1993. His memoirs were published by the Manitoba Law Journal. See *A Judge of Valour: Chief Justice Samuel Freedman - In His Own Words*, (2014) 37(SI) MLJ.

his office was situated right beside mine. He stayed until he passed away in 1993, which was at the same time I became a Provincial Court judge.

DLM: He just couldn't live without you, huh?

CJRC: (Laughs). For eight or nine years, I had this super-human being right beside my office who was counsel for the firm. I would spend on average, maybe two hours a week speaking with him. he would always tell me: ""It is just about processes, about logic, and about common sense, because that's what law is about." He'd always say, "What is the purpose of this law", "What is the purpose of this rule?", or "What is the purpose of this principle?". You always have to go back to first principles. Since then, whenever I write decisions or attack a problem, I always go back to first principles.

For the October 27 educational session, Justice Nicholas Kasirer[41], from the Supreme Court of Canada, is going to come down and participate in the educational session about "Context Matters: The Impact of Historical Events on Manitoba Laws". We're going to be talking about the context surrounding Francophones and Indigenous rights as well as other historical events that had an impact on Manitoba laws.

DLM: I understand you also wrote about bilingualism in a 1997 report?

DLM: You were still in the Provincial Court at that time?

CJRC: Yes, I was in the Provincial Court. The Premier of Manitoba in 1997 was the Hon. Gary Filmon. He contacted Chief Judge

[41] The Honourable Nicholas Kasirer was a professor of law at McGill University's Faculty of Law between 1989 and 2009. In 2009 he was appointed as Justice of the Court of Appeal of Québec. He was appointed to the Supreme Court of Canada in September of 2019, where he still sits.

Webster[42] , who was my Chief Judge, to ask her if she could free me up to review French language services within the Government of Manitoba and make recommendations on how to improve them. I agreed to do so, but I had told the PremierFilmon[43], "If I'm going to do this, I want to have access to Ministers and Deputy Ministers". That is what happened. This was where I used the Deming Philosophy for the first time.

The Deming Philosophy originated after the Second World War, when the United States sent an American mathematician to help rebuild Japan.[44] Mr. Deming was continually trying to improve systems. So he would say, "What are the needs and expectations of the different stakeholders involved in the problem. Are we meeting their expectations? If not, let's make sure that we are. And then a few years later, seven, eight, nine years later, we'll review the same situation to see if we're still meeting their needs and expectations" That approach became known as "CQI" Continuous Quality Improvement.

The report I wrote came out in 1998 [retrieves file from desk], which as you can see, talks about the Deming Cycle, and the Deming philosophy. This was the system I used to review French-language services in Manitoba. I said, "What are the needs and expectations of the Francophone community?" My report had 29 recommendations and all of them were implemented by the Filmon government as well as successive governments.

DLM: So, in 2006, the Domestic Violence Front-End Project[45] received a lot of positive press for the Provincial Court. You were

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42 The Honourable Judith Webster served on the Provincial Court of Manitoba from 1989 to 2006. She served as Chief Judge from 1993 to 2001.

43 The Honourable Gary Filmon was the leader of the Progressive Conservative Party of Manitoba from 1983 to 2000. He served as the premier of Manitoba from 1988 to 1999.

44 The name of that individual is William Edwards Deming, a business theorist, engineer and mathematician. He was born in October 1900, and died in December, 1993.

45 The Manitoba: Domestic Violence Front End Project was initiated by the Provincial Court of Manitoba in 2003 with the goal and accomplishment of

heavily involved in that particular project, as I understand, when you were at the Provincial Court.

CJRC: Right.

DLM: What was that like to get both national and United Nations recognition for a project into which you poured so much of yourself?

CJRC: It was completely unexpected. What a testimony to the work of a great team. This is, again in the context of the Provincial Court improving and looking at systems. In this case, it was the Domestic Violence Front End. We completely reformed the front-end of the process; the intake part. In family/domestic violence court, it was one adjournment after another, and people were frustrated" we had to change the system.

We brought the judges, defence counsel, and Crown Counsel, together, with the police, and we developed a system, based on the Deming philosophy of needs and expectations, to simply streamline the process so that it would happen very quickly. We received a national prize from the Public Administrators Institute of Canada. To our surprise, we were awarded the top prize in Canada. Unbeknownst to us, the winner of that award automatically gets nominated to the United Nations for the Public Service Award and it goes in front of a jury. Then, we were informed that we were one of three finalists. They wanted us to go to New York to address the United Nations. The three countries were South Korea, Belgium, and Canada. Justice leMaistre[46] who was at the time a Provincial Crown attorney, Ray Wyant[47] who was the Chief Judge of the

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making the court system more effective at processing cases of domestic violence.

[46] The Honourable Janice E. leMaistre was appointed to the Manitoba Court of Appeal on June 19, 2015. Prior to her appointment, Justice leMaistre served as Associate Chief Judge of the Provincial Court of Manitoba from 2009 to 2015. She was appointed as a Judge of the Provincial Court of Manitoba in 2006.

[47] The Honourable Raymond E. Wyant was appointed as a Judge of the

Provincial Court, and myself presented in New York. The presentation was in both English and French, at the United Nations, and we found out maybe a few hours later that we had won the United Nations Public Service Award,[48] the top prize.

DLM: So, your litigation career started in New York.

CJRC: (Laughs). Your funny. It was interesting, because in New York, the Minister of Justice at the time, the Hon Gord Mackintosh,[49] and Premier Gary Doer[50], came with us.

A little side story – I'm not sure if the former Premier would remember this – but, after the award ceremony, he and I met at a restaurant. We started talking about different things, and one of them was mosquitoes in Manitoba, specifically in Winnipeg, and how to get rid of mosquitoes. I remember spending about two hours with the Premier discussing how this could be accomplished. Remember, this was June of 2006 and the West Nile virus was starting to be a real health concern. The Premier indicated at that time, that maybe a part of the health budget could be used to assist in eliminating mosquitoes. Since then, I have seen the former Premier a number of times at different functions, and he said to me, "I said I would do something with the mosquitoes" Indeed he did, since 2006 , we have seen a significant reduction in mosquitoes. "That's how I remember New York, because of the mosquitoes.

When you're a Winnipegger and fifth generation Manitoban, a mosquito bite doesn't affect you at all. But they did affect my wife, who is not from Manitoba., When you are not from here and you

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Provincial Court of Manitoba in 1998. He served as Chief Judge of the same Court from 2002 to 2009. He retired in 2024.

48 The United Nations Public Service Award is a prestigious international recognition of excellence in public service. It rewards the creative achievements and contributions of public service institutions that lead to a more effective and responsive public administration in countries worldwide.

49 The Honourable Gordon Henry Alexander Mackintosh is a Canadian politician and former Minister of Justice of Manitoba.

50 The Honourable Gary Doer was the 20th premier of Manitoba, holding the position from 1999 to 2009.

get bitten, it swells and people become genuinely concerned by it. It's always dawned on me that we have to deal with this, because it's not good publicity for our city. We should be able to control it in some fashion.

DLM: I had a very similar experience when I drove into town coming from the University of Windsor. My parents came and got me and they said, "We'll drive you to Winnipeg, and it'll be fine." All my father did, when I was moving here in 2002, was swat mosquitoes in the car. I'll never forget that as long as I live. I say to people regularly, "Yeah, I'm used to it now." If there's standing water, there's going to be a lot of mosquitoes and –"

CJRC: (Laughs) It's not going to be pretty.

DLM: Nope.

CJRC: So, that was in New York.

DLM: Wow, well, we've talked a bit about your unusual career path, but you're one of a very limited number of people, I think, in this province, and I think also, historically across the country, who has gone directly from the lower level trial court, the Provincial Court, up to the Court of Appeal directly, without a stop at the intermediate court. Do you think that makes a difference institutionally? Do you think that makes a difference to how you approach your work when you're on the Court of Appeal?

CJRC: That's a fair question. I think, and I might be corrected on this, but I think I was the first judge in Manitoba who was appointed directly from the Provincial Court to the Court of Appeal. This was in 2006. A year later, in 2007, now-Chief Justice Joyal was also appointed directly from the Provincial Court to the Court of Appeal. Since then, Justice leMaistre, Janice leMaistre, was appointed directly from the Provincial Court to the Court of Appeal, and since then, there hasn't been any. I can tell you that the learning curve from the Provincial Court to the Court of

Appeal, was morre difficult than it was to go from Aikins McAulay to the Provincial Court.

DLM: Really? Okay.

CJRC: The reason for that is because, though 60% of the work of the Court of Appeal is criminal law, the remaing 40% is not, It is civil, family and administrative law.

At the Court of Appeal, you have to know the civil procedure rules, the Court of Queen's Bench rules. Obviously, at the Provincial Court, there was no need to know those rules. But the biggest challenge – and it's something that you don't really use or do in the Provincial Court – is applying standards of review. At the Court of Queen's Bench,[51] you encounter this to some extent, as you're reviewing summary conviction appeals. Decisions from Provincial Court judges on summary matters, are appealed to the Court of Queen's Bench, not the Court of Appeal. So, at the Court of Queen's Bench, there is some familiarity with standards of review.

I remember when I came to the Court of Appeal in 2006, I quickly learned the importance of standards of review for an appeal court and quickly got into the books.

In 2002, the Supreme Court of Canada began to really come down hard on appeal courts who were overturning decisions from the trial courts simply because they wanted to substitute their view without identifying error on the part of the trial judge. So, the Supreme Court wrote Housen v Nikolaisen[52] . Then *Dunsmuir*[53] in regard to administrative law and then a whole series of decisions dealing with standards of review in criminal law – starting with the *Queen v Regan*[54] . When I came here [retrieves book from office], the only book in existence on the standard of review was Kerans on

[51] *Supra* note 27.

[52] *Housen v Nikolaisen*, 2002 SCC 33.

[53] *Dunsmuir v. New Brunswick*, 2008 SCC 9.

[54] *R. v. Regan*, 2002 SCC 12.

Standards of Review[55]. I forget what year it was written, but it was already out of date. Between 2002 and 2008 everything changed in the area of standards of review.

One of the things I did, when I came to the Court of Appeal, was to create my own, what I called, Bench Book on Standards of Review. It set out what the standard of review was for every type of question an appeal court would face.
Another aspect that was fairly new to me, when I came directly to the Court of Appeal, was Chambers or Motions Court.. In the Provincial Court there are no chambers motions *per se*. A motion is simply a lawyer standing up and saying, "I'm applying to extend the time", and simply explaining in a few seconds why the need an extension. No application is filed. There are accompanying affidavits. In the Court of Queen's Bench, counsel has to file a motion brief. So, when I arrived here at the Court of Appeal, I had to quickly refamiliarize myself with all these rules.

So, again, I created a Motions/Chambers Bench Book. This Bench Book and my Standard of Review Bench Book have become bench books for the whole bench. They are very useful tools.

If I were to ask how many standards of review exist in civil law, both of you would tell me that there are two: the standard of palpable and overriding error and the standard of correctness. In administrative law, it's also two: reasonableness or correctness. But in criminal law, I've identified dozens of standards of review.

DLM: Wow!

CJRC: I think I'm up to 40 different standards of review in criminal law. There's no book that even comes close to addressing all of that, and no one's put that together. That's why I started this bench book. Since our bench has adopted as the court's bench book, all of us take our turns to keep it up to date.

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55 Roger P. Kerans & Kim M. Willey, *Standards of Review Employed by Appellate Courts* (2nd ed. 2006). The Honourable Justice Kerans was a member of the Court of Appeal of Alberta from 1980 to 1997.

DLM: I knew there were a couple more than two, because clear and convincing evidence in the case of fraud was the one that popped into my head, but 28 to 40, wow.

CJRC: It's unbelievable. On sentencing decisions, the standard of review is, "Is it demonstrably unfit" – that's the test. You have to show us, you have to convince us, that the sentence is demonstrably unfit before the appeal court can intervene. Another example: a trial judge finds that there is no air of reality to a defence and, as a result, withdraws that defence from the jury. If that decision is appealed to our court, there is a very specific and different standard of review that we will have to apply.

So those are the main challenges that someone faces when they are appointed directly to the Court of Appeal.

DLM: Terrific. I've had the privilege to interview your two immediate predecessors. Both Chief Justice Monnin[56] and Chief Justice Scott[57]. As well, I've been a part of the team that produced Chief Justice Freedman's memoirs. You've talked a little bit about all three of these men. All three of these men were well known for their service, either to the judiciary outside of their decisions, particularly, Chief Justice Scott comes to mind in that regard, or their service to the public. Chief Justice Freedman, in being Chancellor of the University, and Chief Justice Monnin to the Franco-Manitoban community in particular, but others as well. Now, if you had to look back when this is all said and done, what would you want people to remember about you, besides the judiciary?

CJRC: I would like to be remembered as someone who's able to solve problems. That's my forte. I'm an administrator. I'm leaving this job, not because I'm not enjoying it. I'm as passionate about it as ever. It's just that I believe in certain administrative philosophies. I talked about the Deming philosophy, the person who went to

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56 *Supra* note 47.

57 *Supra* note 48. Chief Justice Scott was very involved in the Canadian Judicial Council, the body

Japan after the Second World War. I had the occasion to follow an intense one-week session with him, Mr. Deming, in 1992 in Charlotte, North Carolina. He was 92 years of age. This was when I was still a lawyer at Aikins MacAulay, and one of my clients was one of these large trucking firms. This trucking company believed in the Deming philosophy, and they said, "For you to continue working with us as our counsel, we need you to follow this session. We're asking you to attend Charlotte, North Carolina, with some of our executives and to follow the session." The time I spent with him was truly enlightening. The Deming philosophy is about systems, processes and formulas. What I would like to be remembered as is someone who puts in place new systems. For example, here, at the Court of Appeal, we started off by adopting a court mission statement. Our mission statement is: To deliver quality decisions in a timely fashion". Eight words. Simple. Straightforward. That's our mission.

In regard to our vision, which is our long-term goal, I suggested, "I think we can all agree, it's to be the best Court of Appeal in the country". My colleagues chuckled, and I said, "I know it sounds ridiculous, but that is our vision, that's where we want to go, and we're going to get there by delivering quality decisions in a timely fashion."

The discussion then turned to: "How do we measure that? How do you know you're attaining that?". We then identified a series of indicators to help us track any and all improvements, such as: "How often are we upheld by the Supreme Court of Canada?; How often are cases cited, not by our own Court, but by other Courts of Appeal across the Country?; How often does the Supreme Court of Canada cite our cases?; How often are our cases cited in Sopinka on Evidence[58] or Ruby on Sentencing,[59] or on the Supreme Advocacy newsletter,[60] ; Other than Manitoba trial courts, how often do the trial courts from other provinces cite us?"

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[58] Bryant *et al*, *supra* note 21

[59] Clayton C Ruby, *Sentencing*, 10th ed (Markham, Ontario: LexisNexis Canada Inc, 2020).

[60] Supreme Advocacy is a law firm based out of Ottawa that, among other

We kept those stats. I can tell you, without going into detail, we've improved. We compare ourselves to provinces that are similar in size to us - Nova Scotia, Saskatchewan, and New Brunswick. New Brunswick to a lesser degree, but they are in our statistics. Long story short, we are definitely trending in the right direction.

DLM: That's really interesting. Now, you've dedicated a fair amount of your volunteer time to a lot of healthcare-oriented non-profits and public-faith institutions, including St. Boniface Hospital[61] and its various offshoots. I'm assuming you do that because you're passionate about healthcare for some reason. What makes you passionate about it?

CJRC: I'd like to say it's because I'm a caring and compassionate person, but that would not be entirely accurate. The reason I got involved to begin with was because of something that happened to my father. He suffered a massive stroke at a relatively young age (52 years old). After caring for him at home for many years, my mother decided, after with our entire family, to bring him to Taché Centre, which is the largest personal care home e here in Manitoba. It's run by one of the Gray Nuns Corporations. They run a number of corporations: St. Boniface Hospital, Foyer Valade, Taché Centre, and the St. Boniface Access Centre, which is a primary healthcare clinic, which I helped to found. To make a long story short, I approached the Grey Nuns and said, "Look, my father is now a resident there. If there's anything I can do, let me know." They took me up on it and I became a board member and quickly became Chair of the Board of Directors of that corporation. After five or six years, they asked me to sit on many other boards. I then became a Provincial Court judge. I could still sit on those boards because matters coming from Grey Nun corporations were never in front

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services and expertise, tracks developments out of the Supreme Court of Canada. This firm produces a weekly newsletter that summarizes the work the country's highest court.

[61] St. Boniface Hospital is a major healthcare institution in Winnipeg, Manitoba.

of the Provincial Court. But, when I was appointed to the Court of Appeal in 2006, that was no longer the case. I was at that time Vice Chair of St. Boniface Hospital. Given that the Court of Appeal, hears many cases that emanate from hospitals or malpractice suits, I had to step down. That's why and how I volunteered my time with all of those health care corporations.

DLM: You mentioned that you've been a judge for almost 30 years, has there ever been a case where the public reaction to something you said or wrote was the opposite, or very divergent, from what you would have intended.

CJRC: I've given some thought to that question, there are none. The only one that might come to mind is a recent one about the *Public Service Sustainability Act*[62]. I remember receiving a call from my daughter. I guess word came out that the Manitoba Court of Appeal held that that piece of legislation was constitutional. The result was that the government wage freeze would stay in place. My daughter is a social worker, so she's a member of one of these public unions that was a party to this case. She called me and said, "Papa, tell me you weren't on the panel that heard that case". And, I said, "Sophie, yes, I was on the panel and yes, I wrote the decision". She said, "Oh man" "Why?" I asked, "Have you read the decision?" She said, "No." So I told her, "I would encourage you and your colleagues to read it. It's a lengthy decision, but not unmanageable."

But that's the only decision that comes to mind where I was a bit taken aback by the reaction of the individuals.[63] I understand the disappointment, of course. In terms of the law and whether there was a Charter breach, those are points you don't know for certain when you hear a case. After the hearing, you have a discussion with your colleagues. Sometimes – and this is one of those cases – you

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62 *The Public Service Sustainability Act*, SM 2017, c 24.

63 The name of the case to which the Chief Justice refers is *Manitoba Federation of Labour et al v The Government of Manitoba*, 2021 MBCA 85.

start writing the decision, and the law will take you where it will take you. The law took me where it took me.

DLM: I can understand that. When my colleague, Dr. Bryan Schwartz[64], looked at some of your judgments, he described your writing as concise and as simply saying, "This is the controlling precedent. How would I use it?" He didn't use the word "minimalist", but he said, "This is a guy who grabs the one controlling precedent. He doesn't need 10 cases to try to compare and contrast 10 different cases to get a result. He takes what he thinks is the controlling precedent and concisely applies it to a set of facts". Would you agree with that assessment of the way you write?

CJRC: I would agree with that assessment in the sense that I know I write concisely. I preach that to my colleagues, and I encourage my colleagues to be as precise and concise as possible. I talked about Samuel Freedman a little earlier in terms of the benefit I had, spending a lot of time with him over an eight- or nine-year period, learning how to attack a problem. When I say, "how to attack a problem", when you're at the appeal court, it's how you're going to write the decision. It's based on starting with, "What is the purpose of the legislation?". That's the way I write. I try to write simply. My first draft is two to three times longer than the ultimate decision. I tell my colleagues the same thing: try to bring it down to 20 or 25 pages: certainly under 30 pages.

I've been here for a little over 15 years, so I simply put in the computer, "Print out the top 25 Manitoba Court of Appeal cases that have been the most cited in the last 15 years." Out of those 25 decisions, 10 of those are my decisions. So, 40% of those decisions are mine. They're cited by other judges from across the country and within the province. Why? Because they're concise. Why? Because

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[64] Dr. Bryan Schwartz is a professor of law at the University of Manitoba's Faculty of Law. He also serves as the Asper Chair in International Business and Trade Law, and as the Co-Editor-in-Chief (along with Prof. MacPherson) of the Manitoba Law Journal. Dr. Schwartz joins the conversation in this interview in Part II, below.

they attack a real situation and a real problem. I remember coming here and encountering a case where one of the grounds of appeal was that the judge had erred in their ruling on a Charter breach. I asked myself, "What is the standard by which you review such a decision?" I asked for research, and there was nothing. No one had written on the applicable standard of review for a Charter breach.

I wrote a decision called *Farrah*[65]. *Farrah* is the most cited Manitoba Court of Appeal decision in Manitoba in the last 15 years. It's this decision I wrote on the standard of review on a Charter breach. No one in Canada had written about it, and it's now there and it's being cited. We were talking earlier about standards of review: correctness or palpable and overriding. Well, on a Charter breach, it's not one question. You have to go through an analysis. The standard of review for that Charter breach, it's not a one-line standard. It's a four-step analysis. Obviously, sometimes a judge cites a decision because, "This was wrong", or "I'm going to distinguish this case", but 99% of the cases, when you're cited it's because people are using that case as the authority for their position.

I continue with the standard of review on sentencing decisions. Our court has led the way in regard to the jurisprudence on: How to sentence an accused for multiple offences. Ruby on Sentencing[66] has now developed a section on, "What is the proper procedure for sentencing on multiple offences?" Do you impose a global sentence, which was the way the Ontario Court of Appeal was doing it, or do you follow the Manitoba Court of Appeal, which uses a more nuanced procedure? I think, essentially, almost all of Canada has now gone with what Manitoba is doing. There's one case called *R v Reader*[67], where I coined a phrase called, "the last look". When you sentence someone for multiple offences, you have to make sure, based on the proportionality and totality principle, that the sentence isn't overly crushing for the accused. This is when we're dealing with multiple offences. You've impose a sentence for each

65 *R v Farrah*, 2011 MBCA 49.

66 Ruby, *supra* note 75

67 *R v Reader* (M.), 2008 MBCA 42.

of the offences, you total them all up, and the sentence becomes, for example, 19 years for 5 offences. Then, you take a last look.

DLM: How close are we getting to murder, if murder is 25 years?

CJRC: (Laughs) Well, yeah, that's a whole different discussion, Professor MacPherson. Well, here's a phrase, called "the last look", which I used, and it's now in textbooks. You know, as was decided in *Reader*, the judge has to take "the last look", with respect to that. But anyway, I write concisely. All I know is that they're cited. Is that a good thing? I think it's a good thing.

DLM: Fair enough. A while ago, there was a reputation of this Court, that this Court was overturned a lot by the Supreme Court of Canada. I think that's changed, somewhat. But, I do know that they've overturned some things that this Court has done recently. Some Court of Appeal judges that I've spoken to, don't like that, particularly when they think they were right. Others, it's water off a duck's back. "I did my job, they did their job, so be it". I'm curious as to where you fall on that spectrum.

CJRC: I'm in the category of, "it's water off a duck's back". I was trying to find the quote from the [US] Supreme Court Justice Robert Jackson[68], where they state that the Supreme Court is not final because it's infallible, it's infallible because it's final. That's the way I view things. For example, my decision on the *Public Service Sustainability Act*[69] has been appealed to the Supreme Court of Canada. They haven't decided on whether to grant leave or not, and if they grant leave and they overturn me, it's fine. I came to my conclusion. I said that *stare decisis* was applicable in that case. If I was wrong, they'll overturn me, and that's fine. In the same way, when I overturn decisions of Court of Queen's Bench judges or Provincial Court judges, I hope they don't take it personally.

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[68] Justice Robert H. Jackson, was an Associate Justice of the U.S. Supreme Court between 1941 and 1954.

[69] *Supra* notes 79 and 80.

DLM: You don't intend it to be taken personally.

CJRC: Not at all. No. We don't even remember the name of the judge who wrote the decision. Of course, when we're hearing the appeal, we know it, because we've got the judge's decision right in front of us, but we could be writing this decision two or three months later, and there's five, six, seven, eight decisions that have passed by.

DLM: Fair enough. What would you want the Court of Appeal to be known for in 20 years? We've talked a little bit about you, but you've also talked about the fact that you really are an administrator, and that, to me, seems like an institutional role, rather than a personal one. So, what would you want the Court to be known for, or at least what do you want this period of the Court to be known for?

CJRC: We don't have the manpower to see how often we're overturned. Leave to appeal from our decisions are rarely, rarely granted. When they are, I would say 33% to 50% of the time we're overturned, which is fine. The point is that leave isn't granted very often. Obviously, when they grant leave, they say, "there's something here that we might want to overturn or tweak.". We talked earlier about the decision of *Mabior*[70]. We knew that we were going to be overturned in that case. We knew it. It was written in way to encourage t the Supreme Court of Canada to revisit what the *Cuerrier* [71]test was. And, they decided to change the law, which is what the panel on that appeal wanted.

DLM: Are you suggesting that maybe you wrote, or whoever, wrote *Mabior* in the Court of Appeal, was writing so that we'd have a Supreme Court of Canada judgment?

CJRC: That's exactly what I'm saying. That happens. We do it, and when we're overturned, it's actually a good thing. We're happy that

[70] *Supra* note 17.

[71] *R. v. Cuerrier*, [1998] 2 SCR 371

this precedent from the Supreme Court of Canada has now been improved. Obviously, when we're overturned, no one likes it, but there are certain situations where we wanted this to happen. That's an exception more than a rule. But yes, we do that from time to time.

DLM: You mentioned judicial ethics and judicial education earlier on. Because you're a Chief Justice, you sit on the Canadian Judicial Council. They've taken a few hits in the last few years publicly over some things. I don't want to put you in a bad spot, but I thought if there were anyone who could speak to what the Council is trying to do, either now or going forward, so that it can be said publicly, and so that these things are not left hanging out there, as it were, I wanted to give you the opportunity, if you felt comfortable, to take a look at that and say whatever you felt was appropriate.

CJRC: For people who might not know, the Canadian Judicial Council is the organization where all of the Chief Justices and Associate Chief Justices of Canada's federally appointed courts meet as a council. Under the *Judges Act*[72] of Canada, we are given a few very clear mandated responsibilities under section 60 of that Act. Specifically, judicial education and reviewing complaints against judges. I must say, I know that in the last five or six years, there had been decisions that were made by the Canadian Judicial Council which were controversial, which were challenged by a number of our judicial colleagues. I want to give credit to the new Chief Justice of Canada, Chief Justice Wagner[73], who has put in place a system that requires us, the Canadian Judicial Council, to be as transparent as possible.

The website has been modernized to ensure that all the information there is available to the public and is available to the

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72 *Judges Act*, RSC 1985, c J-1.

73 The Right Honourable Richard Wagner is the 18th Chief Justice of Canada since . He was appointed Chief Justice in 2017.. He was originally appointed a Justice in 2012. He was previously a Justice of the Quebec Court of Appeal from 2011 to 2012, and a Justice of the Superior Court of Québec from 2004 to 2011.

members of the judiciary. When we look at certain situations, whether it be conduct review – and I chaired two public inquiries with respect to conduct of judges in Ontario and Quebec, and it took forever to get this done,costing millions of dollars to the taxpayers. That was one of the things that the new Chief Justice said, "We've got to change the current process." Why? Because we're losing the confidence of the public. Again, I can't repeat this enough, once we lose the confidence of the public in regard to the judiciary being able to police itself, or to be an impartial arbiter, or to question the competency of the judiciary—the system will collapse. It's as simple as that.

Recently, the federal government, after consultations with the Canadian Judicial Council and others, tabled, new legislation in the House of Commons. This legislation will ensure that a complaint filed against a judge will proceed in a timely fashion.

I can talk to you about two things I was specifically involved in. Number one was judicial education, I was the National Chair of Judicial Education from 2018 to 2020, after having been a member of that committee for a number of years. I was tasked with modernizing our policy on judicial education. At the time, it was a brief, one-and-a-half-page document, which was, frankly, inadequate. Our committee developed a fulsome policy that mandates judicial education for newly appointed judges. This policy also ensures that the National Judicial Institute of Canada incorporates three essential components in its educational offerings: substantive law, skills and training as well as social context education. That policy was made public as soon as we adopted it in 2018 or 2019[74]. It's on our website.

The other area that we needed to work on was to modernize the ethical principles for judges.. The new ethical principles for judges was adopted in June of 2021 [75]. I was one of the nine

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[74] Canadian Judicial Council, "Professional Development Policies and Guidelines 2018 (NEW)", Canadian Judicial Council, 2018 CanLIIDocs 11157, online: <canlii.ca/t/tcn7>.

[75] Canadian Judicial Council, "Ethical Principles for Judges (2021)", Canadian Judicial Council, 2021 CanLIIDocs 2336, online: <canlii.ca/t/tcmp>.

members who rewrote the policy. It really, in my view, is something that will help ensure that the public have confidence in its judiciary.

This isn't a code, in the sense that if you breach one of these principles, it doesn't mean that there's going to be a charge or complaint laid against you and that you'll go in front of a conduct review disciplinary hearing. This is aspirational in nature, it's not a code of conduct. This is meant to be a guide for what the perfect judge should look like. We modernized it by dealing with social media issues, and dealing with self-represented litigants, we even have a chapter on the post-judicial career. We all acknowledge that the Canadian Judicial Council has no jurisdiction once the judges retire, but we are of the view that once a judge retires, he or she is still a judge, and should conduct themselves in a certain way. So, we've written certain aspirational principles in there with respect to that.

DLM: Just to be clear, this applies to all federal judges, including the Supreme Court of Canada, right?

CJRC: Yes, all federally appointed judges, and Supreme Court justices are federally appointed, so yes. The only reason I'm hesitating was because I don't ever remember a complaint being filed against a Supreme Court of Canada judge or –

DLM: No, I'm not suggesting that it has been, I'm simply saying because I know that the US is different and that some of that has made news in the popular media south of the border. I wanted to be clear that these things were meant for the Supreme Court of Canada as well.

CJRC: Yes. The last thing I would like to say with respect to the Canadian Judicial Council is concerning whether there should be term limits for all Chief Justice and Associate Chief Justice positions across Canada. The Association of Superior Court Judges, had asked the federal minister to impose term limits on Chiefs. As I said right off the top, I believe in term positions for Chiefs.

The Canadian Judicial Council recently, adopted a new position saying that after 10 years, a Chief or an Associate Chief should consider stepping down as Chief, however it's not a mandated policy. To assist in their reflection, there's 12 or 13 questions Chiefs should ask themselves.

To be clear, even though I believe in term limits for Chief positions, I wasn't the one pushing that agenda, it came from the Association of Judges. And that's how the Canadian Judicial Council decided to react.

Finally, the Canadian Judicial Council has also tried to be more transparent. Our education sessions are now set out on our website: "Here are all of the courses that were offered. Here are the number of judges from this court". It doesn't name who they were, but it says, let's say for our court, "We held a session in May, here was the title of the session. Twelve of the 13 Manitoba Court of Appeal judges attended." We, again, are trying to ensure that there is public confidence in the administration of justice.

DLM: Okay. Next question. As you no doubt remember, we did an interview like this almost nine years ago, in September of 2013. You gave a lot of answers and some of them are very similar to some of the things you've said today, but I'm curious what's changed either for you or for the court institutionally in the 10 years you've sat in this chair.

CJRC: Well, I'll get to them personally in a moment. In terms of institutionally, I remember one piece of feedback that we were getting from the profession was that we were taking too much time to issue our decisions. So, one of the first things I did as Chief was to implement a policy on judicial writing and having a goal and a system in place to ensure that our decisions come out in a timely fashion. We've just issued our first annual report (retrieves file).

DLM: Get more academics. We have to get it out, because if we don't get it out, you guys will get past us. We'll have to change it again. (Laughs).

CJRC: (Laughs). Chief Justice Joyal of the Court of Queen's Bench and I had asked the provincial minister to amend our respective acts to require us to issue annual reports. Again, this is about maintaining public confidence in the administration of justice., The reason I'm showing you this annual report is because it shows that all of our decisions, essentially, are now given within six months. When I became Chief, half of our decisions were over a year old. Now, 97% of our decisions are released within six months.

DLM: Wow, that's impressive.

CJRC: It requires discipline. One of the things I brought here was a culture of discipline. We've all heard about the book, "Jim Collins: Good to Great"[76]. How do you go from good to great? His well-known book is about how you have disciplined people involved in disciplined thought, taking disciplined action; that's how you go from good to great. We've put that doctrine in place here at the Court of Appeal.

Everything is measured. There are timeframes. There are 's objective criteria. We know how many judges wrote how many decisions. Each judge is given each year a range of how many decisions they're expected to write. The range is based on a five-year average, "This is how many decisions we will be writing", so we divide it by the number of judges and they're given the number (it as a range rather than a specific number) of decisions they're expected to write. That way, we ensure the workload is distributed evenly and fairly. What has happened is that there's a more relaxed atmosphere in the office, because everybody knows everybody is pulling their own weight. But the change was not made because of that. It was to make sure that people would not burn out.

The other thing that we did when I became Chief Justice was eliminate peaks and valleys at the Court of Appeal. Historically, April, May, June, September and October were very very busy, while November to March were less so.

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76 Jim Collins, *Good to Great: Why Some Companies Make the Leap... And Others Don't* (New York: HarperCollins, 2001).

So, I developed a system with the Registrar of the court to ensure that we had the same number of appeals every month during the whole year. Again, this has created a more relaxed atmosphere. That was the institutional side of it.

DLM: What's changed for you, having been in this chair? Where do you think you've changed, or the role of Chief Justice has changed from what you expected when you took that chair?

CJRC: I've got to say, there were a number of things that were completely, completely unexpected. When I became Chief Justice, my wife resigned from her position as the executive director of an artist's co-op in St. Boniface, so that she and I, together, could represent Manitoba and attend the different functions. Because we knew there'd be a lot of functions. What I didn't expect though was how this would be a '24 hours-a-day, 7 days a week' job. The number of emails that I get, it doesn't matter whether it's a Saturday or a Sunday. It doesn't matter if it's six o'clock in the morning or eight o'clock, nine o'clock at night, the emails come in. And, I think with COVID, it really worsened the situation. Days of the week were no longer important, even hours during the day were no longer important. I said before, I'm a workaholic. If something comes in, I can't help myself, I've got to respond. My wife tells me, "You've got to let it go, you're going to burn out". That aspect of the job is where I'm genuinely concerned about the direction we're heading. People who expect to have someone answer them by email or by text or by phone call immediately. I don't know how it is with law students, but it's a changing world out there. Maybe the younger generation is used to it, but this old guy isn't. I find that disheartening.

DLM: That's one of the reasons I left practice 20 years ago.

CJRC: You are right. At Aikins, you're right, my practice was sort of like that. That's a great analogy. I'm now remembering my days at Aikins, and that's how it was at Aikins. It was just nonstop. One of my other concerns here, relates to the qualities needed for someone to be a good Court of Appeal judge. In my view, there are

three attributes, in addition to the attributes of being a good judge. You have to have a keen intellect. You have to be a bit of a philosopher and love the philosophy aspect of the law. And the third aspect is that you have to be collegial, because at the Court of Appeal, we work together, always as three, sometimes as five. I can't understate the importance of that.

When COVID hit, and people started working from home, we were losing the mentoring aspects of the office. We were losing the collegiality aspect of the office. And this concerns me. For these reasons, appeal court judges should work, in my view, mostly from the office as opposed to working from home.

In addition, I have clear views on whether we should give parties the choice to have their appeals heard remotely or in person. After the COVID-19 experience, I can say that hearing an appeal remotely is not the same as hearing it in person. When we hear appeals remotely, you don't get the same feel or sense as when you conduct the appeal in person. Our experience, and I don't have the exact numbers, was that the number of questions coming from the panel, was cut by half.

We, as appeal court judges, always tell trial court judges, "You're there to listen. Do not enter the fray. Let each party prosecute their matter in the way they choose. If a party has a problem, has an objection, let the lawyer stand up and say, 'My Lord, Your Honour, I object'". At the Court of Appeal, it's completely the opposite. We've received the factums, we know what the arguments are, we know what the grounds are, we know what the issues are, and we want them to focus on the things that matter to us in terms of, "Here's where we still have issues with respect to your appeal". So, we enter the fray right away. You can start your submission, and within three minutes, the appeal panel will pepper you with questions. Appellate counsel are aware and are prepared for that, and they love it. It's a conversation. I'm sorry, I went on a bit of a tangent, but the point I am trying to make is that with remote appeals we lose the natural flow of things; the appeal, in my view, loses its fluidity both in form and substance.

Last thing, during COVID, we were able to keep on top of our caseload and essentially had no backlog. We've determined that the backlog for the Court of Appeal is 150 cases in our inventory,

which includes everything from the filing of a new appeal to the pronouncement of a decision. Any case in that process is part of our inventory and when our inventory is over 150, we define that as our backlog. When we're at 150, that's the lowest that we can get. Cases come in quickly and move out quickly. At one point, about eight or nine years ago, our inventory was as high as 212 or 220 cases, but we've steadily reduced it to 150.

DLM: What are you most proud of, in those nine to 10 years. Even if it's not years, I'm just curious. You're going to walk out of here having been the guy in charge.

CJRC: Well, there's a few things that come to mind. So, of course, the visit of the Supreme Court of Canada, which was –

DLM: How did you swing that? (Laughs). How did you get them to come? It's Winnipeg in the winter!

CJRC: Well, late September.

DLM: Yeah, but there are nicer weather places in September.

CJRC: I'll get back to September weather in a minute. Life is about relationships. I honestly believe that. I've taught our kids, "Always treat people with respect, whoever you are, whenever you meet with them". Because, you never know when your paths will cross again. Fast forward to July 2016. I'm on the committee that organizes an educational session in Strasbourg, France. My wife had accompanied me there. Justice Richard Wagner, who wasn't yet Chief Justice of Canada, attended that session with his wife. We hit it off. We invited themto visit Manitoba and to meet members of the judiciary, the legal profession and the law students. They agreed and came when: in September of 2016 and the weather was great! And so were all the events that had been organised with the help of Robson Hall, the Law Society of Manitoba and the MBA. All events were sold out. The Wagners fell in love with the city.

Then, in December of 2017, Justice Wagner became Chief Justice of Canada. I think his swearing in was in February 2018. My wife and I went to Ottawa for his swearing in Chief Justice Wagner mentioned to me that, "I've got something special in mind for Winnipeg" and nothing else. Just those cryptic words. His wife said the same thing to my wife. When my wife and I got back to the hotel room that night, I said, "I've got to tell you something". She says, "No, no, I've got to tell you something". Both of us were told, independently from the other, that there was going to be something special for Winnipeg. But, we had no clue what it could be.

A few months later, in May of 2018, after consulting with his colleagues at the Supreme Court, he called me to advise that his court wanted to try something new: it wanted to hold its first-ever hearings outside of Ottawa, in Winnipeg. it also wanted to meet Manitobans as well as various communities. So, having the Supreme Court of Canada come to Winnipeg to hear cases outside of Ottawa for the first time in its history was not my idea. It was the Chief Justice Wagner's idea.

And that is why I started by saying: "Life is about relationships." I like to think that it was because of the relationship that had occurred between the Wagners and the Chartiers, but I recognise that there was more. Winnipeg was the perfect location for the Supreme Court of Canada to hold its first ever hearings outside of Ottawa. Winnipeg is east meets west.

Winnipeg is also where all the constitutional communities of Canada cohabit. We know that the Charter of Rights talks about individual rights, section 1 to 15. What few of us know is that there are also certain communal rights reserved for those nations that existed prior to confederation. We're talking about the First Nations, the inhabitants of French Canada (1534 to 1763),, the Métis and the inhabitants of British Canada (1763 - 1867) . These communities have certain rights that other communities do not: section 23 gives anglophones inside Quebec the right to English education and gives francophones outside of Quebec the right to education in French; section 25 and 35 ensures that Charter rights do not infringe upon existing Aboriginal, treaty, or other rights, for the Indigenous and Metis. Section 35 isn't part of the Charter, it's part of the Constitution, but it gets dealt with on the same level.

The Supreme Court of Canada has said these sections are a codification of The Royal Proclamation of 1763[77] So yes, the Supreme Court of Canada visit to Winnipeg is one of the things I am proud of.

Another thing I am proud of is in regard to the portraits of the former Chief Justices. When I became Chief Justice of Manitoba, the office manager for the law courts Mr. Martin Jandavs came to see me and said, "When they expanded the Law Courts in 1982, they took down all of the portraits of the Chiefs that had been hung in the law courts since we entered confederation." They were simply put in crates downstairs and been left there since. They are in a state of decline. So, the manager came to see me and said, "What do we do with these portraits? I know through your wife that you're a lover of the arts. We have to do something, we can't let them wither away" I said, "Well, let's hang them up". He said, "Well, there's 172,000 reasons why we can't". I said, "172,000 reasons why we can't?". He said, "$172,000 is the cost of restoring these portraits". So, one of my first projects as Chief was to gather the funds to make this happen. It took, I don't know, four, five, six years to restore them all, but they're now all hung up in the Old Law Courts building. They're absolutely beautiful. You have to go to the third-floor gallery to see them. You'd think you were at Osgoode Hall.

DLM: I agree with you. It is spectacular up there. They're wonderful. I think it's an important thing that when you devote yourself at least in part to history, you create the reverence for the institution because it's been around for that long. When people walk through the door, they should know that, because there is a tendency, there are groups today that seem to be groups today that revel in creating disruption, that have a lack of reverence for what came before. Sometimes I think disruption is a good thing, but I

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77 The Royal Proclamation of 1763 was issued on 7 October 1763 by British King George III. It followed the Treaty of Paris (1763), which formally ended the Seven Years' War and transferred French territory in North America to Great Britain.

don't think that it's always a good thing, the way that some people practice it at least.

CJRC: Professor MacPherson, I agree. Sometimes chaos is good, it brings about necessary change.

PART II

DLM: We can't talk in 2022 without speaking of COVID-19. Obviously, there were many difficulties from an administrative point of view that could not have been anticipated. To start off on a slightly brighter note, what did you learn as a judge trying to administer a court that was positive over the last couple of years? Meaning, you know, what were the developments designed to deal with COVID-19 as sort of this unforeseen thing that you would like to keep if you were remaining in the role you're in? What would you want to see stick around?

CJRC: Right, as a court, we've had discussions on that. During COVID, I said this almost every single day, "thank God I'm not the Chief of a trial court during the pandemic". Chief Justice of the Court of Queen's Bench, Glenn Joyal, and the Chief Judge of the Provincial Court, Margaret Wiebe[78], had to deal with a far, far greater volume of cases than we did at the Court of Appeal. At the Court of Appeal, we only have two courtrooms: the courtroom where we hear appeals and another for our chambers court. Whereas the trial courts have hundreds of courtrooms spread out throughout the province. And unlike the trial courts, at the Court of Appeal, we don't hear from witnesses. All of that to say, we were able to pivot almost seamlessly from in-person hearings to remote hearings during the pandemic. So, none of us could have predicted that this was going to happen, but it went seamlessly.

As I indicated just now, we didn't have to make many changes to deal with the pandemic. However, there are two changes that we

[78] The Honourable Judge Margaret Wiebe was appointed as Chief Judge of the Provincial Court from July 10, 2016 to July 9, 2023.

will keep. First, our Court has decided to keep video-conferencing options open to the parties regarding chambers matters, not to appeals, just to chambers matters. Secondly, prior to the pandemic, the parties would physically have to come down to our courthouse to pick up the newly-released judgments. During the pandemic, we released our judgments by e-mail and we are going to continue to do that.

During COVID, our backlog did not increase. We were able to pivot to video conferencing or to hybrid hearings quickly and we have continued to pivot in and out. For chambers matters, we're of the view that we should keep that option and allow counsel to either appear by phone or video conference, or appear in person, and if everybody cannot agree to do the hearing in one manner or another, we've decided to set up our Court to be able to accommodate hybrid hearings.

DLM: My next question is, both the Courts and the government took a good deal of heat over a number of decisions they made as a result of the pandemic, and I wondered when I thought about some of those decisions, I thought about you and your fellow judges for sure. But, I also thought about the people who are not as public facing. They're not meant to be as well-known publicly as perhaps the judges are or should be but are still doing work well above and beyond the "call of duty". It seems to me that you talk about the Court as an institution and clearly the judges are at the apex of that, but you have a bunch of people around who make it possible for the Court to do its work. I wondered if you wanted to speak about some of those people, particularly in these difficult times, and how much they had to do with the courts continuing to function over time.

CJRC: As I said earlier, the Deming philosophy and Jim Collins' Good to Great philosophy are both concepts I believe in. Again, I think it comes back to the importance of developing a culture of discipline and responsibility. The first thing you do when you become in charge of an organization is ensure that you have the right people in your canoe, because to be successful a Court of Appeal has to work as a team. We have team building exercises that

include not only the judiciary, but all other staff members, and we're able to do that very easily because we only have eleven staff, eight full-time judges, and three supernumerary judges.

So, let me come back on how we dealt with COVID. Given that the Court of Appeal workspace is quite spacious, our staff and judges were always able to keep the recommended six-foot separation. When COVID first broke out, I conducted meetings with the judiciary and with staff. There was a lot of fear and uncertainty., We were not sure how things would unfold. What we were sure of is that the court is an essential service, we would remain operational. We asked our staff how they felt about the pandemic especially given concerns about physical distancing. Even though it was a large workspace, I sought volunteers to work from home. To my surprise no one wanted to work from home during the pandemic. Maybe this is because of the team building that we had done done, but you felt it came from the heart. Everyone felt it would be unfair to split up the team. They wanted to be there at the registry counter; they wanted to ensure a smooth transition to remote hearings, and wanted to share in the challenges that we were all facing. I was really touched by their unwavering commitment. We work here as a team and that certainly came through loud and clear during the pandemic. I thank our staff for that.

Bryan P. Schwartz, K.C. (BPS): I'd like to ask about the team building thing in the following context: I was looking through the record of judgments for the Court of Appeal for the last decade or so, and there are remarkably few dissents. Of course, in the heyday of the court, you would have very lively and not always courteous exchanges of opinion by the court in real time at hearing; you would have people who vigorously expressed dissent. I see remarkably few, now in the last decade in the Court of Appeal. Is part of that the product of the team building that you the court did?

CJRC: Maybe, I don't know. I can tell you dissents are not frowned upon, dissents are welcomed. Before I became Chief, the Court of Appeal did not have regularly scheduled bench meetings. We now have two a year. These meetings allow honest and respectful

discussions amongst colleagues and give us the time to tackle difficult issues.

The first bench meeting during my time as Chief, was aimed at developing a mission statement and a vision for our court. As I mentioned earlier, the discussion we had with respect to the vision of teh court was interesting. I suggested that our vision should be that we want to be the best Court of Appeal in the country, and I know my colleagues snickered and laughed, finding it somewhat corny, but I said, "No, I'm serious! I think our vision should be to be the best Court of Appeal." The discussion then became, "How do you measure that? How do you measure how and when we will become the best Court of Appeal?". Again, maybe it comes through my experience of sitting on different boards throughout the years or being a commercial tax lawyer, but there are measurable performance indicators. I said, "Well, let me give you some examples of performance indicators as to how we know we are attaining our vision. One indicator is how often does the Supreme Court of Canada cite decisions of the Manitoba Court of Appeal? Another indicator is how often do the other appeal courts across the country cite our decisions? How often do trial courts from other provinces cite our decisions?" We specifically do not measure how often the Provincial Court of Manitoba, or the Court of Queen's Bench of Manitoba cites our decisions, because of *stare decisis*. Of course, we don't count the number of times we cite our own decisions, that is self-serving, but it's interesting to see how often we are cited by the other courts and so we started measuring that. We also evaluated ourselves in relation to comparable provinces and saw how often those courts were cited, to see whether there was some progress on that front, which there was. I'm not going to get into the details of all of that, but we knew we were trending in the right direction, and we started analyzing why Manitoba Court of Appeal decisions were increasingly being cited . Why are Manitoba Court of Appeal decisions being referenced in books of doctrine more and more? Again, I think it comes back to this whole culture of discipline.

We also put in place different protocols detailing when to write a bench decision and when not to write a bench decision; when to reserve and when not to reserve; if the judge in first instance got

the decision right, why should we be reserving? We should simply say, in a page or two, the judge in first instance was correct, and we are upholding their decision. When I became Chief, 22 or 23% of our decisions were bench decisions. The opposite of course, 78% of our decisions were then reserved decisions. We decided to look at this and have the discussion, as a bench, as to why we are reserving so much if the judge got it right in first instance. Together we, the justices, developed an internal policy with respect to when we. should reserve, and low and behold the number of bench decisions started going up. For the last five years, bench decisions hovered around 50%, sometimes a bit more sometimes a little less. So that means that the number of reserved decisions has gone down from 78% to around 50%.

I said earlier that one of our performance indicators is: how often are we cited. Maybe one of the reasons why our decisions are being cited more often as precedent is because we are now able to spend more time on our reserved decisions. Another indicator that we measure to see if our court is improving is: the number of times leave to appeal our decisions has been granted to the Supreme Court of Canada.

So, all of those performance indicators have trended in the right direction, and I think it's because we've brought discipline. I'm not saying there wasn't discipline before, but there's a whole system around this vision and around our mission. Our mission statement also took quite some time to develop, but we whittled it down to something simple and straightforward: "To deliver quality decisions in a timely fashion." I can tell you each member of the Court of Appeal knows it by heart because every time there's a policy, we start off with emphasizing our mission statement, delivering quality decisions in a timely fashion.

When I became Chief Justice, members of the legal profession approached me and said, "We have a concern with the length of time it takes for a decision to be released at the Court of Appeal." We weren't measuring anything, we didn't have statistics on anything. I asked our staff to start gathering statistics and, low and behold, about half of the decisions of the Court of Appeal were over six months. The Canadian Judicial Council, which is the governing body of federally appointed judges, has a guideline that

says as a rule, decisions from federally appointed judges should be released within six months of the hearing. So, we worked on that. We decided to, again, bring discipline to this, and what happened was that after these difficult but respectful and fruitful discussions, we developed a a protocol that set out how we were going to attain the six month guideline. Essentially, after four months, if a decision is not circulated to the panel members of a court, the Chief Justice is required to talk to the panel members to ascertain why it hasn't been circulated. Once a decision is circulated, it then takes another month and a half or so before it goes through the editing process and what not. Since that protocol has been in place, as a rule reserved decisions are released within 6 months.

Another policy suggests to judges the number of decisions they are expected to write each year. So, each judge is given the same range. I'm not going to say the number, but let's say the range is: 16 to 22 decisions each per year. Obviously if a judge doesn't meet that goal or that guideline, it's not the end of the world. But if after two or three years that is consistently the case, that judge can expect and will receive a visit from the Chief to say, "Is there something that I can do to help out?", "Are things alright?" We can then get into positive discussions. At the end of the day, everybody feels comfortable knowing that everybody is doing their share, and the workload is shared equally amongst people. Obviously, the range is lower for supernumerary judges.

BPS: I'm fascinated by judicial stylistics. So, when we did the series on five chief justices, I wrote about Sam Freedman's remarkable style, and Chief Justice Robson's style[79], extremely different but in its own way admirable. Under your leadership, the Court of Appeal has yet a different style. It seems to me that the style goes together with everything you've just been telling us about quality control. So, when I look at this style, what I see is a very disciplined way of

[79] Chief Justice Hugh Robson (1871–1945) was an English-born Canadian lawyer, judge, and politician who served as a member of the Manitoba Legislative Assembly (1927–1930) and later as Chief Justice of Manitoba. Known for his distinguished legal career, he was appointed to the Court of King's Bench in 1910 and the Manitoba Court of Appeal in 1930, where he served until 1944.

writing, I come back to the word discipline that you use. So, here's my read, you can tell me if I'm mistaken, on the literary approach; there's compactness, which helps to get the product done and helps to get the product used. It's my understanding judges are taught if you want people to read your stuff, it should be reasonably short. Maybe one of the reasons that you're more influential is that compactness and tight organization. Along with discipline, here's the way I interpret some of the methodology, I would call it the shortest and most direct path to a sure outcome. So, if you can find one authority as your starting point, you cite one authority. I will take the necessary and sufficient authority I need to proceed and that's my starting point. You use that as a starting point and there isn't a lot of philosophising about why that is the starting point; that's the authoritative doctrine and the starting point. In fact, there's not a lot of philosophising in the judgment of the sense of extraneous philosophizing. Judges of the Court of Appeal don't say, "well the Supreme Court of Canada did this because, because, because..." The Supreme Court of Canada decided something and that's a doctrinal starting point to proceeding. When the Court of Appeal analyzes it, it's within that discipline, stick to the legal points and never reflecting on personal experiences, or telling stories from the campfire or citing Foucault[80], or John Locke[81]. It's very much to the point. There's not a lot of "watch me think here." So, we get to what the findings are in law and fact without a whole presentation of how the judge twisted and turned to get there. It's basically this is where we got this is why we got there and I'm not giving you all the convolutions along the way.

CJRC: Professor Schwartz, if I could intervene before you get to your question. You're 100 percent correct, you sound like me. I have said repeatedly that our decisions must be shorter.

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80 Paul-Michel Foucault was a French historian of ideas and philosopher who was also an author, literary critic, political activist, and teacher

81 John Locke was an English philosopher and physician, widely regarded as one of the most influential of the Enlightenment thinkers and commonly known as the "father of liberalism"

BPS: (Laughs) So, I am wondering why it's such a satisfying job to in terms of developing or clarifying the law?

CJRC: So, one of the performance indicators is to see how often our court is cited by the Supreme Court, by the other Appeal Courts, and by the other trial courts across the country. We did have an internal analysis to find out why certain decisions were being cited and what was revealed was that the shorter the decision, the more likely it was to be cited. The clearer the analysis with respect to the issue in question, the more likely it was to be cited. So, that is something that I have encouraged our Court to do. It comes back to this culture of discipline and, it also comes back to this culture of continually wanting to improve as a Court, continually wanting to improve as a judge. Those are systems that have been put in place.

Coming back to our prior discussion, that explains why there are less dissents at the Court of Appeal. Panels are encouraged to work together as a team. They are encouraged to meet as a panel to see if they can come to an outcome acceptable to all members of the panel. However, and to be clear, a member of an appeal panel always has the right and indeed the obligation to write a dissenting or concurring opinion, if they are not comfortable with the majority decision.

If you ask me what's the most important quality in an appellate court judge: it is collegiality. If a person can't work together with others, if a person doesn't have collegiality, I can tell you that I would tell the federal ministers' judicial advisor that I don't want that person. I need people who are open minded, who love the philosophy of the law, who are of high intellect, but who are also collegial, able to work with others, able to have respectful discussions and not be upset because someone doesn't hold the same of the law or world as them.

BPS: Just to round out our discussion of style; clearly it converges with the overall idea function. The style is in service of a function, the function is being influential, to be readable, to clarify the law, and so on and so forth. The form follows the function and the management philosophy; all of that makes sense to me. Now again,

the way you write and the way the Court of Appeal writes now is very different from Sam Freedman, very different from Chief Justice Robson, hugely different from the wild days, the old days of Joe O'Sullivan[82] or someone like that. I'm curious, I can understand in terms of the institutional objectives how this style fits with that, but in terms of your own literary influence, because it is a distinctive style, was there a role model for you in terms of a judge or a literary figure? How did you come to this style?

CJRC: Well, when I was a partner at Aikins, just by pure coincidence, the former Chief Justice of Manitoba, Sam Friedman's office was right beside mine. So, I had opportunities to pick his brain, to spend a lot of time with him. Plus, I was friends and a working partner with his son, Martin Friedman, who had the same writing style. It was very direct, very focused, addressing the issue, done in a way that people can understand. I know Samuel Friedman said, "the first draft is always lengthier than your final draft." You start off with a lengthy decision and the challenge is then to break it down to one third or one half of the size. I can tell you that I try not to write a decision that's over twenty-five pages long and often times my first draft is fifty, sixty, seventy pages. It's very tough to bring it down to twenty-five pages, but that's why we're paid the big bucks, and our judges are encouraged to do that.

BPS: The irony, and I've said many times: art conceals art. If you do something really well, people can't tell how hard it was to do really well. If people read a judgment that's five pages, it's like "oh here's a clear authority on it and apply the facts, like how hard was that?" The irony is, that's the hardest thing, it's much harder to get to a conclusion in a much simpler, more direct, and memorable and applicable way.

CJRC: Again, you sound exactly like me. That's exactly the way I talk.

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[82] Joseph O'Sullivan (1927–1992) was a Manitoba lawyer and judge, called to the bar in 1953 and appointed to the Manitoba Court of Appeal in 1975.

BPS: (Laughs). Well, the linguistic part really appealed to me and I'm glad to hear that I got it right in my perception of what you were doing there. One last thing about style, there's a whole theory of linguistics that language influences thought, people who are bilingual will think differently in English than they think in French, or Chinese. Now, a large part of your career has been promoting practical bilingualism in this province, and you study common law in French. Maybe there's nothing to it, I'm just curious, do you find that when you're writing and reading in French, especially about legal issues, that the resources of the English language or the traditions of the French language, and so on are significantly different? Does the language actually influence the sensibility and the thinking process?

CJRC: Two things on language; I think back to my days at Aikins in the tax and commercial branch. Martin Friedman, who was the managing partner at the time, once said to me, "Chartier, I don't want any unanimous shareholders agreement or similar document written in English to go out from you without having someone whose first language is English revises it." He believed, and he was right and I accepted that, that the way I wrote didn't follow same type of logic, syntax or structure that an anglophone would use.

Every year for Christmas my kids buy me books; I love to read. And I tell them go to Fareed Zakaria GPS on CNN[83], a show that's on every Sunday morning. He produces a list of books to read. My kids would buy the books. Because I always wanted to read in French, they would buy the French translations of those books or other French books from a list I provided them. When I joined the Court of Appeal, I was told I'd be writing almost exclusively in English, so I knew I needed to improve my English writing skills. As a result, I told my kids to only buy me books written in English. There's certainly a different structure. I went to a French College:

[83] Fareed Zakaria GPS is a weekly public affairs show hosted by journalist and author Fareed Zakaria on CNN and broadcast around the world by CNN International.

Saint Boniface College[84], classic Jesuit teaching, all very structured and based on the great philosophers.

So yes, I have developed a writing style that is commensurate with my formal education and with what I have learnt along the way: i.e. the Deming philosophy and, as mentioned earlier, my numerous discussions with Chief Justice Sam Freedman. Everyone has a distinct writing style. When I read a decision from any one of my colleagues, I can tell, without seeing the name, who wrote it . Each one of my colleagues has a distinct writing style and I'm sure they'd say the same thing about me. I've tried hard to improve my written English. Luckily, here at the Court of Appeal, each decision is reviewed by two or three different sets of eyes before it is released. , But to come back to your question, I do think I have a different way of approaching matters, it's maybe because of my mathematical background (because I majored in mathematics) or my classical upbringing, I don't know, but I know I attack issues from a slightly different point of view.

BPS: Actually, I can see some of that in your stylistics. The Jesuitical training was about clarity, and it was about finding the principle and applying it. Pierre Trudeau was an extremely smart guy. He wrote and spoke clearly, and many people think that was partly the concept of Jesuitical training. Mathematical training is starting with principals and then reasoning down from them. To me your writing often reads that way, start with the first principle and you find the most efficient , authoritative way to state it and then come to a conclusion. Just to round out the conversation on style, when I try to sum it up in one sentence, it's the shortest, most direct path to ensure an outcome. Meaning, if there's one confident way of getting to the outcome, that's what the Court of Appeal under your leadership will say. You won't say, "well if I'm wrong about this, here's where we'll go", or here's sixteen ways to get to the same outcome. If I take this path, I get to this outcome, and I imagine that also probably minimizes dissents.

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[84] Saint Boniface College

CJRC: I challenge you, Professor Schwartz, to find one decision of mine where I said, "Yeah and if I'm wrong on this point," or, "In the alternative..." As an appeal court judge, I don't do that and why? Be confident in your position. You're at the highest court of the province; be confident. That's something as well, our Court is a confident court. I think of the *Mabior* decision, written by Justice Steel, with respect to what the test was in regard to the HIV issue. By *stare decisis*, we were bound by the *Cuerrier* decision. We knew as a Court of Appeal we were going to be overturned by the Supreme Court of Canada. We knew that, but it forced the Supreme Court of Canada to revisit the issue and change the law" No that's confidence. That was something that, as Chief, I encouraged my colleagues to do, and they have, and I still encourage it. I hope they will continue.

BPS: Again, that would go to the influence of the Court's decisions. Somebody saying on high from the mountain, I bring you down two tablets, when they're all kind of wishy washy well what what's the point, right? There was 10 commandments, they're pretty clear, they are not put in conditional sense. Here's what I brought you down from mountain, ten principles, much more likely to be influential than when the authority itself is hedging, qualifying, expressing its own doubts about how it got there. I can see it converges, and everything you tell me about the institutional objective and the style and your own influences and your background, your unusual background, in terms of math and your Jesuitical background and so on and so forth.

DLM: My next question, had something to do with that element of confidence because COVID shook a lot of people's confidence. When you're dealing with something as fluid as what COVID was, particularly in its early days, I'm curious what was the toughest decision you had to make? You said you went in and out three or four times trying to figure out what was the right decision to make, what was that the toughest level of decision making that you've encountered ? When you're dealing with a situation like COVID, where you don't know even what you don't know in some cases, but you've got no choice but to react.

CJRC: Professor MacPherson, we all remember where we were when the twin towers were attacked; we all remember where we were when the World Health Organization announced the pandemic. I remember we called for a meeting of the three chiefs on March 13th, 2020 and we decided to hold a press conference right after our meeting. It was with the view of leading, the courts would lead. We weren't sure what the provincial government was going to be doing or what the federal government was going to be doing, but we knew what the three levels of court wanted to do with respect to this. In those days we were talking about bending the curve, to ensure that our healthcare system could sustain the number of patients that might be admitted to a hospital. It was a difficult decision to say that we recognize that we are now going into a COVID situation, a pandemic situation and we must react. So, we're going to lead by doing our part, by ensuring that we bend the pandemic curve.

When we did the press conference on COVID, we announced that the public would no longer have access to the courthouses during COVID. That was a major decision. We all know that the role of lawyers is to guide people through the justice system. But the role of judges and lawyers is to ensure that the rule of law is respected, to ensure that separation of power is respected, to ensure that judicial independence is respected, and to ensure that the open court principle – which is a fundamental, indispensable principle of our democracy and of our democratic system – is respected. And we had to say that we would no longer be allowing the public to attend court, only the parties and their counsel. That was a difficult decision to make, and we didn't make it lightly. We of course said that we were going to allow the media to come in the place of the public to ensure public confidence in the administration of justice. We couldn't allow school visits during that period, we had to shut down Law Day, and there's a bunch of things that occurred that were difficult for the court system. But that's called leading.

DLM: Now let's talk about your retirement for just a second. Upon your retirement, what are you going to miss most about being both Chief and a member of the Court of Appeal?

CJRC: You hit the nail on the head. As Chief, I wear more than one hat; I am a member of the Court of Appeal, I am Chief Justice of the Court of Appeal. I am also Chief Justice of Manitoba. When you become Chief Justice of the province, you also become the administrator of the province and replace the Lieutenant Governor when they are unable to execute their functions. I chair the Advisory Council on the Order of Manitoba. I also chair the Advisory Council on Queen's Counsel and there are other things that I chair. The last hat that I wear is, I'm a member of the Canadian Judicial Council. The Canadian Judicial Council is the governing body of the federally appointed judges for Canada. So, to answer your question, as a judge of the Court of Appeal, I'm going to miss my colleagues. I'm going to miss the collegiality that exists within our Court. I'm going to miss writing decisions, I enjoy writing decisions. I can't do enough of that. As Chief of the Manitoba Court of Appeal, I had occasion to work very closely with the two other e courts. We did wonderful things together and I will miss working with the Chief of the Court of Queen's Bench, Chief Justice Joyal, and the Chief of the Provincial Court, firstly it was Ken Champagne[85] and then Margaret Wiebe.

There is magic in Manitoba, I keep saying Manitoba is a community of communities. When Manitoba was settled, we had parts of Manitoba that were reserved for different groups. We all remember when the Red River was settled, there were 12 parishes or municipalities for the francophones and 12 parishes for the English-speaking population. Then in 1871, with Treaty 1, there were lands that were reserved for the different Indigenous communities. Then in 1873 or 1874, the East Mennonite Reserve was created, where nine townships were reserved for the Mennonites. Then, a few years later, the West Mennonite Reserve came into being. At around the same time New Iceland was created

[85] Kenneth Champagne is a Canadian jurist who was appointed to the Provincial Court of Manitoba on April 14, 2005. He served as Chief Judge of the Provincial Court of Manitoba from 2009 until 2016. He was appointed as a Justice of what is now the Court of King's Bench of Manitoba on April 5, 2018.

in the Gimli area. for the Icelandic people. My point is that we're a community of communities and we learn to work together, we learn to help each other out. When we work on different problems in Manitoba, whether it's the three chiefs, the three levels of court working together or the three levels of court working together with Robson Hall, the three levels of court working together with the Law Society, or with the Manitoba Bar Association, or when all five organisations work together to make magic happen… I'm going to miss that.

What struck me, because I travel a lot across the country, was that it's not like that in other provinces. Yes, in some provinces they do, to a certain degree, work in the same way, but I've heard person after person saying, "Boy, I would like to have the working relationships that you have with your law school, with your Law Society, with two other levels of court, and with the Manitoba Bar Association." So, I'm going to miss that.

As administrator of the province, I've had to replace the Lieutenant Governor when required. As it happened, when I was in the stead of the Lieutenant Governor, important constitutional questions arose on two separate occasions. If you look at what happened over the last nine and a half years, you'll be able to identify when those two events occurred. I'm going to miss that. I'm going to miss that type of drama. And who said the Lieutenant Governor's role is merely symbolic!

The last thing with respect to the other hat I'm wearing is at the Canadian Judicial Council (CJC). I was asked to be the national chair for judicial education. We were tasked to modernize the CJC's policy on judicial education. I was happy to write the first draft of our new policy on judicial education, which, in the end, completely changed the way judicial education is done in Canada. I was also asked to be on a nine-member committee tasked with rewriting "Ethical Principles for Judges". Those two projects sought to improve foundational documents for the CJC and I was so pleased that I was given the opportunity to work on them. So, I'm going to miss those the work done at the CJC under the strong and effective leadership of Chief Justice Richard Wagner.

BPS: So, how are you able to make that decision? You've done this job for a long time, I'm sure you've gotten better and better at it, there's things that you've learned along the way, you're doing all these interesting things, you've got fascinating colleagues, and yet you made the decision to sort of leave at the peak of your game, right? That's a tough choice for anyone to make.

CJRC: No, no, you see, so remember I talked about 1992, spending a week with that 92-year-old gentleman named Edward Deming. To this day, the Edward Deming prize is the highest honour that you can be awarded in Japan as a non-native Japanese person. One of the things Deming said, is that: "Ffor people in positions of power, there should be term limits." When I became Chief, you'll both recall that I said I'd be happy to do the introductory interview, but you must publish that I believe in term limits for Chief Justices. I said I wouldl leave after 8 to 10 years, and I'm keeping my word. I've let it be known to all of my colleagues and to all the judges across the country or the Chiefs across the country that I would be gone after 8 to 10 years. I always had this deadline and I've always been pressed to achieve the list of things that I wanted to do because of that deadline. In fact, that deadline kept me focussed during my time as Chief Justice.

So, I'm serene, I'm prepared. When I became Chief Justice, my wife retired from her position in the arts community and she and I both became ambassadors for our province. She knew this commitment required a full time effort of attending social events in the evening, going to different functions across the country and representing our province. So, she knew what we were getting into, and as a family we knew what we were getting into. I said I would check the Manitoba Law Journal from nine and a half years ago, and it's in there. And I'm keeping my word and I'm very serene about it. I'm going to move on to other things.

DLM: Okay, so you'll miss a lot of things about the work. What will you miss least? What's the thing you're quite happy to say well, that's something I won't miss much?

CJRC: Well, yes, I should have given some thought to that. I'll tell you what I won't miss. it's the 24/7. You know, this little contraption (gestures to cellphone), it controls our lives, and it's sad, it's really sad. During the pandemic, it got worse. At least before the pandemic, it seemed that on weekends people would leave you alone, but during the pandemic the days merged into one long day and now people, you know, call me Saturday, Sunday, at night. I can't help myself but to answer the phone. But, I'm not going to miss that at all.

What else am I not going to miss? I talked about constraints when you're a judge. There are constraints that are put on your life; you cannot express your opinion anymore, you cannot attend the same events that you could before, you will always be held to a very high standard, which is all fine, but I have opinions on everything. I've had to keep those to myself for all these years. I was involved in all kinds of activity before becoming a judge, but I understood my role and I kept that oath and I kept all my opinions to myself.

As I mentioned earlier, I was on the committee that rewrote "Ethical Principles for Judges." There were five new sections that we added; things that weren't there when the first ethical principles were written in 1978. One of those is a section on post judicial retirement or transitioning towards another career. When transitioning into the next chapter of my life, I understand that I'm the former Chief Justice of the province. So, I'm not going to sit here saying I'm going to miss the constraints that were on my position, because even as a former judge I'm still going to abide by those constraints. I'm still going to have the title of "Honorable", I'm still going to be known as the former Chief Justice of Manitoba and those constraints are going to continue. So, unfortunately that's going to continue and although I'm going to miss being able to speak out, it is what it is.

BPS: How long do the constraints last as a former Chief Justice? Is there some point that you're far enough away from the job that you can start freely speaking your mind again or is that a lifelong thing?

CJRC: That's a fair question Professor Schwartz because the ethical principles are written by the Canadian Judicial Council and it's

with respect to judges; not former judges. Once a judge has retired, the Canadian Judicial Council has no authority over that judge's conduct. As a former judge I'm given the option of keeping the title Honourable and I've advised the Privy Council and the Prime Minister that I would like to keep the title Honourable and with that title will agree to continue with those constraints.

I'm leaving the legal profession altogether; I've said that to my colleagues. I will not be counsel at a law firm. I can tell you that I will not read another legal decision in my life. I'm going to want to keep a clear, unobstructed path for the person who replaces me.

But subject to what my wife says, I know for the next six months we will be in Southern California, down in Palm Springs. All the experts tell me, do not make a decision for six months. So after six months I will see. If the mayor, the Premier or the Prime Minister or a minister wants the former Chief Justice of the province to examine non-legal related subject matter or a problem that requires a quick answer, that would be something that I would consider doing. But I want to make it clear that I do not want to be paid to do it. I'm going to be receiving a gold-plated pension. I don't want more money. I want to give back to my community, to my city, to my province, to my country.

BPS: I don't know if I'll be able to articulate this very well, but this whole topic of people stepping down from roles. We spoke to former Chief Judge Wyant[86], who previously stepped down. In your case it's a choice and it was a choice you made when you entered the job. Some people find it very difficult, many lawyers, in my observation, find it very difficult to do because their personal identity is so tied up with their professional identity. So, I have a sense that they're scared, "well who am I if I'm not council for this firm?" That's their identity, that's why people respect them, that's how they're useful. It's difficult to then step back and think, "well then, I've lost all these things that make me significant and important." I can see the other side to it, which I think I'm intuiting what you're saying which is, these roles limit the sense to which you could be yourself. Yes, I get this sense of self from the role I'm

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playing, that is also a very disciplined role like the one you have. To some extent, I get a chance to be myself when I step down. I am free to do all the things I wanted to do. I had to stay out of community involvement, I had to limit myself in various ways and now I can be more me. So, I'm losing some of those trappings that contributed my identity but in some ways, I'm liberated to be more of who I really am. Does that ring true, anything I'm saying here?

CJRC: Absolutely, I might let my hair grow a little longer, I might grow a mustache. You're absolutely correct. Imagine, you become a judge and you have to essentially cut off your relationship with your legal friends. That's tough, and now that won't be the case. There's a number of things, several organisations that I was involved with before in the healthcare field. For example, I was Vice-Chair of the Saint Boniface Hospital Board. So, there are different things that I'll be able to become involved with that are not legal related. I've done my time, I want there to be a clean slate. People won't remember me in a year, and they won't see me. My replacement will be able to start anew and afresh, and they'll be able to model their work as Chief Justice of the province and Chief Justice of the Court of Appeal in the way that they want to, and I welcome that. I'm absolutely fine with that.

DLM: Okay, what do you see as the greatest challenges that are going to face those people? For your colleagues, in the role you are stepping down from, in a challenge you've already overcome but will continue to persist, or the next upcoming challenge. What do you see for them?

CJRC: There's increasingly a demand for transparency and the Courts haven't been as transparent as they should have been up to this point. We've all heard the Chief Justice of Canada, Richard Wagner, speak on transparency. He can't say one speech without having to word transparency in it; whenever he talks, it's about transparency. I know here in Manitoba, we've tried to do that by being more transparent by holding press conferences and answering questions, but I think we still haven't done enough. Transparency is about maintaining public confidence in the

administration of justice. Everyone knows that once you lose the public trust, the justice system will crumble. If the public doesn't have confidence in democracy, democracy will crumble. With the advent of the Internet and with social media, things are changing, and you have to be alive to what's happening and to how things are changing in the world. We all know, even if we're not Ukrainian or part Ukrainian, we all have friends in Manitoba that are Ukrainian and we see what's happening in Ukraine. We realize that we live in dangerous times, that democracy is fragile. So, my concern, and I don't want to end this interview on a down note, but we must be alive to different possibilities. I come back to what Churchill[87] said and I never get this quote right, "democracy is the worst system in the world except for other alternatives that have been tried before", or something like that.

DLM: Yes, I think it's "Democracy is a terrible form of government, except for all the others."

CJRC: There you go, thank you for that Professor Macpherson. But I mean democracy is a fragile thing and we in the legal profession, you as legal professors, law students, lawyers and the judiciary, all jurists have an important role to play. My, *mon souhait*, my wish is that more lawyers get involved in politics. I don't care what the party is, please get involved in politics. I know it's difficult, one sees that it's a 24/7 commitment now, your private life becomes front page news; my fear is this is keeping good people away from politics. We need strong women and men to lead our country. Another fear that I have is people forgetting the role of the separation of power. As Courts, we must always be reminded of what our sandbox is, and remind people not to come and play in our sandbox. More importantly, we as judges must remember we can't play in the sandbox of the executive or in the sandbox of the legislative branches of government; we must respect what their powers are and unless legislation is unconstitutional, we should respect what they

[87] Winston Churchill was a British statesman, military officer, and writer. He served as Prime Minister of the United Kingdom from 1940 to 1945 and from 1951 to 1955.

decide. If the public doesn't like the decisions, they'll vote them out in four years. I always have a concern, and more in the last few years, I've talked about reminding judges what their role is as judges and reminding courts what their role is as courts going back to first principles.

BPS: On the transparency point. The reason Darcy and I do this, do these exercises and interviewing people, it's a very intellectually gratifying for us because we find that this process of actually talking to people who are in the centre of the legal system. By now we have interviewed four former Chief Justices in addition to you. This interview has been extremely useful.

CJRC: It's a conversation, Professor Schwartz. It's not an interview, I feel that this is a conversation.

BPS: I hope when people read this, they learn a whole lot of things about the court and the personalities that you don't get from the traditional way we do legal scholarship, just reading stuff without ever actually talking to the people. So, in all sincerity, all of these interviews have been extremely interesting from my point of view and Darcy I'm sure as well. Darcy might have a few more questions, I just want to say since we're close to the endpoint here, thank you so much for doing this. I find every time I do this with people like you and Ray Wyant, I learn so much. I'm hoping, when we put this stuff out there, it really helps people to get an appreciation for the people and the system in a way that's much more vivid and direct than the scholarly documentary approach.

CJRC: This is the Manitoba way. This exercise is the Manitoba way. Again, like you know, we're family; we're all interconnected here.

DLM: That leads me to one of my next questions which is: I've lived in other places, many of us have and taught at other institutions but I've never seen anything like the way that the Manitoba judiciary engages with the law school and our students. Not only you, but certainly you have shown up every year that you've been Chief if I'm not mistaken.

CJRC: Oh yes, I would never miss it!

DLM: Just to hand out the Code of Professional Conduct to our students. To tell them, essentially, that the highest level of the judiciary cares about their education that they're getting from us. That's not something that most law schools, even in smaller places, can necessarily claim. It's been a while since I was at Dalhousie as a student, but I don't remember the Chief Justice of the province showing up on our first day to say, "okay this is important, it's time to start thinking about your ethics and how you're going to do things." Why is that important to you? I mean, it's not an institutional thing. Nobody would have said, "oh my dear this is a grievous breach of tradition," if you had decided not to attend and participate. But you decided to maintain it. Why did you do that and why is it important?

CJRC: I'm old school, I believe in tradition. But I also come from the school of the golden rule: do on to the others what you want done onto you. If I, as a first year law student, had the occasion to hear the Chief Justice of the province speak on my first day of law school; then to have him or her give you the Code of Professional Conduct, shake my hand, take a photo, say a few words; then go to a champagne reception after and then have a drink and just mingle; I would've remembered that to the end of my legal career. I'm doing it because it's something that I wish I could have experienced as a student. I know that it touches the students because, you go to Safeway and then you get stopped or you're at a Jets game and you get stopped by people. Without a word of a lie, the times that I get stopped the most are by former law students saying, "Chief Justice, you don't remember me, but my name is so and so and I've got a photo of you and me shaking hands on my bedroom nightstand," or whatever. That tells me that this means something to people. I understand it, I get it and it's something that leadership must be in touch with, the population.

To come back to when we wrote the ethical principles; the constraints don't mean that you as a judge have to live in an ivory tower, it just means that you are aware of these ethical principles.

It lays out the four factors you should consider as to whether or not you should be attending this event. The big one is whether, by my participating in that organization or attending that event, this will be a matter that finds its way into the court system and may jeopardize the public's confidence in the impartiality of the judge because their involvement in that specific function. Judges must participate in community events; attending law school and speaking with the students. Millennials are so direct. At first, I thought they were irreverent, but no, it's just who they are. They're doing it, out of kindness. They call me by my first name. Like, what are you doing calling me Richard? I would never, in the 1970s when I was in law school, have called the Chief Justice by their first name. I would have said 'Chief Justice' or 'Chief Justice Chartier'. But then I get to work alongside the students, because we have a clerkship program for third year law students here at the Court of Appeal, when I see what they write, how intelligent they are, how their research is thorough. What they do for us, it's gold. These kids are bright, they're worldly, they belong to the world, they understand what's happening in Ukraine. They don't see countries with borders, they want to be citizens of the world. Some of us still must get used to being citizens of the world, but it's refreshing. How do I know that? By going to events involving law students and meeting them and then having a glass of champagne and shooting the "you know what" with them.

DLM: For sure. Now we've come to the end because I think most of the other questions that were on my list, you've largely answered. I was going to talk about your retiring before the mandatory age, but you've talked significantly about why, despite your vitality and energy, you made the decision quite a while ago, before you ever started. I can only hope that the law school can tap into some of that energy and vitality at some point in the future when you've had your time away to relax and decompress and maybe occasionally come in and help our students, whether it be in advocacy or other things. That would be a tremendous way to spend some of your time if you so choose. That said, my last question is this: what question didn't I ask that you wish I had and how would you answer

it? What did I not bring up where you said, "Gee I wish somebody had really asked me about this that or the other"?

CJRC: My goodness, Professor MacPherson, this interview has been all-encompassing. I can't think of anything we didn't talk about. One of the highlights of my tenure as Chief Justice of Manitoba, is the visit of the Supreme Court of Canada.

DLM: Yes, we spoke on that a little bit. You had indicated your interpersonal relationships were a very significant part of why the Court chose to come here.

CJRC: *Exactement.* Life is about relationships. My wife and I met the Chief Justice of Canada and his wife for the first time in Europe, in Strasbourg. We hit it off. He wasn't Chief Justice at the time, He and his wife had never visited Manitoba. So, here we are in Europe in Strasbourg in July and I'm saying, "you're coming to Winnipeg in September, if you've never been to Winnipeg, you're coming to Winnipeg in September." It was in 2016 and he fell in love with the city. There's something in the culture of Quebecers, this song called "*À Winnipeg, les nuits sont longues*"[88]. It's a very well-known song, it means "In Winnipeg, the nights are long" and it was written by Pierre Lalonde. It's an easy song to sing once you hear it, it stays in your memory. So, they always remember "*À Winnipeg, les nuits sont longues*", and in their mind they're saying, "why would I go to Winnipeg?" So, when he came, he just couldn't believe the beauty and the diversity of the city.

We brought him to meet the students. We brought him to meet the executives of the Manitoba Bar and the Law Society. We brought him to Rady Centre to meet the leaders of the Jewish community. We brought him to Saint Boniface to see Saint Boniface University, and things like that. And of course, we had meetings with the legal profession, which included a larger dinner. When he became Chief Justice, I remember my wife and I flew down to Ottawa for his swearing in and the night before there's a

[88] À Winnipeg is written by Quebec singer and television host, Pierre Lalonde. Lyrics of the song include, "À Winnipeg, les nuits sont longues".

big gala evening for him, and as soon as he sees us, he grabs me and he steps aside, he just whispers in my ear that "I've got something for Manitoba". So I said, "What?" I'm curious and I'm direct as well. I said, "I'm not patient tell me what it is!" And he said, "No, no. I'll get back to you on that." So, I get home to the hotel at night, and my wife tells me that Chief Justice Wagner's wife, who is a judge in the Superior Court, had whispered in her ear saying, "We've got something special in mind for Manitoba." My wife also didn't get more information. Then suddenly, eight or nine months later, they make the announcement that in September of 2019 they're coming to Winnipeg.

It was a success at all levels as you know. The courthouse was packed for all their hearings. The public meeting that we had at the Museum for Human Rights[89], had 500 to 600 attendees, there were about 40 police officers undercover or in uniforms that were present to ensure security. It was an open mic event with the nine justices of the Supreme Court accepting to answer questions. I was asked to be the moderator for that event;to moderate the discussion and to intervene when required. This was probably one of the most difficult things I had ever been asked to do because as we know, if a judge is tainted or something goes wrong you can appeal their decision to the Manitoba Court of Appeal and even when a Court of Appeal decision goes wrong, you can appeal it the Supreme Court. But if the Supreme Court of Canada becomes tainted by an answer to an improper question, it becomes problematic because there is no higher court in the land. In the end, the meeting with the public went very well. And what can be said about the sold out event at the Convention Centre where over 800 members of the legal profession attended. It was simply fantastic.

DLM: It was stunning, I mean it was quite remarkable.

CJRC: And to this day the justices of the Supreme Court of Canada still talk about their visit to Winnipeg and how it was a great success, to the point where they are now doing it again in September in Quebec City, in a few weeks.

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[89] Museum for Human Rights.

DLM: That's wonderful.

CJRC: You know, Professor MacPherson, I think you've touched all the bases and I just want to thank all of you for this conversation. I'm always touched, like, I'm just a Joe citizen and I'm going to return a Joe citizen.

DLM: I hate to tell you, but you're not. (Laughs)

CJRC: No, no, but you know, when you go to Europe, if they find out that you're the Chief Justice, they're so class-conscious over there, they're going to move Heaven and Earth to give you another room. I find all of that embarrassing. I'm a simple person, I'm going to go back to being Joe citizen and I look forward to that. It's been a great time; I've been a judge for twenty-nine and a half years and I'll let someone else lead now and whoever it will be I'm sure they'll do a great job.

DLM: So, you don't actually know who your successor will be?

CJRC: No. That would be playing outside of my sandbox, as I say. That's the prerogative of the federal government and they will appoint whoever they want. I don't know if they'll appoint before I retire. My official date is October 30th, there's a gala evening on October 27th, I don't know if they'll announce before or after, but we'll see. It will be either someone from within the Court of Appeal or someone from outside the Court of Appeal, but that doesn't tell you anything.

DLM: But I think regardless of who it is, they have big shoes to fill.

CJRC: I had big shoes to fill. After having to follow Chief Justice Richard Scott, those were big shoes to fill. He is a great man and was a great Chief Justice as well.

DLM: I would agree with all those sentiments, but you haven't lowered the bar any, let's just put it that way.

CJRC: He mentored me. I was with him for seven years

DLM: Hopefully we can find a way for you to enjoy your retirement and still enjoy the public service that has characterized your life following your retirement as well. If there's any way that the law school can facilitate that, I think I speak for just about everyone when I say we will do whatever we reasonably can to make it a great experience for you.

CJRC: Thank you, that's very kind.

DLM: Thanks so much.

CJRC: Okay, merci, thanks. *À la prochaine!*

DLM: *À la prochaine!*