

Interview with Diane M. Kelly*

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

I. INTRODUCTION

Bryan Paul Schwartz (BPS): We are extremely grateful that you are here, Diane. You've had an extraordinary career and it is hopefully far from over.

You've done so many things in so many places. Now you're the Assistant Deputy Minister Child Family Services, trying to bring customary care. It's hard to imagine a much more important policy issue in the province right now and into the foreseeable future. So, if we can go back to the beginning

Diane Kelly (DK): Yes, of course.

BPS: So, you grew up in what kind of community?

* Interview conducted by Bryan P. Schwartz.

Diane M. Kelly is from Ojibways of Onigaming First Nation. She graduated from the Assiniboine Community College in Brandon with an award for highest academic achievement in 1988 and a Bachelor of Arts degree from the University of Manitoba in 1992. She earned her law degree in 1995 from the University of Manitoba. She was admitted to the Manitoba and Ontario law societies in 1996 and 1998 respectively and became the first Anishinaabe woman lawyer from Treaty #3 Nation.

Diane has extensive experience in First Nations governance, board training, research and development, treaty negotiations, education policies and all aspects of child welfare. She was a sessional co-Instructor of Native Studies at the University of Manitoba and taught the Canadian Legal systems course at Yellowquill College.

Diane was the first woman Grand Chief of Grand Council Treaty #3 from 2008-2012. In that position she carried the responsibility of protecting, preserving and enhancing Treaty Rights in 55, 000 square miles of Treaty 3 territory in Northwestern Ontario and Southeastern Manitoba which includes 28 First Nation Communities. In April 2015, Diane became the Assistant Deputy Minister of the Child & Family Services Division for the Government of Manitoba.

DK: Well, I sort of grew up here and there, but I was born on a reserve in Northwestern Ontario. My dad was in the residential school system, right. He was really keen on education and he was very bright. When he went to the residential school at eight years old he took about two years to finish grade six. He wanted to go to high school, any high school, but at that time there were policies that acted as a barrier for Indigenous students, so he was unable to attend. He just wanted to learn and become educated. So, there went his high school out the door right there, right. But, he was always keen on education so from there we sort of travelled around here and there. He went to the University of Toronto and then later he went to Osgoode Hall.¹ So yes, I grew up in many communities including Kenora, Fort Frances,² Toronto, Winnipeg,³ and back home to our home community. So my childhood was here and there.

BPS: By the way, I just heard the other day that Wab Kinew⁴ is your brother?

DK: Yes he is.

BPS: My goodness, I didn't know that. Wab Kinew was recently elected to the legislative assembly.

DK: Yes he was.

BPS: So, and you mentioned your dad at Osgoode Hall, your dad went to law school?

¹ Osgoode Hall is the law school at York University, in Toronto, Canada.

² Fort Frances is an industrial town in Northwest Ontario.

³ Winnipeg is the capital city of Manitoba, Canada.

⁴ Wabanakwut (Wab) Kinew is the leader of the New Democratic Party in Manitoba, and the leader of the opposition in the Legislative Assembly of Manitoba. He was raised in Winnipeg Manitoba, but is from Onigaming First Nation, located Northwestern Ontario.

DK: Yes, but he only went for the first year. He left law school to rebuild the Grand Council⁵ Treaty 3⁶. They were looking for a way to unify because they had the Indian bands under the *Indian Act*,⁷ which was isolating the communities. The communities really wanted to unify so he said, “Why don’t we start the Grand Council again. That is really our unity, our common denominator is Treaty 3.” So, that is when he left law school and helped to rebuild that. He played a really big role in terms of First Nations politics, governance, and Indigenous law. Growing up I saw all of that, he would take my brothers and I to meetings. I was really immersed in a lot of that more traditional way of thinking and doing business.

BPS: Your father went to law school for one year, did he have a good experience there?

DK: You know, he didn’t really talk about it too much. Although, he always told me you should go to law school, so I don’t know if it’s something he wished he had finished. He didn’t really talk about it. Good, bad or indifferent.

BPS: Treaty 3 is known in the history books as having been tough negotiators with the crown.

DK: Absolutely.

BPS: I’ve read some history and in my recollection the documentation from the Canadian government side was saying that Treaty 3 peoples were...

⁵ The Grand Council is the traditional historic government in the Anishinaabe Nation in Treaty 3. It also plays a spiritual function, this system still exists today and is the basis of Manito Aki Inakonigewin (resource law) for example.

⁶ Treaty 3 was an Indigenous land and rights agreement between the Ojibwe Nation and Queen Victoria, signed in 1873. It involved land now situated in northwestern Ontario and eastern Manitoba.

⁷ The *Indian Act*, RSC 1985, c I-5 was passed in 1876. It served to define the term “Indians” and regulates band governance, Indigenous land-use, administrative structure relating to education and healthcare among many other things. It is a controversial piece of Canadian legislation whose provisions have been constitutionally challenged several times in the courts.

DK: Shrewd, I think they said shrewd negotiators.

BPS: Yeah, tough. How many acres was it that they got per family?

DK: I thought it was something about one hundred and sixty acres.

BPS: Some of the later treaties didn't do as quite as well in terms of acreage, but Treaty 3 became the precedent for a lot of future negotiations.

DK: Absolutely. In fact, they had to come back to renegotiate Treaty 1⁸ and Treaty 2⁹ after Treaty 3, right?

BPS: Right.

DK: They wanted to start with Treaty 1, because that is the logical way to go, starting in the east and then working their way, but then they took four years to complete Treaty 3.

BPS: Yeah, there was some unrest in Treaty 1 and Treaty 2 and there was some renegotiation of that. So, just from the dinner table conversations, the meetings, and so on, you had the tradition of people passing down what happened at the original Treaty 3 negotiations?

DK: Absolutely.

BPS: Is a lot of that oral history preserved?

DK: Well it's preserved, but not so much in writing. People still talk about it, but not everybody, I find that it's getting fewer and fewer. When I was Grand Chief one of the things I really wanted to do was meet with the elders and gather that information and make as much as we could

⁸ Treaty 1 is an Indigenous land and rights agreement between the Chippewa and Swampy Creek First Nations and Queen Victoria. The treaty includes land in Southern Manitoba, it came into force in 1871.

⁹ Treaty 2 is an Indigenous land and rights agreement between Queen Victoria and Ojibway First Nations situated in Southwestern Manitoba and Southeastern Saskatchewan. The treaty was signed in 1871.

permanent. I probably met with the elders at least once every two or three months, and I'd asked them different things. As an example, I'd ask about fishing. What was the traditional way of fishing? How did we know we weren't over fishing? How did we know when it was time to fish for walleye? I asked them questions like that so we could try to pull out what the principles and protocols were around fishing or wild rice harvest or resource extraction. I was always told we were copper miners as an example. We did those things. We weren't just roaming around the bush looking for berries as you learn in public school.

BPS: Very interesting.

DK: It was a little deeper than that.

BPS: The fact that you made the extra effort to preserve the oral history is great, I'm very interested in oral history. We need to document people's oral histories. For example, if you lived through what it was like to be involved in the '82 negotiations,¹⁰ or Charlottetown rallies,¹¹ and so on and so forth. Yeah, there are documentary histories, but that isn't the same as actually talking to the people, there is nothing like getting the voice of those who actually lived through it.

DK: Absolutely, I agree. When I attended law school it was a somewhat of a disappointment that everything was seen through the lens of the *Indian Act* or seen through the lens of Aboriginal law. Even back in the late '90s I know things were still developing, they are always developing, but that was a major disappointment to me. The native law course that we had here, for example, was more of a seminar; everybody could pick their subject and could either be for it or against it.

BPS: Yeah, well culturally law schools are built around the printed word.

DK: Absolutely.

¹⁰ The 1982 Negotiations refers to the discussion surrounding the patriation of the Canadian Constitution.

¹¹ A series of rallies surrounding the constitutional negotiations that led to the Charlottetown Accord in 1992.

BPS: Some of the people I've spoken to say it's one of the cultural differences that will eventually have to be addressed in encouraging Aboriginal people, because there is a long tradition in First Nations' cultures of an oral tradition and mainstream tradition has been written law. People think of law and they think of words on a page. I think that as we try to implement the TRC¹² recommendations that being more open to learning things by direct conversation seems to be an essential part. Print has its advantages, but talking to a real person and capturing the voice and the nuance and the emotion, it's quite different from seeing the world filtered through paper.

DK: Yes.

BPS: I just want to find some place to get some of these things on record. It's unfortunate that for a lot of First Nations the way their oral history has been collected and preserved has been in the context of litigation.

DK: Right.

BPS: I'm very concerned about some of that material being lost. When the Indian Claims Commission¹³ shut down, their stuff was, apparently, transferred to national archives. I don't know how carefully preserved it is. Also, because it's physically at the archives, and not online, it's not easily accessible. Words on the paper and the tapes are going to degrade, so I'm hoping that somebody will be attentive to try to preserve all the information that the Indian Claims Commission amassed and that people will do what you did, which is make the effort. You never think of it when people are still alive and around to do it; you sort of forget that people aren't there forever. The more we can preserve those voices while they are here to share with us the better.

¹² The Truth and Reconciliation Commission's (TRC) mandate is to educate and inform Canadians on Indian Residential Schools, and to help promote reconciliation. The TRC's final report consisted of 94 "calls to action" regarding the legacy of the Indian Residential Schools and the process of reconciliation.

¹³ The Indian Specific Claims Commission was established to conduct impartial inquiries, mediate, and facilitate agreement on specific claim disputes between the Minister of Indian Affairs and Northern Development and First Nations.

II. UNIVERSITY & LAW SCHOOL

What was your first degree?

DK: A Bachelor of Arts.

BPS: Even then you already knew you wanted to go to law school?

DK: Yeah, I knew for a long time that I wanted to go to law school.

BPS: When you did your undergraduate degree which university was that?

DK: It was here, at the University of Manitoba.

BPS: Was it a reasonably welcoming environment in those days? That was what period?

DK: Yeah, I thought so. I graduated in '92. I did my degree in two and a half years, because I went through the summers. So yeah, I thought it was reasonably accommodating. Although, I don't know about the word accommodating, because it has a legal definition to it. But yeah, it was open.

BPS: That's a funny thing about having a legal education. It's like studying musical theory; you can never actually hear music again without putting it in some conceptual framework. Once you're a lawyer, every term like reasonable accommodation or accommodation or reasonable, in your mind, it all has accumulated precedents attached to it. Then you came to law school in what year?

DK: In 1992.

BPS: Okay, I was already here.

DK: You were my constitutional law professor.

BPS: How'd that work?

DK: Well, I passed.

BPS: Regarding the environment as a whole, you mentioned that we did not have a lot of courses?

DK: No, we didn't. In second year we had a number of different options so I did choose the native law course, that's really all there was on Aboriginal issues. I remember when I started I advocated that we needed to have an elder here. When I began law school went through there were ten of us Aboriginal students, which was unprecedented. That was probably the first and maybe last time that there were that many Aboriginal students going through at the same time.

BPS: Did you have a student's association, an Aboriginal law student's association, or something?

DK: Not that I recall. I had advocated that we really needed to have an elder here, and that we needed to have more courses with Aboriginal content. I remember that I'd gone to the Saskatoon pre-law program¹⁴ and I'd taken property law with an Aboriginal component. One of my major disappointments was that Aboriginal law wasn't integrated into courses here.

BPS: Even just a mention in the substantive classes so that you know there is a different regime on reserve than off-reserve.

DK: Yes, even a five-minute mention did not happen.

BPS: Right, I think that's one of the main purposes of law school. There is not enough time to tell you everything, but there is enough at least to know there is something out there. You need to know what you don't know so that when something comes up you know to look for it.

¹⁴ The Program of Legal Studies for Native People (PLSNP) is often a condition for acceptance to law school, and counts as a property law credit for first year law. It is an eight-week course offered in the summer prior to beginning law school.

DK: Well, absolutely. Later on, being out in the field, one of the things that I found, particularly being an Indigenous person, was that we would hire lawyers to come in and work with us on our claims, our governance, our building infrastructure, and whatever, but we always had to educate them. When they left they had this education that they had learnt in the community, and to me it seemed kind of strange, given that we were already paying them very expensive rates.

BPS: You should never pay for your lawyer's education.

DK: Well, that's what's happened. But, now you see firms that will focus on Aboriginal rights, and maybe have a higher number of Aboriginal lawyers working for them. But really, I always found it disappointing that we had to educate some.

BPS: So, consultants did not have a lot of higher education to help them prepare for this experience coming in and we should be doing a better job of that in law schools and in other professional faculties. I'm going to ask you about the receiving end and the beginning end. Were consultants good listeners? Did you, generally speaking, find the accountants and the lawyers and the travelling class of consultants fairly open to learning? Or, did you find that they were coming in with a preconceived set of notions that you had to overcome with some resistance? Can you generalize?

DK: Just as a generalization, I'd say that for the most part they would be open. I think that the biggest challenge was interpreting our rights vis-à-vis *Indian Act* rights. A good example would be Treaty 3 – the claims have really ramped up in the last six to eight years, or so. So, from the Treaty 3 perspective, or the Grand Council perspective, we know we've been here from time immemorial, we can show our boundary, our territory, our political system, we've protected that land and we've had rights and responsibilities over that land. We negotiated a treaty, which was to share the land, and we've always said as deep as the plough so about six inches. Then, you put that against the backdrop of lawyers and consultants advising from the perspective that the *Indian Act* is where rights flow from. To me, the *Indian Act* really narrows down the strength of our rights, but in terms of the whole treaty, to me it waters down our treaty rights. So, I've found that on issues like claims there was potential to put the Grand

Council and the communities at loggerheads, because how do you reconcile those two differences? How do you make it a win-win? It was a real challenge to make it a win-win. Outsiders have said that the Grand Council only has a role when the communities come together and participate and delegate rights or roles and responsibilities. If you don't participate or delegate, then there's nothing there. But then I think of all the things my dad taught me, and everything I saw and heard growing up in the community – that is really our strength, and if we could keep that strong then the communities, the people, would be stronger. It was a real challenge trying to juggle the two. I think to me it was a real prime example of the two legal systems hitting head on. I think that this really does a disservice to Treaty 3, but also to the Grand Council, our traditional governance system.

BPS: It seems to me that that's one of the toughest questions we have to face. What happens sometimes is that you are part of a larger treaty nation, but there is a gold mine or uranium mine or something nearby. So, you say that it is a part of our traditional territory, our particular band. The benefits could be very particular to one particular community, but what about the rest of the community? With gaming I think there has been more of a model of sharing among a number of communities, with mining and other resource development it seems to be more based on the individual community. This leads to all kinds of anomalies. You can potentially have one band that is getting massive benefits from a project, while other communities continue to suffer. I'm not saying there's any obvious answer, but I think you've put your finger on what's an extremely important emerging question. There is a huge national discussion now on resource extraction and revenue sharing. Is it going to be treaty nation based, individual band based, how are we going to do this? I don't think anybody just has the answer at the top of their head, but there is a much larger discussion to be had.

One of the things you've mentioned, Diane, and we've heard from other folks, as well, is that consultants sometimes come in with this unduly narrow sense of what rights are because they've picked it up from the paper. For example, on the idea of taking up land for settlement, as I understand it, First Nations understood those as sharing and the crown understood it as surrender and extinguishment. It's a very different cultural understanding of what those treaties actually meant. You've

mentioned the question of subsurface rights. Is it just the depth of the plough? So on and so forth. I've also wondered about the sort of reverse risk that the consultants are telling the communities what they think you want to hear. They are not being candid with you. It seems to me they are not doing their job, which is to try to dispassionately tell you, "Well, maybe that is what you think, but other people could say this." In your experience, are there issues of consultants not wanting to give you their best advice because you won't want to hear it?

DK: Well, it's probably an issue sometimes, I don't know if it's a huge issue. In my work, I really haven't used a lot of non-Indigenous consultants, only very sparingly. So, I really don't know the answer to that.

BPS: Let me ask you what you think the future about that should be. For example, a young person coming to Robson Hall today who is not Indigenous but is interested in working for Indigenous communities, should they be thinking, "There's going to be a cohort of highly trained Indigenous people who will work for Indigenous communities, so really I shouldn't be thinking in those terms anymore?" Any views on that?

DK: Well, I don't know. I don't know what it's like to come into an academic setting as a non-Indigenous person, but I think I could see it from the perspective as an Indigenous person. Sometimes our communities will put more stock in a non-Indigenous person, but I don't know what the data would show. When our students go to get educated they are always sort of told, "Go get educated, then come back and work for the community," but, it doesn't necessarily work that way. We do hire people that do not know the community, and there are no questions asked about paying that person. It really makes you wonder why that is.

BPS: Maybe it's, "We're all family here so why would you charge me all this money." As a professional we try to project an image of being very learned and important, so that our clients have confidence and we can justify charging the money we do. Like why am I giving you a bill if I don't know this material already? As a lawyer, I believe in plain language drafting – just say it clearly and simply. But sometimes, if you don't write it in a fancy way, clients might not think that they are getting their money's

worth. It's a wider irony of practicing law; like a lot of things done well, they look so simple, but it is actually hard to make it that clear and simple. When you were at law school, did we have any supports for Indigenous students?

DK: No.

BPS: Should we, and what would it look like? Do you think there is a need for law schools to have people specializing in providing support guidance for Indigenous students?

DK: Well, I think it's important for any students. It was quite unique, I think, when we were here, because there were ten of us, right. But, if there had been only two or three of us I think it may have been more of a challenge and so maybe then it would have been good to have mentors or somebody to reach out to. Also, every person is different right, some people do not really gravitate to those sorts of support programs, and prefer to get through those types of situations on their own. I know Wendy Whitecloud¹⁵ had started here just a year before that same year so she was just starting...

BPS: Yeah, I think Leonard Schwartz¹⁶ was doing that before now that you mention it...

DK: Oh yeah.

BPS: I recall Leonard went on to become a physician. He got out of law and went into medicine. I believe he's been very effective and successful at it.

DK: Really? Interesting. Okay, so maybe he was here the first year that I was here because I remember him, and I don't know where else I would have known him from.

¹⁵ Wendy Whitecloud is the Director of the Academic Support Program at Robson Hall.

¹⁶ Leonard Schwartz works as a physician at his own clinic in Winnipeg, Manitoba. He was part of the student support program.

BPS: He was a quiet guy but very bright and capable in my recollection.

DK: In my time at the law school I know there were a couple events organized. I think it was maybe Wendy Whitecloud who had arranged to have Phil Fontaine come to the law school one day, so we sat around with Phil and chit-chatted about different things. I think there might have been an elder once or twice, but I don't really remember who. So it was not really support, but just sort of little events here and there.

BPS: Okay, and we didn't have a lot of courses?

DK: No.

BPS: And, we certainly didn't take the pervasive approach to at least touch on things. You took family law at the time; there wouldn't have been any specific discussion on removing the Indigenous children from their homes?

DK: The 60's scoop,¹⁷ no. In fact, where I got my CFS¹⁸ background would've been through the course that was taught - Children and the Law. That was an optional course.

III. POST-LAW SCHOOL & CHILD AND FAMILY SERVICES

BPS: So, you came out of law school and your first job was where?

DK: I articulated with Rhys Jones.¹⁹

BPS: Was that focused on any particular area?

¹⁷ The 60's scoop refers to a practice that began in the 1960's where Indigenous children would be removed from their home and placed in foster homes or put up for adoption in outside communities.

¹⁸ Child and Family Services (CFS) is government branch tasked with ensuring that children are being provided for by their family and community.

¹⁹ Rhys Jones was her principal at Lofchick Jones located in Winnipeg, Manitoba.

DK: His firm, at the time, had some criminal law, family law, some land claims, working with the bands around issues that flowed from the *Indian Act*. So, I guess it was a range.

BPS: How long did you practice there?

DK: After articling, I practiced there for maybe six months, and then I moved to Ontario.

BPS: Did you have to do the Ontario bar ad program?

DK: I actually did have to do that.

BPS: This is where I pick up my head shaking from the recollection of the anomie and dread while I went through the six months of lectures.

DK: Well actually, you know what, I didn't have to do the course but I had to write the exams. I had to write all their exams, except for criminal law and constitutional law because they said it would be the same as Manitoba.

BPS: In your early career did you have the idea that you would stay in the field as a legal practitioner? Or, did you have the idea that you would go into politics and public service?

DK: Well, sort of both. When I graduated here I wanted to do my masters and it was actually DeLloyd Guth²⁰ who said, "You really need to article because then you get the whole rounded experience." I didn't want to article because I could never see myself litigating, but still I thought I would follow his advice and article. I did that and then it sort of took me into that direction of practicing.

BPS: So early in your career you didn't know that you would go back into public service and government?

²⁰ DeLloyd Guth is a professor at the University of Manitoba Faculty of Law, a position he has held since 1993.

DK: Well, I did always feel that is where I would go eventually. Again, being raised by my father and being exposed to the things I was exposed to – I always felt it was someplace I was going to go.

BPS: In practice were you doing child and family service issues?

DK: Through my articling, my time with Jones and Associates, I did do some, and also when I went to Fort Frances²¹ about six months later. Vic Savino²² opened an office there for me so I could practice. So again, it was a variety of things for me – some criminal law, some CFS, some community work, in 1997 and 1998.

BPS: You worked with Vic?

DK: Yeah.

BPS: I never met Vic, but I know at least one person who remembered him well. Vic would have some issues later on.

DK: Yeah, he did.

BPS: He was very impassioned and dedicated to First Nations causes.

DK: Absolutely.

BPS: Very sincere and dedicated to them. Again, I never met him in person but he seems to be a larger than life figure to the people who remember him. Okay, so how did you get involved with Child and Family Services?

DK: I was approached by a First Nation Child and Family Services agency, based near Fort Frances, saying that they were opening an office in Kenora and they wanted me to be their lawyer. I've always preferred to work with my community, so I jumped at the opportunity. So, that is really where it started, at a First Nation CFS agency. We were practicing in customary

²¹ Fort Frances is located in northwest Ontario.

²² Vic Savino was a successful Winnipeg lawyer at one time.

care, and I'm proud that the whole time I was there from about 2000-2008 I didn't have one trial, we collaborated on everything. We worked with the community, and we worked with the families. You know, we were looking at stats from across the province and saw that some agencies have millions of dollars in trial fees and legal fees and we didn't have a single trial. I really tried to work with the communities and families, and build their capacity around the traditional law, around caring for children, because it's really about kids, it's about family, and it's about communities. That's really where things started to fall into place for me, around combining what I was taught from my dad, and where I could use my legal education to make a difference.

BPS: From the outside, it seems to me that Child and Family Services issues are about the toughest policy area you can get involved in. Either you don't intervene, and risk that something horrible happens, or you do intervene and you disrupt a family and potentially take somebody away from their cultural connections. Even if you get it right it is still difficult.

DK: Yes it can be horrible, but it can be also be very rewarding.

BPS: Obviously, we are still in the throes of trying to get it right here in this province, and you're going to be centrally involved in trying to get it right. Tell us about what went right with your experience in Ontario. I'm a great believer in learning from experience and finding out what works. Something obviously worked there. Say, for example, that you've got a single parent with health problems or addiction problems. You're concerned about the safety of the child, so how do you go about dealing with that in a way that's effective given all those tensions?

DK: I wasn't a social worker, so I wasn't dealing with it from that angle, but more from a legal and self-governance perspective. What I would encourage the workers to do is to meet with the family and meet with the community. Knowing our communities is very different than here in Winnipeg, where I don't necessarily know my neighbours, and nobody knows what's going on inside my four walls; in our communities it's different, right. We are all connected to each other, so I know that if I'm having a problem raising my kids, whether it is because of addiction or grief or whatever, historically somebody would step in. There is support

within the family and community, so that is what I would encourage the workers to do – they need to find who the supports are in the community because we need to get those people together to create a plan. If we can find supports and a plan, we don't have to remove that child from the community. Usually it's not just one person who is important in that child's life, usually it's five or six people, so let's get all these people together and let's talk about it. When we bring the community or family together there are always people that are willing to step up. It's vital that family and community are decision makers, and held accountable so that changes can be made.

The other important part is that we were not constrained by time limitations. An agency could get temporary guardianship of six to twelve months, after that - permanent guardianship. With customary care we are able to go beyond that, I think it really recognizes the impacts of residential schools and the 60's scoop. It might take me more than six months to deal with all this grief I've had to deal with.

You know, I know from our communities that there isn't one person, including myself, who hasn't been closely impacted by a suicide. "Okay, you go to a twenty-eight-day program, and then boom you can have your kids back," that just isn't going to work for everyone. It may take somebody more time than that, and that is why building the community support around that person, the parent and the child or children, is so important. We were able to do that. We often had the Chief in Council involved, or the community elders involved. I know in one community we ended up doing a traditional adoption – the mother had some extreme addictions, and the child had been given to this woman in the traditional way, which we formalized through a quasi-legal process.

BPS: I'm not an expert in the field, but I would think there is a significant cultural difference, which feeds into public policy. In First Nations communities, I cannot imagine it is common that there isn't a cousin or uncle or somebody who's got a family, not just a community relation, but also a family relation nearby. That is a potential strength.

DK: Absolutely, that is a strength.

BPS: So, you're looking at the disruptive effect of residential schools. There's been a lot written and said about the intergenerational disruptions

– people grew up not living with their own parents, and not having a model of parenting. That goes generation to generation. However, a potential countervailing strength is the fact that you always have relatives nearby, and always have people who are related by kinship. From what you're saying, you can draw on that in a way that may be more difficult in a big city. In terms of dealing with the federal and provincial bureaucracies, were they open to having patience and giving you the autonomy you needed?

DK: Again, this is where Treaty 3 has been somewhat different. Back in the 80's, I think it was '86 or '87, one of our communities, the one where my grandmother was from, stood at the reserve boundary and said to CFS, "Hey, you're not coming in here, you're not taking any more kids, you're not crossing this reserve boundary, just get out of here," and so they did. They left, and that's when we really started being challenged to go back to customary care. We used to call it circle of care or community care. Because of actions like that, the Ontario ministry dealing with social services had to change their policy to fit what we were doing, because ultimately, I think in the legal sense, they were liable. So, the Ontario Ministry introduced Part Ten into the CFSA, which was customary care, following what the communities were doing.

BPS: It is interesting that by the sounds of it a lot of the law reform wasn't rendered effective because someone wrote a fancy report or something, it was because of the sheer assertiveness of the community in practice. Sometimes it comes back to how deep historical roots are. We were talking at the beginning about how Treaty 3 people were known to be tough negotiators with the Crown. Maybe it had something to do with where Treaty 3 was geographically and historically – it was the hinge with the western Canadian fur trade and the east. So, maybe there was a culture of some sophistication in dealing with different groups. It sounds like there is still a cultural value of standing up for yourself and being reasonably assertive. So, was Ontario the pioneer in recognizing the customary care model?

DK: Yes.

BPS: When is it, and how is it, that you ended up coming to Manitoba?

DK: I was with Anishinaabe Abinoojii²³ First Nation up until 2008, and that's when I was asked to run for Grand Chief. I did that from 2008 to 2012. Sometime after that I had a fluke meeting with Minister Kerri Irvin-Ross,²⁴ and from there we sort of connected and she later asked me if I would be interested in coming to work with the Child and Family Services Division, within the department. I said that I would think about it. I then met with the deputy minister, and we talked about CFS and how things could be done differently, and how we've got to start thinking outside of the box.

BPS: Do we have a legal framework in Manitoba to support customary care?

DK: We don't, but this was one of the items I was tasked with. It actually was tabled last fall, but the election came and the draft Bill to amend the CFS Act did not pass; I have been advocating with the new government to consider customary care. There are lots of the pieces in place. There was some opposition from some First Nations around customary care when it was tabled last fall, which I found really, really surprising.

BPS: How were they articulated?

DK: From what I understood, there was a misconception that Manitoba was trying to codify customary care, which wasn't the case. The customary care framework would have opened the door in the legislation for greater flexibility for Indigenous communities to be decision makers in the care of their children.

BPS: It's the problem of law reform generally. I still remember a close working colleague and personal friend of mine, who passed away a few years ago, was working on something to do with organ transplants, he was a scholar in that area. He went to talk to some doctors and nurses about how they were going to comply with the law, and they said, "What law?"

²³ Anishinaabe Abinoojii Family Services provide child welfare and prevention services to Treaty 3 First Nations in a way that respects Anishinaabe heritage.

²⁴ Kerri Irvin-Ross was the MLA for Fort Richmond riding, and the Minister for Family Services.

There is a new law?” The lesson is that sometimes you can do things with or without formal legal change, but unless you’ve got people willing to actually accept the perspective, work with it and actively engage, you can effectively stymie anything through passive aggression, indifference, underfunding and so on and so forth. So, it seems to, again this isn’t my area but just reading newspapers, look like we have an ongoing crisis in Manitoba.

DK: We do.

BPS: Something worth noting is that if a crisis goes on forever, it stops feeling like a crisis, because it’s always going on. Secondly, it seems to me that if people knew what was happening regarding some of the issues in First Nations communities that they would demand a lot more action. It isn’t that people lack empathy or good will, but some of the communities that we are talking about are so geographically remote that people just have no idea. For example, you mentioned that just about everybody in First Nations communities is affected by suicide, but people in the mainstream generally wouldn’t know that. Suicide in mainstream society is a rare event; it certainly wouldn’t be that everybody I know has been personally affected. So, all of which is to say, I can understand how people are somewhat unaware of the issues facing First Nations communities.

DK: One of the things that I’ve seen and heard is that since the loss of Phoenix Sinclair,²⁵ which was so front and centre within the media, has resulted in workers tending to be very risk adverse. I think that is one of the reasons we have more children in care. It’s always so tragic to lose anyone. But sadly, tragedy happens. I’ve been involved in cases where children should absolutely not have any contact with their family. It’s just awful and horrendous what some kids have to go through, but on the other hand, there are cases where there is no compelling safety reason that the system should become involved.

BPS: How do you properly integrate and how do you properly separate the political from the professional? I ask the question knowing there is no

²⁵ Phoenix Sinclair was a child whose death catalyzed the Phoenix Sinclair Inquiry, an inquiry into the child welfare system in Manitoba.

obvious or easy answer, but you've had a successful experiment in Ontario, and you've been a very senior political leader yourself. How do you balance and reconcile the role of the professional First Nations civil servant with that of political leaders?

DK: Well, when you talk about Indigenous or First Nations communities, what I've always tried to encourage, both as in-house counsel for the CFS agency and as Grand Chief, is that the community has to have a voice. It doesn't always have to be a political voice, it doesn't have to always be the Chief, but if the Chief can appoint somebody to the board for example, then they have representation right within an organization, I think that's one way to do it. But, the problem is also communication. You've got to have information and communication flowing back and forth.

BPS: What about measurement and monitoring? With the development of customary care in Ontario, is there tracking and statistics so that you can see how things are working in communities with customary care versus those running on the traditional child family services model?

DK: There must be some recorded statistics, I don't know them off hand. I do know that if I listen to the community leadership and the leadership of Treaty 3 talking about customary care they still say, "okay, maybe we have a say, maybe we have input, maybe more kids are connected with extended family, but there are too many kids and families that are involved with the agency." It's not utopia just because we have customary care.

IV. TIME AS GRAND CHIEF

BPS: I want to ask you a bit about your experience as Grand Chief.

DK: Okay.

BPS: You were Grand Chief for how long?

DK: Four years.

BPS: Obviously being senior in these organizations is no small challenge. There are different orders of First Nations government. It's a really complicated dynamic with at least three different orders: the community, the nation and the national organization. You mentioned earlier in the interview that you think consistent with Treaty 3 culture is trying to build up more of a sense of Treaty 3 nation, and not just a bunch of individual bands?

DK: Yeah. The *Indian Act* could be abolished tomorrow, then who would I be? You know? We do still have our treaty, and that is my focus.

BPS: What about the role of the communities and nations vis-à-vis the Assembly of First Nations?

DK: When I ran for National Chief I said I thought it was time to clarify the role of the AFN, and what the AFN is there to do. My understanding is that it was to lobby at a national level. That's fine, that's great, that's something that's needed from time to time, but it is not a government and it does not have treaty rights. I know that the chiefs do vote, but does that in itself make it a government? I don't know... Is that what the First Nations across Canada want the AFN to be? I do not think so. So, I thought that clarifying the role of the AFN was something that we needed to do. For example, since consultation has been a big issue in the last twenty years or so, entities, and particularly the federal government, will go to the AFN if they want to consult. I don't think that's what the AFN was intended to be. So, I think that has to be clarified. The AFN can be very powerful, and at other times it really seems to get in the way.

In Treaty 3 we say that we're the strongest treaty on education. We believe that we're the ones that should be front and center for the Treaty right on education, and, in fact, under my leadership we actually did file a claim against the Federal Government on First Nation education. So, the AFN, or any national chief, or any other lobbying organization should be aware of the landscape so as not to pull the rug out from under something that a different area is doing. There absolutely is a place and a role for the AFN, but what that is needs to be clarified. As time changes issues change too and organizations need to evolve. There

certainly are things that the AFN can do more effectively. My experience at AFN assemblies was that very few chiefs participated. So if, for example, approximately one hundred chiefs registered, a quorum of that would be fifty-one.²⁶ So, there is potential for fifty-one chiefs to make decisions and give a mandate to the AFN to do something or not do something and that to me doesn't speak to relevance. In that scenario, how can fifty-one chiefs make a decision that's going to impact my community? So, I think there is a lot of work that needs to be done around the AFN.

BPS: It's probably a consequence of the *Indian Act*. Even labelling an entire group of people across Canada with that one label. I think people in the mainstream tend to say, "Well you're a First Nations citizen, a First Nations person is a First Nations person is a First Nations person. So, whether you come from Vancouver Island or come from Newfoundland, you're all one culture." In reality, there are a whole array of different cultures. It's very different being in a west coast British Columbia First Nation where you have this isolated fjord community versus the Cree nation which is spread all over the middle of North America, all the way from the Navajo to the north, and so on. Also, jurisdictionally speaking, everybody deals with different provincial governments which politics has an effect on culture and vice versa. Can you give any thoughts about cross-cultural differences within First Nations across Canada? Do we underestimate in the mainstream extent to which there are these differences? Is it something we should tell law students about? For example, even within a nation don't assume that just because Norway House has this tradition that Berens River has this tradition. Any thoughts about that?

DK: Well, I think there are absolutely some common denominators. You know, the connection to the land, and some of these things. We were always treated the same through policy and through laws, the *Indian Act*, through the constitutional changes. We've all been treated as one group and lumped in, so I guess the impacts of that have been probably similar. On the other hand, I totally agree that there are definite distinctions. Even within Treaty 3, which is a small area, from the Fort Frances area to the

²⁶ To put this into context, there are approximately six hundred thirty chiefs across Canada.

Kenora area there are differences in the dialect and in how we say things, how we understand things, and how we practice things. That's just within the Anishinaabe within Treaty 3. So, how do you compare that with anyplace else in Canada? Somebody told me years ago a story about perspective around cultural understanding. The story is that there was a guy that built a sweat lodge frame near the shoreline in the winter. The next spring he went to go set it up and a beaver had made a little home inside that sweat lodge. So, he didn't know what to do. He approached an elder and asked, "What am I to do? This beaver has made a home in the sweat lodge frame." The elder told him, "Well you need to take the lodge down and burn it, that's a really bad sign." So he thought, "wow, this is serious," and he then went to another elder and again asked, "What am I supposed to do, this beaver made a home inside this sweat lodge?" The elder replied, "Oh, that's a blessing from the creator. You need to honour that, that's fabulous." Feeling a little perplexed, he went to a third elder and again asked "What do I do? A beaver's built a home." The elder said, "Trap it and skin it, you can get thirty bucks for the pelt." So, there are distinctions even within our own communities. It is a difficult question because there are definitely some things that are common. I don't know, on one hand I think it's something very important that should be taught, but on the other hand I could imagine being a law student and being taught about culture and wondering what the relevance is to their career path.

BPS: Yeah I think that it's a problem that has to be taken seriously. In orientation week we now have an elder. You sort of do this ceremonial exercise and think you've done something, but you may have done a lot less than you think. It's something, but it's not the same as having students actually sit down for a number of hours and engaging in a general dialogue with someone.

DK: Well, there is a difference between an elder and a knowledge keeper. Often an elder is invited in and will smoke their pipe or smudge and say some kind words, you know, open the meeting or the day in a good, positive, healthy way from a First Nations perspective, which is valuable. Alternatively, there is much more depth, in a discourse with a knowledge keeper speaking to a whole other way of seeing things and understanding

things. There's a whole other dimension right? In my opinion, there's great value in sharing that type of knowledge.

BPS: To actually get the full value of having a knowledge keeper or a leader and policy maker such as yourself my stance is that there has to be openness on both sides. Students have to feel comfortable to ask questions without feeling as though they are being judged as being offensive.

DK: Absolutely.

BPS: Students need to feel like their questions aren't being judged for ignorance, but actually taken seriously. My view is that you learn things by actually talking to people.

DK: Absolutely, to me that's reconciliation. You have to have the tough questions both ways. I totally believe that.

BPS: Is there anything you want to talk about that we haven't asked about?

DK: I really would like to see more institutions like the law school Robson Hall take... or at least carve out a space where people like myself could further my education around Indigenous knowledge you know? There really should be a place where that's valued. As an example U of W has done some things recently to create that space. I think it would be great to have that option here. I would encourage you and the faculty here to create that space. I think that's really important.

BPS: Right. In my view, you want to create an environment where people want to learn things, not, "I am forced to do this."

DK: Absolutely.

BPS: It's kind of sad that a lot of the oral history of First Nations is preserved only in a confrontational, adversarial, context. A lot of oral histories were assembled by the TRC commission, but that's traumatic history.

DK: Absolutely, yeah.

BPS: There's got to be people going out and collecting the positive side, not just the residential school stories, but how people lived, what the stories were, the culture, the languages. Every time another generation of elders disappears, unless you make a special, proactive effort to go out and collect, that history is going to be lost. Every generation is going to have its adventures, but looking at where the legal world was a few decades ago compared to where it is now after the TRC commission is amazing. We have the opportunity to talk to a generation of people who actually lived through it and experienced it. What an extraordinary history that generation has lived through!

So, I know you've got a zillion things going on, the Assistant Deputy Minister doesn't have a lot of time to do things like this, so I am genuinely extremely appreciative Diane.

DK: Well, I appreciate the offer so thanks for the invite.