

Interview with Jack London*

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

I. INTRODUCTION

Jack London (JL): My opening words are that: what you're about to hear and what I'm about to say will be true – but not necessarily accurate.

Bryan Paul Schwartz (BPS): Wow, that could take years to assimilate!

JL: It could, it could, I'm not speaking from notes.

BPS: That's fine!

JL: Maybe it's because I never take notes.

BPS: So, you grew up in a little town in Manitoba; you wouldn't have grown up in an environment where you would have encountered First Nations people, would you?

JL: Well, I grew up in Winnipeg and there were Aboriginal People in Winnipeg. Mostly, I was aware only of those people I saw on the streets in the downtown areas. But I also grew up in Winnipeg Beach¹ in the Interlake, and there was more of an encounter with Indigenous People in that area than in the city. But the encounters were minimal and unremarkable, which is probably the way to describe how society operated in those days – it was unremarkable because we were unconscious.

* Interview conducted by Bryan P. Schwartz. Jack London graduated from the University of Manitoba, Faculty of Law in 1966 and completed his LLM at Harvard Law in 1971. He is currently Senior Counsel at Pitblado Law, in Winnipeg, Manitoba.

¹ Winnipeg Beach is a town of roughly 1000 people located in the Interlake region of Manitoba, 56 kilometers north of Winnipeg.

BPS: When you practiced you became very interested in tax; you did your Masters in Tax at Harvard. Did you decide when you were going to law school that tax was going to be your thing?

JL: No, I was destined to be a Clarence Darrow,² the best criminal defence lawyer ever. In fourth year law school I brought two motions before the Law Society. One was to abolish the fifth year of articling, which then was required for those people who didn't have a previous undergraduate degree, and I argued that case. The Law Society granted that motion. The other was occasioned because there was a position available with the Attorney General's Department, which I wanted to fill because that was considered to be the postgraduate course to be able to do criminal defence work. It required that I have my call to the bar by a certain date, which meant that I had to get an early call to the bar. I brought that application before the Law Society, and they essentially said I could only get one of the two.

BPS: You should have asked for four things!

JL: (Laughs). So, we got the abolition of the fifth year articling requirement for those without previous undergraduate degrees. And by a complete random occurrence – I had no sense that this was the direction – the Justice Department was interviewing at the school at that time. I went to an interview and they offered me a position in the Tax Section of the Justice Department in Ottawa. I said “Yes,” and the rest is history. The point being that, as with almost everything that ever happened to me in my life and in my career, the occasion has been random. I've never had a plan, and things just seem to have fallen out of the sky into my lap. The only thing I had to do was take advantage. Luck trumps all.

BPS: We were having a meeting in this building about a year ago with Sacha Paul and some other people who were part of a group briefing Aboriginal students at the law school about career opportunities. It's interesting to mention that because one of the things that we all stated – because it was all of our own independent views, not just echoing the first person to speak – was, don't decide too early in law school what it is you think you're going

² Clarence Darrow (1857-1938) was a labour and criminal lawyer, well-known for his dramatic style during trial.

to be. You actually don't know, you might think you want to be a criminal lawyer, but then the lifestyle, the grind, the legal aid certificates... you might decide that it's not for you. You might sit and think, what could be more boring than commercial leases, and it might turn out that you really actually enjoy doing the creative aspect. The advice we all gave to the students was to expose yourself to as much as you can in law school, because you never know which way your practice is going to go. And you don't know what's going to turn out to be satisfying for you.

JL: Yeah, so there are two things. One of the ways in which I explained it when I was at that meeting, based on my own experience and the advice I give my own family, is that when you are studying anything, law or any other profession – or discipline for that matter – it seems to me that the best possible strategy that you can employ is to build the pyramid of understanding, knowledge, and experience as broadly as possible. Everything else you do in the rest of your professional career is going to narrow you in one way or another, so if you're able to call on a wider spectrum of understanding and data, you're going to be better off, even as it narrows, in the ability to perform the tasks that are required of you. There is no question that I think the more the generalist approach at the outset is preferable to a narrower approach. That is why, if you recall, when we changed the curriculum at the law school, I advocated for the mandatory courses for the first two years to ensure that everybody would have that broad base at least. This was much to the chagrin of many, many people.

BPS: Yes, there has been some generational divide since then. Some of the newer faculty are wondering, "Well, why are we making the students do all this stuff? It's because the previous generation is too practice oriented." I continue to believe in that philosophy and advocate giving people the building blocks and critical framework no matter what they get into. I always quote Henry Kissinger³ that you have to build your thinking before you become Secretary of State because there is no time once you are there.

JL: Yes, corollary to that is: that when I was doing graduate work at Harvard they had done a study on the incoming class three years earlier. It was about what their aspirations and objectives were in terms of practicing or working

³ Henry Kissinger was the 56th Secretary of State, serving from 1973 to 1977.

when they graduated. They then sampled the students after they first graduated. In those years, the 70's, there was a little hippy-ish characteristic to all of this. 80% or 85% of the people coming into Harvard Law said they would want to do *pro bono* law in poverty areas. However, I think it was 77% of the class who wound up in Wall Street law firms. It would have been really difficult if they would have missed the course in Securities Regulation along the way.

BPS: You have to be realistic – and at some point you actually have to make a living.

JL: Unfortunately true.

BPS: But yes, if you want to do a lot of *pro bono* work you're going to be stressed out of your mind if that's all you're doing. You won't have an economic base for your practice, so that's something to be said for having a diverse skill set and practice.

JL: So, on graduating with my LLB, I went to work for the Department of Justice and that was where I started doing tax work. That became the dominant theme in my teaching and practice for the next 22 or 23 years.

BPS: Did you go to Izzy Asper's⁴ firm after that?

JL: I went to Asper's firm before I went to Harvard. I practiced with the Department of Justice for two years in tax litigation, and then I practiced with Asper for two and a half years doing tax work in the private sector. Then I decided that wasn't the career path that I wanted to take, and that was when I went to Harvard. Izzy had offered me a partnership and big bucks but I was determined to be happy.

BPS: So at that point, there was no foreshadowing that you were going to have this lifelong and extremely consequential role in legal issues involving Aboriginal people?

⁴ Former tax lawyer Israel Asper formed Asper, Freedman & Co. in 1959, then went on to form Buchwald, Asper and Henteleff in 1970 which subsequently merged with another firm to become Pitblado LLP.

JL: I would say that is right. There was no foreshadowing, except for the fact that I'd cut my teeth during the civil rights movement in the United States. It was so interesting, challenging, and so much the right thing to do that I think I, like a lot of us, developed a sensitivity to want to do something like that, at some point in time. I felt that doing that would have an emotionally and philosophically satisfying outcome. So I think the seeds were laid, however, the opportunity just hadn't come about yet.

BPS: One of the people we interviewed was asking "Why are there so many Jewish people involved with the Aboriginal rights movement in Canada?" I responded that there is rather extensive literature on Jewish people in the legal profession, and that Jews tend to grow up seeing themselves as outsiders and identify with other outsiders. They therefore have an enthusiasm for engaging and helping other people. It happened for African-Americans in the civil rights movement and to a certain extent, happened here in Canada.

JL: There is no question that the civil rights movement led – years later – to a couple of incidents, which I am sure we will get to, in the course of my later law practice, where I realized that just as is the case in all societies, anti-Semitism is not unknown in some Aboriginal individuals, for a number of reasons. I experienced that anti-Semitism myself during the course of that subsequent practice. I needed to develop a kind of quick one-liner to deal with those situations as a way, "in and out." I came to say, "I come from a people who have suffered discrimination for 5000 years, you've suffered discrimination for 300 or 400 years, when you get to 5000 we should have a conversation about what it all means." I hasten to add, it was said in jest.

BPS: What you experienced, was that a product of the Evangelical background of some Aboriginal people, or Catholic background? What were the roots of that?

JL: I've asked that question a lot of the people in the First Nations community who are close to me and are in some sense my teachers and mentors. They are the ones who had confirmed what I had seen and confirmed that in fact it was an accurate observation. One particular Elder, Joe Keeper, a wonderful man, said to me there were three reasons he thought anti-Semitism exists among some people in Aboriginal culture in

Western Canada. One was that the First Nations had been colonized by the Europeans and in particular by the religious Europeans. The priests and so forth came in and would preach on Sundays that the Jews had killed Christ. They preached as though it was a fact and that it was something to be looked down upon. That became an understanding of the First Nations people that they were converting at the time. The second thing he said was that there were really no other groups of people about whom the Indigenous people could feel superior and look down on. Everybody else seemed to hate the Jews, so it seemed natural to adopt that stance and it seemed a safe bet to take part in it. The third reason, which he gave – which is my favorite – is that in those years there were a group of men called the “Free Traders.” They used to come from the east with merchandise to trade. They would trade all through Western Canada for product from the Indians. They would trade for Seneca Root or furs, that sort of thing. The Elder said, “it wasn’t that we were being exploited by the Free Traders, many of whom were Jewish. The problem we had which really angered us was that they thought we didn’t understand that we were being exploited.” It was that overlay of superiority, “you’re stupid”, that led to anger and opposition. These are anecdotal, and I don’t put them out as accurate history, but those were his impressions, and his impressions will be a lot better than mine.

BPS: Speaking of this strain of anti-Semitism among folks, certainly I’ve seen and heard it. It’s hard not to remember, for example, former National Chief Ahenakew’s⁵ remarks.

JL: Ahenakew had his closest consultant call me to ask me to act for him when he was being charged under the *Code*, because he wanted a Jewish lawyer defending him in court.

BPS: Did you?

JL: No, I turned it down, but I said that I would try to find a Jewish lawyer. I tried two here in the city of Winnipeg, both of them said no, but he found one in Toronto who would act for him, at least for a while.

⁵ David Ahenakew served as National Chief of the Assembly of First Nations from 1982-1985. In 2003 he was charged by the Saskatchewan Justice Department with promoting hatred following a series of anti-Semitic remarks in which he suggested Hitler should have finished the job.

BPS: I see. On the other hand, there are Indigenous people who have found the Jewish experience a real resonance. You're an ancient people, we're an ancient people, you went through hard times, we went through hard times, and you're back. The state of Israel is back and somehow — despite everything — you've achieved redemption and found a place in the modern world while maintaining your traditional culture. I've seen that as well, is that consistent with your experiences?

JL: Sure, there are lots of examples of people, on occasions, where you had mutuality of interests and of history and it was seen that way. I don't mean to say that every person who's Indigenous is anti-Semitic, just that it exists amongst some. There is a resonance, but at the end of the day here's what the bottom line was. The bottom line was that an Indigenous person believed correctly that his or her rights had been offended for centuries, that his or her land had been taken, that his or her property had been damaged and that his or her children had been scooped. Whatever the issue might have been, these were people who had tremendous grievances and felt the absolute conviction of their rightness, that they were right in being angry and right in making the claims. Of course, they were right. Under those circumstances it's very difficult to see how you can respect someone who comes in and gets paid and earns a huge living out of representing you even successfully. There is envy in it, and jealousy, and a feeling of being exploited by that person. Even though that person is helping you, and doing what he or she is supposed to do under the circumstances and is successful at it. The question is, it was my right, it was my land, it was my damage, why are you coming out of this with income when I was the victim and I should never have had to pay for the service. I think most plaintiffs, in all kinds of cases, not just aboriginal plaintiffs feel that way.

BPS: Staying with this topic, and the wider question of legal advisors talking with First Nations people, in my perception, lawyers sometimes have a problem properly communicating with First Nations clients. I would think in very rare cases it is some sort of bias or a sense of superiority. I think in some cases it is unintentionally patronizing, "I can't tell you what I really think" or "I want you to think that I'm even more enthusiastic about the cause than you are," and not always giving the frank advice a lawyer should be giving. Frank advice like, "Well that's the theory, but actually in practice

this might not work, or you may have to realize there is another point of view in how other people would see it. So if we are going to negotiate, we may have to frame it this way, or that way.” How did you experience that challenge? You obviously want to be respectful and realize you are dealing with another culture that has its own values, its own history, and you come in not knowing that much about it. On the other hand as lawyers, we are supposed to be telling clients what they need to know, not what they want to hear all the time. How did you navigate those issues?

JL: It’s a little more complex. There isn’t a single or homogenous answer to that. To a certain extent it depends on the nature of the work that one is doing. Much of the work that I did through the years was at a political level, a political, constitutional, governmental level. I was working with and representing – for the most part – educated and sophisticated people, many of whom did not live on reserves anymore. They’d moved into the cities. The issues that were being confronted at that time were large issues *vis-à-vis* the non-aboriginal governments on the other side. When you argued that you ought to take “this” position rather than “that” position, it was seen more as a strategic matter, which made sense. At another time one would take the next step, it was necessary incrementalism at best. I was taught a lot of lessons by the First Nations clients that I had acted for at that time, particularly Phil Fontaine,⁶ who was the Grand Chief of The Assembly of Manitoba Chiefs⁷ and then National Chief of The Assembly of First Nations⁸ for many years. It was a true privilege. He was very open to realistic advice. In that scenario, there was very little of this “hold back” on what you can, and what you can’t, and what you should, and what you shouldn’t say and advice you could give.

It was sometimes different when I was acting for a particular Band, a particular First Nation or for individuals. I rarely acted for individuals. When the client was a First Nation which had been damaged, particularly in the North, where the Bands were less sophisticated and educated. By the way, there is no “they” in the Indigenous world, the population is multi-faceted and there is a huge divide between Northern and Southern and

⁶ Larry Phillip (Phil) Fontaine is a prominent Canadian Aboriginal leader.

⁷ The Assembly of Manitoba Chiefs represents 62 of the 63 First Nations in the province of Manitoba.

⁸ The Assembly of First Nations aims to protect and advance the interests of Indigenous peoples and is considered generally to be the national voice of First Nations

Eastern and Western First Nations. So, anyway, you had quite a different difficulty; the sales techniques of mostly non-Aboriginal consultants who were negotiating their land claims or compensation claims, flooding compensation and so forth were less than frank. The consultants often offered very distorted promises of the worth of a case. So, the Bands would be starry eyed from the outset. These were people who, if one had said to them at the outset, "I know you think this is worth a hundred million dollars, but I'm telling you now that it's not going to be a hundred million dollars, it's going to be five million or eight million dollars" there would be a problem. You probably wouldn't get the case; you wouldn't be able to continue to act because you would be seen as just another one of those guys — who was not really supportive of their position and pain. And, throughout, you would be facing the reticence of the defendants and the fantasy of the clients. Not always, by any means, but very often.

You were dealing, almost inevitably, with consultants who were not lawyers, who actually had the major connection to these groups. It was the consultants who were bringing you in and the consultants were the ones spinning these fabulous, fascinating, huge tales. You were caught in the crossfire; you had to be sensitive to the dynamics, not only with your client but with the consultants who were the main advisors of your client during the period of time. You sometimes tended to be less forthright and less forceful than you might otherwise be, because in those cases incrementalism was not seen as a strategic option the way it was in political work. But I fought against that tactic, which I thought unethical. I tried to call it as I truly saw it. Additionally, when I started in, the legal profession had not yet recognized the breadth of the "Aboriginal market" and as realization set in, lawyers started to spin outlandish tales as well — in competing for the retainers. Having said all that, sometimes the outlandish valuations the consultants and lawyers offered in their marketing turned out to be realized. It depended on the political orientation of the non-aboriginal governmental authority at the time. Certainly, that was true in the outcomes of the commercial deals we were negotiating. Some governments and Crown entities were vulnerable to making deals they never would have done for a non-Aboriginal partner or supplier. We had major successes, of which I am quite proud. So, one learns the proper balance in predicting outcomes. All realism needs to be tempered by advice that sometimes fantasy develops into reality.

One last comment. The fantasies were not always monetized. They were political in the sense of how quickly self-government might be achieved and how broad would be those jurisdictions. On the money side – damages and such – the toughest problem often was that having negotiated a settlement worth tens or hundreds of million dollars, the governments fought giving the Band autonomy of choice in how to use the funds and – on the other side – particularly up North, it was difficult at community meetings to explain the deals because there was a general lack of cultural awareness of the economic distinction between "capital" and "income". One had to resort back to the "tree and its fruit" or; the "waters and its fish" to get the point across.

BPS: Moving back now to the chronological unfolding, you had some fun practicing with a law firm which was a cradle for people who went on to have quite fabulous careers. Izzy Asper worked right across the street from the current location of the Canadian Museum for Human Rights location. Harold Buchwald, Yude Henteleff,⁹ and who's the guy in Toronto now, the big ...

JL: Gerry Schwartz!¹⁰ By the way, Buchwald and Henteleff were not part of my early experience, my experience was with Asper. Asper had offered three of us young bucks' partnerships but we wound up deciding to leave and that facilitated a merger taking place with Buchwald et al, and we were all gone by the time the merger took place. I didn't come back until the late eighties.

BPS: Oh I see, so was Schwartz involved?

JL: Schwartz was gone before I joined the Asper firm. I joined the firm in 1968 and Gerry had left just prior to that in 1967.

BPS: It's kind of curious, you look back into history and those are two folks who will certainly be remembered for a considerable period of time. Gerry is still alive, and again you have to just look across the street to see Izzy's dream, The Canadian Museum for Human Rights. Did you have a sense

⁹ Buchwald and Henteleff were founding partners in Buchwald, Asper, Henteleff, which is a predecessor firm to the current Pitblado LLP.

¹⁰ Gerald Schwartz is the CEO of Onex Corporation.

that you were dealing with larger than life characters while you were dealing with them? Because we tend not to, right. There are people I've known and at the time you don't realize, "I didn't know you would turn out to be *"the"* Joe Shlabotnik, I just thought you were Joe Shlabotnik."¹¹

JL: (Laughs). Gerry Schwartz and Izzy Asper are quite different. First of all, Izzy Asper was eleven years my senior and Gerry might be a year older than I am, but we're essentially the same age. We were classmates. Schwartz, from the time I first knew him, which was at law school, was unusual. He once took me down to the vault that he had at the Bank of Nova Scotia across the street on Portage Avenue at night, because he had night access. The guard took us into a room in which he had stacked shelves of what were then called "mint sets." Mint sets were issued by the Mint of each of the coins in perfect condition, and they were packaged. Because they were limited editions, they increased in value tremendously. Each person had a limit of five mint sets that could be purchased, so he got about a thousand addresses or more to have them sent to and he bought all of these mint sets. Maybe they were \$2.20 and they escalated in price to about \$10 or \$12 and here he had these piles of them. The reason I tell you that is that you knew right from the beginning that Gerry was going to be unusual and wealthy. Though he stood a bit below me in grades at law school, he was way, way smarter and more ambitious than I was. It was clear that he was going to do really well. He was smart and very able, his schooling was terrific, he also went to Harvard, and did his MBA. He has been enormously successful and a fabulous philanthropist. He's a nice guy.

At that time, and still to this day, Izzy Asper is the most creative man I've ever met. You knew when you worked with him, when you were mentored by him, and when you were spat upon by him, that you were dealing with someone who was out of this world. He wasn't the same as everybody else, he had more of everything. I don't know that any of us thought that it would rub off. In fact, I reacted to it for a number of reasons, and I left him at the end of a couple of years to go back to school. This was for a whole bunch of reasons which I am not prepared to talk about. There was no question that you knew you were in the presence of greatness. I don't

¹¹ Joe Shlabotnik is a fictional baseball player whom Charlie Brown admires in the Peanuts comics.

think I knew anybody else then, and I don't think I know anybody else now, even you, who have that incredible aura.

BPS: The Izzy I knew, and of course there were many, many, and different Izzy's and you'd meet him in different contexts, was absolutely fearless about talking to anybody and saying, "Okay all kidding aside, this is what's really going on." He could talk to anybody, it didn't matter what your background was. If anybody else was worried about saying exactly the right thing, or using the right terminology, or not offending, Izzy didn't have that problem. But he was still respectful to the people he was talking to, because he was never condescending.

JL: He was never condescending.

BPS: Yeah. It was just like, "So you think that's the deal? Okay that's your idea of the deal, but that doesn't make any sense to me." He would have that conversation with just about anybody about anything.

JL: He was so self-confident that he didn't need to be superior. He didn't need to have a superior attitude at all. He didn't need to put anybody down, ever. That was not his character unless you worked with him and you did something wrong, he was outrageously angry. But that was a different kind of situation. If you read Peter Newman's book on Asper there is about a three-page soliloquy that I did when I was interviewed for that book which describes him,¹² and feel free to use that. Essentially what I called him then, and I would call him now, apart from being a genius, was that he was a loveable rogue who always played very, very close to the line but always knew where the line was or ways to avoid it successfully.

BPS: Since you mentioned self-confidence, one dimension I thought I saw of him, but you knew him much better, was that even when he was the man, he always thought of himself as a little guy from a rural town and the snotty established people didn't really give him the respect he deserved. I had a conversation quite late in his life and he still had this kind of chip on my shoulder, "I'm just a little Jewish dude from..."

¹² Peter C. Newman, *Izzy: the passionate life and turbulent times of Izzy Asper, Canada's media mogul* (Toronto: HarperCollins, 2008).

JL: ...The North End of Winnipeg!

BPS: Yeah! “And the snooty people with the old money really don’t give me the respect that I need.” Did you have similar perceptions?

JL: Not so much, I knew him as the darling of everyone except the tax department.

BPS: (Laughs).

JL: They couldn’t stand him and they were constantly on his case. He had lots of incredible experiences as a result of that. But I don’t remember that particular aspect of him. As for the confrontations with CRA, I can’t report on them. It’s all privileged material.

BPS: Okay, but I think we’d all agree Izzy had many, many dimensions to him. He was many different people in many different contexts.

JL: The quintessential Izzy for me, particularly in light of the fact that there’s a Human Rights Museum across the street, is that when smoking became inappropriate, even illegal, in public and at public events or at a wedding...

BPS: Oh yeah, I remember that.

JL: Izzy continued to smoke a couple of packages of cigarettes a day. He would go to an event and he would be in a hotel room with 300-500 people, no smoking allowed and in the middle of dinner Izzy would light up at the table. He felt no compunction about lighting up because he saw that as a human right.

BPS: (Laughs).

JL: He had a very strange view of what human rights were. He distorted the notion that there is a competition or trump between rights. His algorithm was: “My right to smoke trumps your right not to get sick.” He had a one sided vision of what a right was, and a dominant right was always his right.

BPS: Well he was ahead of his time because physician assisted suicide is the coming wave.

JL: The two developments that I think are important legislative developments that will take place in Canada in our lifetime are the following. One is that they are going to legalize marijuana in Canada, and the second is, I want the right to control my death, I don't want any interference from anyone else under any circumstance. The notion that I'm going to be a mind trapped in a body is so abhorrent to me; I will fight to the death to be able to die. I am so disappointed in the current Canadian government and limitations of the assisted suicide legislation it has promulgated as a result of the decision of the Supreme Court of Canada defining assisted suicide as a constitutional right. I don't think the limitations are going to stand scrutiny by the Supreme Court. I think that in a way for me, this is the ultimate development of individual rights, the right to die. As for legalization of marijuana, I believe prohibition of an activity or substance commonly practiced or used is a key – maybe the key – factor that respect for law generally is diminished, particularly for the young who can't discriminate between breaking a “senseless, victimless” law and “all” law. The prohibition has been a source of widespread disrespect in society and a decrease in respect for legal institutions. Strong advice and communication on dangers, particularly to young brains, is absolutely required but prohibition simply is a disaster for many reasons.

BPS: Okay, let's talk a bit more about this.

JL: My mother had Alzheimer's and my sister had Alzheimer's.

BPS: That probably would give the issue special poignancy for you, I would think. I have equal opposite views to this issue. My libertarian side is totally committed to the view that it's your body and who is anybody else to tell you what to do with it, and if you have a disability – my egalitarian side says you should be able to get help. I guess if I was voting, I would've voted that you can't constitutionally prohibit physician-assisted suicide, at least not in the broad way that they did. My gloomily practical side is that the public health care system is overburdened. It doesn't treat people who actually need urgent therapeutic help the way it should. It doesn't do a good job of long-term care. Once we've legalized it, and therefore regularized physician

assisted suicide, the system will have less incentive to provide adequate palliative care. It will never be done explicitly, but there will be a passive message which is, “You’ve got six months left, you could be in a lot of pain and suffering, you’re going to cost the system a lot of money, which could be spent on new needs and other people, so you don’t have to do this, it’s a choice, but really why are you hanging on and giving yourself grief and costing the system a lot of money when you could just exit?” That worries me quite a bit. Is that a realistic concern or am I being overly dire?

JL: Everybody has a perspective, I honour yours. I think it’s wrong, but I honour it. I understand the economic argument, but we could make a slippery slope argument on virtually any rights’ development of any kind, anywhere. Very often you’ve done that because that’s part of the perspective we take on some rights issues. There may be some economic consequence, and that economic consequence may have some negative filter in the community. I suppose every action has a reaction and why would this be any different? When I was growing up, attempted suicide was a crime in Canada under the *Criminal Code*, which always struck me as absurd. They then — of course — took the offence out of the *Criminal Code*, so it was no longer an offence to try to kill yourself. I don’t see why it would be an offence to have someone help you kill yourself, as long as you are consenting to it. The decision was already made when they took attempted suicide out of the *Criminal Code*; it was a recognition of the individual right to control one’s body. In the same way, all those years ago, I did about a hundred speeches on abortion rights. Ultimately, you could talk about periods of gestation and all sorts of theories, but at the end of the day it was a question of “Who controls one’s body?” I think that this is the ultimate statement of that, so I support it completely.

II. FIRST NATIONS FOCUSED PRACTICE

BPS: So, you’ve been in private practice, been in public practice, you’ve done tax, you got to Harvard, so what happens next? How do you end up being a lawyer for First Nations?

JL: So, I went to do graduate work, and, after graduating with the LLM, I had lots of offers to practice law again or to teach. I could have come back and practiced with a firm here in Winnipeg, I had offers from Boston and

New York law firms to practice with them. But, I didn't like practicing law. I didn't like it because I think I'm one answer on a questionnaire short of demonstrating attention deficit disorder. It's very difficult to be that kind of person and to lack the discipline that's required in order to really practice law or anything else. I'm exaggerating that, of course with questionable humour, to make a point. The point was that I didn't feel comfortable practicing law. I didn't like the activity, and couldn't muster the kind of discipline that I think you need in order to be able to practice law at the highest level. Certainly not the way I had been able to do when I was in government service, where I didn't have that problem. The demand in government service is quite different and has a much broader timeline. The Queen always pays her bills, and there is no one talking to you about the number of billable hours you are booking. It was a very different experience, I liked that experience, and I didn't like private practice in those years. I decided that I didn't want to practice anymore. I was open to teaching because I thought that I could do that, and as a child having been a barker at an arcade, I figured that I could stand up in front of a classroom and sell intellectual property as well as I could gadgets on an arcade table. More seriously, I liked the intellectual challenge, the interaction with students and the exploration of policy issues, so I was quite attracted to it. I interviewed at lots of different places, some places accepted me and some places didn't. Winnipeg was always a magnet for me. I could've gone to a number of different law schools in a number of different provinces in Canada, and ultimately, later, while I was already teaching at Manitoba, particularly Toronto and Vancouver. I had offers to go elsewhere. But, I was happy in Winnipeg so I decided to come back and teach at the Faculty of Law. I started teaching tax essentially. I was good at it. I started teaching in 1971 and in 1974 I won the Olive Beatrice Stanton Award,¹³ I was promoted to full Professor and granted tenure. I was having a successful academic career, though I never felt totally at ease because on the other hand, I didn't see myself, and I still don't, as a scholar. So, there was a bit of tear down the middle, the teaching part I could do really well, but I'm not a star at the scholarship part and I wasn't as interested in it. That stayed with me all the way through and it was ultimately one of the reasons I left the University. I taught for a number of years and I remember those years really happily. I

¹³ The Olive Beatrice Stanton Award for Excellence in Teaching is presented at May convocation annually to an outstanding teacher nominated by students. Jack London was the recipient of the award in 1974.

had a love affair with the students, and the students had a love affair with me, for many years. That ended later on in time, however in that case it was true. Seven or eight years after I had started teaching, a friend of mine who was the head of the film industry in Manitoba asked me if I would do some legal work for the Manitoba Film founding organization. I said sure, and started giving that kind of advice to them on the contracts where they were financing films. I got a taste back of the practice and quite liked it at that point.

BPS: So was this before you were dean?

JL: This was before I was dean. That was the way I carried on. I became dean in 1979 when I was 36, which was actually too young to be dean. I spent five years doing that, and I learned that I wasn't that crazy about being a middle manager either. We could spend a whole day on middle management, but I didn't prefer middle management.

BPS: Let me just say because you mentioned "middle," it's my impression that the dean of law had a lot more autonomy *vis-à-vis* central admin than they would nowadays. Did you have the sense of yourself as basically being the top of the hierarchy despite the fact that there was central admin that you had to negotiate with? Or, did you have a sense that really you were in the middle between central admin and the faculty?

JL: I wasn't in the middle substantively, you're right, because nobody external to the faculty knew essentially what was going on, that was all internal. The budget issues and issues involving the policies that controlled the University and the relationship to UMFA,¹⁴ and so forth, were all matters where you were in the middle and had no control. On the one hand, you were going to have a bunch of people who wanted you to do one thing, and on the other side someone who wanted you to do the other, and you were caught in the middle of those two things. Some people are really good at that and good at accepting it, I didn't like that format. Early on, between 1972 and 1974, Dale¹⁵ asked me to participate with him in fighting a case.

¹⁴ University of Manitoba Faculty Association.

¹⁵ Dale Gibson is a Distinguished Professor Emeritus at Robson Hall, Faculty of Law at University of Manitoba.

It was a privately arbitrated case involving a young physics professor, Dick Stevens, who had been denied promotion and tenure. Dale wanted to do the argument but he didn't feel comfortable putting in the case when he knew the case was going to arbitration, so I agreed to do that. The professor was a teacher not a scholar, which was the whole issue. The Faculty of Science and the Dean of Science had denied him a promotion and tenure. His field was electromagnetic theory. When I was a student at the University I think I got minus 16 in physics.

BPS: (Laughs).

JL: For sure. So now I'm going to be cross-examining these three world experts that they brought in on electromagnetic theory to evaluate Steven's work. So, two dissident professors in the physics department who were on Stevens' side, not on the faculty's side, cloistered me for three weeks and they taught me electromagnetic theory and the physics I needed. I cross examined these guys, and did a pretty good job of it, I think. I also cross examined the president of the University and the Dean of Science, both of whom confessed they had lied in the proceedings preceding the arbitration. We ultimately lost the case for other reasons, but that was a thrilling experience. The other thing I learned, because I remembered this as a student, is that when I was a student I would study for a whole period of time before an exam, and after the exam I would forget everything that I had studied. That was also true about learning about electromagnetic theory, because the next week I couldn't tell you anything about electromagnetic theory. The Stevens' case was notorious at the University and led to the formation of UMFA, the professorial union.

BPS: So, let's see, you recall this kind of amnesia phenomena that in second year you forget everything you did in first year, it's like it never happened, right?

JL: I want to bring in another anecdote; it's something that happened recently that surprised me about those years. Right from early on as a professor at law school, I would give the first lecture to the incoming students in first year. It was certainly true when I was dean, but it happened before that as well. In that lecture I developed the habit of opening with the following thing: "Look to your left and look to your right", most other

people then went on to say, “One of you won’t be here next year,” or “Two of you won’t be here next year,” but I didn’t do that. I said, “I know you think that each of the people on the other side of you know more than you. I’ll bet that you think both people on the other side of you are smarter than you are, and that neither of them is nervous in the way that you are. You would be wrong, because everybody in this class is wearing an emotional mask and that’s a problem because that sense of privacy means other people feel uniquely imperfect. Don’t feel that way; it’s not true, you all feel exactly the same way.” Flash forward 41 years, I run into a former student down at the concourse here in my office building. She comes over and says hi, and she says, “You know I remember that day in class when you said, “Look to the left look to the right, one of you won’t be here next year.” I said, “I never said that,” and she thought for a minute and then said, “Yes you did.” We had a debate for about five minutes where I tried to convince her that I’d never said that, and I could not convince her of that. She was absolutely certain that that’s what I had said. So, I learned it didn’t matter what I said because it was all going to be translated differently as time went on according to the student’s needs.

BPS: (Laughs). Very postmodern experience there. Coming back to this whole question of standards of expectations, because it’s going to be important when we talk about when the first wave of Indigenous students came through. When you were still having your love affair with the students, it was my stance of you as a colleague that throughout your career you were committed to teaching, you enjoyed the interchange with students, but you were quite principled about saying, “These are the standards, these are the expectations.” You weren’t somebody who was popular with the students because, “The exam will be easy, and I will tell you the questions,” or “I’m not going to give out real grades,” so on and so forth. Am I correct about that?

JL: Yeah, I had a couple of objectives. A principle objective was to abolish mandatory attendance of classes, because I had been debarred for not attending classes in second year law, and I swore that one day I would get that thrown out. When I became dean I had the opportunity to do that, and we abolished mandatory attendance, which I believe is the single event and victory of my life. So we could talk a lot about grading, but I think you

are moving it into the issue of the entry of Indigenous students into the school.

BPS: Yeah, because it's starting to become an issue as to what extent you accommodate, and to what extent there's a rigorous standard applied to everybody. Not asking this in any leading way, but it was something that everybody had to struggle with as we started to incorporate people from unconventional backgrounds.

JL: The major test happened when I was already dean, between 1979 and 1981. We'd already embraced the exception that Aboriginal students and some mature students weren't required to meet the same entrance standards that other people had met. If an Aboriginal applicant hadn't been able to qualify through GPA and LSAT Score, they could go to university in Saskatoon and do a special, summer program and could come back in that way.¹⁶ In those years, not all of the Indigenous people who graduated from law really would be the kind of people who went on to make a real positive mark as practitioners. There was a lot of slippage in terms of standards during that period of time. That was also true, of course, of the whole student body. One cannot escape the bell curve.

Frankly, I don't remember the number of Indigenous students who came through while I was dean but one that I remember above all. There was a student who, well, the rules of the Faculty of Law were that if you failed twice in two years over the course of your time at law school you were permanently withdrawn. There was a First Nations student who had failed first year and had come back and successfully completed first year as I recall. In second year, he had three supplementals on final exams, and had a failing grade in one of them, which meant that he was a failure that year under the then rules, which meant that he was withdrawn from the program. That was the first time that I knew of where Faculty Council had to look at this issue of standards. As I recall, there was quite a debate with people on both sides of it. The Faculty Council decided, as I advocated, that he become a permanent withdrawal because it was time that we established that everyone who graduated from the Faculty of Law, no matter their race, no matter

¹⁶ 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.

their ethnicity or origins, was entitled to graduate, and the degree meant that this person was qualified and passed the test of access to the profession.

It was the hardest decision I ever participated in by far, it still gives me nightmares all these years later. It brings tears to my eyes as I tell this story, because we could have been destroying the life of this individual. He wasn't destroyed as it turned out, and did quite well after. That was my first experience with that issue and it was at that time that a recognition set in – at least for me – that a problem was that we were taking that position, but there were no support services at the faculty to help the people who needed that help. So in a way, it was unfair. In retrospect it was more unfair than I think I thought at the time, because I wasn't sensitive enough to it at the time, to know that was a consideration. Affirmative action without support is a recipe for disaster.

BPS: Now we have permanent staff which is supposed to support people who may have come from backgrounds other than the mainstream. I don't remember us having that in those days.

JL: We didn't have it. In fact, in 1977 I took a leave of absence from the University as the Law Society of Manitoba asked me to come over and re-do all their education programs, including their Continuing Legal Ed programs for lawyers, Public Law Programs and the Bar Admission Program. We brought in what now has turned out to be the modern day Bar Admission Course at the Law Society. One of the features of that was that there were assignments, which were done in groups by the students in the didactic portion of the articling program. I remember very early on a couple of Indigenous students, including Ovide Mercredi,¹⁷ who ultimately went on to be the National Chief of the Assembly of First Nations in 1991. I hadn't even thought about and wasn't sensitive to, the fact that the dynamic in those groups was inconsistent with the culture of the First Nations people in particular, and they were alone in those groups. There were no supports there either, and we had to begin to look at structural changes to remedy that. All of that was still in its infancy and it wasn't until a number of years later that programs really began to come in, which could truly be called an

¹⁷ Ovide Mercredi, a member of the Cree First Nations community, graduated from the Faculty of Law, University of Manitoba in 1977. He is the former National Chief of the Assembly of First Nations.

adequate attempt at being supportive of people who were coming from different cultures.

BPS: At the time, the Aboriginal expert was Butch Nepon¹⁸ was it not? We wouldn't have had any First Nations or any other Aboriginal faculty members at that time; it would still be many years more. The first group that came through – you say – was about five Aboriginal students?

JL: I don't even think there were five. Ultimately, there was a dedicated five special consideration students coming into the first year. But you mentioned Butch Nepon, he was the only person doing anything remotely related to Aboriginal people. Essentially, he was consulting on constitutional cases, or very often Supreme Court cases, and very often involving the *Migratory Birds Convention Act*.¹⁹

BPS: There were a number of prominent cases that came out of Manitoba in those days. They were about natural resources, transfer agreements, and migratory birds. In the seventies, of course, we didn't have section 35 of the Constitution yet,²⁰ so many things would change both doctrinally and in terms of law school.

JL: *R v Drybones*²¹ was going on at that point.

BPS: *R v Drybones* was one of the various early ones. So you finished up as Dean, and my sense is that once you've been dean, it's hard to go back to the routine life of being professor. Especially now that there's all this premium with scholarship, a lot of it is sitting in front of your monitor, noodling. The life of a dean is more; "Okay, what's my crisis today?" It's a lot of action episodically rather than sustained by a monitor in isolation. I've never really tried the dean thing and I never wanted to so I don't know. My sense is that it would kind of be hard to go back.

¹⁸ Butch Nepon was at the Robson Hall Faculty of Law from 1969 to 1998.

¹⁹ *Migratory Birds Convention Act*, 1994, SC 1994, c 22.

²⁰ *Constitution Act*, 1982, being Schedule B of the *Canada Act 1982 (UK)*, 1982, c 11, s 35 recognizes and affirms the rights of Aboriginal peoples in Canada.

²¹ *R v Drybones*, [1970] SCR 282, [1970] 3 CCC 355.

JL: I frankly don't know the reason that it became hard for me, or rather made me less happy, to be teaching at the law school. I'm not sure to this day exactly all of the things that were involved. What I do know is that, in my mind, if in no one else's, between 1985 and 1988 I stopped being as good a teacher as I had been. I wasn't as dedicated to being the best that I could be anymore. I don't know why that was the case, but it was the case. As a result of that, I felt as though I was cheating to a certain extent. I was no longer putting the same kind of passion into teaching that I had before. Someday maybe a shrink will help to find why that happened. Maybe it was that the student body was changing, and the reactions to teaching methodologies were changing. I was teaching socratically, and wasn't happy any longer with the students, that was a possibility. I may just have become bored with the material. Whatever it was, I knew that I was no longer doing it as well as I had. I had been a part of a group of two or three of us who set up the Canadian Law Teaching Clinic. We looked at different teaching methodologies and we would have an annual conference in Banff where law professors from across the country came to learn different methodologies. We would also go out and demonstrate to universities the different methodologies one might employ. I did a bunch of that. Teaching became an almost academic exercise, rather than one that was intended to impart.

BPS: You're teaching about teaching.

JL: I was teaching about teaching, exactly, rather than teaching students. So I began to think about the fact that it was going to be time to take off. In 1985 I took a one-year administrative leave and did a television series for CBC, *The Right Thing To Do*, which looked at the way people in the professions and in business made ethical decisions. We did eight shows. I was the host and writer doing Socratic stuff with panels of specialists. I received an *Actra* Nomination as Best Host but lost to Peter Gzoski. Unfortunately, at the end the first year it was cancelled, I don't know why, but they cancelled it. But, I found the work made me happy and I knew that I was going to look for another place to begin to work. Still at that point for me, it had nothing to do with Aboriginal people.

BPS: In terms of conversion, just from many conversations we've had over the years – including this one – if I can provide the amateur psychoanalysis,

it says here your worldview is kind of like Ulysses in the Tennyson poem.²² Life piled on life has no attraction; you want to have all these new experiences and adventures.

JL: (Laughs). Yeah, I always prized change. I have always been committed to change. I'm an experience junkie.

BPS: Yeah, and after a while you want to keep starting new courses. There are guys like Phil Osborne²³ who could re-read the cases and teach torts for the thirtieth time with exactly as much self-discipline and intensity as the first time, and I always admired those people. For me though, I've changed a lot of different courses over the years. I have a lot of trouble, even though I've stayed in the same environment, teaching the same stuff over and over again. I don't know if you experienced what Gerry Nemiroff²⁴ did, Gerry retired not because it was time, but because he couldn't get the students to play the game anymore.

JL: That may have been a part of it. I actually don't know how to explain it. I just know it happened.

BPS: One thing I tell my students frequently about intentions is that it's hard to figure out other people's intentions because it's hard to figure out your own. It's a surprisingly difficult challenge, often if you have any insight it's only 20 or 30 years after you did it, when you look back. But that's biased too because you see how things turned out, and don't necessarily look at it with an un-skewed eye in that way either. So you decided to try your hand at practice again?

JL: Yeah, so in 1988 I took the first of what turned out to be a bunch of unpaid leaves of absence. When I took that first leave I didn't have a job, I'd assumed that my work experience and my abilities would be portable, marketable, and transferrable. I made all kinds of applications, I interviewed to be the host of a couple of CBC series, and I applied to be the CEO of a six-billion-dollar pulp and paper company in British Columbia, of which I

²² Ulysses is a poem written by Lord Tennyson published in 1842.

²³ Phil Osborne is a senior scholar at the Faculty of Law, University of Manitoba.

²⁴ Gerald Nemiroff is a retired professor from the Faculty of Law, University of Manitoba.

knew nothing. I thought I may go into the financial world and see how that works. I submitted my CV to a couple of my friends, people who were in that industry. One of them said that for me to work in the financial industry, I would have to cut out half of the research and writing that showed up in my CV – because it would be inappropriate for clientele; “rights” and such. You get the picture.

BPS: Because of political content?

JL: All of that stuff. The other said that it was terrific, but his company really had no room for a court jester because I was too “renaissance”. The only thing that was left, because I had to earn a living, was to go back into the practice of law, which is what I did. I came back to the predecessor to Pitblado LLP, Buchwald Asper.

BPS: In my interview with Gerry we talked a lot about the freedom that his generation had, which I think would sound quite mythical and wondrous to people from this generation. Gerry used to talk about, “Well I tried this, I tried that, if I didn’t work, I was getting a job somewhere else.” He was talking about the sixties, seventies, maybe the eighties. Did you have that sense of freedom? Obviously you were a talented guy who had a great CV. Was it still a time where it was okay if it didn’t work out because there were lots of opportunities? I don’t have the sense that the current generation I’m teaching has that second confidence in the future that, “I know if I don’t get a job here, I’ll get a job there,” or “if it doesn’t work out at my first firm, there are lots of places I could go.” At least in my sense from talking to the students, the millennial generation is much less confident in the future that something will work out; less than the sixties and seventies generation. You still felt that freedom in the eighties?

JL: I felt that I was part of a privileged group. I was born three years too old to be a true baby boomer, but I adopted myself as a baby boomer anyway. I saw the world as being an open pathway to really whatever I wanted to do, whenever I wanted to do it. I was surprised when it turned out not to be quite the case, but it was the case in the sense that there were always going to be great opportunities that were open to me. If it might not have been X, it would have been Y, if not Y, Z.... The future was unlimited! But I see now

particularly in my grandchildren, that they feel quite differently about it than I did.

BPS: I think it filters down to teaching law nowadays, it's a whole other discussion.

JL: My daughter went through a divorce last year, she's 48. There's a man living with her now who gave up his life in Germany. He has a PhD in engineering, computer science, he taught math. Brilliant guy, he had a wonderful job doing research in Germany. When he found out that my daughter was no longer married, he having never been married nor had children said to her, "I have loved you since we were children, you were always the person I wanted, if you want to give me a chance I'd like to be your person." He gave up everything he had in Germany and moved back to Winnipeg about a year ago, to live with her. They've moved in together and then married. The reason I tell you that is that he's got a CV that would knock your eyes out, but he's been unable to find the kind of work that he wants to do. He'd like to find an academic position, very difficult to get. He'd like to do research, very difficult to get. He heads an IT Department at a college, but he's underemployed. It's clear to me that there just isn't the same flexibility and opportunity as once was the case.

BPS: We, as the academy, are getting more and more scholarly and academic in our orientation. Our incentives and awards as academics are going on one particular path, which is being part of the social sciences and humanities, less so professional training for practice. At the same time, my view is that students are looking into a market which is way tougher than anything you experienced or I would have experienced. What they want to know is, "What am I going to learn here that's going to help me get my first job, and actually enable me to practice?" I think that's somewhat of a cultural divide that I'm not sure we all appreciate as law professors. It is that the economic reality, and therefore the whole personal reality of our students is different than it might have been in another time.

JL: I think it has always been that law professors have had a quite different view, of why students are in law school, than the students have had of why they are in law school.

III. INVOLVEMENT IN INDIGENOUS AFFAIRS

BPS: So you're back in practice, and eventually a huge part of your practice would involve the most important political and constitutional legal developments, involving the Assembly of First Nations and the First Nations generally. When did you first get involved in Aboriginal affairs?

JL: After I took my first leave from the faculty without a parachute, and not having been able to really see another path, I came back to the practice of law. I thought that I would come back and do estate planning and tax work, which at that mark was still my *métier* and the expertise that I knew. I made an arrangement with a firm, Buchwald Asper (later Pitblado LLP), to do that, and over a period of a year I did some of that work. I wasn't any happier doing the work then than I had been in the first go around. I also started doing some arbitration and mediation work which I found a lot more interesting; that was good stuff, and I was having success with that. My practice wasn't mushrooming in any huge way, it was just adequate. In my arrangement with the law firm I refused, then and forever, to be a partner. I was designated as Senior Counsel to the firm. Over the course of 28 or 29 years I've received only one referral from anyone else in the law firm. All the other work I've done I've generated myself, but I delegate around 75% of the business I bring in to other people in the firm.

So, I only had one referral, and it was very early on from Tom Frohlinger,²⁵ who had been a student of mine at law school. It was a case in which a northern tribal council, KTC, held a piece of property in Thompson, Manitoba in trust for its member First Nations, for their kids who needed housing when they came to school in Thompson.²⁶ It was urban, not on a reserve, so it was a domestic trust, not a constitutional trust. The case had been lost because the Municipal Authority had held that under the legislation, which exempted trusts from having to pay taxes in the town of Thompson, this particular trust wasn't the kind of trust that had been envisioned by the Legislature. I took an appeal to the Court of Queen's Bench, and won the case. The Tribal Council's property taxes were returned to them. They were happy with the result and I was happy with the result.

²⁵ Tom Frohlinger graduated from the Faculty of Law, University of Manitoba in 1981. He is a named partner at Pullan, Kammerloch, Frohlinger Lawyers.

²⁶ *Keewatin Tribal Council Inc. v Thompson (City)*, [1989] 61 Man R (2d) 241, [1989] 2 CTC 206.

That was my first interaction with anyone in the Indigenous world as a practitioner. Shortly after that, the Government of Manitoba, unappreciative of the fact that this group was now no longer taxable on its property in Thompson, brought in a bill to amend the legislation to specifically exclude this kind of trust from the legislation. At the time the Grand Chief of the Assembly of Manitoba Chiefs was a man named Phil Fontaine, he called me because he knew I had been involved in the case, and asked whether I would sit with them at the committee hearing to consider the bill. That was where our relationship was forged; we've been together ever since. The path that the legislation took was irrelevant and as a result of that he asked whether I would be Counsel to the Assembly of Manitoba Chiefs notwithstanding that I knew very little about Aboriginal Law, or, for that matter, Indigenous issues. I said that I would and began to do work for the Assembly on all sorts of issues. Primarily, as I said before, these were constitutional, political or inter-governmental issues. They weren't land transactions; I wasn't buying and selling real estate for the Assembly. The work was spectacular, reinforcing my fundamental belief that the detours in life very often produce extraordinary results. The Keewatin case led to a twenty year ride for me with Chief Fontaine during which I helped tend to the most important and interesting pieces in the emancipation struggle. What a privilege!

Shortly after that, as a result of that work, a man called me and asked me if he could come and see me, I said sure. He came to my office, his name was Ernie Hobbs. He operated a company called Hobbs & Associates, a consulting firm, for many years, specializing in First Nations work. He was a former director in the Department of Indian Affairs. He was acting on behalf of two Cree nations in Northern Manitoba. The lawyer who had been assisting them was a former Deputy Minister of Justice, federal, who had decided to go off and do other things and was no longer able to act for them. He asked me whether or not I would take over the two files which involved claims against the Province of Manitoba, Manitoba Hydro, and the Federal Government for damages caused to the lands of these two First Nations and to the people through the development of the Grand Rapids Hydro Electric Project in Northern Manitoba in 1962. As you can tell, it had been going on for a long time and nothing had been done. Hobbs asked me whether I would take it on, and I said that I would. That was in 1988. We have been very successful and this morning I was continuing to work on those files,

they are still a part of my practice and led to lots of other First Nations work. I had found my happy niche.

Then, one day I got a phone call from someone saying that there was a group of First Nations from Manitoba who were assembled at Fort Garry Place because they were unhappy with something called the Meech Lake Accord.²⁷ They were looking for a lawyer to assist the Assembly of Manitoba Chiefs in opposing that accord, and asked if I would be interested in talking to them. I said yes, and I immediately walked over to Fort Garry Place to talk with them. The reason that they had called me wasn't so much the stuff I had already done embryonically and my having acted as Counsel to the Assembly of Manitoba Chiefs, but because sometime before that, for fun, I had acted *pro bono* for a group called Canadians Against Free Trade. It was a group of rag-tag politicians who were going across the country arguing against the advent of the Canada-US Free Trade Agreement under Brian Mulroney's²⁸ government. They were attaching posters on public telephone poles, and other public buildings in Winnipeg, political posters. They were charged under a City of Winnipeg by-law and had been convicted. They didn't have any money, but someone who referred them to me wanted to know if, *pro bono*, I would seek leave to appeal to the Court of Appeal, and I did. I brought a motion before the Court of Appeal for it to be heard. It was heard by a single judge, Justice O'Sullivan,²⁹ who was cantankerous but a really smart guy. We had a debate about private and public property, and so forth. Finally, he accepted the possibility that my argument under the *Charter* on expression was correct, and let the matter go to trial. As a result of that the charges were dropped, the City of Winnipeg amended its by-law, and these people were allowed to poster wherever they wanted to poster. Little did I know that my own future had just been secured. Luck. Detour!

What happens in these political gatherings when there's a big issue is that every political group, no matter what particular issue they're in, they all come, they all gather together, it's a happening. They were sitting around and someone said, "We need the lawyer to go after the Meech Lake Accord."

²⁷ The Meech Lake Accord was a proposed amendment to the Constitution negotiated in 1987, which ultimately failed. Indigenous groups opposed the amendments because they had not been represented in the negotiations.

²⁸ Prime Minister Brian Mulroney was the Canada's 18th Prime Minister, serving from 1984 to 1993.

²⁹ Justice Francis O'Sullivan (1927-1992) served as a Justice in the Manitoba Court of Appeal, appointed in 1975.

One of these guys from Canadians Against Free Trade said, “There was this guy London, he did a good job for us *pro bono* just a little while ago, we should get him,” and that was how the call came in. Phil wasn't there at that moment to say anything. I went over there, and I was retained by the Assembly on this particular matter to fight the Meech Lake Accord. As you know I was joined in it by Gordon Mackintosh³⁰ a lawyer who was a former Clerk of the Legislature. He acted nominally for Elijah Harper, a First Nations, NDP MLA³¹ who sat with his feather in the legislature and said, “No” to a procedural motion which would have put the Accord to a vote for the ratification of the Accord – which certainly would have been ratified. But, the procedural motion had been filed late and so it required unanimity of all MLAs to allow the vote. His singular “NO” killed it and the Accord because to be ratified, all provinces had to ratify within a certain time limit which expired just then. Gord did that part of the work, and I did all the political work, strategizing and advising of the Chiefs and was the interface between governments and the First Nations people on all political negotiations that went on. That was my first foray into national recognition for work with Aboriginal people. It was a huge thrill to help successfully against such odds. To this day, people still remember that and want to talk about that. So after that, I gave up wanting to spend more than 25% of my time related to tax. I still did some arbitration and mediation work, and became a permanent mediator for Canada Post for a while, along with two other lawyers from Manitoba. As time developed, about 75% of my work became work with First Nations people. I say Indigenous or Aboriginal people because I think in those terms, but in fact, I only acted for First Nations, I never acted for another Aboriginal group, neither Inuit nor Métis.

BPS: Going back to the pre-Meech Lake areas, you did dabble in that work in the Thompson case, but working with Phil at the Assembly of Manitoba Chiefs was the first time you were extensively working with First Nations.

³⁰ Gord Mackintosh is a former member of the Manitoba Legislative Assembly. Mackintosh attended law school at the University of Manitoba. See interview with Gord Mackintosh: Interview Conducted by Bryan Schwartz & Erin Melrose “Interview with Gord Mackintosh” (2002) 30:1 Man LJ 49.

³¹ Elijah Harper (1949-2013) was an Oji-Cree politician, consultant and policy analyst from Red Sucker Lake, Manitoba, who played a significant role in the ultimate rejection of the Meech Lake Accord.

Regarding the Assembly of Manitoba Chiefs, now, of course, you would have met a lot of chiefs and constituents and so forth, but at the time was Phil your Rosetta Stone to understanding the politics and the culture? You were dealing with Phil Fontaine who obviously has a very deep understanding of how politics work, of how people think. He had a very pragmatic attitude to accomplishing a long-term agenda and having to deal with people and situations. How much did you have to learn the culture and the politics, how much of an advantage did you have working with the master-pro already in Phil?

JL: I had the advantage of working with master-pro Chief Fontaine in another instance where I would say, and I think accurately, that I was mentored by my client. He taught me, by example for the most part, what I needed to know to be able to do that work. What I brought to it was a fairly able set of skills, including negotiations. The best thing that I've ever done, and continue to do, is to negotiate. It's an art and a part of my being, to put it that way. But in terms of understanding the culture and being introduced to that culture, he was my mentor and teacher. Over the years, as a result of that, very often I had difficult relationships with other chiefs and other people within the First Nations communities. This was because – coming back to a theme we hit before – in the Meech Lake Accord process and other things, there was this notion that people were propagating, sometimes within First Nations communities, and sometimes with external pundits such as Jeffery Simpson³² and *The Globe and Mail* and others, that I was a ventriloquist. That the ideas that were coming out were my ideas and Phil was mouthing them and saying them, rather than their giving him credit for the fact that these were his ideas, and that he had taught me and instructed me on, and I was just putting a little wrapping, packaging on them to make it more acceptable and effective. Within that context, very often there was this 'knowingness' that the fact that I was Jewish was one of the reasons that there were lots of people within most communities who were not too happy seeing the depth and the profundity of the relationship Fontaine and I developed. We were brothers then, and we're brothers now. That notion was offensive to many people. There was rampant envy. Everyone wanted, but could not have, that depth of relationship. As Phil once said in

³² Jeffrey Simpson is the national affairs columnist for the *Globe and Mail*.

addressing a gathering and speaking of the three most important people in his life, "Of every one, I trust Jack with my life".

BPS: Let's talk a bit about what Phil was so good at. You have a better sense than I do because you were in a lot more court rooms and more situations. Part of it is he was a really smart guy who could read a situation, had very strong beliefs and emotions like everyone else, but was able to clinically read, "This is what these people want, and why." This is important for lawyers of course, because you're very often dealing with, as you said earlier, issues that are absolutely existential to people. Is there anything you can tell us about what Phil Fontaine and Jack London learned about how to deal with emotionally charged conflicts and getting past it to find some way to work together?

JL: I'm not prepared to talk about the emotional side of the relationship, and the emotional side of Fontaine. He was a survivor of Residential Schools, he was the person who first came out and announced he had been abused as a student at a Residential School. It left him with a series of scars which are always going to be a part of our interaction and everything that happened. That's all I can say about that part of it, that's his story to tell. In terms of policy though, and in terms of how to get things done, he was very much a person who was very convinced of the rightness of his cause and the needs and rightness of his people. He was a pragmatist, and, I hate to use the term, "incrementalist," because some people will diminish him because of the use of that term. However, he understood that in negotiations, you fight long and hard, and at some point you have to make a deal. You get as much in that deal as you possibly can. He also knew that if you do that, and to a certain extent this was the teaching of Jean Chrétien³³ in a number of instances, if you got that deal, that deal was never going to be the final deal. He knew that when you are dealing with something as profound as the rights of whole peoples, it was always going to be open to enhance it, and enhance it, and enhance it over time. You just have to be patient to do that. So that was one of the things I learned to do. When I started doing that work, given that I had come out of that kind of "sixties" thought about the civil rights movement in the United States, I thought that very quickly I was

³³ Former Prime Minister Jean Chrétien was Canada's twentieth Prime Minister, serving from 1993 to 2003.

going to be part of the revolution. An emancipatory revolution in which all of a sudden there would be a huge change in the lives of First Nations people, and I just couldn't wait to be a part of that and see that happen. Very quickly I learned that to make the slightest bit of progress was huge in the fight for emancipation.

I also worked with First Nations people who had chips on their shoulders, people who were hot heads, people who were angry, some who were dishonest, (the bell curve always), all of those people. They didn't actually get anything done, there was a lot of smoke but there was very little fire in terms of what was going on in terms of accomplishment, as I perceived it. The best example may be that Phil's predecessor as National Chief in the Assembly of First Nations had a very angry methodology for dealing with the Canadian Government. As a result the funding for the Assembly of First Nations had fallen by a huge amount, maybe by as much as 60-70%. When Phil became National Chief, I spent about six months negotiating with Indian Affairs to not only get that budget restored, but increased. I gave them someone to negotiate with rationally, somebody that they could deal with on the other side. There was something that could happen, something positive could come out of the expenditure of money and effort in getting that done. That was Phil. That was his lesson.

BPS: If somebody was listening to the interview and wanted to know: "Well, the Meech Lake Accord was all about Quebec and a Distinct Society, did that really have all that much to do with Indigenous people?" What would you say is the perception of that event now?

JL: The best thing that's ever been written is the book by Pauline Comeau, who was a reporter for the Winnipeg Free Press at the time. She wrote, "Elijah, No Ordinary Hero,"³⁴ on what happened in Manitoba on Meech. There's a comprehensive and very good explanation of what went on at that time. In short, this is what happened. The Meech Lake Accord had a preamble, which referenced the two "founding" Nations of Canada. The First Nations were unappreciative of the fact, that the French and the English were the founding nations of the land because they had been here first. They were also very concerned with the decentralization that the bill presented of authority and power from the central government to the

³⁴ Pauline Comeau, *Elijah: no ordinary hero* (Vancouver: Douglas & McIntyre, 1993).

provincial governments. One of the reasons for that was they relied on treaties with the Queen and the Federal Government under the Constitution was essentially the government with which they interacted, who had control over the *Indian Act*³⁵ and other things. They were concerned that they would get sideswiped in that situation. The third thing was that they felt their treaties were more at risk as a result of the Meech Lake Accord than they otherwise would be. The metaphor was, “What do you mean there are two founding nations that are going to be pre-ambler words in the constitution of Canada?” That’s what they wanted to attack, did attack, and it was defeated as a result of that, notwithstanding every effort lots of governments, including the Federal Government, made trying to undermine the cause, to get them to back off with promises and all sorts of things. In that particular instance one couldn’t say to them, as Mulroney tried and failed, “We will call a Royal Commission and look at this, we will have another study, and we will look at this.” This was not to be something that was going to sit on a shelf. This was a once in a lifetime opportunity to prevent that kind of demeaning constitutional legislation being enacted in Canada. They pulled out all the stops to get that to happen.

When I had talked about Fontaine’s incrementalism or patience or understanding, that you just get done what you can and then come back later, that all works generally, but it doesn’t work when you are amending a constitution. That can work legislatively and in policy terms, but it can’t work when you are doing a constitution because it’s going to be etched right in stone and the amending formula is so difficult to get the governments, all of them, to come back to it later on. It’s almost impossible. So on that situation, Phil, through the medium of Elijah, just said “No,” and there wasn’t any possibility of slippage. At one point I was being called regularly by the Prime Minister’s Office, I had a direct line to the Privy Council, and we had some conversations directly with Mulroney. There was lots of stuff going on, lots of offers being made. At one point I made a suggestion to the feds, that maybe if the Prime Minister would come to a reserve in Manitoba and promise a national inquiry and amendments to the Constitution at a later date in time that that would work. I thought maybe my clients would

³⁵ 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.

accept that. When I told Fontaine that I had done that, it was the only time in our entire relationship where he said a negative word to me. He said, "That's not your call, you can't do that. This isn't your fight in that way." So I withdrew it of course and never did anything like that again. It was an example to me that there's a line in the sand here that we're not crossing; my personal and cultural life were not implicated.

BPS: A student taking Constitutional Law right now might have some boring footnote or something, Meech Lake Accord, yeah this happened, ancient history. My recollection at the time, though, is that there were people thinking, "If this doesn't go through, Quebec is going to separate," and people accusing those who were opposed to it of being potential "country killers." You had this colossal pressure, I would think, of wondering: "Oh jeez, are we doing something that's going to cause the break-up of Canada?" Plus, you had to resist the pressure and cajoling from Brian Mulroney, who was really good at it, he thought you could make a deal about anything. It was just a question of: "What do you want? You want something, just tell me what you want and sooner or later we'll get there." Did you feel that kind of psychological pressure at the time?

JL: Sure, there was a lot of guilt going on. I'd get Parliamentarians calling me and telling me I was dishonourable, and that I was breaking the country apart. There were editorials that spoke to that. There was a lot of negativity expressed along those lines. At a point in time, I had a bodyguard.

BPS: I didn't know that. Wow!

JL: At a point in time we were bunkered down in a concrete space because our phones were being tapped, so we went down deep in concrete to prevent our lines from being tapped. Fontaine and Elijah Harper both had bodyguards. This was not any way to win a popularity contest in Canada, at all.

BPS: It sounds, from what I'm hearing, that it was easier than it might have been in other circumstances, because you had Phil; who was someone to whom this was a non-negotiable situation.

JL: Sure, I had very clear instructions. I had tremendous leeway. My leeway was, “No.” There was no ambiguity – all strategies – every action was intended to bring about a single result; failure of the Accord. A classic example of that is when the Prime Minister sent Senator Lowell Murray³⁶ to Winnipeg to negotiate with the First Nations. I did all those interfaces so we arranged for a meeting with the Chiefs to take place here at Pitblado,³⁷ in fact, in the room you’re sitting in right now. There was a huge crowd, lots of press, and lots of people, lots of stuff happening. The Prime Minister’s staff was here with Lowell Murray. Prior to that meeting I was asked by the Chiefs to develop a script of what we were actually going to do. The script that I developed, which we used all the way through, actually, was that we were always going to be polite, we were always willing to listen, we were always willing to talk, and we were never going to say, “Yes.” So Murray came, did his best which was very unimpressive, and we said, “Thanks” and walked out of the room, and that was it.

BPS: Were you an advisor to Elijah during this time at all?

JL: I’ve been talking about Phil, and I’ve been talking about the Assembly, and of course Elijah Harper was the central, public figure in this. Because of his position in the Legislature, he was the messenger. If you want to talk about pressure, he was the person who was under the greatest pressure, because he was sitting in that Legislature and was being bombarded by demands that he toe the line. Even from people within his own party. He was a New Democrat. There were people who thought he was doing the wrong thing. He was being guilting and had a very difficult time. That matter, the Meech Lake Accord failing in Manitoba, would not have occurred simply because of the work I was doing or the Chiefs and Fontaine were doing, I am happy to have been a part of it and I think I played an essential role in it, but the technical, quintessential legalistic research role was played by a lawyer being a lawyer. Gordon Mackintosh knew the Rules of the House and understood the procedural niceties that might prevent that Accord from coming to the floor for ratification. I’m not sure I would have thought of looking at the rules like he did. He directed that. He was

³⁶ Lowell Murray first became senator in 1979 under former Prime Minister Joe Clark. He also served as senator under the Mulroney government.

³⁷ Pitblado LLP is a law firm in Winnipeg, Manitoba.

technically Elijah's lawyer through the whole thing. Gordon and his wife actually had a child born during that period, and they named the child, Elijah. Gordon was fundamental to success. I had my part to play, but he also played a crucial role. Without the political manoeuvring the Accord would have been ratified; that was our job. The House Rules would not have ever come into play. Without the legal analysis, the avenue of success would not have appeared. It was a concurrence and confluence of roles.

BPS: By the way, there is a volume of *Underneath the Golden Boy* I did about Famous Legislative Crises. One of the crises was the Meech Lake Accord. I interviewed some people who were there in the Assembly at the time on both sides.³⁸ When I do these things Jack, I sometimes like to dwell on a name or two. When names come up I like to take a moment and reminisce just because history forgets so quickly. We were consumed by the Meech Lake Accord at the time – you were in the trenches, I was an academic – and thirty years later it's a footnote. It was very consequential to Canadian History but people won't recall it. Elijah used to call me when he came to town and stuff when we were friends. One thing people may have not appreciated about Elijah, he was this avuncular looking guy, but my sense is that he was really, really smart.

JL: He was smart. And he was one of three First Nations' leaders, Ovide Mercredi, Elijah Harper, and Fontaine, who had gone to university ahead of their time and had university degrees. They were quintessential First Nations people, but they also understood the operation of the outside world. Elijah was smart. Unfortunately, for many reasons, both physical, oral and manner driven, he could not become a great, messianic leader in the Indigenous world. We could talk more about Elijah if you want, but I want to make a different point before I forget – two points, actually. One is the reason that the Meech Lake Accord should not be a footnote in history. Concurrent with Meech Lake, there was a crisis taking place in Quebec. It was the Oka Crisis³⁹ about a golf course being expropriated, and the Mohawks who were opposed to it. They were involved in a shooting battle

³⁸ Bryan Schwartz & Erin Melrose "The Meech Lake Accord" (2003) 30:1 Man LJ 39.

³⁹ The Oka Crisis lasted 78 days, from July 11 to September 26, 1990. The proposed golf course expansion and condominium construction were cancelled. However the disputed land, which was purchased by the federal government, has not been transferred to the Kanasatake Mohawk, who claimed that it was their land.

with armed forces and there were huge standoffs, and huge problems with people wearing masks to prevent identification later; the kind of stuff that we don't generally see in Canada – that we probably hadn't seen since the FLQ in Quebec on separation prior to that. That was a militant response to an act of the government. That was violence based, political response by a group of people who believed in militancy, that armed struggle was an appropriate methodology for dealing with an oppressive nation.

Meech Lake was the exact opposite to that. Here was a man using the legislative procedures of the country to effect exactly the same end, and he did it without a shot being fired. He did it by sitting and saying, "No." I always thought that those two events were extraordinarily juxtaposed, and that the lasting lesson that would be taken from them was more probably going to be the lesson from a "NO" than it was from Oka. That lesson was that there's always going to be a militant group in the spectrum of a political position, but at the end of the day it's the person who learns how to use the system itself, who is going to be most helpful in achieving change. I think that's what happened, and what was the major result of Meech Lake. I also just want to add parenthetically, that if I live to be a 1000, and practice law during that whole period of time, I doubt that I will ever experience as a lawyer the same thrill as when the Meech Lake Accord was defeated, and that we had played a role in that happening. For me it was, think about it, a bunch of mid-western people taking on the ten provincial governments and the Government of Canada on a revolutionary constitutional issue, and winning. Maybe, years later I experienced something similar when I was able to negotiate First Nations rights into the operations of the *Federal Clarity Act* which defined the rules of success or failure of any attempt by a Province, read Quebec, to separate from Canada.

BPS: Although not all directly related to the defeat of the Meech Lake Accord – some to more extent and some to a lesser extent – I think there were at least three major developments in the immediate aftermath with the demise of Meech. On the formal constitutional front, the effort to pick up the pieces was the Charlottetown Accord.⁴⁰ In that round, one in which once again you were an advisor at the table, an attempt was made to recognize that you could never again do a recognition clause and not include

⁴⁰ The Charlottetown negotiation was a failed attempt to amend the Canadian Constitution; it was proposed by the federal and provincial governments in 1992.

First Nations people. During the Meech Lake Accord I wrote that instead of recognizing people at separate times independently, we should have a more comprehensive way.⁴¹ Now they call it a recognitions clause, and that ultimately became the proposal Premier Bill Vander⁴² did. It was really the starting point for the Charlottetown Accord that the recognitions clause had to be comprehensive. If you look at the Charlottetown Accord, recognition of the Aboriginal role is no longer a footnote, exception, or notwithstanding. And there will not be another round of constitutional negotiations – like Meech – where you could focus on a particular issue that has a significant impact on Aboriginal people without having Aboriginal people at the table.

In terms of the three major post-Meech events, one is on the formal constitutional front – the Charlottetown round and so on – which definitely bears the imprint of the defeat of the Meech Lake round, and that effect, I think, will be permanent. You mentioned Oka; the aftermath of Oka was a second major development, a spurt in trying to resolve specific claims. Later on when you were working with Phil Fontaine at the Assembly of First Nations, the AFN became a partner with the federal government. It took a long time, but from the beginning to the end you were the one who got me involved. I was counsel working with the AFN and negotiating the *Specific Claims Tribunal Act*⁴³ which eventually became a reality. Now there's approaching a hundred claims filed with the tribunal. The specific claims system doesn't work well, but the *Specific Claims Tribunal Act* is working remarkably well, that will be a permanent legacy of Phil and your involvement with Phil. By the way, Phil was on the Indian Claims Commission⁴⁴ that arose after Meech Lake Accord. The third is the litigation path. When you were working with Phil, AFN had a major role in

⁴¹ Bryan Schwartz, *Still Thinking: A Guide to the 1992 Referendum*, (Hull: Voyageur Publishing, 1992); Bryan Schwartz, *Opting In: Improving the 1992 Federal Constitutional Proposals*, (Hull: Voyageur Publishing, 1992); Bryan Schwartz, "Refashioning Meech Lake" (1989) 18:1 Man LJ 19.

⁴² William Nicholas "Bill" Vander Zalm was the Premier of British Columbia from 1986 to 1991.

⁴³ *Specific Claims Tribunal Act*, SC 2008, c 22.

⁴⁴ The Indian Specific Claims Commission performs a variety of tasks as an impartial third party, including: mediation, inquiries into a disputed rejection of a special claim, and disagreement over compensation criteria to be used in determining the amount of a specific claim.

landmark litigation at the Supreme Court level which will last a long time; for centuries to come it will be important in the jurisprudence.

So, Phil becomes National Chief and one of the accomplishments you mentioned already, was that he established a far more constructive relationship with the Federal Government and gets a substantial increase in funding. It's my understanding that Phil, while working with you as AFN Counsel and some other folks, tried to make the AFN much more like a government – have departments, portfolios, and be more professional at the same time that you were pursuing various legal agendas. One thing that you were the lead on with, and Phil was the political director on, was that the AFN started getting more heavily involved in litigation as an intervener at the Supreme Court of Canada. What was the origin of Phil's seeing that as a battlefield that he wanted the AFN to get involved in as a national organization, and how did that work out?

JL: Let's go back to Charlottetown for a second. I attended the negotiations on the Accord on a number of occasions because all of the regional, provincial associations, like the AMC, were also part of the Charlottetown process. It was like taking a post-graduate course in Aboriginal law because there was nothing that wasn't covered by Charlottetown. I was the beneficiary of all that learning. In terms of the Supreme Court litigation, actually it didn't start with the AFN, it actually started when Phil was Grand Chief of the Assembly of Manitoba Chiefs. Under the *Charter*, as we know, there is this question about what the depth of section 35 is on the issue of self-government. It's a multi-layered box that's being uncovered layer by layer as the years go by. It turned out that the very first time that the all-encompassing notion of "self-government" was going to be defined in the Supreme Court was in a gambling case out of Ontario. Did a First Nation need a licence from the provincial government to allow organized gambling on reserve or was that an inherent power of the Chief and Council, that is, was it an Aboriginal or treaty right?

BPS: Pamajewon.⁴⁵

JL: Because this was going to be the first case, Phil and I had several conversations about what the role was of First Nations in pursuing this path

⁴⁵ *R v Pamajewon*, [1996] S.C.R 821, 92 OAC 241.

to use the courts to effect change. As I argued at the time, if you were to take a look at all the legislative changes that were taking place at the time and were impactful and helpful to First Nations, they would constitute a very small percentage of the growth in First Nation rights sweeping the country. The growth in rights actually took place because of what was happening in the Supreme Court. This was a court led revolution, as we know. So since this was about self-government we decided to intervene at the Supreme Court in *Pamajewon* and *Jones*. That was the first time I was to appear in the Supreme Court since 1967 when I silently junioried in Second Seat in a Supreme Court tax case, *Algoma*,⁴⁶ for Justice Canada. I developed the argument that gambling was the new “white buffalo,” the economic salvation of First Nations necessary to fund self-government and attempted to get the Canadian Supreme Court to come along with that. We lost the case because the fact situation, which had been developed and argued by Ontario locals, was awful and therefore unlikely to succeed. That was significant because later on, as this progressed, when Phil was National Chief and we were intervening regularly, I think we were became sensitive to the fact that you had to choose your cases carefully. You had to have really good fact patterns going to the Court or you were going to lose on the fact pattern and that wasn’t going to be helpful to the principal legal points you wanted to make. In fact, they could set you back. We inherited the *Pamajawon* facts and they were insufficient to allow us to achieve the goal of emancipation.

BPS: There was a case where you asked the Supreme Court of Canada whether you could put in a point form written outline of your argument while standing to argue, kind of a ‘guide,’ and the other parties resisted it. But, the Court accepted it, and subsequently it became a requirement of Supreme Court practice that you submit a one or two-page outline; I remember doing many myself. It all started with that case, was that *R v Badger*?⁴⁷

JL: Right, of course. Okay, so we did *R v Badger*, which I would call a landmark decision in Canada for sure. I wanted to do *Badger* because I thought it was going to set a fundamental set of principles on hunting rights,

⁴⁶ *Minister of National Revenue v Algoma Central Highway*, [1968] SCR 447.

⁴⁷ *R v Badger*, [1996] 1 SCR 771, [1996] SCJ No 39 (QL).

the evidentiary value of oral history, the methodology of Treaty interpretation, and the relationship of Treaty Rights to the *National Resources Transfer Act*. The stakes could not have been higher. The fact patterns were good. We were right. The reason I wanted to give the judges the outline was twofold. First, oral argument in the Supreme Court is subject to very difficult time limits; and this was a way of limiting the oral niceties and expanding the oral content. Secondly, because it was a complex case on a number of very difficult and diverse issues that were going to set important law, success would benefit from the judges having a road map in front of them. Seemed logical to me and, anyway, the worst that could happen was that they would say no. I thought it was a good idea. Apparently so did the Court.

The whole idea was to change the stars shining on First Nations' future. Phil was supportive, not because of the details of the argument, but because he accepted our sense of which cases were landmarks and which just signposts. On the question about how all this participation by AMC and AFN became supported I think the importance of full participation by First Nations in the Supreme Court arguments on matters affecting them came about in our time for a number of reasons. Effecting change is like preparing a potion. Different ingredients need to go into a potion and, properly dosed and mixed, you can wind up with a catalyst that effects change. So the potion that we had then included Fontaine, who was open to and sensitive to the participation and the expenditure of funds by the First Nations organizations to intervene at the Supreme Court level and who was very supportive of it. It had really nothing to do with the contents of the arguments themselves in a way. It was more about: "if you want to be a government, act like a government". That was a phrase that I developed for the Assembly of Manitoba Chiefs when we fought Meech Lake. In the Supreme Court arguments, we would pass the arguments – in each of the cases – by internal counsel at the AFN, but essentially the arguments were all developed externally by us. I had the personal organizational relationships where I could make the argument that these things should be litigated. I would do that annually at the General assembly of Chiefs of the First Nations of Canada. I would go up in the Plenary and defend what we were doing and why we were doing it and all of that sort of stuff. That was part of the potion. The potion effects change. The third part of the potion, which was the crucial part, was that through happenstance you were also

Counsel at Pitblado. We also had a couple of very young people, Melanie Bueckert⁴⁸ and later Darla Rettie⁴⁹, who were available to help. It's important for a lawyer to know the difference between his or her strengths and weaknesses and focus on the strengths and not on the weaknesses. I would never have been able to do the development of that argumentation myself in the Supreme Court of Canada as well as it was done, except with the assistance particularly of you and also by Melanie and Darla. So, it was those three ingredients of the potion that worked to get us into those cases and be successful at those cases. I am a believer that existence precedes reason, rather than reason preceding existence, and that everything is just luck. Life is absurd, and things happen for no apparent reason. So here you have a confluence of these people coming together in one place in Central Canada, having an influence in Eastern Canada and, through that collectivity, access to the Supreme Court of Canada

BPS: In retrospect, what are the odds that Jack London would happen to run into Phil Fontaine in a different context? Phil would end up being National Chief, they would end up establishing litigation programs, Jack would know me from law school and Pitblado and we did about a dozen Supreme Court Cases in Canada.

JL: There's also an even more striking issue of absurd luck. I hired you at the law school.

BPS: That's true, I got my first teaching job. I was a great negotiator in those days, you offered me a two-year contract and I accepted one!

JL: (Laughs).

BPS: (Laughs). Looking back on the big picture, we were involved with cases that I think, well, someone once interviewed me and said, "Is this the case of the century?" And I said "yeah, well until the next case of the century." But even actually with the hindsight, some of them are, and will, remain very important.

⁴⁸ Melanie Bueckert graduated from the University of Manitoba Faculty of Law in 2003 and worked at Pitblado.

⁴⁹ Darla Rettie graduated from the University of Manitoba Faculty of Law in 2002 and works at Pitblado.

JL: *Badger*, for example.

BPS: These are cases that are fundamental to everybody who has a Treaty — like all the numbered treaties in western Canada. I'm trying to think back on what we did and why we were quite successful. As interveners, none of these were our cases so we were coming to it at the last level. What can the intervener do that's useful? You have to remember you are not supposed to repeat what one of the main parties is doing, you have to have value added as an intervener. Certainly, one of the things that I think we did do quite effectively was big picture stuff, standing back from the immediate facts and try to fit this into the larger pattern of cases that were emerging. You mentioned, for example, *Pamajewon*, Jack, it was you who mentioned it to me that it pulled the thread that unraveled all of the complicated doctrine. You pointed out to me once that the Supreme Court of Canada does not like recognition rights on a commercial scale. In practice, whenever the rubber tried to hit the road on rights on the commercial scale they always found a reason why it didn't. The other thing we tried to do, was we had a bit more flexibility than a party might in taking a position. A party might not be able to politically say, "Okay there's an exception," or, "There's a qualification," and so on. We had a little bit more freedom of action there. We were certainly never undermining the main party but sometimes we could put an alternate suggestion on the table.

Think of commercial rights, for example, in *R v Sappier*⁵⁰ and *R v Gray*.⁵¹ Commercial rights were having a hard time with the courts, so that was our contribution. How about recognizing rights for domestic purposes, which was much broader than personal use, but doesn't go quite as far as commercial. We put that on the table and the Supreme Court adopted it. There were a number of cases, and certainly having the experience of doing a lot of these cases gave us an advantage in terms of looking at the big picture in full. The Court loves that of course because the Supreme Court of Canada is not thinking about minutia, they are always thinking about big picture issues. We had flexibility as interveners to try and offer an alternate formula or an alternate way of getting to a favorable result which a party might not have always had. That's my sense of how we were able to be fairly

⁵⁰ *R v Sappier*, 2006 SCC 54, [2006] SCR 686

⁵¹ *R v Gray*, 2004 NBCA 57, [2004] 4 CNLR 201.

influential. The point wasn't just to go there and make noise and show that the AFN cares, the point was to actually have a positive impact on the overall flow of doctrine, and I think that we were quite successful. That's my sense of what we tried to do anyway.

JL: I think that all of that is accurate. But I think it would be a mistake to leave out that when you're the national organization and you're an intervener, there is a whole political issue that takes place in the nature of the arguments you make. How you make them, when you make, who argues, which party argues first and second, and all of that stuff that goes on. As an intervener in rights cases, when you're part of a political organization, you have to make the strongest possible arguments. But, you can't make arguments that would be antithetical to the people whose case has actually come to the court. You're never going to come up and say, "You know those guys from Alberta, they don't know what the hell they're talking about," you have to do it in a more sensitive political way. It's really the art of "lawyering."

BPS: Yeah there's temptation for an intervener, not specifically in Aboriginal cases, but high-profile interveners, to say, "Okay I'm the smartest guy in the room," or, "We're the organization that made the big difference." When you're the AFN you are of course part of a national organization. You're always trying to be supportive and seem to be supportive so you have to be sensitive to the diplomacy and so on. I think collectively we did that well.

JL: You remind me there in one of the cases, *McDiarmid Lumber Ltd. v God's Lake First Nation*,⁵² we developed very strong arguments. I felt very strongly about our presentation. The counsel from the First Nation that was the appellant in that case called me to find out what it was that we were going to argue. I told him and went through all the arguments. He argued first in Court of course. I argued after and he just took the argument we had presented to him orally and spoke it virtually verbatim. (Laughs). I had a "What do I do now" moment?

BPS: Those ten minutes were an art form in and of themselves.

⁵² *McDiarmid Lumber Ltd. v God's Lake First Nation*, 2006 SCC 58, [2006] 2 SCR 846.

JL: Yes, they were.

BPS: Ten minutes sounds like ten minutes, but it feels like 45 seconds.

JL: Absolutely.

BPS: The advice I would give to any lawyer is that if you don't know what the 30 second version of your case is – you don't know what you're doing. It's so easy to get immersed in all the details, and you have to have everything at your fingertips, but they can ask you a dozen questions, and things could go every which way you didn't expect. You have got to remember what your key point is, because that's what you come back to. I really admired the way you handled *Blackwater v Plint*,⁵³ which was the Residential Schools case. By the way Jack, I'm glad I wasn't at the podium when it happened. We had developed an intervention, and a lot of it was looking at history textbooks and showing that it was not, in fact, the case that the Federal Government had no idea what was going on, and further that they continued the policy after they knew. We had earlier authority from the Supreme Court of Canada that they may take judicial notice of things like textbooks. You sat up there, and the first thing that Chief Justice McLaughlin⁵⁴ said was, "Please proceed and I would ask you not to discuss any facts that were not entered at the trial level." We said, "Well, actually, that is the exact basis of our argument here," and just carried right on.

JL: (Laughs).

BPS: So you handled it extremely deftly and you were able to go ahead with a 10-minute argument. The feedback afterwards was that you had many admirers from what you accomplished. Do you remember that experience?

JL: You know I'm older than you are, and Alzheimer's is more developed in me than in you, and so I don't always remember everything. I have the worst memory of anybody in the world.

⁵³ *Blackwater v Plint*, 2003 BCCA 671, 192 BCAC 1.

⁵⁴ Beverley McLaughlin has been the Chief Justice of Canada since 2000.

BPS: That's a blessing! (Laughs).

JL: Well, it is a blessing because I recreate the past as I like it all the time. But, I don't need to recreate the moment after the arguments were in, when my younger daughter – who was studying law at McGill – sat with me on the case and was standing next to me when one of the opposing lawyers, a giant of Supreme Court cases, walked over and said, "Jack, that was the best [expletive] argument I've ever heard." Tears time!

BPS: Yeah!

JL: So let's just switch over since this is actually supposed to be publishable. I don't want to leave out the other side of this, which is the non-litigious work with the provincial and federal First Nations political organizations of record. I spent a lot more time on this other part of it. It was working with and developing arguments about, and solutions to, problems that were political in nature within the AFN and Assembly of Manitoba Chiefs. There you had very significantly different regional interests being advocated by different First Nations. British Columbia and Nova Scotia didn't really share a lot of similarities in terms of what they wanted to happen. In addition to that, it's a very competitive world, it's a political world, and the National Chief or the Grand Chief has a large number of Indigenous enemies within the organization. He has to give a lot of speeches and has to develop a lot of policy that will placate people within the organization and will become acceptable as policy that ought to be adopted by the organization. This is on everything from: education to missing and murdered women, First Nations children being scooped up and delivered to non-Indigenous care, resource development rights and rights to attend gatherings of Premiers and the Prime Minister, how to reform the tax system so as to provide assistance to Indigenous business, unsafe drinking water to dying languages, gender equality within First Nations' membership lists, protecting Fontaine's back against the daily onslaughts of his own people, angling for his job, regional wars, fixation on funding and the annual or semi-annual budgets of the Minister of Finance, and on, and on. I spent the largest part of my time in those worlds doing that: political strategies. In a way I was lawyering, but I was lawyering with the added function of assisting Fontaine and others at the political level in being able to manage their lives and their organizations and their agendas. That was very interesting work,

it was as interesting as being in the Supreme Court. It wasn't as sexy as being in the Supreme Court, but it was really interesting work.

It was in those situations again where I ran into this continuous stream of antipathy from different regions and from different people, because my relationship with Fontaine was close. They didn't like it being that close, and him being influenced by this short, white, bald Jewish guy from Winnipeg. They didn't give him enough credit to know that he was being influenced only in the way that you think someone as an advisee would be advised by an advisor. They saw the way he was being scripted as a control feature, and it was never that. Just to relay one incident in that regard which I think is pretty telling. When he ran for office the second time, the General Assembly was being held in Edmonton. We had rooms reserved in a hotel in Edmonton, where he and a lot of the chiefs and I were staying. I had reserved it, and when I got there I was met by a group of chiefs who told me I wasn't welcome in the hotel, that I couldn't stay in that hotel and that I had to stay elsewhere. I took a room somewhere else down the street and didn't attend the actual Assembly until the vote was in and Phil had returned as National Chief. I didn't want to negatively impact the votes that were going to take place and two or three votes could matter. But, I had written his platform and his speeches. So you have to suppress your ego very often and you have to toughen the thin skin, you have to go with the flow. Whatever their reasons, they weren't prepared to accept me in that context.

I actually think it had a lot to do with anti-Semitism, I'm sure of it actually. In addition to that, you can tell by seeing me here, I'm not a wallflower. I can appear to be really, really, really confident about myself and to have ego and proceed with a bit of a swagger. It's something I try to control but can't always control. There are people, in addition to all the other things, who may have felt demeaned by that. I had to learn to walk the line in those organizations. For a very long period of time I did the speech writing on my own. Later other people became involved and Phil had developed other advisors along the way who also became involved. It became a much more collective activity, and as that happened, my role became less at the forefront than it had been up to that time.

BPS: There is something I've thought about a lot, and I don't think there is any clear-cut answer. I remember I discussed it once with David Asper. D'Arcy Henry McCaffrey I think we'd agree used to be what, one of the top three litigators in Winnipeg.

JL: Yeah.

BPS: He had a fantastic practice. I remember I had a conversation with him about six months before he passed away. I remember a certain melancholy because he was talking about how he's tried to disengage himself emotionally from clients because he's tired. I thought, "Well D'Arcy you've got the best practice in town, and people think of D'Arcy as the irrepressible super lawyer D'Arcy." Even D'Arcy is getting tired by the emotional grind so it seems the question, something we don't talk about at law school, which I think we should, is how much you get emotionally engaged in your clients' business. To some extent you don't want to be overly engaged because you have to be detached enough to give the client the objectivity they lack. With emotional engagement you pay the price, the more you care the more you actually internalize wins, losses and the indignities inflicted on your client. On the other hand, maybe you actually do a better job if you care and you do get engaged emotionally. Any thoughts on that looking back?

JL: Well, I think that the clients are really unhappy if they think you are not on board emotionally. They want you to think that they're right, and that the arguments that you are making and the steps that you are taking are absolutely the right thing to be doing, without question, and the objective taking of those steps is absolutely right, no question. There were times where I lost faith that the killing of Meech Lake Accord was the right thing to do. I went through periods where I thought, "Geeze, what if we really do destroy Canada? Do I want to be involved as one of the guys who destroyed the country?" At those points, that's when the notion comes in that as a lawyer you have one function. That function is to do what's best for the client from a lawyer's perspective, no matter what your personal emotional state is. That's what would happen during those periods of time. One caveat by example, back in 1968, I was asked to take a pro-bono case for a man charged with the brutal rape of a two year old infant. I couldn't do it. My first daughter had just been born. I would have sold him out.

There is another aspect to it, which is that your practice is dependent on a certain kind of clientele, First Nations or otherwise, or a certain set of issues; that's where your income comes from. All of a sudden you have doubts, you lose faith, whatever it is. But what do you do? It's very difficult to say to oneself, "I've decided not to earn an income anymore," or

“I’ve decided to see a large reduction in my income.” In practical terms it’s very unlikely that you’re going to walk away. You’re more likely to want to be self-protective. This is a role and phenomenon that needs to be examined, in terms of how a lawyer marries passion with reality, and ethical behavior with realism. I have spent a lot of time in my life thinking about that, and I don’t have any real answers other than to say, “Sometimes you’ve got to do what you’ve got to do.” In that context, there is another event that took place when Phil was the Grand Chief of the Manitoba Assembly of Chiefs. One of the things that we set out to do – he wanted to do it, and I was along for the ride as the negotiator – was to develop an agreement with the federal government to terminate the presence of the Department of Indian Affairs⁵⁵ in Manitoba. It was to replace that bureaucracy with a bureaucracy of First Nations people in a form of self-government, still delegated but rather less than with ordinary municipal government which is tied to the apron strings of the grantor legislature. There was always large argument there about whether or not this was going to be delegated authority or constitutionally defined self-government. We set about doing that project. Ron Irwin⁵⁶ was the Minister of Indian Affairs at the time, and the lawyer for Indian Affairs was a man named Allan Williams. Williams and I sort of clicked and we decided to do what we called “Open Kimono Negotiating.” We were going to be transparent in the negotiations and try to build trust to be able to develop this agreement. We spent, I can’t remember, maybe a year or so negotiating this agreement and finally came to an agreement which effected exactly what we had hoped. It was the catalyst to ending the role of the Department of Indian Affairs in the province of Manitoba. The agreement that we made was called “The Framework Initiative Agreement.” Anyway, we finally came to an agreement that was mind-blowingly fabulous, I thought, and Phil thought, and a lot of people thought. The Government of Canada through Irwin labeled it the “mother of all self-government agreements” and it came up for approval by the Manitoba Chiefs. There was a lot of opposition to it within the Chiefs, the stoic chiefs, and people that were a part of that didn’t speak to me again because they thought either that we actually were going to be successful in getting rid of the *Indian Act*, which they professed to want to do but really

⁵⁵ The Department of Indian Affairs and Northern Development was created in 1966.

⁵⁶ Ron Irwin was the Minister of Indian Affairs and Northern Development from 1993 to 1997.

didn't, or that somehow or another I'd maneuvered this for some personal gain, I guess. But, finally it was approved. I thought that was going to be the signal achievement of my lifetime and Phil's and a huge step of emancipation forward for First Nations. Here you had something that was more than incrementalism; here you had a revolution that was taking place. I thought that was pretty hot stuff, and right stuff! It was a great piece of work; ground-breaking! Once the terms of the agreement had been settled, and approved by the Chiefs and Canada we actually started implementing it, which we knew would take a considerable period of time. There was huge funding provided by the Federal Government and the Chiefs, as was their wont, quickly decided that half of that funding would go to other purposes for their First Nations. Immediately, the project was undercut. It financially was not going to be able to survive. In fact, it didn't survive. The Chiefs, with amazing short sightedness and greed, simply snatched the funds for their own other purposes. On the other hand it was another example of what happens when large sums of money fall into long deprived hands. It's all just too tempting. I felt personally diminished by what had happened because I had worked so hard. I felt much worse for the people who would have benefited and been propelled into a new universe of possibility. Fontaine was depressed. The agreement was so incredible that I was invited to attend before an audience comprised of the Harvard-MIT group on negotiations and conflict resolution to give chapter and verse. They invited me to come in and talk about how we'd managed to get this agreement put together; there were lots of questions and comment and criticism as one would expect of an academic audience. But, the agreement essentially fell apart for want of funding and effort. What was I going to do? I could have said, "I'm going to walk away from this, I'm not going to do this anymore, I believe this was inappropriate, it was antithetical to good responsible government." But you can't do that. What you do is you package it somewhere in the back of your brain. It's always going to be there, emotionally its always going to be a bit of a mark. You go on though; you go back in smiling and happy. You go on to the next project as though that never happened. That was one of the tougher transitions for me.

BPS: Just to ask you one more thing about your accomplishments and experiences with Phil, can you tell us a bit about the residential school's agreement?

JL: Let me cut it short because I didn't have a significant role to play ultimately. I had negotiated for years with the feds about a system of recognition of and compensation for the harm that had been occasioned by the Residential Schools abomination, the cultural genocide, but my role changed over time. I had set the foundation but the house was to be built by others. By the time that was going on, as I said before, there were other advisors that had participated in it, including Kathleen Mahoney, who was a law professor in Calgary.⁵⁷ She had a personal relationship with Phil and she was the one who actually did that piece of work, brilliantly. I was peripheral to it. I was part of, but again peripheral to the Paul Martin⁵⁸ initiative for the five billion dollars' worth of funding in the Kelowna Accord. By that time, my role at that major political level had diminished and my work with Fontaine and First Nations since then has been less at that large political level, and more in terms of individual cases involving damage claims and hydro claims and that sort of stuff. The grand years of emancipatory politics were done for me though I have continued forever to be Phil's most intimate advisor on his most difficult challenges and issues. I will always have his back but he has others also now at his side.

BPS: Big firms have not had a lot of success in getting and keeping newly graduated Aboriginal students to come and stay. I'm not sure why. I think big firms have all tried in good faith and I think every big firm would like to have more Aboriginal lawyers, but the numbers aren't there in proportion to graduates. I actually don't know why. Do you have any theory?

JL: We've had in my time, I think, four Aboriginal articling students at Pitblado, one or two of whom stayed with the firm for a while and then left. I think that there are a number of obvious reasons. You're a square peg in a round hole. There's no one around that looks like you, feels like you, knows about you, and there are no support services.

BPS: That's a very good point, and something that most of us who come from the mainstream wouldn't consider. Starting in law at a private firm is

⁵⁷ Kathleen Mahoney, a professor at the University of Calgary, was the chief negotiator for the Assembly of First Nations for the Indian Residential School Settlement Agreement.

⁵⁸ Former Prime Minister Paul Martin, Canada's twenty-first Prime Minister, served from 2003 to 2006.

a tough environment, but we wouldn't think how extra tough it is not having the cultural familiarity.

JL: There is some sensitivity to it, there's someone who keeps watch and is a touchstone, but for the most part it's the process that women went through twenty-five years ago. Same sort of thing, all of a sudden you were in a group of ninety men and you were the only woman. Who did you talk to? Who did you share with? What kind of relationships could you have? How did you deal with harassment? All that sort of stuff is now happening, partly with First Nations students. In addition to that – I know that this is controversial and on the record – I think that law is derived and practiced based on a written and not oral tradition. Culturally, some students have difficulty in the transition in the reasoning processes and the way in which one expresses outcomes and ideas in the written world, even students that have come through the universities and law schools. I think it's harder for students that come out of that oral tradition to be able to deal with the difficulties there are in this infinite unmanageable body of law and the activity and experience that you need in order to get ahead. On top of that you have a cultural overlay. I think that was a part of it. And, Indigenous graduates tend to migrate pretty quickly to the safety of First Nations organizations and arenas. Not, all by any means. There are great Indigenous lawyers but they are the exception at this point. That will change dramatically as the years go by and more and more pay their dues by building the widest possible experiential base to the pyramid of a career.

For instance, I remember the Assembly of Manitoba Chief had asked me to propose an idea, a plan including a chart, of what a new form of Aboriginal government might look like in the Province of Manitoba. Given that and given my background I went back to what I know about government. I had hierarchies, regional governments, local governments and more central government, all that sort of stuff. Those were difficult concepts in and of themselves but the largest debate was about the fact that I had in the diagram used a series of square boxes and lines. A student of mine, whom I really admired and had a good rapport with, Joan Jack, said, "It can't be that, it has to be circles, we have to figure out a way to express that as a circle because it won't be acceptable with square boxes and lines." So we worked on doing it as a circle, and ultimately we came up with something. I think we did both, in fact, so both of us could be happy with it. That's a metaphor for the sort of thing I'm talking about. It never dawned

on me that it had to be a circle, and, in fact, my basic perception of governance and the relationship between the people, the regions, and the central government really is square boxes and lines. There's that hill that needs to be climbed and so I think that those are some of the reasons anyway that there are very few Aboriginal lawyers who are practicing law with large firms. They are practicing law in other forms and other institutions.

Coming back to something we said right at the very beginning about building your base as widely as possible. Let me give you a couple of practical examples. Over the last few years I've spent an enormous amount of time negotiating a deal for a First Nation. The deal is to become a partner in the Keeyask Hydro-Electric Project.⁵⁹ The Keeyask Hydro-Electric Project is an anathema in the First Nations Communities. The hydro projects destroyed their communities in the first place, and now all of a sudden they're going to be partners in that. There's a difficulty with that. In addition to that is the difficulty of negotiating over five or six years, nearly a thousand pages of terse commercial prose and terms in an agreement. My eyes water over, and I fall asleep looking at it. In that same First Nation I've done about nine limited partnerships for Keeyask and a number of other commercial ventures. The reason we're doing limited partnerships is that – forgive me for this – under tax law, where you have a corporation that's resident on a reserve doing work off the reserve there is a tax issue, and there are going to be taxes payable on the revenue. If what you do instead of that is have the Band as a partner, that same work being done off reserve will not be taxable. But you want to limit the liability of the Band individually for each venture so that a disaster in one business will not damage the others. So you do a limited partnership where you've got a corporate general partner, controlled by the Band, which assumes all the liability and owns a negligible percentage of the project, and the Band owns all the rest of the project as a limited partner. I've spent a lot of time in the First Nation communities trying to explain this reasoning. I get a phone call every week or so from a Chief or Council or from the organization saying, "Do we really need to have all these companies and these nine limited partnerships? Why can't we just simplify it in some way?" You go through the same song and dance every time about liability and taxation and so forth. The work that I've done over these past years for that particular group has nothing to do with Aboriginal law. With

⁵⁹ The Keeyask Hydro-Electric Project is a hydroelectric generating station being developed between Manitoba Hydro and four Manitoba First Nations.

the exception of knowing about one little section of the *Income Tax Act* which equates First Nations with tax exempt municipalities, no one has to be an Aboriginal or know anything about Aboriginal law to be able to do those transactions. Those are commercial transactions that are the future in those communities.

BPS: And, of course, sometimes when you're doing what would otherwise be a routine commercial transaction, such as mortgaging a building, it's way more complicated if you are under the *Indian Act*. So, in many cases it's partly traditional commercial law, it's partly a whole lot of complexities with the *Indian Act*.

JL: That's true in many cases but not this one. But, under the *Indian Act*, for example, technically I can't draw a will for a First Nation person, unless the Minister approves it. That's still true.

BPS: Yeah, still in the books.

JL: Still on the books.

BPS: Amazing. Do you think there will be an evolving ethos that Aboriginal organizations will want to hire only Aboriginal lawyers, or do you think it will continue to be mixed?

JL: I think that every Aboriginal organization would rather hire an Aboriginal lawyer to do the work if that Aboriginal lawyer can do the work. But there aren't that many people around yet who can do the work. In this office, one of our partners, Howard Morry,⁶⁰ acts for, amongst others, the Southeast Tribal Council, and did the work on the development of the South Beach Casino and so forth. He knows what to do in the commercial world, which is the world that they've entered into. They want someone that can do that best, they're not going to sacrifice the experience and the quality of the work in order to have someone of the right color do it, not yet. If Howard Morry were to be a First Nations person they'd fire the white Howard Morry and hire the brown Howard Morry, for sure.

⁶⁰ Howard Morry is a partner at Pitblado LLP. He was admitted to the Manitoba Bar in 1985, after receiving his Juris Doctor from the University of Manitoba in 1984.

BPS: It seems to me there are a lot of challenges facing Indigenous people that are not going to be solved by engaging in any kind of rigid and circumscribed conversations such as we typically have in academia. A whole lot of things are really complicated, and ultimately there have to be frank conversations in order to find the way forward. We have got an academic culture, which tends to think that the neocolonialist narrative explains everything and anything. Do we have an environment where we can have the conversations to actually talk through these things and do the best we can to find the appropriate solutions; “We” meaning everybody? Are we having the conversations we need to have? Are we too circumscribed? Where do you think we are?

JL: I think it goes back to my original comment that when I started doing this work I expected to be able to encourage and invent a revolution immediately and learned that wasn’t going to be the case. So, you’re posing the question as though there is an answer to it that is immediate – “Here is what we can do.” I think that if I had to pick one word, I would say, “Patience.” I think it’s going to take a lot of time. I think there are going to be a lot of small steps that happen along the way. There will be some trial and error. Some things will work and some things won’t work. Those of us who do Indigenous work but are not Indigenous need always to confront our own learned and sustaining racism; so do many Indigenous people. We have to remember that there is no “they” but many “theys” with different backgrounds and needs. And, one cannot overcome millennia of issues, even preceding organized civilizations, in a simple step. It will take time, fortitude, ingenuity, passion, creativity and funding to move the ball down the line. Patient determination and support will be key.

When I started working with Fontaine – trying to be as close to accurate as possible – there were X number of Aboriginal students in secondary and post-secondary education in Canada. When he left as National Chief, there was many times X. That’s going to grow even further, and I think that’s fundamental. Education is fundamental to all of us. It is the keystone. It’ll take time for that to integrate and grow and develop so I don’t think that there is a quick fix to problems. I don’t think there’s enough money in the world at this point to be able to do it in a revolutionary fashion. I think it’s going to continue to be a contest between the societies. I think it’s going to take time and I think the growth will continue. It will be pushed partly by

the courts and partly by the governments but mostly by ever increasing educated generations. The balance is going to have to be found to not have the non-Aboriginal population react militantly or violently. That will set everything back. King and Ghandi proved the point. It's a function of time, and what it needs is for people who are willing and able to participate in the project, alongside the people in the First Nations communities who are willing and able to participate in the project, to work patiently to a solution. To come to partial solutions along the way which lead to greater gains. I speak not of quiescence or acceptance of the inherent racism of our history. But, the problem with the argument on neocolonialism is that it's a really easy catchphrase that's empty of solutions.

BPS: Yeah.

JL: But what does it mean today? It doesn't have a real meaning today. The things that are happening today are happening because of today and they need to be solved in today's world. It's too easy just to use a term.

BPS: On some problems, even if you had a candid conversation, I still wouldn't know what the answer is and maybe nobody does. A lot of things have to be worked out over the course of time. Looking at the example of, "I read academic articles, and everything is neocolonialism." Well, there is a pretty bad history there, and so oppressive, but looking at today's problem, it's a rather simplistic diagnosis and it doesn't get you along the discussion you need to progress.

JL: It would be interesting, and now I'm stepping out on to a ledge here, but it would be interesting if it were possible, and it isn't possible, to say, "Let's assume there hadn't been colonialism at all, and societies had developed according to their origins and particular cultures and globalization came anyway." Would these societies now be more able to compete? They'd own the resources, sure, but owning resources and knowing what to do with them are quite different things. They may have not only survived but much improved their outcomes. Or, they might be stuck in a time spiral in which a sense of orthodox commitment to old ways deprived entry into the new age. I see a lot of damage being done by orthodox elements in the Indigenous communities worldwide. The sense of "what was good for me and my ancestors, hunting, fishing, trapping and

gathering, is good for my children is a prescription for decay. There are elements in Indigenous communities that hold those views and teach those principles. In my view, orthodoxy in Indigenous communities, like orthodoxy in my own Jewish communities, is a recipe for regression not progression. I'm clearly not a fan of orthodox thinking in any society.

BPS: Yeah, there would be challenges even in the scenario you presented, right? Cultural challenge of tradition versus assimilation into universal global culture, how do you sustain global population if you are doing traditional resource gathering? At some point it becomes ecologically impossible. So, even absent a history of oppression, and there is a history of oppression, you still have challenges.

JL: It's not to deny that oppression is not horridly consequential. It was and is and has been terribly consequential. Colonialism was and is terribly consequential. But, it's not helpful to try to come to solutions with such abstractions and catch phrases. These are practical problems that need to be resolved practically. The Supreme Court has it right when it requires "reconciliation" between the historically dominant and subordinate peoples but applies that doctrine within progressive boundaries. Making up for past injustices and ensuring that Indigenous societies are partners with resources, not dependents, in carving out the future is unimpeachable. An eye on the future, not the past, is an absolute necessity.

BPS: Thank you Jack. You've given us a huge chunk of time, we really appreciate it.

JL: Thank you.