

VALEDICTORY RESPONSE  
OF  
THE HONOURABLE SAMUEL FREEDMAN

*Extracts from the address given by the Honourable Samuel Freedman in response to tributes paid to him at a dinner on April 9, 1983, at the Winnipeg Convention Centre, held by the Manitoba legal profession as the culmination of a week-end of events to honour him on the occasion of his retirement as Chief Justice of Manitoba.*

... I must offer a word of sincere thanks in several directions: to the committee who planned the events of this week-end, to the members of the bench and bar, both local and elsewhere, who by their presence invested the occasion with a special significance, to those who participated in the programme (and all of them did it so admirably), and to the members of the public at large who made this send-off seem as important as some would like to think it is.

Thirty-one years ago yesterday, April 8, 1952, I was appointed a Judge of the Court of Queen's Bench. Memories of those days, now somewhat touched with time, crowd in upon me ...

I served on the Court of Queen's Bench for nearly eight years. They were active and interesting years. I enjoyed both the civil and the criminal work, especially the Assize Court work. During my 19 years as a practising lawyer I had done both office work and court work, the latter being largely civil in nature, with some criminal work as well. I had practised in the Assize Court as defence counsel in a variety of cases, including conspiracy, fraud, motor manslaughter as it was then called, and the ultimate crime of murder itself ...

The work I had done in the criminal area proved very helpful when, as Judge, I presided over jury trials in the Assizes. In my view the subtlest and most intricate task a trial judge has to face is to charge a jury in a complex and difficult case, on short notice. When the day of elevation from lawyer to judge has come and when the judge finds himself presiding at a criminal trial with a jury, when he has to deal with evidence that is admissible against one accused but not against the other accused, when he has to deal with corroboration, with evidence of an accomplice, when he has to put the issues of fact to the jury, with clarity and with fairness, and, above all, when he has to put the defence to the jury, taking care not to demean that defence (as some trial judges have done) but leaving it to the jury to reach their own conclusion on it, on that day and in that hour he will give silent thanks that these things are not alien to him because in his years as a lawyer he did not disdain the practice of criminal law.

One of the matters we had to deal with regularly in the Court of Queen's Bench was divorce. During my term as a judge of that Court the law had not yet broadened out, and adultery was the sole ground for divorce. As a result we regularly heard evidence of one of the spouses resorting with the third party to a hotel or a motel. Indeed the evidence in proof of adultery tended to follow a predetermined line. It was very much the same in every case. It gave rise to a presumption of fact which was looked upon as only a bit less certain than a proposition in geometry. It could be expressed thus: If a man and a woman spent the night together in a hotel or motel room, the court is entitled to infer

that sexual intercourse took place between them — unless of course they are husband and wife.

Looking back to my period of service on the Court of Queen's Bench, I ask myself if there is anything of value that I could pass on to those who are just beginning their encounter with the judicial process. To them I recommend the wise use of the three P's — preparation, politeness, and patience. *Preparation* — always to come into court with some knowledge, through advance reading of the record, of what the case is about. Only in that way will the judge know what questions to put; only in that way will he be able to deal with the legal issues on at least even terms with counsel. *Politeness* — that hardly needs elaboration. We know its meaning best when we confront its opposite. If what the judge says to the lawyer would be contempt of court if the lawyer said it to the judge, then surely politeness has for the moment disappeared. Nor need the offence go so far. Any form of judicial discourtesy must always be eschewed. *Patience* — do not make up your mind too speedily. Keep your tentative conclusions to yourself, unspoken. Sometimes a case is decided by the testimony of the last witness. How unfortunate if you have already declared yourself in favour of the opposite view and now have to back-track, to get out of the pit you had dug for yourself.

In 1960 I became a Judge of the Court of Appeal. An appellate court judge performs a dual function. He is both a soloist and a member of an orchestra. He writes his judgments as a soloist, whether he is on the majority or minority side. Those judgments express his view of the case, and not necessarily the view of any other member of the court. It is generally acknowledged that when a judge writes in dissent he has greater freedom of action than when he is writing the judgment of the majority. It has been said that the dissenter, knowing that the present cause is lost, speaks to the future. Sometimes indeed the future brings its own vindication, when the dissent of today becomes the law of tomorrow.

But the appellate judge is also a member of an orchestra. If the court is to function efficiently and harmoniously, a collegial atmosphere must be maintained. That does not mean that a judge must surrender his right of independent thought. It does mean that in the exercise of that right he must always remember that his colleagues possess that same right as well, and that on controversial questions honourable men may honourably differ. What is important is the attitude and the spirit in which the matter is approached. There is no room on the court for rancour, for bitterness, for personal antagonism, for any kind of back-biting. I can recall, when I was practising at the bar, that the work of the Court of Appeal of our Province was marred by a personal feud between two members of the court, a feud well known not only within the bar but beyond it as well. If Mr. Justice A said he agreed with your submission you could be certain that Justice B would soon say that he disagreed.

Hence it is a delight for me to say that over the 23 years of my membership on this court the collegial atmosphere which is the hallmark of a harmonious court has been maintained. Individual views are asserted, often with vigour, but never with antagonism. Points of view are pressed, often with sturdiness, but never with hostility. Let me therefore say, simply but sincerely, that it has been a personal joy for me, over the last dozen years, to preside over such a court.

How would I like that court to be thought of and remembered? What has it accomplished? I suggest that a fairer way of framing that question would be, What has it tried to accomplish? "Tis not in mortals to command success, but we'll do more, Sempronius, we'll deserve it". We have tried to assert the priority of substance over form. Put another way, we have tried to avoid giving judgment on the basis of technicalities. If we have a choice between substance and technicality, substance will win.

In line with that approach, we have tried to give a deserving litigant his day in court. If through error or inadvertence he has not filed a document in time, we will, if we legitimately can, extend the time for him and permit a late filing. We have tried to remember that procedure with its rules is the handmaid and not the mistress of justice. Procedural rules exist as an avenue for the attainment of justice. They should not become a road-block.

Soon the task of presiding over the Court of Appeal will be taken over by my friend and colleague, Mr. Justice Monnin. I extend to him warmest congratulations on his elevation to the highest judicial post in Manitoba, coupling therewith my best wishes for a happy and fruitful tenure of his high office.

One week from today my tour of duty ends. I leave my post with two things very much in mind. The first of them is a pride in and allegiance to Canada. That has always been a part of my continuing philosophy. In assessing Canada I must guard against a double danger. One is the danger of romanticizing on the theme, of yielding to uncritical, fulsome praise. So let me acknowledge at once that Canada has had its blemishes, its hours of shortened vision, its mistakes and its fools. That is to say, it is human. And the other danger is to adopt the cynicism of the worldly-wise cynic, to play the role of the perpetual fault-finder, the eternal kicker, the person who regards everything Canadian as necessarily inferior simply because it is Canadian. I find no allurements whatsoever in this kind of inverted patriotism, of patriotism in reverse.

Rather I like to think of Canada at its best, a Canada which aspires to be tolerant of everything except intolerance, which rejects the dislike of the unlike, which prefers the role of moderation to the counsel of extremism, a Canada which has accepted the goal of multiculturalism, a Canada in which two founding races and a variety of other races or ethnic groups are making their contribution to the common treasury of Canadian citizenship.

And the second thing, no less a part of my continuing philosophy, is a recognition of the importance of a free society and of the rule of law as one of the instruments for the attainment of such a society. More than half a century ago, in my law school days, I was struck by a passage in Will Durant's "The Mansions of Philosophy". I went back to it the other day. It still has a message for those who believe in the rule of law. He said:

Here are two men disputing: One knocks the other down, kills him, and then concludes that he who is alive must have been right, and that he who is dead must have been wrong . . . Here are two other men disputing: one says to the other, "Let us not fight — we may both be killed; let us take our difference to some Elder of the tribe, and submit to his decision". It was a crucial moment in human history! For if the answer was No, barbarism continued; if it was Yes, civilization planted another root in the memory of man: the replacement of chaos with order, of brutality with judgment, of violence with law.

In those words the author is identifying and paying tribute to the role of third-party judgment, to the instrument of peaceful arbitration. Indeed, without expressly saying so, he is defining the function of a judge and the nature of the judicial process. It is only a short step from the Elder of the tribe informally arbitrating the dispute between the two tribesmen, to the judge, formally on the bench, trying to resolve the issue or dispute between contending litigants, and in that process seeking justice according to law. In a free society based on the rule of law the courtroom, no less than parliament itself, is a citadel and a sanctuary of our democratic faith.

The task of building such a society is never ended. It must be pursued with a sense of dissatisfaction — not the dissatisfaction which springs from dependency or which is rooted in cynicism, but the dissatisfaction which is continuous because the goal is high. To that task we should address ourselves with steadfastness, with fidelity, and with high-hearted resolve.

Ladies and Gentlemen, you have honoured me greatly, and I thank you for everything you have done.