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# A Judge on the Court of Queen's Bench (1952–60)

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There was a judge who, when he was a lawyer at the bar, had by no means achieved the reputation of being a teetotaler. Then suddenly came the announcement that he was being elevated to the bench. A newspaper of that time, feeling perhaps that this was the worst appointment since the Emperor Caligula made his horse a consul, commented on the appointment and questioned whether the new judge would be happy, seeing he had been compelled to desert the bar. A friend of the new judge asked him whether he would sue for libel on account of the innuendo. The judge said, no, he would just sit tight.

[From preamble, "Challenges to the Legal Profession," speech, Seattle, 1963]

**I**n the course of a year or so I must have made nearly \$10,000 in fees from the Milk Distributors. As a matter of fact, I was at a meeting of the Milk Distributors on the day in April 1952 when the federal Liberal government's Minister of Justice, Stuart Garson, telephoned me, inviting me to become a judge of the Court of Queen's Bench. I accepted with enthusiasm, even though it would mean the dissolution of Freedman and Golden, as well as an immediate loss of income. The days of big fees came to an abrupt end. Indeed, the loss of income has been the story ever since.

My contemporaries at the Bar have continued to make money far in excess of a judge's salary. But still, if I were faced with the same decision today I would make the same choice I was honoured to make that day in April. I had always revered the judicial office, and now I was being appointed to the high court of justice. I was pleased with the idea of the appointment, the challenge it presented, and with that challenge, the opportunity to make a contribution to the development of justice in the province.

The invitation to the Bench was the second I had received. Earlier on, in the fall of 1950, I had been asked if I would consider joining the County Court. And so eager was I to assume the judicial role that I accepted, though only for two or three days. Brownie kept saying to me, “What sort of work do they do? Who are the County Court judges?” When I named them, she said, “Why don’t I know them? I know all the Court of Appeal judges. I know the Court of King’s Bench judges. Whenever we go to a lawyers’ or social event, I meet them. Who are the County Court judges?”<sup>1</sup> I realized at once that this put the finger on the central issue: County Court judges were lower court judges, the office lacked prestige, and it would be a mistake for me to accept it. I decided against putting forth my name.

Later I told Chief Justice E.K. Williams of the Court of King’s Bench about this quandary, and he said, “Sam, I’m glad you said no, because I hope within eighteen months to have you on my court.” At that time he was expecting the retirement of another judge. As it happened, within less than eighteen months, near the beginning of April, a vacancy did come up, though unfortunately it came about because of the death of Mr. Justice J.J. Kelly—a great judge who, at the age of fifty-two, should never have died so soon.

For me, at the age of forty-four, becoming a judge of the Court of Queen’s Bench was an exciting moment, though it was tinged with some sadness because of the circumstances. On the day Mr. Justice Kelly died I was at the Law Courts on another matter, when the elevator operator told me about his death. I was then president of the Manitoba Bar Association. I told the clerk of the Court that when the court next opened I would like to speak for the Bar on the death of Mr. Justice Kelly. And I came to the Wednesday court, where the presiding judge called me to speak. That afternoon there was a call from Chief Justice Williams. I thought it was to ask me to be an honorary pallbearer at the coming funeral, but Chief Justice Williams said, “Sam, I think you’re going to get a phone call from distant places where the wise men live. If it comes I hope you will accept without hesitation.”

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<sup>1</sup> The County Court (sometimes known as district court) judges were members of a federally appointed court that heard intermediate civil cases and most serious criminal cases. Manitoba had ten County Court judges in 1952. Beginning in 1975 provinces started to abolish their County and District courts, merging them with their superior courts; Nova Scotia, in 1993, was the last to do so.

I said, "Chief Justice, you know I will accept. But this isn't the way I hoped it would come." He said, "I know, we're all saddened and distressed by Jack's death." I said, "Have you any reason to think I'm going to get that call?" and he said, "Oh Sam, you know I never know anything." I learned later that the judges of that court had met earlier and considered a successor, and mine was the name they chose to recommend to the Minister of Justice. Six days later the Minister of Justice called.

I remember first of all phoning Brownie to tell her the news. All I said was, "Darling, that call just came through." She knew immediately what I meant. Then I telephoned my parents. My mother answered, and I said, "Mother, great news." She said, "What?" I said, "Guess." She said, "Max is married?" Mothers have a strange way of being able to put all things into proper perspective.

News of my mother's response got to Ottawa remarkably speedily. I walked over to the courthouse to see my new brethren of the Court of Queen's Bench and to say hello also to the judges of the Court of Appeal. I was in Mr. Justice Coyne's office talking to him, and I told him about my telephone call to my mother. He laughed—and he had a laugh that could reverberate through the halls of the entire courthouse. He loved the story. Not ten minutes later, he telephoned *The Winnipeg Free Press* and spoke to the editor, Grant Dexter, who was also delighted to hear the story. Dexter at once put in a long-distance call to Ottawa. He got my brother Max, who was Ottawa correspondent for the *Free Press* at the time. Max was with George Ferguson, a former *Free Press* editor. Dexter told both of them the story, and Ottawa, at that point, got it.

As for David Golden, we parted amicably. We had seen some good years together and made a success of our association. David had gone to Ottawa in 1951 to help set up the legal division of the Department of Defence Production. He was supposed to be away only for a few months, but the work had dragged on and on. Then in 1952 he took up a permanent appointment in Ottawa, the first of many. He eventually became Deputy Minister of Defence and later still President of Telesat, the Canadian communications satellite company. For a product of the North End, he did well, living with complete integrity as a Jew and as a Canadian.

Years later, in his retirement speech as Chief Justice, Sam Freedman joked: "When I was first appointed to the Bench, I received a telegram

from someone in the Department of Justice saying, "Please inform your full Christian name."<sup>2</sup>

Judicial vacancies are filled in Canada through executive appointment, and Sam Freedman's appointment to the Bench was not without its controversies.<sup>3</sup> Sam was the first Jew appointed to the Bench in Western Canada, and only the second appointed in the whole of Canada.<sup>4</sup>

Until the 1950s, the Canadian judiciary consisted almost entirely of judges who were either English or French (and non-Jewish) in their family origins. And before World War II, federal appointments, cloaked in secrecy, tended to follow the lines of parties in power.<sup>5</sup> In his detailed research into judicial recruitment over the period 1905-70, William J. Klein found, "Former benchers, law teachers, Canadian Bar Association (CBA) executives, and members of Parliament (MPs)

<sup>2</sup> From Notes on Sam Freedman's retirement dinner speech (9 April 1983) taken by Dale Gibson, Winnipeg, Faculty of Law Archives (Samuel Freedman file).

<sup>3</sup> Section 96 of the *British North America Act* gave the federal government the power to appoint provincial superior court judges (known in various provinces as Queen's Bench Supreme Court, or High Court) and the Court of Appeal, as well as provincial county and district court judges. In Manitoba the "Court of King's Bench" became the "Court of Queen's Bench" in 1952 with the accession to the throne of Queen Elizabeth II. The Court of Queen's Bench has "jurisdiction over serious and moderately serious Canadian Criminal Code cases and over private law cases involving sums of money exceeding the monetary limits of the small claims courts," including jury trials. See Peter McCormick & Ian Greene, *Judges and Judging: Inside the Canadian Judicial System* (Toronto: Lorimer, 1990) at 15. See also Freedman's discussion of the federal/provincial powers regarding the justice system in *Reference Re Questions Concerning the Amendment of the Constitution of Canada* (1981), chapter 11, below. In 1952 Manitoba had six judges sitting on the Queen's Bench.

<sup>4</sup> The first Jew to be appointed to a superior court was Harry Batshaw in Quebec, whose elevation also came in the early 1950s, just before Freedman's. There were only two earlier appointments at the lower, county court level. According to Irving Abella, "In 1914 Samuel Shultz had been appointed to the county court in British Columbia, but it took thirty-one years before another Jew, Sam Factor in Toronto, was appointed." Irving Abella, *A Coat of Many Colours: Two Centuries of Jewish Life in Canada* (Toronto: Lester & Orpen Dennys, 1990) at 217.

<sup>5</sup> See FL Morton, ed, *Law, Politics and the Judicial Process in Canada*, 2d ed (Calgary: University of Calgary Press, 1992) at 73; and William J Klein, "Conclusion and Implications: Federal Recruitment of Judges in Manitoba, Ontario, and Quebec, 1905-1970," mimeo, Chapter VII, "Judicial Recruitment in Manitoba, Ontario, and Quebec," PhD thesis, Department of Sociology, University of Toronto, at 3.

received appointments far in excess of what could have been expected by chance. Clearly, the bench has tended to be selected from lawyers who were leaders in the legal profession or politics.”<sup>6</sup> Moreover, another study showed that prior to 1949, twenty-two of the forty Supreme Court judges had “at some point in their careers been elected politicians,” and another researcher found that “all but a few of the judges appointed during the period [1945–65] were affiliated with the party in power at the time they were appointed, and most were actively engaged in politics.”<sup>7</sup>

Those who came from the political side often had no previous judicial experience. As Klein pointed out, there were few rules in recruitment: “Except for limiting judgeships to lawyers aged less than seventy-five years with more than ten years at the Bar, and occasionally restricting the choice to French Canadians, the law is silent about scrutiny of any sort over the choice or promotion of judges.”

In his classic study of Canada’s elite structure, John Porter noted a peculiar contradiction in the tendency of establishing judicial careers based purely on politics. Such appointments, he said, “constitute what must be one of the most curious of occupational systems, one in which a person whose political role is marked by partiality, irrationality, and opinion-expression assumes a judicial role marked by impartiality, rational inquiry, and attention to fact.”<sup>8</sup>

The correspondence of Ralph Maybank, local M.L.A. for Winnipeg South Central (and later a judge) leaves a ragged but revealing trail of the political considerations and changing sensibilities that would eventually lead to Sam Freedman’s appointment.<sup>9</sup> Maybank, a lawyer who was first elected to the federal parliament in 1935, played a “pivotal” role in Liberal Party politics and judicial appointments in the 1940s and 1950s.<sup>10</sup> In the mid-1940s it was not Freedman but another local Jewish lawyer, A. Mark Shinbane, who was under consideration.

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<sup>6</sup> *Ibid.*

<sup>7</sup> Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, report prepared for the Canadian Judicial Council, Ottawa (1995) at 236.

<sup>8</sup> John Porter, *The Vertical Mosaic: An Analysis of Social Class and Power in Canada* (Toronto: University of Toronto Press, 1965) at 415–16.

<sup>9</sup> Maybank papers, Winnipeg, Provincial Archives of Manitoba (MG14 B35, file 78).

<sup>10</sup> Vivian Rachlis, “A Biographical Note” in Cameron Harvey, ed., *Chief Justice Samuel Freedman: A Great Canadian Judge* (Winnipeg: The Law Society of Manitoba, 1983) 1 at 6.

On December 5, 1946, Maybank wrote to Joseph Jean, the federal Solicitor General in Ottawa, outlining his thoughts on the possibilities of upcoming appointments:

I wish to recall to you a certain statement that I made when we were at lunch together. That statement was, (a) that every possible effort should be made to appoint none but Liberals to the Bench and (b) that there were plenty of suitable Liberals for appointment, and (c) ... that an appointment of Mr. Coyne ... would be well received, and (d) an appointment to the Bench of Mr. Shinbane would not be well received but, that, it would be considered objectionable by a large number of people.

... I might also add with reference to Mr. Shinbane that while every one of us has a high regard for him, the truth is that there is a great deal of anti-Semitism about at the present time. This may be unreasonable but it is a fact and we have to take facts of life into consideration when we are considering such problems....

Maybank reminded the Solicitor General that all of the others at the luncheon table had “agreed completely” with his statement, though he took pains to indicate that their position did not spring from anti-Semitic feelings. He added, “If I had to be classified as anti-Jew or pro-Jew, I would most certainly be classified as pro-Jew. I am fighting at all times against anti-Semitism or any kind of racial discrimination.”

In another letter, of February 17, 1947, Maybank expressed concern about the importance of ensuring a balance regarding French-speaking judges in the province, given its large French-Canadian minority. “The fear is that if a Jew were given an appointment which a French-Canadian ought to have there would be no chance whatever of surviving the blow. In truth I hadn’t myself realized how serious that is. They have told themselves that they are entitled to this appointment and it has become an obsession with them. Hence, if they found an Israelite being named their rage would know no bounds.”

A candidate for judicial office also had to belong to the right party. In July 1947 Maybank told the federal Justice Minister, J.L. Ilesley, “There are only two persons who can be considered for judicial appointments to take care of the French situation. They are [St. Boniface County Court] Judge Roy and J.E. Beaubien.” But, he added, “All Liberals of whom I have ever heard, with two exceptions, are strongly averse to any preferment being given to Beaubien. He is a Tory. No doubt about that. Until a very few years ago he was active in Tory circles and generally on the executive of South Winnipeg

[constituency] .... Personally I am bitterly opposed to anything being given to a Tory.”

Later in that same lengthy (four-page) letter Maybank came around, once again, to the prospects of Shinbane as judge:

As an interjection I should say that any appointment of Shinbane would be very bad indeed .... If you say to the French that they are not going to get an appointment and at the same time you appoint a Jew instead of a Frenchman, I think you give such a slap in the face to the whole French community that the Government and the party would have to pay dearly for it. There is no use in mincing words. An appointment of Shinbane would be disastrous. In any event I feel there are plenty of Liberals more entitled than he is.

Mark Shinbane never was appointed to the Bench, though a year and a half later his name was still under consideration during a period when three positions were available in the county court. By that time Sam Freedman too was a candidate, though Maybank continued to be cautious about the prospects of a Jewish appointment. According to Maybank, Stuart Garson had indicated that “he would like to be the first Minister of Justice to make a Jewish appointment. Also that there was a great deal of propaganda being put out in favour of a Jew.” When Sam Freedman was approached about the possibility of a county court appointment, he apparently responded that “he would be honored to accept although he wasn’t seeking it.” In a January 1949 letter to Irving Keith, reporting on developments, Maybank notes, “It had also been said that if it were a King’s Bench Appointment and a Jew were to be appointed the only one to appoint at the present time would be Shinbane. This information and this fact had an influence upon Sam in making his affirmative decision.” Maybank apparently told Sam Freedman that he in fact preferred two other local men for the first two appointments available:

... and that next to that I would prefer to see a city man for the third appointment and that a city man might very well be a Jew. In fact, I said [to Freedman] that I thought that would be a good thing, and to advocate a Jew for the third appointment might be the desirable strategy to hold the thing in the city. In such a case, there would be nobody but him. In fact, I said there was no Jewish appointment excepting his own which would be desirable. I guess I told him, what the fact is, that the appointment of him would be a good one from every point of view. I did not tell him what I believe the fact is, that the appointment would be definitely harmful; that in fact there is a much larger number of Gentiles in the community than there are Jews.

Sam, Maybank wrote, “made it quite clear that he was not in competition with anybody excepting other Jews. If all the appointments went to Gentiles he would be well enough pleased ...”

Another two and a half years passed before Sam Freedman got the call from Garson appointing him to the Queen’s Bench. By that time the appointment of a Jew was a feather in Garson’s cap, and the appointment in particular of Sam Freedman, “though a very young man, by Canadian standards, for such high office,”<sup>11</sup> was a popular one.

By the 1950s, although patronage continued—and it never has entirely disappeared—professional and expertise attributes were coming into greater play. And as Canada moved into the second half of the century, the factor of ethnicity was beginning to fade, however slightly, as a barrier to advancement. Irving Abella notes that by the late 1940s and early 1950s, “the pervasive anti-semitism of earlier years had receded.”<sup>12</sup> The possibilities had improved for a Jew, at least for someone with the “awesome talents” of Sam Freedman, to be elevated to the Bench.<sup>13</sup>

<sup>11</sup> “Welcome, Mr. Justice Freedman”, Editorial (1952) 24:1-2 Man Bar N 11.

<sup>12</sup> Abella, *supra* note 4 at 213.

<sup>13</sup> The description of Freedman as a man of “awesome talent” comes from Dale Gibson & Lee Gibson, *Substantial Justice: Law and Lawyers in Manitoba 1670-1970* (Winnipeg: Peguis Publishers, 1972) at 299. According to Abella, since the appointments of the early 1950s, the changes in this regard “have been dramatic.” In the 1970s and 1980s Jewish judges have found work at all levels of the judicial system, and five provinces have had Jewish chief justices. Abella, *supra* note 4 at 217. Still, by the 1990s Canada’s ethnic makeup continued to be unevenly represented on the bench. See McCormick and Greene, *supra* note 3 at 61-62; and Peter H Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987). McCormick and Greene outline the difficulty faced by Bora Laskin in pursuing a judicial career.

Women, still a tiny minority in the legal profession, would have to wait three or four decades for their chance to move onto the bench in substantial numbers. By 1968, for instance, the federal government had appointed only two female judges. By 1976 there were still no federally appointed female judges in Manitoba. In the decade 1988-98 the number of women serving as judges in Manitoba’s courts tripled, but they still remained far behind their male colleagues in number. In March 1998 Manitoba’s Court of Queen’s Bench had ten female judges, equal to 24 per cent of the total number. Canada as a whole had 184 female superior court judges in March 1998, equal to 18 per cent of the total number on the bench. *Winnipeg Free Press* (17 March 1998) A6; Ed Ratushny, “Judicial Appointments: The Lang Legacy” in Allen M



Although he had never been a member of the Liberal Party, which at the time dominated politics both at the federal level and provincially in Manitoba, Sam Freedman had established himself as a member of the Winnipeg legal elite in the 1940s, not just through his expanding law practice, but also through his other activities and involvement: his chairing of the Winnipeg Branch of the Canadian Institute for International Affairs, his work on the Civil Liberties Association of Manitoba and the Winnipeg branch of the League of Nations Society, his highly acclaimed editorship of the *Manitoba Bar News*, and his short stint as president of the Manitoba Bar Association. His speech-making had established a certain prominence; his talents, especially his ability to steer a meeting through difficult moments with mixtures of firmness and empathy, precision and charm, had been noticed. The young man from North Winnipeg, with his "at least one hundred and ten per cent effort" (a degree of effort subject to his usual understatement), had moved into elite circles and become accepted. Perhaps it could be said that for the anglo elite of Winnipeg his brilliance and willing energies far outshone the more off-colour glow of his social background and ethnicity.

Years later his university friend Maxwell Cohen would say: "Nationalism and internationalism; public affairs and social awareness; intellectual style and the literary skill to express it—this was Sam Freedman's environment and perhaps this explains why his natural talent found the soil within which he was to become a flourishing image of Manitoba at its public best."<sup>14</sup>

In 1952 Chief Justice E.K. Williams gave the public rationale for the appointment. Describing the new judge as a "real Canadian" (as opposed to what would now be called a "hyphenated Canadian"), Williams stated, "I have never been able to understand why in this day and generation, any Canadian citizen should have an adjective attached to his citizenship .... To me he is a fellow-citizen, to be valued according to his personal merit and not otherwise." Williams emphasized how the judges before whom Sam Freedman had practised had observed the "fairness" with which he had presented the cases he was involved in.

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Linden, ed, *The Canadian Judiciary* (Toronto: Osgoode Hall Law School, 1976) 43.

<sup>14</sup> Maxwell Cohen, "The Canadian Legal Profession and International Law" (delivered at the Winnipeg Convention Centre, 9 April 1983), (1983) 13:2 Man LJ 203 (special issue in honour of the Honourable Samuel Freedman).

“They knew that here was Counsel upon whose word they could always rely, who would never attempt to mislead or deceive a Court.” He noted Sam’s scholarship, “known to all.” Sam Freedman, the judge said, was hardworking and courteous, with a sense of humour that is “delightful, the more so as it is controlled.”<sup>15</sup>

I think I wanted to be a judge from the moment I had contact with the law, and that attitude never changed. Indeed, it was strengthened with each additional year of work in the law. It is a noble calling, and it was the work of the court, its function in settling disputes between opposing parties in the civil field, that attracted me.

I would serve on the Court of Queen’s Bench for a total of about eight years. In that period I had a variety of cases, some civil, some criminal. In the criminal field I had everything from petty crimes to murder. It proved interesting to see a case in progress—examination, cross-examination, re-examination, a surprise witness (either one who wasn’t expected to be called at all, or the expected witness who says unexpected things and throws his lawyer into a tizzy). You have got to adjust to the current of the moment like rowing on tidal waters, and above all you need to apply patience to the matter at hand, keep an open mind until the very end. That’s a golden rule for a judge.

I was now glad that, as a lawyer, in addition to my civil work I had taken some criminal cases, because after my appointment to the Bench I moved into an area where one could not escape criminal law. I have always felt that 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 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

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<sup>15</sup> EK Williams, speech on the occasion of Samuel Freedman becoming a judge, Winnipeg, Provincial Archives of Manitoba (box 113, file 9); see also “600 Honor New Justice Freedman: Chief Justice Williams Prophesies Worthiness Of New Judge”, *The Winnipeg Free Press* (27 August 1952) 18.

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.

I was glad that my experience in the field of criminal law, while not extensive, was at least of such a character as to rob the Assize Court of its terrors. I think I was able to adjust to the work of the criminal part of the judicial role in a manner that would not have been as smooth, as easy, as comfortable as it would have been, if I had not had some criminal law experience.

One of the matters we had to deal with regularly in the Court of Queen's Bench was divorce. During that time 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 man and wife.

Another problem for a judge is that people can try to take advantage of your position. Usually when that happens it is due to a misapprehension on the part of the person who makes the approach. I received letter after letter from people, including friends, seeking legal advice or perhaps trying to get help in presenting their case to the court, and I would have to tell them they needed to consult a lawyer, not a judge. Those are minor incidences, easily dispensed with.

I can recall only one time in my career as a judge when a potentially more serious intervention was sought. That was when I was presiding over the trial of a Jewish junk dealer charged with the offence of receiving stolen goods, as it was then called. He was convicted of the offence, and I was then faced with the task of sentencing him. For that purpose I remanded the case to the end of the Assize—that meant some three to five days later. In the interval the phone started to ring.

First of all came a call from my rabbi. He was careful. He said, "Sam, can I talk to you about the case of ..." and he named the accused. I said, "Rabbi, the answer is no. It would not be proper for you to talk to me on

it, or for me to hear you on it.” He said, “Thank you very much, Sam, I will retreat.”

A day or two later I got a phone call from a friend who said, “Sam, I am calling you on behalf of all the junk dealers of the province of Manitoba.” I said, “Morris, I’m not able to talk to you.” He said, “Sam, all of the junk dealers, they’re very much interested in you hearing this.” I said, “Morris, we will remain good friends, but I am going to hang up. It’s not proper for you to talk to me on this, or for me to listen to you on it.”

It would be an offence for me to talk to someone as in those cases, if the conversation related to the proposed disposition of the trial. There is an offence called obstructing the course of justice, and when an outsider makes an approach to the judge and makes representations to him, he is interfering with the due administration of justice—because if the judge is to decide the case on the evidence in open court, or if it is a matter of sentence, to decide with the assistance of the lawyers, who make their submissions to him in open court—if that procedure is sidestepped by the judge permitting an outside representation to be made to him, he is not properly administering justice, and the person who makes the solicitation to the judge is wrongly interfering. Any judge worth his salt will not permit the matter to reach that stage. You’ve got to nip the thing in the bud at the very outset. In the case of the junk dealer, I did that very thing.

In a speech to a dinner given in his honour after the appointment, Sam Freedman outlined his four-point credo for himself as a judge. The first necessity was a reverence for the judicial office, which was one of high honour and great responsibility. The second was that he hoped he would have time for cultivation of interests outside his judicial work, for books and friends and participation in activities the furtherance of which was one of the applications of good citizenship.

The third point was that he hoped he would never lose his sense of humour. The fourth was a faith in Canada, in its greatness, its way of life, and its future.<sup>16</sup>

Chief Justice E.K. Williams, who had been appointed chief justice in 1946, was my mentor when I went on the Bench. For eight years I was able to enjoy a happy association with one of our distinguished Canadian judges. He was a man who commanded a great deal of respect, a scholar of

<sup>16</sup> *Ibid.*

the law. A distinguished-looking man, he looked like a chief justice should: grey hair, a Vandyke beard, which he called his chin-whiskers. He seemed to be austere and stern, but had reservoirs of humanity—and a very fine sense of humour—which the general public did not credit him with possessing.

In a speech, I once said that my admiration for Chief Justice Williams was like Li'l Abner's undiluted hero worship for Fearless Fosdick, with the difference that Fosdick is an inept detective, whereas the Chief Justice is a giant in intellect, and a wonderful human being. He had a reverence for the law—its history, its traditions—and he did his best to impart these virtues to judges and members of the Bar. I cherish his memory.<sup>17</sup>

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An early example of a sharply drawn Freedman ruling as a Judge of the Queen's Bench came in 1953 in *Regina v Dorion*. At a trial in The Pas, Arthur Dorion, a Treaty Indian, had been charged with the murder of his common-law wife, Jane Ross. The *Winnipeg Tribune* reported in August 1953 that a surprise announcement from the judge "came before a stunned courtroom as the trial, entering its third day here, was nearing completion. All Crown witnesses had been heard and the defence was prepared to bring its own witnesses." Freedman's ruling, though razor-sharp in its determination and decisiveness, was softened with a typical compassion for both the perpetrators of the problem (the trial guards) and the accused. Also of interest are his pointed reprimand of the local press for its part in the affair, and the lesson to be drawn in the end.

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<sup>17</sup> One writer said of Chief Justice Williams: "Stern, correct, impeccable in dress and expression, Williams personified all the characteristics popularly associated with judicial office." Dale Gibson, "An Anecdotal Sampler" in Cameron Harvey, ed, *The Law Society of Manitoba 1877-1977* (Winnipeg: Peguis Publishers, 1977) 191 at 221. Williams served as Chief Justice of Manitoba's Court of King's (later Queen's) Bench from 1946 until his retirement in 1962.

**JUDGMENT: Regina v Dorion (1953, Court of Queen's Bench)**<sup>18</sup>

Freedman, J.: As a result of something which was brought to my attention about 6 o'clock last night, I must make the following statement and decision.

This is a trial on a charge of murder. On such a trial the court must direct, in accordance with Section 945(3) of the Criminal Code, that proper provision be made for preventing the jury from holding communication with any one on the subject of the trial. I did so direct.

In fact, it will be remembered that on Tuesday, in open court, in refusing a request that the members of the jury be permitted to attend a motion picture theatre in the custody of their guards, I stated in the most explicit terms that nothing must be done which would even raise the *possibility* of outside communication with the jury on the subject of the trial. I called attention to the decision of the Court of Appeal of British Columbia in *Rex v. Ryan*, 101 C.C.C. 101. At that time I expressly asked the two guards, who had been sworn to keep the members of the jury together under circumstances which would prevent communication with them, if they understood my directions and their responsibilities. In open court I was assured that they did so understand what was required of them.

It is a matter of profound regret to me to have to state that there has been a very grave dereliction of duty on the part of the guards in charge of the jury. This, I am sure, did not arise from wilful disobedience to instructions, but was doubtless due to inadvertence or momentary thoughtlessness. But the consequences are most serious none the less.

Yesterday, during the course of the trial, Crown counsel offered in evidence a certain document, the admissibility of which was objected to by defence counsel. In accordance with the usual practice in such cases, a so-called "trial within a trial" was held for the purpose of determining its admissibility. During this "trial within a trial," on which the accused himself gave evidence, the jury was excluded from the court room. At the conclusion of this "trial within a trial" I ruled that the document offered in evidence was inadmissible. Thereupon the jury was recalled and the trial continued. At about 4 P.M. the case for the Crown was completed, and defence counsel requested an adjournment till 10 A.M. this morning before proceeding further. This adjournment I granted.

Late yesterday afternoon the November 18th issue appeared of the weekly journal known as *The Northern Mail*, published here in The Pas. The feature

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<sup>18</sup> *R v Dorion*, [1953] MJ No 5, 61 Man R 336 (Man QB).

article on Page 1 was headed “Dorion Statement Ruled out of Trial.” The article made specific reference to the excluded document, and it went on to quote extracts from the testimony of the accused himself when he took the stand in the absence of the jury. Let me make it clear that my criticism at this time is not directed against the newspaper or its reporter. Court proceedings are public matters to which the press has a right of access. The publication of the details of a murder trial is a legitimate newspaper function, and so long as it is exercised accurately and fairly, there can be no complaint. Here may I express the view, however, that it is inadvisable, if not improper, for a newspaper—as was done in this case—to describe in a manner prejudicial to the accused a document which has not been admitted in evidence and not read in open court at the trial.

But no damage would have been done had it not been for the fact—as I was informed by the Sheriff at 6 P.M. yesterday—that the guards purchased four copies of this newspaper for the express purpose of distribution among the members of the jury, and in fact so distributed them. As a result the members of the jury have had the opportunity of reading—and almost certainly have read—a newspaper report dealing with matters which occurred while they were excluded from the courtroom, and which I expressly ruled to be inadmissible as evidence.

There has therefore been a clear violation of the provisions of Sec. 945(3) of the Criminal Code. There has been improper communication with the jury on the subject of the trial.

Under the circumstances, I am compelled to declare that there has been a mistrial. The case will be traversed to the next criminal assize to be held at The Pas. The members of the jury are now discharged.

It is regrettable that the entire proceedings will have to be begun anew. It is also regrettable that the accused, through no fault of his own, will have to go through the ordeal of a murder trial a second time. I hope that the unfortunate situation which has occurred, with its attendant expense, inconvenience, trouble, and distress, will at least help to impress upon custodians of the jury, as well as upon the public at large, how important it is that the strict requirements of the law relating to the conduct of criminal trials be scrupulously observed.

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When appointed to the Court of Queen’s Bench, I publicly declared that I would try to be active in some form of community work that could be carried on without prejudice to the due discharge of my judicial duties.

I was particularly determined not to turn my back on my Jewish heritage. I wanted to be active in some Jewish activity, at the same time recognizing that there are limitations on what a judge can do and what he should not do. A judge had to be careful to avoid, for example, any area of activity involving political controversy. Neither could I be active in any organization which might petition the government on occasion. I discussed the matter with E.K. Williams, who suggested that during my first year as a judge I should avoid taking part in extra-judicial work. Thereafter I should feel free to do so, provided two safeguards were observed: (1) that the activity selected be one not inappropriate for a judge; and (2) that it be not so burdensome as to impair the quality of my judicial work. I took these admonitions as guidelines by which my conduct in these areas should always be governed.

Not long after my appointment Allan Bronfman and A. Mark Shinbane came to visit me. Mr. Bronfman was president of the Canadian Friends of the Hebrew University. Mr. Shinbane was a member of the executive of the Winnipeg Chapter of the Canadian Friends. They invited me to become president of the Winnipeg chapter. I realized that this was the answer to my question. It was an educational rather than a political activity, and the best Jewish activity a judge could engage in. Here was an opportunity to make a contribution to the Jewish group, in an area in which I was very much interested, and at the same time, one which would not involve any possible impropriety of engaging in an activity unsuitable for a judge. I told them of my arrangement with Chief Justice Williams regarding extra-judicial work, and that if they invited me again after my first year as judge had run its course, I would (subject to any unforeseen difficulties arising in the interval) view the invitation favourably. The result is that in April 1953, one year after my appointment to the Bench, I became president of the Winnipeg Chapter of the Canadian Friends of the Hebrew University.

I continued in that office through several terms to a total of sixteen years. In 1955 I went to Israel for the first time as an observer to the annual meeting of the international board of governors of the Hebrew University of Jerusalem—and while there I was elected a member of the board of governors, so I came home in a different role entirely. The board was made up 50 per cent of Israeli citizens and 50 per cent of members from abroad and included governors from all over the world. I continued to be a board member until 1988. For the greater part of this period the



board met annually. As an active member and as chairman of its nominations committee I made it a point to go to Jerusalem for these meetings whenever I could. So I attended nearly all of them.

The Freedmans' first trip to Israel for the Hebrew University board meeting took place from March 29 to April 14, 1955, followed by a week in England. Their friends Allan and Lucy Bronfman were also in the Canadian contingent, and it was during these meetings that Sam was elected a governor of the university.

The formal event launching the Hebrew University of Jerusalem had taken place on April 1, 1925, on Mount Scopus. I think it relevant to note that seven years earlier—on July 24th, 1918—the foundation stones of the Hebrew University were laid. The First World War was still on. The ceremony of laying the foundation stones took place within the sound of the guns in battle. Chaim Weizmann records that memorable event in his book *Trial and Error*: “I spoke briefly, contrasting the desolation which the war was bringing with the creative significance of the act on which we were engaged.”<sup>19</sup> To many people it might have appeared as a paradox that in a land which needed practical things like roads and bridges, priority was being given to the establishment of a university. But, Weizmann said, it was no paradox to people who knew and understood the soul of the Jew.

Several months before the celebrated event of April 1st, 1925, the authorities in charge sent letters of invitation to numerous universities throughout the world. Quite understandably, most of these institutions merely sent messages of greeting and good will to the new university. Not so, the University of Manitoba. Acting in response to the initiative of the Menorah Society (the Jewish students group), the University of Manitoba sent a representative to the 1925 ceremony, the Menorah Society footing the bill. That representative was Dr. E. Guthrie Perry, professor of Hebrew at the University of Manitoba, who delivered his greetings in person, speaking partly in English and partly in Hebrew. When Dr. Perry returned from Palestine, he delivered a lecture on the event to an audience of about two thousand people, of whom I was one. Across the decades I cherish recollections of a great evening; the kind of evening one encounters but seldom.

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<sup>19</sup> Chaim Weizmann, *Trial and Error: the Autobiography of Chaim Weizmann* (New York: Harper & Brothers, 1949) at 237.

The magazine *The New Palestine* published a special edition to mark the establishment of the Hebrew University. It contained articles by distinguished leaders writing from various parts of the world. It was a storehouse of riches. For myself, the article that made the strongest impression on me was that written by Maurice Samuel. About ten years later he came to Winnipeg to deliver a lecture. I was one of the inviting committee, so I found myself with Mr. Samuel for a good part of the day. I brought up the subject of the *New Palestine* special edition, and I said that of all the articles in that publication, his was the best. He said, "Well, thank you very much. And what did you think of the article by Rabbi Stephen S. Wise?" I said, "It was good, but not as good as yours." Mr. Samuel said, "Well, I wrote that one too."

As chairman of the Nominations Committee of the Winnipeg Chapter, I quickly learned that the committee's report, unless dressed up in some way, was likely to have as much impact at the annual meetings as the reading of a telephone directory. So I resolved to dress it up. This I did by telling the meeting a story. It was a great hit. The following year, when the Chairman called on me for my report, he added, "And I hope that Justice Freedman will tell us a story or two." From then on, at each annual meeting, I accompanied my report with a few stories. One of the senior officers of the Board said, "Thus are traditions established."

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Another extra-legal involvement came in June 1959 when I was appointed Chancellor of the University of Manitoba. This appointment was linked, some thought, to the Crowe case of 1958.

Professor Harry Crowe was a member of the History Department at United College, then an affiliate college of the University of Manitoba, but which later evolved into the separate University of Winnipeg. It was a church-related college, under the aegis of the United Church of Canada. In 1958 Professor Crowe was a visiting professor at Queen's University in Kingston, Ontario, and in regular correspondence with some of his colleagues at United College.

On March 14, 1958, he wrote a letter to Professor Packer of the German Department. Most of the letter dealt with the forthcoming federal election. With amazing accuracy Crowe predicted the Diefenbaker sweep. But, more importantly for the following events, the letter was also directly

critical of those professors and administrative officials who wanted faculty members to play a more active role in raising funds for the United College Building Fund. A paragraph that became the heart of the subsequent controversy said, "I distrust all preachers and think we have abundant evidence that religion is a corrosive force"—here followed the names of six men prominently identified with United College. The paragraph ended, "People don't seem to have principles unless they are prepared to go to hell."

Here was a strong opinion, expressed by one professor to another in a private letter. But the letter did not reach Professor Packer. Correspondence addressed to faculty members was normally placed on a designated desk. Presumably this letter was picked up by an unauthorized person. After opening and reading it, this individual sent it on to United College Principal Wilfred Lockhart with an unsigned note attached reading, "Some loyalty, eh!" The principal, not knowing what to do with the letter, showed it to the chairman of the Board of Regents. He was largely responsible for the mess that followed. He had the letter Xeroxed and sent a copy to all members of the Board.

The ensuing controversy was bitter. The Regents wanted to fire Crowe, and they ultimately did. The Canadian Association of University Teachers set up an inquiry committee consisting of Bora Laskin, then a law professor at the University of Toronto, and another professor. They found against the college and for Crowe. The case became a subject of debate in Manitoba particularly, and to a degree in university circles across the country. The Crowe supporters, led by faculty members throughout Canada, asserted that to dismiss a professor on account of personal views, like Crowe's, expressed in a private letter to a friend, would be a gross invasion of academic freedom and civil liberty.

The chancellor was Victor Sifton, publisher of *The Winnipeg Free Press*. For many weeks while the controversy raged the *Free Press* took no editorial position on it. When finally it did write on the subject, the paper's editorial had one paragraph for the Board, then one for Crowe, then one for the Board, then one for Crowe, and so on. Something better than this was expected from the *Free Press*, the organ of liberalism.

In his memoirs, journalist and public servant Tom Kent also writes about the Crowe case. Kent was editor of the *Free Press* at the time and acknowledges that, under pressure from Sifton and much to his own

dismay, he found the paper's news staff giving "unfair priority ... to the college administration's side of the story." Kent writes: "I am not quite sure what I would have done about the particular situation if it had not been for a friend, Sam Freedman .... At a social gathering ... he remarked to me in his measured tones that "this is not the *Free Press's* finest hour." That seemed to crystallize my feelings." Shortly after, Kent gave Sifton notice of his resignation.<sup>20</sup>

Mr. Sifton's term as chancellor of the University of Manitoba was to expire in June 1959. Leaders of the faculty position in the Crowe case felt that Mr. Sifton's successor should be a person with an appreciation of the central role played by faculty members in a university. In due course I was approached and asked if I would allow my name to be placed in nomination for that post. As a judge I had taken no public position on the matter, but privately I was known to favour the faculty view. I agreed to stand and was elected, by acclamation as it turned out. I was to be the first Jewish chancellor of the University of Manitoba, though as a university official the position meant that I would have to give up my role as lecturer.

I felt the Crowe case cast a white light on the question of university government. More specifically it invited examination of the question of excluding faculty members from the Board of Governors. Members of faculty were excluded by section 10 of the *University of Manitoba Act*. I felt this was wrong and I determined to fight it. I did so and, after nine years of controversy, victory came. A statute passed in 1968 removed the ban, and faculty members, as well as some students, could now sit with lay members on the Board of Governors.

My duties as chancellor began with the passing of an order-in-council June 23rd, 1959, and I quickly came into close touch with the work of the enterprise. I was just as quickly impressed by the vastness, and sometimes the complexity, of the problems which face a modern institution of this kind. Even before my official "installation" as chancellor at a convocation in November, I began attending meetings of the Board of Governors and Committees of the Board, of the Senate and Committees of the Senate, and many others. These meetings consider problems relating to staff, to curriculum, to students, to faculty, to government, to the general public. I

<sup>20</sup> Tom Kent, *A Public Purpose: An Experience of Liberal Opposition and Canadian Government* (Kingston and Montreal: McGill-Queen's University Press, 1988) at 75.

saw clearly the central and pivotal role played by the university president, in this case Dr. Hugh Saunderson. He showed a comprehensive knowledge of the myriad of problems which fall within his administration and invariably brought a sane and well-balanced approach to their consideration.

It happens that the institution of the university is something for which I have deep respect. I think of the university not only in its utilitarian sense—that it is the source from which we get our doctors, our lawyers, our engineers, our accountants, our actuaries, and so on—but also in the sense of its allegiance to a high sense of values. I think of the university as an institution in which minds are trained, good taste encouraged, critical judgment formed, and intellectual curiosity developed. I would emphasize that both the scientific and the humanistic attitudes have a place in the university, and that the good university strives for a happy synthesis between them. For, as the whole is greater than the part, no one aspect of a university should be confused with its totality. All of those things help to give a university its style and character. Those are the reasons for which I became involved with the University of Manitoba.

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Long before he gained recognition as a judge and a lawmaker, Sam Freedman had become known for his speech-making abilities, gaining a reputation that quickly spread across North America. Typical of the response to his addresses is a note in *Chitty's Law Journal*, March 1951, reporting on the mid-winter meeting of the Council of the Canadian Bar Association:

Perhaps the most remarkable feature of the meeting was the after-dinner address given by our old friend Sam Freedman of Winnipeg. Remarkable not only because his address ranks with the best of all the after-dinner speeches heard at meetings of the Association, but also for the hiding of such a shining light under a bushel in the Association for so long. It was a brilliant address from every aspect. The subject was timely and thought-provoking. It was meaty and full of constructive ideas. It was given with a humour and ease of delivery that at all times carried his audience with him. But why has the Association not heard of and from Sam Freedman long before this? ... We gathered from some things said before the dinner that, in the West, Freedman is a prophet with honour in his own land, and we are unable to understand why he has not been allowed to display this talent, among his many others, to the Association long before this.

In a letter of November 8, 1952, David Goodman told Sam, “We are all looking forward to meeting and hearing you, as your ability as an interesting and erudite speaker as well as a fine jurist is well-known in Toronto.” Earlier that year, in June, Sam had addressed the Advertising and Sales Executive Club’s annual meeting in Toronto, and later J.A. Lyone Heppner, District Manager, Confederation Life Association, Montreal, had remarked, “I believe it is something of a novelty for a judge to talk about down to earth advertising and sales subjects.” In May 1956 Benjamin B. Tepper wrote to a friend about a recent Freedman speech: “After hearing him last Friday hold the Bench and Bar of our city spellbound for thirty minutes, I must say that he ... should take his place with the really great orators of present-day North America....

“Sam Freedman’s capacity for names, places and events is fantastic, and several in attendance were amazed that he was able to remember them after many years.”

Sam Freedman started his speech-making career in public school, built on it during those lunch-time exercises in high school, and honed it in university debates. By the 1940s speech-making, and the travel it involved, were an integral part of his and Brownie’s life. (He wouldn’t travel anywhere without me going along,” Brownie said.)

His speeches were known for being eloquent and topical but, what is more, for being amusing, gently ironic. He poked fun. “It has been said that an honest politician is one who, when bought, stays bought,” he told one audience. Or he might tell the story about the judge who came into court one day and announced: “This morning I received a cheque for \$10,000 from the plaintiff; this afternoon I received a cheque of \$15,000 from the defendant. I propose to return \$5,000 to the defendant so I can try this case on its merits.”<sup>21</sup>

An editorial in *The Brandon Sun* in March 1957 following a Sam Freedman speech at the Charter presentation of the Canadian Council of Christians and Jews in that city provides a testimony to the Freedman speaking style:

<sup>21</sup> “Smedley’s Corner”, newspaper column, probably *The Winnipeg Tribune*, [nd] (1955), in the Freedman Scrapbooks, 1955-59.

The voice is resonant, effortlessly charged with carrying power; the enunciation clean-cut without prissy precision. Cadence in a flowing rhythm makes music of the phrases. The appeal lies both in what he says and how he says it. The words grow burnished bright in their selection and placement. The scholar emerges in allusion and quotation from a mind freighted with the wisdom of the ages. But the scholar is no recluse. He identifies with ease one Sally Rand and balances Grey Cup Finals against Stratford Festival as aspects of Canadianism.<sup>22</sup>

Sam Freedman often spoke of what he saw as the great promise of Canadian society and the importance of working always to build and maintain a free, democratic nation—a condition that had not yet been totally achieved, although, he would note, the institutions for a truly free society—parliament, schooling, the justice system, the media, among others—had been set in place and must be guarded, nourished, always improved. He often warned against the excesses of rampant materialism and cynicism, and cheered on those who recognized that “democracy is a thing of intrinsic worth and of imperishable value.” And involved in the concept of democracy “is the recognition of the freedom to dissent.”

### THE MOMENTOUS 20th CENTURY

[Speech, reprinted in *The Kiwanis Magazine*, August 1957]

... There is a place, I put it to you, for the non-conformists. The history of the world shows that many of our greatest men espoused ideas at one time unpopular but ultimately granted recognition. “Truth,” as Will Durant said, “always originates in a minority of one, and every custom begins as a broken precedent.”...

It seems to me that at the beginning of the 20th century we talked in terms of complete non-interference by government in the affairs of mankind,

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<sup>22</sup> “An Eloquent Jurist”, Editorial, *The Brandon Sun* (9 March 1957), Winnipeg, Provincial Archives of Manitoba (box 101, file 17); also found in the Freedman Scrapbooks, 1955-59. Freedman had met Sally Rand, a famous fan dancer, in 1949, at a luncheon meeting of the Hennepin County Bar Association in Minneapolis. At the luncheon Sally Rand had briefly addressed the topic “Judges and Lawyers I Have Known.” “Lucky Canadians Get Best of U.S. and British Laughs”, *The Minneapolis Star* (12 April 1949) 18 (found in the Freedman Scrapbooks, 1949-54). The occasion had given rise to a spur of the moment Freedman quip: “A lawyer and a fan dancer: two noble forms of culture, both addicted to briefs.” Interview with Lorne Brandes, Winnipeg, 1978.

and yet we recognize today that unrestricted activity on the part of individuals is likely to result in distress and the great problem of the 20th century has been to bring about some measure of social control without at the same time imperilling or endangering human freedom. In the process of doing that, we have sought to evolve a state thinking of the welfare of individuals. One of the factors that hastened that was the Great Depression of the 1930s. Then following on that came the Second World War. It seems to me that right through the war, we were thinking not merely of victory, but our great leaders were looking beyond. We were thinking in terms of peace. Everyone was determined that no matter what happened we would not go back to the world of August 31, 1939. It was recognized that of the Four Freedoms which the great President Roosevelt espoused, Freedom from Want was by no means the least important.

A pair of Freedman speeches reported on in the early 1950s reveal that Sam, like most others of the time, was not unsusceptible to the mainstream anti-communist temper of the times. "The greatest challenge to a free society at the present time is the threat of communism," Freedman told an audience of three hundred gathered at the Bessborough Hotel in Saskatoon for the annual "Citizen of the Year" banquet in the mid-1950s. The difference between the two ideologies of democracy and communist totalitarianism was that:

...one worships the sovereignty of the individual; the other the sovereignty of the state. One practised freedom in the largest measure; the other, governed by pressure. One had the view that life had merit, the other took a pagan outlook on life.

Talk to a Communist—you will be confronted by some of the fallacies that they bring forward. You will find that the end always justified the means. But the experience of history has taught us that even a noble end, if pursued by ignoble means, leads to disaster.

In many ways, the Communist threat is somewhat more insidious than the Nazi threat. Nazism in a democracy will appeal only to thugs. Communism, as you have seen, is exerting a fascinating appeal to many people.

On March 20, 1952, Freedman delivered another speech on the dangers of Communism to the Rotary Club in Winnipeg. "Three kinds of individuals responded to the challenge of Communism—the traitor, the unwitting fellow traveller, and the reactionary," he said, as reported in a Winnipeg daily:



Our own hostility to Communism should not blind us to its capacity to win converts .... In any discussion where Russia comes up, I always find someone who makes a spurious defence of the other side. I know he's not a Communist but he counters with remarks like, 'Search your own soul. There's a negro problem in the U.S.' His is the cynicism of the worldly wise sinner.

There are people who take the negative whether they believe it or not. When Russia or the iron curtain is mentioned they say, How do you know that? Are you relying on the newspapers and the radio? That is intellectual scepticism from liberals who have not learned, from unwitting fellow travellers.

Sam Freedman's critique of Communism sprang from his abiding belief in the institutions of a "free society" and the all-important rule of law, "one of the foundation stones on which ... society is erected." This belief meant that violence and unlawfulness, even in the name of a good cause, could never be warranted. He recognized, and often stated, that the instruments of democracy and the free society were not perfect, and perhaps not even fully in place, but they were nevertheless worth the constant struggle to improve and certainly to defend. (Later on, his controversial stand on the October Crisis in 1970, in support of Trudeau's *War Measures Act*, would be consistent with this approach.)

He also recognized the dangers of McCarthyism in the United States, seeing this as an exhibition of a lack of faith in our own democracy; a sense of fear that Western democracy was not strong enough to stand criticism. The danger was that McCarthyism took up the very weapon of Communism: the restriction of freedom. A few years later, in the speech "What's Right with Canada and Canadians," he would remark that Canada avoided the excesses of McCarthyism by the "sense of balance and of moderation" that "prevailed and saved the day."

In 1952 he told the Rotary Club: "The best answer is a new type of thinking: strengthen our own democracy and help others to do the same. It means we must take our politics more seriously. We must cease to be afraid of social reform. We must eliminate Communist influence from local and municipal government as trade unions eliminate it. We must make democracy strong yet secure."

## WHAT'S RIGHT WITH CANADA AND CANADIANS

[Speech typescript, 1957]

Critics of Canada, who are quick to point out its imperfections, are vocal indeed. Perhaps it will help in some small measure if one who has a genuine affection for this country offers a few words in support of the theme, "What's Right with Canada."

### *1. A sense of moderation.*

If caution be a Canadian defect, then the other side of the coin, moderation, is surely a Canadian virtue. It is illustrated by the difference in the Canadian reaction to the challenge of communism from that of the American reaction. When our American friends yielded, for so long a time, to the influence of demagogue extremists, when an entire nation seemed to be in the grip of panic and hysteria, here in Canada a sense of balance and of moderation prevailed and saved the day.

### *2. A love of liberty.*

Our love of liberty stems from our attachment to democracy and the ideal of a free society. It is in specific cases when freedom is denied or threatened that we must seek the answer to the question whether Canadians are really sensitive to the meaning of freedom. One aspect of that answer is to be found in the judicial attitude to freedom, particularly on the part of the Supreme Court of Canada. In the *Saumur* case, granting freedom to the Jehovah's Witnesses, in the Quebec Padlock Law case, and in the recent case of Roncarelli against Premier Duplessis, the Supreme Court upheld the rule of law as a shield against arbitrary action of the state and those who represent it.

### *3. An increasing recognition of the importance of education.*

In recent years we have witnessed an increasing recognition of the importance of education and of the role it performs. One indication is the declared concern of government and public alike with matters relating to education. As a result we see the dominion government, through the Canada Council, giving tangible support to our universities. With a greater concern for education has come, too, an enhanced respect for the teacher and the professor.

### *4. The emergence of a Canadian sense of identity.*

A sense of identity is emerging; a national spirit of Canadianism is being born. It has evolved in the face of the two major forces—the British

connection, involving history, and the American influence, arising from geography—which have shaped our development. But slowly a new concept of Canadianism is making its appearance. It is the product of all the features of our expanding civilization.

There are pitfalls to be avoided. Our youth, for example, must guard against the excessive veneration of wealth and material success. Thirty years ago, if the youth of my college generation had been polled to select the most distinguished citizen of Winnipeg, victory would have gone to John W. Daffoe. Would a similar standard prevail today?

But we must not yield to cynicism. I believe that Canada's future is one of shining promise. It will play a valuable and meaningful role in the human adventure.

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When an interviewer asked him, "Who writes the material for your excellent speeches?" Sam Freedman replied: "I do my own research and my own writing, such as it is. On one occasion I was called upon to make a short speech. A person came up to me afterward and asked, how long did it take to write that? I said, 'Two minutes of thinking, about forty or fifty years of reading.'"

Another interviewer (in the 1980s) noted that Sam might be the only person listed in Canada's *Who's Who* as having public speaking for a hobby. "I think most people would regard public speaking as an ordeal or a necessity rather than a pleasure."

I probably shouldn't enjoy speech-making as much as I do. I like doing it. I know that I've got to space these things. You can't be working on speeches all the time. You can't let it interfere with the primary task at hand, whether it be the judicial work, or now [in 1980s, post-Chief Justice] counsel work. I had to say "no" to requests to speak more often than I could say "yes". But within the limits of time and opportunity available, I like speaking. I like the preparation of it, working out a plan. I like most of all the reception of it, if I'm making a good speech. You can tell, very quickly, if your audience is listening or is indifferent. I have had both experiences, but I'm glad to say the indifference has been the exception rather than the rule.

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Later in the decade I had an encounter with capital punishment as a judge that was even more personal than was the *Stoney* case of 1951. It was something that seared the subject right into my soul. It became my duty as trial judge, within a period of about five minutes, to impose the sentence of hanging on three boys.

These three boys, Gerard de Tonnancourt, Claude Paquin, and Joseph Ferragne, lived in Montreal. Two of them were seventeen, the other eighteen years old. They were hitchhiking out west in January 1955 when they came to Portage la Prairie, or just beyond it. They got a ride in a car owned and driven by Father Alfred Quirion, a Catholic priest, though he was not so garbed. It may well have been that they didn't know he was a priest.

They rode about seventy miles together—they were French, he was French—I haven't the slightest doubt that there was conversation between the boys and him. At around 4:15 P.M., about five or six miles east of Brandon, one of them said he wanted to relieve himself, so Father Quirion stopped the car and all the boys got out. Shortly after that Father Quirion was shot, killed, and robbed of his wallet, containing about \$90. The boys were later found and arrested in the CPR station in Brandon. Ferragne had in his possession a key to a station locker, which contained a navy kit bag on which De Tonnancourt's name was imprinted. The kit bag contained, among other things, guns and ammunition.

The trial, before myself and a jury in Brandon, took twelve days in November 1955. It was an event of great public interest, probably because not only was the victim himself a priest, but also the boys charged with his murder were themselves Roman Catholics. All three accused had demanded, pursuant to s. 536 of the *Criminal Code*, a jury composed at least half of persons who spoke their language, namely, French. The jury in question was accordingly selected to comply with the section: six were persons skilled in both French and English, and six were persons skilled in the English language alone.

The defence for Ferragne was that he was insane. We heard much evidence on that issue, with expert opinions on both sides. Two psychiatrists said that Ferragne was legally sane and two said he was legally insane on the date of the offence. All four agreed that Ferragne was in some degree abnormal, being possessed of a schizoid personality. One

psychiatrist, from Montreal, gave some background information. He emphasized particularly what he called a “fugue” in Ferragne’s history. It appears that one day Ferragne had taken a train from Montreal to North Bay. When he got to North Bay he simply waited on the platform until a train was going back to Montreal, and then took the train home again. This, said the psychiatrist, was the fugue: a purposeless trip, a flight away from reality.

The psychiatrists, like the handwriting experts I encountered in the *Minuk* case very early on in my career,<sup>23</sup> were dealing with a difficult problem, and honest men may honestly differ. It is for the jury to weigh the testimony on the issue and ultimately to decide which expert is most persuasive, most sensible, most rational according to their view. The safeguard is that judges and juries try their best to approach the matter in a spirit of broad reasonableness.

De Tonnancourt and Paquin both denied any plan to rob Father Quirion, or anyone else. De Tonnancourt’s defence was to the effect that he had been asleep at the time of the shooting. He stated that when he was awakened by a noise (presumably the shot or shots) he saw Father Quirion slumped on the front seat, realized something serious had happened, and panicked and felt that they had to get away from the scene. Then, seeing Father Quirion’s wallet sticking out of his pocket, he took it. He also denied being in possession of the kit bag.

Paquin stated that at the crucial time he was outside the car, relieving himself. Suddenly he heard a noise, a shot, and the car started to bounce forward. He saw Ferragne running alongside the car with his arm caught. The car then went into the ditch. Later they got a lift in another car to Brandon.

The evidence adduced by the Crown indicated that the three accused had planned to rob the deceased, and in fact did rob him. They had taken his wallet and divided the \$90 among themselves. The person who did the shooting was Ferragne, and the other two, by virtue of s. 21 of the *Criminal Code*, were parties to the offence. A ballistics expert gave it as his unqualified opinion that the bullet taken from the body of the deceased had been fired from a Smith & Wesson revolver found in the kit bag.

The statements given by the accused to the police revealed a plan to commit robbery. Ferragne’s statement indicated that he and the others

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<sup>23</sup> See chapter 3, *supra*.

had planned to rob the first man giving them a lift who happened to be alone in his car—and that turned out to be Father Quirion. Ferragne described how he pointed the gun at Father Quirion, saying, “This is as far as we go.” Quirion held up his hands towards the gun as though to put it down, whereupon Ferragne, “in his unnervement,” shot at Father Quirion. The statements of De Tonnancourt and Paquin supported the view of a preconceived plan to rob. They also indicated the use or threat of force in the carrying out of the plan.

In admitting those statements at a trial within the trial, in the absence of the jury, I indicated that I was satisfied that the onus of proving their voluntary nature had been discharged by the Crown. I directed, however, that certain portions of the statements be excised and kept from the jury. The main one was a reference—it was mentioned by each of the accused in his statement—to the manner in which they had obtained the guns, namely, through a robbery committed in Montreal three days earlier. I regarded this as irrelevant to the charge of murder, and I refused to admit it in evidence. Its introduction would, of course, have been highly prejudicial to the accused.

I am satisfied that the jury weighed the matter correctly and that their verdict of guilty in each case was the proper verdict. But the result of the jury’s verdict was that I had to pronounce the death sentence, and because there were three accused, I had to pronounce them individually, three separate times. I am not going to pretend that it was an easy thing to do. During the course of this trial, which took place in the presence of the parents of these boys, I acquired a feeling towards them (I won’t say a paternal feeling, perhaps an avuncular feeling). In any event, to pronounce the death sentence—to say that these boys should on a certain day between 1:00 A.M. and 6:00 A.M. be taken from their place of confinement and taken to the place of execution, there to be hanged by the neck until dead—that was not a very pleasant thing to do, nor an easy thing. The date set for execution of the sentence was Tuesday, February 28th, 1956.

I had to pronounce this sentence despite my own aversion to capital punishment—Parliament having spoken, and having declared, during that time at least, that capital punishment was the law, in the trial itself I would have been false to my oath as a judge if I had recommended clemency simply because I did not like capital punishment and not because the facts of the case warranted such a recommendation. I *did* impose the death

sentence, because following the jury's verdict, the judge must impose that sentence.

You can draw a parallel with a field far away from murder: divorce, for example. Many a Catholic judge who personally doesn't believe in divorce because of his religious convictions will pronounce a decree of divorce as a judge implementing the law of the land.

I did something afterwards, though. The trial judge has to present a report of the case to the Minister of Justice in Ottawa. When I presented my report, I accompanied it with the recommendation for clemency.<sup>24</sup> There were at least three grounds for the recommendation: one was the youth of the boys; second, the fact that the one that did the shooting, while not legally insane, was clearly abnormal mentally; and thirdly, the carrying out of the execution would mean taking three lives for the one they had taken.

The Minister and the cabinet acted on the recommendation. The death penalty was set aside. A commutation took place in favour of life imprisonment.

A footnote to the case: The boys were in Stony Mountain Penitentiary for about eight or nine years, and then they were released on parole. When last I heard of them, in the late 1970s, they were still out on parole, and according to the information I had received, none of them had been in any trouble since.

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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 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

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<sup>24</sup> Sam Freedman's letter recommending clemency is reproduced in Appendix I, at page 263.

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, too early in the case. Keep your tentative conclusions to yourself, unspoken. Sometimes a new light is thrown on everything that has gone before by the testimony of the last witness. What this witness says and how it is said may transform your whole concept of the case. How unfortunate if you have already declared yourself in favour of the opposite view and now have to backtrack, to get out of the pit you had dug for yourself.