

From the Balancing of Rights to an Illusory Retirement

It has been an eventful hundred years. When it started the world was quite a different place to live in. It was a world without motor cars, radio, television, aeroplanes, mixmasters, and certainly without computers. Those hundred years witnessed a massive expansion of material things of all kinds and descriptions. They witnessed as well two great wars, a great depression, and a terrible holocaust.

But it is 1982 and we are here. May I express the hope that we may continue to be here for a good while yet and that life for us may be pleasant, useful, and creative. And may I express the further hope that as we move into the next century we may in increasing measure find a world of justice, a world of tolerance, a world of tranquillity, a world of peace.

[From notes for a speech, "The Weidman Centenary," 1982]

People asked me in spring 1983, when I was about to leave my post as Chief Justice, "What is the dominant thought in your mind as you prepare for retirement?" I responded in a simple sentence: I approach my retirement with curiosity. As we say, "That's that."

As I look back upon my life, here set forth somewhat sketchily, as I review its major events, both the good and the bad, I conclude that a fair assessment of it warrants a favourable verdict. It has been an active life, with not many wasted years. Above everything else it has not been dull. And in the things that count the most I have been extraordinarily lucky.

I take two examples. I could cite more but I do not need to, because the two selected are fundamental in character. They are (1) my marriage and (2) my vocation. In both cases the decision I made was not in the nature of a first choice. In both cases the second choice, forced on me by the unavailability of my first choice, proved to be better, infinitely better, than the first choice could possibly have been. When destiny decreed that I should ask a girl out on what would be my first date, and I responded by phoning a girl I knew, it was nothing but sheer luck that this girl was busy on the evening in question and could not accept, thus compelling me to

make a second choice. My second choice was Brownie Udow, and no man could ever be luckier. So too, when the Rhodes Scholarship Selection Committee urged me to abandon the objective of becoming a professor of Latin and Greek and to give them a second choice, my response was that my second choice would be law. Again, no man could have been luckier. Despite my affection for universities and my esteem for the professors who work in them, the academic life could never have provided me with the interest, the stimulation, and the opportunities which came to me through law and the judiciary.

I have been fortunate in that my family has been made up of a galaxy of stars, not just my own children—Martin and his wife, Roxy, Susan and her husband, Bill Galloway, and Phyllis and her husband, Dr. Bill Shragge, now adults with fully engaged lives and careers of their own—but also my ten grandchildren who, besides being endowed with the gift of normalcy, possess gifts of character, intelligence, understanding, and great personal charm. My dear wife, Brownie, has always urged me to avoid complimentary references to her in my speeches or writings. If I feel I must say something nice, let it at least be done with appropriate restraint. I will try for such restraint, but it will not be easy.

She is a person of intelligence and sound judgment. If I needed an opinion on any subject of human relationship I would prefer Brownie's over any other. For Brownie's would be rooted in common sense, an old-time virtue whose utility today is as good as it ever was. She has a deep and sincere interest in people. How often over the years have I seen Brownie engaged in conversation with another person, and giving her whole attention to that person and to the subject of their conversation. Not as might be the case with some persons, would there be a pretence of interest without the actuality of it. For the duration of that conversation Brownie would truly be absorbed in the occurrence of it. And I can tell you that she would be acting with the utmost sincerity.

I must not forget the admonition to exercise restraint. I can do so only by cutting short my assessment. This is a person of intelligence, character, and personality. Mr. Justice Holmes said of his wife: "For sixty years she made life poetry for me." Well may that sentiment be applied to Brownie and to our lives together.

After retirement from the Bench, I acted as counsel for Aikins, MacAulay & Thorvaldson, Winnipeg's largest law firm and just incidentally one in which my son Martin is a lawyer and senior partner. I

served as a one-man inquiry commission dealing with an alleged conflict of interest on the part of Wilson Parasiuk, a cabinet minister in the Manitoba government of Premier Howard Pawley. I served as chairman of a board of seven persons examining whether members of two Indian Bands had suffered mercury poisoning, and if so, granting appropriate awards to them from a fund specifically set up for that purpose. In this occasional arbitration work sometimes I'm the sole arbitrator, and that makes me feel once again like a Queen's Bench judge. Recently I was chairman of a three-member board of arbitration, and that made me feel like a judge of the Court of Appeal again, indeed, like a chief justice.

When I retired from the Bench I also offered to retire from the board of governors of the Hebrew University. I received a reply from the president telling me that now that I had time on my hands the university expected me to devote even more of that time to its needs. I am happy that I can still be doing something useful in Jewish life, something that is not politically controversial.

Perhaps the most widely discussed of Sam Freedman's cases of the 1970s was *Regina v Carswell* (1974)¹, which became the subject of a controversial appeal, *Harrison v Carswell* (1975),² to the Supreme Court of Canada. The case involved the relatively new phenomenon of a union on legal strike picketing a workplace located in a large shopping mall. When Sophie Carswell, a unionized employee of Dominion Stores, refused to obey an order from the shopping centre manager, Harrison, to stop picketing on what the firm declared was "private property," the police charged her with trespassing, and she was subsequently convicted.

The key legal issue became the conflict between the traditional, common-law concept of private property on the one hand and the right to strike on the other; but the twist in the matter was the post-1960s development of shopping malls, places frequented by the public—and, in the pursuit of business, the more public the better—but privately owned and managed. The Freedman judgment shows an uncommon

¹ [1974] 4 WWR 394, 48 DLR (3d) 137.

² [1976] 2 SCR 200, 6 WWR 673.

awareness of labour's essential need for a fair and equal representation of its cause in a labour-management dispute. "Peaceful picketing," Freedman said, "deserves better" than the restrictions placed upon it by the property owners and the lower court.

In the judgment, Sam Freedman concluded:

I have accordingly reached the conclusion that in the conflict between the property right of the owner in the sidewalk and the policy right of the employee to engage in peaceful picketing in the course of a lawful strike, the latter right should prevail. It seems to me that considerations both of public policy and good sense dictate such a conclusion.

On appeal of this decision, the majority of the Supreme Court judges again did not agree with Sam Freedman and his colleagues. By a 6-3 decision they reversed the Manitoba Court of Appeal. The majority decision, written by Brian Dickson, himself formerly a colleague of Sam's on the Manitoba Court, found the *Peters* case³ to be indistinguishable and governing. Bora Laskin, writing the minority opinion, once again agreed with Freedman, adopting his reasons and adding comments about the *Peters* case. A key issue became the power of the Supreme Court to rework the "ancient common-law concept of trespass to property in order to take proper account of such modern developments as public shopping centres and collective bargaining legislation."⁴ Laskin, like Freedman, recognized the necessity for the law to deal with new and changing social conditions.⁵ He wrote:

It seems to me that the present case involves a search for an appropriate legal framework for new social facts which show up the ineptness of an old doctrine developed upon a completely different social foundation. The history of trespass indicates that its introduction as a private means of redress was directed to breaches of the peace or to acts likely to provoke such breaches. Its subsequent enlargement beyond these concerns does not mean that it must be applied on what I can only characterize as a level of abstraction which ignores the facts.

³ *Regina v Peters*, [1971] 1 OR 597, 16 DLR (3d) 143.

⁴ Paul C Weiler, "Of Judges and Scholars: Reflections in a Centennial Year" (1975) 53 Can Bar Rev 565. The following quotations from the Supreme Court judgment appear in the same source. See also Janet L Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (Montreal and Kingston: McGill-Queen's University Press, 1996) at 57.

⁵ Gerald L Gall, *The Canadian Legal System*, 3d ed (Toronto: Carswell, 1990) at 283.

While Dickson recognized that it was within the power of the Supreme Court to alter the fabric of Canada's law, he believed that the Court must play a more constrained role. His judgment stated:

The submission that this Court should weigh and determine the respective values to society of the right to property and the right to picket raises important and difficult political and socio-economic issues, the resolution of which must, by their very nature, be arbitrary and embody personal economic and social beliefs.⁶

The changes, he believed, must come about through legislation passed by elected representatives, and not through the courts. Dickson also maintained that legislation had long drawn lines on the extent to which picketing was allowed on private property. He added: "Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by due process of law."⁷

A few years later, speaking to law students at the University of Manitoba, Sam used the *Carswell* case to make a point about judicial bias. In the cases before them, he said, judges have a tendency to come to their conclusion early on in the proceedings; what they do later on is try to justify that conclusion. Therefore, not surprisingly judgments reflect the bias of judges. Citing his experience in the *Carswell* case as an example, he mentioned that it had been one of his former colleagues from Manitoba, Judge Brian Dickson, who found in favour of property rights. "But then," Sam added after a pause, "he has so much of it."⁸

Another key thread in judgments through the 1960s and into the early 1980s followed the line of constitutional law. Several cases concerned the hunting and fishing rights of Aboriginal peoples in Manitoba; a key case touched on the issue of French-language rights in

⁶ *Supra* note 2 at 218.

⁷ "Harrison v. Carswell" in FL Morton, ed, *Law, Politics and the Judicial Process in Canada*, 2d ed (Calgary: University of Calgary Press, 1992) 34 at 39-40.

⁸ This anecdote comes from an interview of Roland Penner (30 March 1998) Winnipeg, MB.

the province; and a final case, in 1981, played a role on the national scene, in Trudeau's efforts to repatriate the Canadian constitution.

The decisions in two Aboriginal cases, *Regina v Daniels*⁹ and *Regina v Roulette*,¹⁰ were delivered on the same day, April 25, 1966, and dealt with the same issue. A key question was a clash between a Manitoba provincial law, in the form of the Manitoba Natural Resources Act, and a federal law, the Migratory Birds Convention Act. In *Daniels* Sam Freedman took a dissenting position, and the Supreme Court, on appeal, upheld the majority view by a split decision. In the appeal to the Supreme Court, one of the dissenting judges, Emmett Hall, quoted passages from the Freedman judgment, stating that he was in "full agreement" with him.¹¹

Shortly after he retired as judge and chief justice, Sam Freedman was asked by an interviewer to say which of his judgments in particular stood out for him above all the rest. "That's not easy, if you will allow me to say," Sam said. But he went on to cite two judgments delivered late in his career, both of them constitutional matters: *Reference Re Questions Concerning the Amendment of the Constitution of Canada* (1981);¹² and *Forest v Attorney-General of Manitoba and Attorney-General of Canada* (1979).¹³

My judgment in the constitution case would be one in which I take the most pride. The part of it that I would stress would be my analysis of prior dealings of the court with the issue of conventions developing into law. My conclusion was that there had not been a strong enough pattern established to constitute a full-fledged convention ready to be evolved into a law. I said we were on our way towards that goal, but had not arrived there as yet. The *Forest* case, dealing with the language laws of Manitoba, is a judgment which I can point to without a sense of shame, or anything like that.

⁹ (1966), 57 DLR (2d) 365, 56 WWR 234.

¹⁰ Unreported. See Cameron Harvey, ed, *Chief Justice Samuel Freedman: A Great Canadian Judge* (Winnipeg: The Law Society of Manitoba, 1983) at 108, 195.

¹¹ *Ibid* at 110.

¹² [1981] 2 WWR 193, 7 Man R (2d) 269; see Appendix II, at page 277.

¹³ [1979] 4 WWR 229, 47 CCC (2d) 417.

After making these brief points in an interview, Sam Freedman said: "There are others. But I don't think there's any point in praising my judgments in this manner. Let's turn to something else."

In the 1980 constitutional case, which came in response to a proposal for patriation of the Constitution made by Prime Minister Trudeau, Freedman's judgment typically included a brief history lesson and illustrated an acute sense of the complexities of the dispute that surfaced after what he astutely referred to as "the last (or should I say the latest?)" of the attempts to find an "amending formula."

On appeal the Supreme Court of Canada affirmed the Manitoba decision in *Concerning the Amendment of the Constitution*, although it did not elaborate on the consequences for other intervening legislation enacted only in English.¹⁴ The Supreme Court would say, on the matter of what makes for a "convention", "We respectfully adopt the definition given by the learned Chief Justice of Manitoba, Freedman C.J.M. in the Manitoba Reference..."¹⁵ And almost fifteen years later, in a new edition of *The Dictionary of Canadian Law*, Daphne A. Dukelow and Betsy Nuse continued to use the same Freedman definition for both the "constitutional convention" and "convention" entries.¹⁶

Although the long-suffered constitutional crisis would have many another day in court, the Manitoba Court of Appeal was the first court to rule on the struggle between the provinces and the federal government over the Constitution.

After the *Forest* case, Sam Freedman wrote to his friend, Supreme Court Justice Bora Laskin, who at the time was in a hospital in Vancouver, recovering from a recent surgery—"a third operation in less than two months." Sam remarked: "I am personally sorry that you were not able to be on the Court when our French language case was being

¹⁴ [1979] 2 SCR 1032, 2 Man R (2d) 109. See Barry L Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review* (Toronto: Butterworths, 1988) at 266-67.

¹⁵ For the Supreme Court decision, see Reference re Questions Concerning Amendment of the Constitution of Canada as set out in O.C. 1020/80 (1981) (sub nom. Resolution to Amend the Constitution of Canada, Re) [1981] 1 SCR 753, [1981] 6 WWR 1.

¹⁶ Daphne A Dukelow & Betsy Nuse, *The Dictionary of Canadian Law*, 2d ed (Toronto: Carswell, 1995) at 235, 253.

argued earlier this month. Your absence left a visible and serious gap.”¹⁷



Fig. 10

Mine has been, as it turns out, a kind of illusory retirement. I don't work evenings; I don't work weekends. That is the main distinction from what occurred before. In my work with Aikins, MacAulay & Thorvaldson

¹⁷ Letter from Sam Freedman to Bora Laskin (23 October 1979), Winnipeg, Provincial Archives of Manitoba (box 92, file no 4).

I deal mainly with the litigation lawyers. In practice my function is to advise the firm's young lawyers on legal questions, give them my opinions, help them over rough spots, and generally steer them in the right directions. This firm draws the best students available each year. There are a lot of sharp minds here. I have to maintain the illusion that I know more about this work than they do. It's not always easy, and how long I can continue to maintain that illusion, I don't know. In any case, I enjoy what I'm doing. It has presented me with a task in hand every day. I don't have to wake up to the mournful experience of saying, "What am I going to do today?" I have law work to do, so there is no question, and there is no boredom. I find it an exciting thing to be continuing in the law, albeit in a different capacity from that in which, over a long career, I had previously been engaged.

My life work as lawyer and judge (nineteen years as a lawyer prior to my retirement, thirty-one years as a judge, fifty years in all) led to other avenues of interest and endeavour. Thus it was at least partly because I was a judge that I was invited to assume offices of leadership in the University of Manitoba and the Hebrew University of Jerusalem. So too with the invitation to be the commissioner on the run-through inquiry. The government wanted a person of independence and impartiality, and the judiciary was the ideal place in which to find such a person. And so it has been, in regard to other aspects of my life.

I love the judicial role, and I still cherish it, even though I'm no longer doing it. It is an important, necessary role in our society. Not everyone possesses the judicial temperament, though. You have to have a balanced approach to life and be able to listen to the other side. Those abilities, combined with the right intellectual equipment, will produce a superior judge. For most of us, this is an aspiration, rather than an attainment. But although I revere my profession, I am aware of its shortcomings. I know that it is administered by human, fallible men, and that it has imperfections, but I have a deep reverence for law and the judicial process. Several areas of the law particularly call for reform, and many of them have been the subject of investigation by one or another of law reform commissions set up in recent years. The courts themselves can cling to the laws as they are, or they can interpret laws more widely, responsive to change, growth, and adaptation. I hold to the latter view. Going back to what Roscoe Pound, former Dean of the Harvard Law School, and internationally recognized as an ornament of the legal profession, said

about the law in general: our courts must be stable, but they must not stand still.

If my approach of philosophy as a judge had to be expressed in a few words, while standing on one foot as it were, I would say that my philosophy was to prefer substance over form, to recognize that procedure with its rules is the handmaid and not the mistress of justice, to remember that procedural rules are an avenue to the attainment of justice and that they should never be a roadblock. I like to think that I am a liberal. I do not regard it as a term of abuse but as a badge of honour. It is a difficult principle to define, but I believe it has to do with recognizing the worth of an ordinary individual and personality, and aspiring to bring a harmony between law and justice.

If any young man should ever ask me my advice about choosing law as a profession, I would tell him that if he sought rewards of great wealth, the law was not its best source; that if he expected a life that would be easy, unmarked by study and toil, the law was not for him; that if he expected supreme mastery of his profession, he would be disappointed because in law perhaps more than in other professions, what one knows is always so measurably less than what one needs to know. Performance lags behind aspiration, and man's portion is the road and not the goal. But to travel that road on which great men of a great profession have travelled before him—Mansfield and Story, Jessup and Marshall, Holmes and Cardozo, Erskine and Marshall Hall and Clarence Darrow—can be a stimulation, an enrichment, and a high and satisfying adventure. Among the people in the field of law who have had the greatest influence on me I would acknowledge the influence of great names like Lord Denning, an innovative judge who has helped to shape the law. Or Mr. Justice Cardozo, whose judgments of luminous felicity provide us with a happy blending of the law and literature.

As I have always pointed out, and as I hope I have shown, my judicial philosophy has consisted of four attributes: that reverence for the judicial office, which I have mentioned; a desire to maintain contact with the world beyond the judiciary; a recognition that life is not always grim, that there is a lighter side; and a strong allegiance to Canada. A personal point of importance is that in all of my various areas of endeavour I believe I was able to function without any compromise of my integrity. This was so because the things I was called upon to do did not involve conflicting

loyalties but rather concentric loyalties—to being both a good Jew and a good Canadian.

I have always had a public love affair with Canada. In assessing Canada, though, 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, like law, lawyers, and judges, 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 critic, 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 whatever 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 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 recently. It still has a message for those who believe in the rule of law. Durant 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 despondency 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.