

The 1970s: War Measures and the Chief Justice

“Four things,” said Socrates, “belong to a Judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially.” No ideal can be higher for any man who occupies judicial office.

[Speech, “Some Aspects of My Profession,” Empire Club, Toronto, Jan. 5, 1961]

CHALLENGES TO THE RULE OF LAW

[Speech to the Empire Club, Royal York Hotel, Toronto, 14 January 1971]

What do we mean by the rule of law? The phrase embodies many ideas: In its best, its most ideal sense, it implies a government of laws and not of men; it rests on the concept of equal justice for all; it springs from an appreciation of the worth of the ordinary individual and of the dignity of human personality; it aspires towards that higher morality in which law and justice will be one; and it recognizes that the courtroom, no less than parliament itself, remains the citadel and the sanctuary of our democratic faith.

But we live in a time of change, when established institutions are subject to critical scrutiny and frequently put on the defensive. The law itself has not escaped from such challenge and such attack. And that raises some very pertinent questions. How do we bring about a change in the law? What methods are permissible, and what are impermissible? How do we respond to a morally unjust law? Is it ever appropriate to disobey a law? The last question brings us face to face with the problem of civil disobedience, a phrase which invokes memories of John Milton denouncing England’s law for the licensing of books by an official censor, of [David Henry] Thoreau refusing to pay a general tax to a government that countenanced slavery, of Mahatma Gandhi peacefully refusing to comply with laws in order to bring an end to British rule in India, and Martin Luther King Jr. openly but peacefully disobeying

laws that deprived Negroes of their rights. Civil disobedience represents one form of challenge to the rule of law. In a moment I shall look at it, to see if it is ever legitimate, and, if so, within what limits.

But first I wish to comment upon the permissible and the impermissible methods for bringing about a desired change in the law. A free society acknowledges the right of dissent. Indeed it places a high value upon it, recognizing that it is not always the majorities that hold the keys to progress. The dissenter has several avenues open to him through which he may express his dissatisfaction with an existing law—by speeches, by circulation of petitions, by picketing (which has been described as a form of symbolic speech), by the organization of peaceful marches, and, ultimately, by the ballot, to put in office new lawmakers. All these are legitimate courses he may take.

But there is no right to seek change by unlawful means. If I were to attempt to classify that kind of action in a few words I would describe it as conduct that wrongfully interferes with the rights of others. It may take several forms—trespass, illegal seizure and occupancy of premises, intimidation, personal assault, and organized violence. Events of recent years have made us all familiar with these forms of conduct. Admittedly violence is not a new phenomenon, even though recently we have witnessed manifestations of it in new and diabolical forms. But whether new or not, and wherever exhibited, violence is as wrong as it is dangerous.

In Canada the political pressures of the 1960s and the historical tensions between Anglophone and Francophone reached a culmination in the October Crisis of 1970, which resulted from the kidnapping of both British diplomat James Cross and the Quebec Labour and Immigration Minister Pierre Laporte by separate cells of the Front de Libération du Québec. Laporte was eventually murdered by his kidnappers, and Cross was released in exchange for free passage of his captors to Cuba. The kidnappings followed seven years of bombings that had resulted in several deaths and injuries.

Prime Minister Trudeau's response to the crisis was to invoke the *War Measures Act*, a move that in itself created one of the country's most bitter civil liberties conflicts. The *Public Order Regulations, 1970*, outlawed the FLQ and made unlawful "any group of persons or associations that advocates the use of force or the commission of crime as a means of or an aid in accomplishing governmental change within Canada." Walter Tarnopolsky summarizes the results: "In the end,

some 497 persons in all were arrested, of whom, by February 1971, 465 were released and 32 were still in detention. Of all those arrested, only 62 were charged. Of these, less than one-third were convicted.”¹

For anyone who had followed his career, or who had heard speeches such as “Youth—the Police—and Community Relations” (chapter 9, *supra*), Sam Freedman’s position on the *War Measures Act* would not have been surprising. He supported Trudeau’s intervention and affirmed not only his abhorrence of violence as a means to achieve change but also his unrelenting belief in the rule of law. In this stance he pitted himself against most champions of civil rights—this from someone who had spent a career advocating for and supporting civil liberties. Though he was unequivocal about his position, the conflict placed him within what were perhaps the worst moments of his career.²

The day after Laporte’s body was found, Sam took part in a nationally televised debate on the CBC program *Weekend*. Two short segments of the program appeared on succeeding Sundays. Unlike the other members of the panel, Sam supported the *War Measures Act*.³ “No one but a fool would deny that it carries within itself the seeds of danger,” he said to the TV audience. “Any lover of civil liberties will recognize that this is an extreme measure. Its justification is that it was necessary.” Sam had his qualms about the TV program. In a letter to his friend Nathan T. Nemetz of the B.C. Court of Appeal, he remarked, “Actually less than one-third of the programme was used, and I have the distinct impression that in editing out the unused two-thirds the sponsors made sure that my favourable references to the Government, to Trudeau, and to Turner did not come before the viewers.”⁴ In a note scribbled at the bottom of a letter to Sam, Nemetz had said, “Your TV performance was non pareil!” Sam, or someone else, must have complained about the brevity of the segment—Richard

¹ Walter S Tarnopolsky, “Civil Liberties During the Post-Centennial Decade” in Julio Menezes, ed, *Decade of Adjustment: Legal Perspectives on Contemporary Social Issues* (Toronto: Butterworths, 1980) 48.

² Conversation with Mrs. Brownie Freedman, Winnipeg, 2 August 1995.

³ Interview of Sam and Brownie Freedman (15 April 1983) on *24 Hours*, CBC Television, Winnipeg.

⁴ Letter from Sam Freedman to Nathan T Nemetz, Court of Appeal, Vancouver, BC (29 October 1970), Winnipeg, Provincial Archives of Manitoba (box 91, file no 5).

Nielsen, executive producer, and Pat Ferns, producer, sent Sam a telegram apologizing that “fuller use was not made of the discussion.”⁵

In a crisis calling for special measures, Sam argued later in one of his talks, the *War Measures Act* was the only measure available. The alternative—lengthy debate in Parliament—would not have worked. He admitted, though, that “it seems that the Quebec authorities spread the net too wide and with insufficient care.”⁶

In the speech delivered to the Empire Club in Toronto just a few months after the crisis, Sam introduced himself as admittedly “a partisan, as one with a commitment to the free society; as one also who believes that the keystone of such a society is the rule of law.”

Let me turn to the question of civil disobedience. There are two propositions which I put before you. The first is this: as a member of the judiciary who has a deep respect for law and the judicial process I say, simply and sincerely, that laws are to be obeyed. I do not counsel or advocate disobedience to law. Having said that, I must add the second proposition. There have indeed been instances in human history—not many but enough to be significant—in which disobedience to law has proved of benefit to law and to society. Is that a paradox? Perhaps so. But it’s true. Who will deny that the cause of mankind was advanced by the deliberate refusal of Martin Luther King Jr. and his followers to obey the “white only” laws of the southern states? Dr. King openly declared that many Negroes would disobey “unjust laws”. These he defined as laws binding on a minority but not binding on the majority. Civil disobedience in the classic tradition has two distinguishing characteristics. First, it is always peaceful; and, secondly, those who engage in it must be prepared to accept the penalty arising from breach of the law. The purpose behind their breach of the law is to expose it as immoral or unconstitutional, in the hope that it will be repealed or changed.

But it is important to note what is *not* civil disobedience but which frequently tries to masquerade under that name. Sometimes individuals or groups participate in demonstrations involving breaches of public order, if not actual violence, and then seek to label their conduct as civil disobedience on the theory that they were protesting against some form of government action,

⁵ Winnipeg, Provincial Archives of Manitoba (box 101, file no 18).

⁶ Notes (in pencil) re “The War Measures Act,” undated, Winnipeg, Provincial Archives of Manitoba (box 64, file no 1).

say the war in Vietnam, or some such thing. Coupled with that stand is usually a claim for immunity from prosecution. The short answer to this is that they are wrong on both counts. Non-peaceful conduct can never qualify as civil disobedience, and even conduct that does so qualify confers no immunity from prosecution. Indeed the very opposite is the case. The person who commits an act of civil disobedience expects that the law will take its course and that he will have to suffer its penalty.

On this whole subject of civil disobedience I am bound to say that there is only a narrow range within which it may legitimately operate. Its conditions must be accepted and its consequences faced. I may add that at best it is a perilous adventure for individuals to choose which laws they will obey and which they will disobey. In the words of a former American judge: "Thoreau was an inspiring figure and a great writer; but his essay should not be read as a handbook on political science."

I move on to a second challenge to the rule of law. I call it courtroom disruptions, for that is the form it takes.

Is this something new? In the form in which it is manifested, yes. Disruptions of court proceedings, rare though they have been, have not been unknown in legal history. But they have usually resulted from impulsive and thoughtless acts on the part of disgruntled litigants.

Thus there was the case in England of a dissatisfied litigant who was committed to jail for six weeks for throwing tomatoes at the Court of Appeal. It is said that he was released after fifteen days because Christmas was coming and, one may legitimately assume, his aim had been poor.

Then there was the incident, probably apocryphal, concerning Lord Coleridge. An irate litigant picked up a book from the counsel table and hurled it at Lord Coleridge. His Lordship quickly ducked, then raised his head, and said, "Had I been an upright judge I would have had it!"

But I am thinking of courtroom disruptions of a different kind. These are deliberate, and their aim is either to frustrate the normal working of the judicial process or, in some cases, to publicize a political cause, perhaps even one having no relation whatever to the case before the court.

An illustration of the latter type occurred in England last year. During the course of a trial in the High Court before Mr. Justice Lawton and a jury, a group of Welsh students from the university at Aberystwyth suddenly invaded the court. "They strode into the well of the court. They flocked into the public gallery. They shouted slogans. They scattered pamphlets. They sang songs. They broke up the hearing. The judge had to adjourn. They were removed. Order was restored."

Why did these students do what they did? They were demonstrating for the preservation of the Welsh language and protesting against an order, harmful to their cause, that had been made by a Welsh court. Later in the Court of Appeal Lord [Alfred Thompson] Denning would be heard to praise their motives, albeit to condemn their methods. “They wish,” he said, “to do all they can to preserve the Welsh language. Well may they be proud of it. It is the language of the bards—of the poets and the singers—more melodious by far than our rough English tongue.”

I pause only to note that Lord Denning was not then thinking of the old ditty:

Not far from his dwelling
 From the vale proudly swelling
 Rose a mountain, its name
 You’ll excuse me from telling.
 For the vowels made use of
 In Welsh are so few
 That the A and the E
 The I, O and U
 Have really but little
 Or nothing to do,
 And the duty of course
 Falls the heavier by far
 On the L and the H, the N and the R.⁷

Well, although aware of the praiseworthy motive of the students, Mr. Justice Lawton quite rightly acted that very day to deal with their flagrant contempt. Eight of the students who agreed to apologize were fined £50 each and in addition were required to enter into recognisances to keep the peace. Fourteen others who, as a matter of principle, refused to apologize were sentenced to three months in prison. They immediately appealed, and their appeal was heard just one week later; the Court of Appeal put aside all other cases in order to deal with that one, since it concerned the liberty of the subject.

Hear now Lord Denning in the Court of Appeal: “The course of justice must not be deflected or interfered with. Those who strike at it strike at the

⁷ From the poem, “Patty Morgan and the Milkmaid’s Story” by 19th century English poet Richard Harris Barham (who wrote under the name “Thomas Ingoldsby”).

very foundation of our society. To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it.”

And on the subject of the sentence: “The appellants here no longer defy the law. They have appealed to this court and shown respect for it. They have already served a week in prison. I do not think it necessary to keep them inside it any longer. The appellants are no ordinary criminals. There is no violence, dishonesty or vice in them.”⁸

The judgment of the Court of Appeal was that the students be then released from prison, but that they be bound over to be of good behaviour, to keep the peace and to come up for judgment if called on within the next twelve months.

Quite different is what occurred in the trial of the Chicago Seven.⁹ There, you will remember, we had the spectacle of unruly defendants deliberately hurling insulting epithets at the judge. The tactics were designed to be, and in fact were, disruptive of orderly judicial process. What should be done in a case of that kind?

The situation presents a conflict between two principles. On the one hand, every accused has a right to be present, to hear the witnesses, and to make full answer and defence to the charge. On the other hand, a judicial trial is to be conducted peacefully and with dignity. Here in Canada we have made provision for dealing with a possible conflict between these two concepts. Our *Criminal Code* expressly provides that “The court may ... cause the accused to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible.”¹⁰

In such circumstances the court, although not obliged to do so, might give consideration to appropriate alternatives, one example of which could be to make the proceedings available to the accused in the form of two-way television.

In Chicago, however, the method resorted to was to bind and gag the unruly accused. There may be worse methods of dealing with the problem, but I am puzzled as to what they might be. I am afraid that what occurred in Chicago, on both sides, will not be recorded as America’s finest hour in the administration of justice.

⁸ *Morris and Others v Crown Office*, [1970] 2 WLR 792 at 797.

⁹ The Chicago Seven—Abby Hoffman, Jerry Rubin, David Dellinger, Tom Hayden, Rennie Davis, John Froines, and Lee Weiner—faced charges, including conspiracy and inciting to riot, resulting from large-scale protests that took place outside the Chicago site of the Democratic National Convention in 1968.

¹⁰ *Criminal Code*, RSC 1985, c C-46 s 650(2)(a).

I share Lord Denning's view that the course of justice must not be deflected or interfered with. Admittedly the power to punish for contempt of court should be sparingly used. When that power is exercised it is done so, not to vindicate the personal dignity of the judge (which is not the important consideration at all) but rather to uphold and protect the due administration of justice. I firmly believe that the maintenance of the rule of law requires that unruly activists or courtroom disrupters—litigants, accused, counsel, or strangers—be dealt with firmly, promptly, and fairly; as was done with the Welsh students in England, and as assuredly we should do here.

I turn to a third challenge to the rule of law. Let me call it violence for political ends. It may take a variety of forms. They are all familiar to you, and I need not linger upon them. Their grim catalogue includes blowing up of buildings, planting bombs in post boxes or, perhaps, in a supermarket—bombs timed to explode at the busiest hour—hijacking of planes, sometimes with the passengers held at ransom, political kidnappings, and the ultimate crime of murder itself.

Events in Canada, arising from the illegal activities of the FLQ, have given us a special awareness of the dimensions of terrorism. The crisis of last October has been and continues to be the subject of active discussion. Many are the observations that can be made about it. Let me make three brief ones now.

The first is this: it appears to be relatively easy to perpetrate a successful political kidnapping. Since September 1969, in a period of sixteen months, there have been a total of eighteen of them throughout the world. It is of course impossible to provide adequate security for every possible target. In the result many an honourable public figure must remain vulnerable to this form of attack.

Secondly, let us not be deceived into believing that the danger in October was not grave because the membership of the FLQ embraced only a few hundred persons or, at most, a few thousand. If there is any lesson we can learn from the tragic events of recent times, it is that a small number of persons, determined in purpose and scornful of law, can inflict havoc and terror entirely out of proportion to their numbers. I do not know how one measures the power of instruments of terror in terms of human beings. I do know that one bomb, or one explosive, or one machine gun in evil hands is capable of subduing or immobilizing vast numbers of innocent and peaceful citizens.

Thirdly, let us not commit the error of thinking that because FLQ activity is directed towards a political end it thereby becomes legitimate and permissible. Criminal acts remain criminal even if politically motivated. This

is a point that ought to be obvious, indeed axiomatic; yet in some quarters it remains a matter of doubt or dispute.

I do not wish to leave this subject without adding a word on the manner in which the October crisis was met. The debate upon it continues. But I suggest that after all the weighing, and pondering, and assessing, and analyzing are done, one thing remains, and it is the heart of the matter: what the FLQ did in the Cross and Laporte matter was a frontal challenge to the rule of law; and what Canada did by way of response was a courageous refusal to yield to that challenge. Canadian leadership in an hour of trial met the threat of terrorism head on. In the language of *The Economist* of London, it declined to submit to an act of terror and thereby did something to make terror a less credible weapon.

I am aware that the steps which were taken, even as a temporary measure, have been criticized as an invasion of civil liberty. Such criticism must be respected, and it must be seriously considered and assessed. But I venture to suggest that the Canadian action proceeded from the necessities of the situation; that no other practical option was available; and that despite its unpalatable features, its broad effect was to vindicate and uphold the rule of law against a sinister threat to it that was unique in the Canadian experience.

One final word. Our revulsion against violence and terrorism should not blind us to the existence within Quebec of grievances that call for attention. Here let me make it clear that I am thinking not alone of Quebec but of Canada as well. Canadian Confederation was a bold experiment carried through in the face of many difficulties. Now, after 103 years of development and growth, we confront the question of whether Canada can continue as a viable entity. Do we want it to continue? Our answer to that question will reflect our conception of Canada, of what it is and, even more, of what it is striving to be. Let us think of a Canada made up of the two founding races and of many other ethnic groups, all making their contribution to the common treasury of Canadian citizenship; a Canada cherishing the ideal of democracy rooted in freedom; a Canada rejecting the dislike of the unlike and tolerant of everything except intolerance; a Canada in which justice based on the rule of law is honoured throughout the land. That is the kind of Canada to command the allegiance of us all. Let us strive with steadfastness and fidelity to bring that Canada nearer and nearer.

Although most civil libertarians attacked Trudeau's use of the *War Measures Act* and its later (December 3, 1970) replacement, the *Public Order (Temporary Measures) Act*, 1970, and a majority of New Democratic Party members officially criticized the action in Parliament,

public opinion was solidly on the side of the government action—the government received a general approval rating of as high as 85 per cent. Prominent among supporters of the government position was university professor Frank R. Scott, a recognized authority in constitutional law, civil liberties, and Anglo-French relations, and one of the original policy-makers for the New Democratic Party. Scott stated in late October, “Trudeau, in the light of the request from the Province of Quebec and the evidence of an organized conspiracy, could not have refused [to provide] emergency help.”¹¹

As a judge Sam Freedman could not, as he once said in an interview, “become involved in any political controversy.”¹² Yet it would seem that his support for Trudeau’s imposition of the *War Measures Act* was indeed such a controversy. Certainly it was seen that way by Mr. Justice Thomas Berger of the B.C. Supreme Court just over ten years later. Berger, speaking at a university convocation in November 1981, criticized the recent constitutional accord for ignoring the rights of Native Canadians and Quebecers. Among other things, Berger had remarked that, “the decision of all Canadian first ministers to abandon native rights as one of the prices for agreement on the constitution was ‘mean-spirited and unbelievable.’”¹³ A complaint about Berger’s speech went to the Canadian Judicial Council, a body newly established under the *Judges Act* and composed of the chief justices and associate chief justices of the superior courts, and chaired by the Chief Justice of the Supreme Court. After an inquiry, the Judicial Council found that Berger had acted improperly and reprimanded him for violating the principle of judicial independence.

In his defence, Berger referred to Sam Freedman’s support for the *War Measures Act* as a Canadian precedent for a judge expressing a point of view on what is a public matter. “Chief Justice Freedman went on television in October 1970, to declare his support for the invoking of the *War Measures Act*,” he said in a letter to the Canadian Judicial

¹¹ *The Winnipeg Tribune* (31 October 1970).

¹² Myron Love, “Hon Samuel Freedman: Reverence for Scholarship, Zeal for Truth & Justice”, *The Jewish Post* (21 August 1986) 10-11.

¹³ *Advocate Citizen* (Ottawa) (10 November 1981); reprinted in FL Morton, ed, *Law, Politics and the Judicial Process in Canada*, 2d ed (Calgary: University of Calgary Press, 1992) at 108-9.

Council.¹⁴ Later Berger argued that the Executive Committee of the Council had displayed

an enterprising selectivity The Committee says it does not have the facts about Chief Justice Freedman's expressed public support for the invoking of the War Measures Act in 1970, and is therefore in no position to comment on it. This is hard to understand, for the facts are well known to every lawyer and judge in Canada who claims any knowledge of public affairs. In any event, as Chief Justice Freedman sits on the Judicial Council, the Committee could have obtained the facts (if there is any doubt about them) by asking him.¹⁵

Berger resigned from the Bench in May 1982.

At least one newspaper columnist had noticed Sam Freedman's foray into politics in 1970. Ron Haggart, in *The Toronto Telegram*, noted,

The fact that 85 per cent of the Canadian people will agree with Mr. Justice Freedman's political assessment of the FLQ crisis does not alter the impropriety of his deliverance of it.

Judges cannot have it both ways. They cannot claim the sanctuary of non-political positions, with their appointment and tenure not subject to debate in Parliament and the Legislature, and, at the same time, enter the political fray on such issues and at such times as they choose.

It is particularly distressing that Mr. Justice Freedman, a Federal appointee, should enter the political arena to voice his approval of Federal Government policies.

¹⁴ Letter from Thomas R Berger, The Supreme Court of British Columbia, Vancouver, BC, to The Right Honourable Bora Laskin, Supreme Court of Canada, Ottawa, Ont (3 December 1971); reprinted in Morton, *supra* note 13 at 113. The Canadian Judicial Council was established in 1971 as a means of supervising judicial behaviour, with a statutory mandate to conduct inquiries into alleged judicial misbehaviour. Chaired by the Chief Justice of the Supreme Court of Canada, its members include the chief justices of the provincial courts of appeal. Sam Freedman thus sat on the Judicial Council after becoming Chief Justice of Manitoba.

¹⁵ Letter from Thomas R Berger, The Supreme Court of British Columbia, Vancouver, BC, to The Right Honourable Bora Laskin, Supreme Court of Canada, Ottawa, Ont (21 May 1982), Winnipeg, Provincial Archives of Manitoba (box 15, file no 1). The Council's response and a later address by Laskin to the Canadian Bar Association that discussed the conflicts involved in "the Berger affair" appear not to have commented on Berger's comparison with the Freedman intervention; Bora Laskin, "The Meaning and Scope of Judicial Independence" (address to the Annual Meeting of the Canadian Bar Association, 2 September 1982); reprinted in Morton, *supra* note 13 at 115-20.

The fact that his views are popular does not make them any the less political. The fact that few judges in the country have such an enviable reputation for good sense and humanity on the bench makes it all the more distressing.¹⁶

A half-year after the October Crisis, Sam was appointed Chief Justice of Manitoba, becoming the first Jewish Chief Justice in Canada.

Speculation about the appointment had begun at least five years earlier, in late 1966, when news broke that Chief Justice Calvert Charlton Miller would be retiring early in 1967. Miller, appointed to the post in March 1961, had taken a year's leave of absence as of December 1965 due to illness, during which time Sam was acting Chief Justice. Late in 1966 newspaper reports appeared suggesting Freedman as the likely choice for next Chief Justice of Manitoba. In December of that year, Sam's friends Lucy and Alan Bronfman in Montreal sent him a clipping with the headline "May Succeed Chief Justice, Press Reports," with a photo of "Mr. Justice Freedman" and the caption "Likely Successor". The Bronfmans added a handwritten note: "I am in favour and so would thousands of other friends and admirers be—Love to Brownie. Lucy and Allan."¹⁷ The article quoted Sam as saying: "I regret the public speculation on the subject. Beyond that I have no comment."

Another newspaper article, probably from *The Winnipeg Tribune*, dated Dec. 21, 1966, was headlined "Chief Justice C.C. Miller Expected to Retire Soon," and also named Sam Freedman as the "most likely successor."

In the event, it was Sam's colleague on the court, C. Rhodes Smith, who was named Chief Justice, causing newspaper columnists Douglas Fisher and Harry Crowe to speculate on the problems of political appointments and what they saw as a resulting lowering of the judicial calibre:

Mr. Trudeau gives the impression that quality is his aim yet there is the simple fact that in Manitoba he appointed a judge recently to the top judicial post of the province whose main distinction had been a short provincial political career.

After electoral defeat the party set him up with a fairly long and undistinguished stint on a Federal Labor Board in Ottawa; from which he was returned a few years ago to Manitoba as a judge.

¹⁶ Ron Haggart, "Keeping Judges on the Bench", *The Toronto Telegram* (19 January 1971).

¹⁷ Winnipeg, Provincial Archives of Manitoba (box 70, file no 7).

Now this man has been put in the senior position of the province's superior court. Passed over was Judge Freedman, recognized as one of the most distinguished jurists in the country. Mr. Freedman was certainly a Liberal in his politics, but he'd never run the constituency gambit.¹⁸

On March 10, 1971, came yet another of those long-distance phone calls that marked turning points in Sam's life.

I had known, of course, that I was up for consideration. The rumours were Freedman or Dickson, Dickson or Freedman—Brian Dickson being one of my colleagues on the court. Then came a great moment in my life—Wednesday, March the 10th, at 11:45 a.m. the telephone rang and the operator said, “Mr. Justice Samuel Freedman, long distance is calling,” and then a lady's voice came on and said, “The Prime Minister is calling.” A moment later Mr. Trudeau's voice came on. I had never met him in person, but immediately recognized his familiar voice. The call took place about five days after his marriage to Margaret, and after the opening formalities I had the presence of mind to jump in and say, “Mr. Prime Minister, may I join in the congratulations on the happy event.” He laughed and thanked me. I attempted a few words of pleasantries in his own language, which in turn evoked from him a few sentences in French—they were too quick for me and I immediately reverted to English, and we stuck to that language for the rest of the conversation.

Related to that, a few years later, when the Supreme Court of Canada was celebrating its one hundredth anniversary [1975], the Canadian Judicial Council met in Ottawa, having planned its meetings to come just before the Supreme Court celebrations. On the last night of those celebrations we were at a dinner given by the Governor General at Rideau Hall. The Prime Minister and Margaret were there, and Margaret must have been in the ninth month of carrying her last child. After dinner we found ourselves in a little group talking—Brownie and Mrs. Dorothy Farris of British Columbia and Margaret were talking, and I was a few steps away from them with Pierre Trudeau. I reminded him of our telephone call in

¹⁸ Douglas Fisher & Harry Crowe, “When Trudeau Goes, Who Knows?”, *The Winnipeg Tribune* (7 December 1967), Winnipeg, Provincial Archives of Manitoba (box 101, file no 17).

1971, and how it was just a few days after his marriage and it had been on the tip of my tongue then to say, “And now I assume you are calling me for guidance on this new venture?” But, I told him, “I decided this was a flippancy one shouldn’t indulge in with prime ministers.” He laughed and, pointing to Margaret’s stomach, said, “As you see, I did not need guidance.”

In 1971, the minute the call came, I knew why he was calling me. It was a call for which I had been waiting and waiting. When he told me that his reason for calling me was that he wanted to make me the Chief Justice, I almost knocked the table down in my eagerness to say yes. He told me that he would be presenting the appointment to cabinet the next day, Thursday, and after that he would make the public announcement. After we finished our brief conversation I telephoned Brownie and said only, “He sounds on the telephone exactly as he sounds on the television.” She said, “Did Trudeau phone you? Are you the Chief Justice?” I said, “I will be. He said to keep it under wraps until tomorrow.”

By Thursday evening we had bought the liquor, and the table at our place was set. We had been waiting for the public announcement, and it hadn’t come, and it didn’t come that night. Around the Freedman household there was a tremendous feeling of letdown—it was not a celebration but a wake. The *Tribune* heard rumours, telephoned me, and though I told them nothing they ran a story on Friday, “Freedman to Get Top Post.”

Such articles are dangerous things, because in Calgary a lawyer named Riley was expected to be appointed to the Bench. His picture appeared in the newspaper: “Likely Judge.” A day or two later a man named Cairns was appointed, which caused some wag to say, “Cairns will now live the life of Riley.”

The announcement finally came on Friday. The first thing that morning, about 9 a.m., I got a call from a young man I knew, a lawyer, who had been a lecturer at the Manitoba law school and was now at the Department of Justice in Ottawa, so he had an inside track. He phoned me to congratulate me. The news hadn’t actually been released, he said. The order-in-council had been passed Thursday afternoon but they hadn’t got the press release out. The announcement would come later that day. Brownie was anxious to telephone everyone. I said, “Wait, wait.” By about twelve noon we couldn’t hold back any longer and she began to make a few calls to friends. The announcement came on the air about one or two

o'clock. That evening friends came over, and our house was jam-packed. It was a great occasion for us.

My official duties began on March 20, 1971, with my salary, determined by the House of Commons, set at a rate of \$30,000 per annum, plus the additional expense allowance of \$2,000 per annum as provided by section 20 of the *Judges Act*. Things soon settled down. I had to write a lot of answers to letters and telegrams and resolutions passed by Hadassah groups. There was a great holy joy in doing all of that, and I answered every one of them.

On assuming my new status I couldn't help recalling that over the past nineteen years it had been my privilege to serve under four chief justices, and that now I was joining their ranks. For eight years as a judge of the Court of Queen's Bench I was a member of a court to which Chief Justice E.K. Williams had provided the dignity and the wisdom of his leadership. Then I moved from the Queen's Bench to take on the much more arduous duties of the Court of Appeal. While judges of the Court of Appeal are individuals playing their particular roles in the administration of justice, at the same time they are members of a team—members of an orchestra, as I put it earlier. It is very important to the effective functioning of the court for the team spirit to be operative. That doesn't mean there will be agreement on issues, and many cases will, of course, end in dissent. That is not in any sense inconsistent with team spirit. The question really is *how* are these things done? They should never be done in a spirit of acrimony. The personal aspect never comes to the fore. If there is a difference, it is an honest difference.

In evoking and maintaining that team spirit the Chief Justice can play a significant and pivotal role. Certainly the Court of Appeal I had known and worked in for the last eleven years, first under J.E. Adamson, then under Cal Miller, and then under Chief Justice Rhodes Smith, was at all times a court of harmony. As I took on the mantle worn with such grace and distinction by these men, it was my hope that the Freedman court would be a pleasant and harmonious court. Indeed, in my whole experience on the Court of Appeal, I can remember only one or two instances of heated dissent, not publicly but privately. There were no such cases after I became Chief Justice. Inevitably differences of opinion arise, but they are resolved honourably by honourable men. As it turned out, we had a good court. We didn't fall behind in our workload, and we were to be always more concerned with substance than form.

The Chief Justice, to use the old familiar Latin expression, is “*primus inter pares*,” first among equals. Members of the Court of Appeal were all equal in the sense that we all had one vote. The Chief Justice is first among his brethren because he presides in court and presides over meetings of the judges, including the discussions after hearings of those panels to which he has assigned himself. Then there is a further function of the Chief Justice: he determines when the Court of Appeal should sit as a full court of five members. We did that very early on after my appointment with a capital murder case, and with a constitutional case, and thereafter would do it with any case that seemed of sufficient importance to require a full court.

One benefit of being Chief Justice was membership in the Canadian Judicial Council, which had just been formed when I received my appointment. Membership consisted of all the chief justices of Canada. Thus we were a small but prestigious body. We were involved in the field of continuing legal education for judges. A good judiciary is an informed judiciary. We also helped judges get a fair deal in terms of remuneration.

There’s no doubt that the judge is under the compulsion of giving effect to the law even if the result does not please him. Where we are dealing with a statute whose terms are abundantly clear, and there is no way of circumventing its application, we have to administer the law as it stands, even though we may have preferred otherwise. I think every judge, at some time in his career, faces that problem, where he finds himself the prisoner of a statute. It may sometimes be that his decision may serve as an instrument for later amending the law, and that would be some consolation to him.

Sam Freedman’s appointment was followed not long after by two other Jewish appointments to top positions in superior courts: Nathan Nemetz became Chief Justice of British Columbia; and in 1973 Bora Laskin would become Chief Justice of the Supreme Court of Canada, sitting “at the apex of the pyramid,” as Sam put it in an interview.¹⁹ Sam wrote to a friend, “Wasn’t Bora’s appointment a wonderful thing? I think he is a great judge and a great person.”²⁰ After Sam sent him a warm letter of congratulations on his “elevation to the topmost judicial

¹⁹ Interview of Sam Freedman by Lorne Brandes (1978-79) Winnipeg.

²⁰ Letter from Sam Freedman to Hon E Patrick Hartt (17 January 1974), Winnipeg, Provincial Archives of Manitoba (box 96, file no 4).

office in Canada,” Laskin replied, “What a thoughtful friend you are!”²¹

Laskin’s elevation to the office of Supreme Court Chief Justice was the subject of some controversy at the time, not so much because he was Jewish but because he had only been sitting on the Supreme Court panel for three years. He had been appointed to the Court on March 23, 1970. Most of his career (1940–65) had been in the academic world, where he had developed a reputation as a legal scholar. In 1965 he had been appointed to the Ontario Court of Appeal. In an interview in the late 1970s Sam remarked about the Laskin appointment:

The government did not apply the rule of seniority in making the appointment, but the simple fact is that there had been no rule. There had been a practice in the last few appointments of selecting the senior man. But the cabinet, the prime minister, and the minister of justice in the end had to take the responsibility for the appointment, and they are not bound to appoint the senior man. They didn’t in the case of Bora Laskin, and on the record Bora’s performance has been splendid and the noses that were out of joint originally have to a considerable degree been straightened out.

CHIEF JUSTICE BORA LASKIN

[Introduction to Bora Laskin, who was speaking at the eleventh annual lecture, Manitoba Law School Foundation series, Winnipeg, November 28, 1975; these introductions, done annually, usually appeared in *The Winnipeg Free Press*]

It has been said that there are two kinds of judges—judges of caution and judges of valour. The judge of caution sees his function as the limited one of expounding the law. He tends to look backward to precedent and the leading case. He likes nothing better than to find in the law books a similar case to the one before him, and then to rest his decision on that earlier case.

The judge of valour perceives a more creative role for himself. He recognizes with Roscoe Pound that the law must be stable and yet it cannot stand still. He is aware of the organic character of the common law. He sees it as an instrument that is capable of adaptation and growth, one that has developed through wise judicial use.

²¹ Letter from Bora Laskin to Sam Freedman (25 January 1974), Winnipeg, Provincial Archives of Manitoba (box 92, file no 4).

Some observers regard Laskin as a Canadian Denning. There is good reason for linking these two jurists, for each in his own way is the prototype of a liberal judge. Like the judgments of Lord Denning, those of Laskin are often infused with a moral quality. They reflect a deep concern for individual rights and human welfare.

Some of Chief Justice Laskin's great judicial utterances have been made in dissent. Someone has said that the dissenter, knowing that the present cause is lost, speaks to the future. Perhaps Laskin spoke to the future when he declared that a Toronto art exhibit on the theme of love was not obscene; or when he asserted that a wife's labours at the side of her husband should not go unrewarded when their marriage ends; or when he condemned inequality of treatment between an Indian woman and an Indian man as a violation of the Canadian Bill of Rights.

Bora Laskin's career has been a distinguished one in various fields—as a law professor, as a discerning commentator on the law and its problems, and as an illustrious judge. Chief Justice Bora Laskin is assuredly a judge of valour, a creative judge, one who believes that the law must serve life. He is sensitively aware that the judicial process can be an instrument for the attainment of social ends, as well as a shield and a safeguard of the freedom of the individual.

The always heavy Freedman workload became increasingly so with the appointment as Chief Justice. "You should be kinder to yourself," a concerned friend had written a few years earlier. "Once you shed the Chancellorship, Sam, things should be a bit easier for you—unless you decide to replace that responsibility with another almost as heavy."²²

In the 1970s, as Ed Ratushny, at the time the special advisor to the minister of justice, put it, the role of the provincial chief justices was "continuing to increase in importance as problems of court administration continue to increase."²³

One administrative problem that the Chief Justice of the Court of Appeal—and the Manitoba court system in general—faced during the 1970s was an expanding court workload. A letter from the Law Society of Manitoba, Jan. 15, 1974, made the case for increasing the number of judges, stating: "People are finding it increasingly difficult to have their

²² Letter from Arnold Karlins, Minneapolis, to Sam Freedman (17 March 1968), Winnipeg, Provincial Archives of Manitoba (box 72, file no 1).

²³ Ed Ratushny, "Judicial Appointments: The Lang Legacy" in Allen M Linden, ed, *The Canadian Judiciary* (Toronto: Osgoode Hall Law School, 1976) 45.

causes heard at early dates and at convenient times.” The judges in both the Court of Queen’s Bench and the Court of Appeal “are subject to the burden of rendering an ever increasing number of judicial decisions.”²⁴ The number of appeals brought to the higher court had increased from 88 in 1958 to 294 in 1973. “Because of the changed nature of our economy,” the memo said, “cases are becoming more technical, complex, and of longer duration.” Meanwhile the number of appeal court judges remained the same, fixed at five. In a December 1973 letter, Sam told his correspondent that the list of cases lined up for the sitting beginning January 4 was “staggering.”²⁵ The heavy load would continue throughout his years as Chief Justice, and a common complaint in judicial circles during the time was that the administration of justice was underfunded. In May 1977 Sam wrote to his friend Arnold Karlins: “Our Court calendar is heavy both in the numerical sense and in the quality of cases up for decision. We have a number of reserved judgments awaiting our decision. Those are always the hardest. And I am not without extra-judicial responsibilities.”²⁶

In June 1973 Sam received an honorary degree (D.C.L) from the University of Western Ontario—one of sixteen such degrees he received during his career. His speech to the university convocation touched on a prevailing political event of the time, the Watergate scandal.

**FROM “CONVOCATION ADDRESS OF CHIEF JUSTICE
SAMUEL FREEDMAN”**

[University of Western Ontario, Friday, June 8, 1973]

We meet at a time when the squalid revelations of the Watergate affair have shaken the American nation and sent a tremor through it, a tremor whose reverberations are felt in lands both near and far. I speak here with some diffidence. Questions of culpability still have to be resolved, and in

²⁴ Memo from the Law Society of Manitoba, Law Courts, Winnipeg, to the Attorney General of Manitoba (15 January 1974), Winnipeg, Provincial Archives of Manitoba (box 91, file no 1).

²⁵ Letter from Sam Freedman (11 December 1973), Winnipeg, Provincial Archives of Manitoba (box 74, file no 4).

²⁶ Letter from Sam Freedman to Arnold Karlins (6 May 1977), Winnipeg, Provincial Archives of Manitoba (box 76, file no 6).

those areas judgment must be suspended, with due regard to the principle of the presumption of innocence. But enough has already emerged and been judicially determined to shock the moral sense. Thus the Watergate bugging is not a matter of speculation or mere accusation but of established fact. And the cover-up is no less a matter of established fact, the only doubt surrounding it pertaining to its extent and to the identity of the participants in it.

One's head must be bowed in shame at the spectacle of men in high places following paths of trickery and deception and trampling on the simple virtues of truth and honour. Not what is right but what we can get away with appears to have been the test. What a sad commentary Watergate offers on the inverted values that had been allowed to creep in and tarnish American political life. Truth appeared to be in retreat, honour on the defensive, and morality in a state of blackout.

Yet we must not lose our faith in the American nation and in its capacity to survive the painful trauma it has experienced. For let us remember that the United States is a free society, erected on principles of democracy, and seeking always to tread the road to freedom. That road took a tragic detour at Watergate, but the great mass of Americans are deeply and basically committed to doctrines of honour and integrity, and they will assuredly put the nation on the right path again.