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The Politics of the 1960s: South Africa, Civil Rights, and the Rule of Law

One day in court, in a case against O'Sullivan, one lawyer referred to his opponent's case as a "semantic quibble." Looking down from the bench, Judge Freedman said to the first lawyer, "I am disappointed to find that you are anti-semantic."

[Note in Freedman file, undated, University of Manitoba Faculty of Law Archives]

In Spring 1964, while attending a meeting of the Board of Governors of the Hebrew University of Jerusalem,[1] I received an interesting speaking invitation at a breakfast arranged by four distinguished members of the Jewish community of South Africa. They had heard me speak at the Jerusalem meetings, and now they asked me to be the speaker for that year's South African United Israel Appeal. The stay in their country would last for about four weeks, and the time suggested was August. I accepted the invitation with enthusiasm.

> In preparing for the South Africa trip, Sam left a terse note for his appeals court secretary regarding his impending absence: "Open all mail. Mr. Justice Freedman's life is an open book!"[2]

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1 Freedman was awarded an honorary degree by the Hebrew University of Jerusalem at these meetings.

2 Note to Sam Freedman's secretary (23 July 1964), Winnipeg, Provincial Archives of Manitoba (box 68, file no 7). Following the instructions regarding his mail, Freedman proceeded to outline a short note that the secretary could use as a model for responses to letters in his absence.

We left Winnipeg on July 25 and returned on August 30, with a short stopover in Nairobi, Kenya, on the outgoing trip and a similar one in London, England, on our return. In South Africa I made eighteen speeches in all—with about twelve of them full-length efforts and the others about ten minutes in duration. But perhaps the most interesting feature of the trip was our own exposure to a society markedly different from our own. We came face to face with a crucial problem of our times—"apartheid". In actuality this officially sanctioned "separate development" meant white supremacy and black subservience. Everywhere we went we saw the signs "Whites Only" or "Europeans Only". Apartheid is so savage a doctrine that it could only be sustained by policies of savagery, including banning orders and job reservations.

We saw the evidence of apartheid and we also talked to some of its opponents on the white side, including novelist Alan Paton and Member of Parliament Helen Suzman. We found that our Jewish hosts had an ambivalent attitude towards apartheid. They were the beneficiaries of the system: they lived very comfortable lives, had an abundance of servants, all cheaply paid, and they earned large incomes. In conversations our new friends would try to defend the policy of apartheid—relations with blacks were just as bad in the United States, they would say—but it was evident that their hearts weren't in it. The knowledge that their prosperity was achieved on the backs of black South Africans was something in which they could take no pride.

We were glad to have had the South African experience. The land is one of sheer physical beauty. The people are friendly, and intelligent. What marred the picture and imparted to it a fatal flaw was apartheid. The words of J. Wendell Johnson have application here: "A nation organized for only one race is living on borrowed time."[3]

The accession to the prime ministership of B.J. Vorster in 1966, following the deplorable death by violence of Hendrik Verwoerd shortly after his re-election that year, focused worldwide attention once again upon the South African problem. Verwoerd had developed the policy of

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[3] Freedman had spoken out publicly on South African racism at least as early as 1950. "Racial policies of South Africa are a denial of the principles of tolerance and understanding upon which the British Commonwealth is based," he told the Manitoba Optometric Society, as reported in "South African Race Policies Held a Danger", *The Winnipeg Free Press* (1 February 1950).

apartheid, banned the African National Congress, and withdrawn South Africa from the Commonwealth, declaring it a republic in 1961. Some commentators saw in the change of leadership a potential source of hope and of promise. I confess that based on my trip I did not share that optimism. Indeed, the one bright light piercing the general gloom attendant on the return of the Verwoerd regime to power that year was the re-election to Parliament of Helen Suzman. Brownie and I had been fortunate enough to have lunch at her home in August 1964, and at the time she was pessimistic about her chances for re-election. That mood was reflected later in a splendid profile of her in *The New York Times*. We were doubly glad, then, that people in her constituency had the good sense to return her to Parliament.

By the mid- to late-1960s politics in North America and abroad had reached a boiling point. Running parallel to Sam's continuing work as a judge were other events and preoccupations: his trip to South Africa; intensifying U.S. civil rights conflicts, the heightening Vietnam War; his responsibilities as chancellor of the University of Manitoba (which placed him in the middle of the student activism of the time); and his involvement in the labour struggles of the decade, especially through the railway run-through commission. All of these, combined with his own fifty-plus years of experience as a Jew in an Anglo-dominated society, played a major role in the formation of his concerns during the period, which were in turn reflected in key speeches of the time.

A FREE SOCIETY AND ITS INSTRUMENTS

[The North Lecture, delivered at Franklin and Marshall College, Lancaster, Penn., October 27, 1966]

The twentieth century has brought to a focus a clash between two fundamental ideologies. One worships the sovereignty of the individual, the other the sovereignty of the state. One grants all the freedoms—freedom of speech, freedom of the press, freedom of assembly, freedom of conscience—the other governs by oppression and terrorism. One has an ethical outlook on life and believes in the dignity of human personality; the other has the pagan outlook on life and believes that man simply eats, and sleeps, and lives, and dies, and goes down into the ditch like the beasts of the field.

May I suggest another kind of contrast. There are various forms of a free society, exhibiting freedom in varying degrees. I would like to contrast the free society as we know it on this continent, with a society which is, to a considerable extent, unfree; one which is, to a marked degree, akin to a police state. That state is South Africa.

In our month in South Africa my wife and I had many discussions on the South African question, both with supporters of the Nationalist government and with its opponents. After the trip I found myself reconsidering the instruments of a free society as we know them in North America and contrasting that picture with a somewhat gloomier picture as it exists far away in South Africa.

I know it has become fashionable to adopt a note of disparagement when talking about the institutions of representative government and the lawmakers who serve us; but I believe that beneath all the criticism is a recognition that the institutions themselves represent something of enduring and imperishable value.

I sometimes think that we tend to value too lightly that which we enjoy continuously. Somehow the tang and the savour wear off. Yet the whole apparatus of democratic government—the right of franchise (not restricted on the basis of race or of colour); the secret ballot; the accountability of members of Congress and of Parliament to the people through recurring elections; the system of checks and balances resulting in a division of power; the carrying on of public business under the pitiless glare of publicity, and always in the knowledge that there may be criticism from the opposition, from the press, from the public—are not all these instruments of a free society, and do they not help to secure human rights?

I know that our parliamentary institutions, our congresses, are human and fallible instruments. Yet I suggest they have been the source of beneficent legislation safeguarding human rights. If our concern is human rights, we can point to fair employment practices acts, fair housing accommodation acts, a civil rights bill, among others, all of which attest to the concern of our legislators with the matter of human dignity, and to their recognition of the need for taking effective steps in its protection. I concede that our legislatures and our congresses have sometimes faltered and failed. But, by the same token, they have taken some great steps forward. I often think that the way of man's progress is not in the form of a straight line, but rather in the form of a spiral. Occasionally he may slip back—occasionally he has slipped back—but I suggest that in this area of human rights the broad total picture is one of steps taken which have never been fully retraced, that the movement is forward and that it is bringing man nearer and nearer to the light. We may not be able to

legislate *for* the human heart, but we can legislate *against* human bigotry; and the U.S. Congress and our Parliament have done just that.

The other instruments of a free society—the rule of law, the free communication of ideas, the academically free college or university—are equally important. America, for instance, was born of the urge of freedom. Freedom has been a part of its heritage since the days of Jefferson. I suppose the story of Jefferson's last days is part of the folklore of the American people. Jefferson had prayed that he be spared to live to the fiftieth anniversary of the Declaration of Independence. He lived exactly to the fiftieth anniversary of that day. In a letter to a friend, written shortly before his death, he wrote: "Here we stand as a bulwark against the return of tyranny and of bigotry. As for me I prefer the dream of the future to the history of the past."

And I think of my own country, no less free than the United States. I recall a story told in connection with the life of a former prime minister, Sir Wilfrid Laurier, on the occasion of the Diamond Jubilee of Queen Victoria in 1897. One day while Sir Wilfrid was attending this Jubilee, he became engaged in conversation with one of the English statesmen of that time. This was a period when Canada was just beginning to embark upon the immigration policies which were to bring to our shores many people from Europe and other lands. This English statesman said to Sir Wilfrid, "You already have in your country Englishmen and Frenchmen. Now you are embarking on a policy which will bring to your country Russians, Germans, Italians, and Belgians, and so many others. With all these people, what will the nationality of Canada be?" Sir Wilfrid replied, "The nationality of Canada will be freedom."

I am aware that the ideal of the free society has not been realized in all its completeness in either the United States or Canada. But the objective has constantly been before us as a glorious ideal, and towards its attainment we have been working. If we are to succeed in our purpose, what will be required, above all else, is a spirit of tolerance and of understanding, a determination to reject the dislike of the unlike, and above all a recognition of the great words of John Morley: "Tolerance means a reverence for all the possibilities of truth. It means an acknowledgement that she dwells in diverse mansions, and wears a vesture of many colours, and speaks in strange tongues."

That is the ideal, noble and glorious but difficult to achieve. To bring the day of its achievement nearer and nearer is a cause for which all of us should strive with steadfastness and with fidelity.

SOME REFLECTIONS AS THE YEAR 1968 ENDS

[Speech typescript, place and date unknown]

The task of improving human relations cannot be in the nature of a crash program. It operates slowly, it moves ahead silently, it advances imperceptibly. Essentially it is nourished by a climate of goodwill, and anything that contributes to the creation of such a climate—however small or even local an endeavour—is deserving of our esteem and our applause. In the words of Dr. Michael Novak, "It takes a lot of men in a lot of places to change the quality of life on this planet so much as by a featherweight."

We meet hard upon the close of the year 1968. It has been a year crowded with events, not all of them happy, but surely a year of action, of excitement, of significance. It was the year of heart transplants and the Olympic games, of continuing war in Vietnam and peace talks in Paris, of student power and the colour problem, of law and order and Chicago's Mayor Daley, of the Pope's encyclical and Russian aggression in Czechoslovakia, of the presidential election and the shadow of George Wallace, of the assassination of Martin Luther King Jr. and Robert Kennedy and the miracle of Apollo 8.

From the vantage point of a tumultuous year just ended and a new year that has just begun to unfold, I should like to offer some observations on two matters, not entirely unrelated, which in the context of our time speak to us with special urgency. The first of these is youth, the New Left, and student power. The second is the problem of colour in human relations.

Youth, the New Left, and Student Power

Turning my attention to the first question I take as a starting point a perceptive observation of Diana Trilling. She reminded us that just as the industrial revolution of the last century brought into being a conscious working class with "grievances" and "demands" and "interests", so the cultural revolution of today has brought into being a new class, youth, with its special demands and interests. The expression of those demands has brought us face to face with a new phrase, student power. Let me say at once that I do not recoil in horror at the sound of that phrase. As one who is not entirely without credentials to speak in this area, perhaps I may indicate where I stand.

I place myself on the side of the students. That does not mean I endorse all their objectives or all their methods. But I am convinced that on balance society stands to gain from the assertion of student power. There is a strong case for student participation in university government, and the sooner that fact is recognized the better. A stubborn and hard-nosed refusal on the part of

those in the seats of power to acknowledge the legitimacy of a student role in government will only exacerbate the situation and make its solution more difficult. Let us not forget that we are dealing with young adults who are one of the constituent elements of the university community; that as such they may be expected to have a proper concern for the manner in which the institution is governed; and that their claim for a place in its governance is accordingly understandable. In my view it is not only understandable but justifiable as well.

I put this justification on the grounds of equity and utility. In some aspects of university affairs the case for a student voice can hardly be disputed. I have in mind problems relating to student residences, to dining facilities, to parking, to discipline, and the like. Some would stop there, contending that students lack the maturity, experience, and objectivity to deal with broader questions of academic policy. I do not share these views. Some students are equipped, others are not, to make a contribution in this field. The task would be to select the right ones. Admittedly students may not have all the answers, perhaps even none. It is sometimes enough to ask the right questions. To expose a problem is itself a contribution.

For myself, if I may deal with the matter momentarily in local terms, at the University of Manitoba I would accord students a place not only on the Senate, but also on the Board of Governors. Nor would I object to open meetings with respect to all non-confidential matters.

On this whole question of student power there has been fault on both sides—on the part of boards and administrations on the one hand, on the part of students on the other. Let me take a quick glance at both.

Some months ago the disturbances at Columbia University in New York City riveted our attention. Student excesses and illegalities in the form of seizure of campus buildings and the holding of university officials as hostages deeply disturbed and shocked us all. Here was misconduct that was obvious. Less obvious but not less real was the fault of the administration. An independent Commission headed by Archibald Cox, former solicitor-general of the United States, subsequently found that a large share of the blame for the crisis at Columbia must be laid at the door of the administration. Insensitive and arbitrary, university officials seemed to be completely out of touch with the mood and the feelings of the campus over which it was their destiny to preside. They forgot that their stewardship was a trust and that the university did not belong to them. One may recall in this connection what was once said of even the great Dean Roscoe Pound, that he ran the Harvard Law School as if he had just bought 51 per cent of the stock.

Coming closer to home, we have seen in our neighbouring province of Saskatchewan a recent manifestation of a "no-nonsense, let's get tough, we'll show them" policy towards students. The decision to cease to collect student organization fees as a punishment for student excesses and improprieties in their campus newspaper has been described as a fiscal sledgehammer to impose censorship, and that indeed is what it appears to be. Will a hard-line attitude of that character solve anything? I question it. By this action the board is telling the students, "Collect your own fees. We'll have nothing further to do with you in that regard." This is not communication but deliberate alienation. Administration needs to be reminded that it is sometimes the part of wisdom not to use all the strength that one possesses.

The student record is similarly marked by blemishes. There is a minority among them who militantly and proudly proclaim themselves as adherents of the New Left. What is the New Left? It is not easy to identify or define it with precision. The literature on the subject tells us that the adherents of the New Left believe in existential politics, the politics of feeling and action rather than of clearly defined goals. They say that one should feel and act first, and that the experience of feeling and action will of itself produce the goals. Here, as Arthur M. Schlesinger Jr. has pointed out, is an interesting development in human conduct. It was the ideal of libertarian democracy to seek means proper to and consistent with noble ends. But the Stalinists parted company with this doctrine and asserted that any means, no matter how harsh or violent, could be adopted; for in their eyes the end justified the means. Now the New Left propounds a still different doctrine, namely that the means create the ends.

Here surely is something at once fallible and dangerous. What goals of value can we expect from tactics of disruption and acts of violence? To say that they will generate their own goals is to ignore the very real risk that they will rather produce countermeasures, and that from the resultant clash the liberal goal of a university as a custodian of the life of reason will tend to disappear from view.

Cordial as I am to the student cause I should yet like to offer to them a few words of benevolent advice.

First of all, let them not cherish the delusion that idealism was invented by youth and is the prerogative of youth alone. Progressive ideas have all through the ages owed much to men of maturity. In our own day we need think only of Pope John XXIII, of Bertrand Russell, of U.S. Chief Justice Earl Warren, seekers all for the betterment of human beings. Let the students think of these things, with humility and without arrogance.

Secondly, let them not overreach themselves. Student influence is one thing; student control is quite another. There is a sound case for the former. But there is nothing to be said for student control, which is as wrong in principle as it is unrealizable in practice. Student power may be acceptable, student tyranny never.

Finally, let them not think that they are faced with a choice between two extremes: reaction on the one hand, revolution on the other. There is a third way. The liberal way of reason, of moderation, of persuasion is admittedly neither as spectacular, nor as dramatic, nor as speedy perhaps, as the way of violence. But it leaves less scars. And, above all, it is moral in spirit, lawful in nature, and likely to prove more enduring in character.

The Problem of Colour in Human Relations

I turn now to the problem of colour in human relations. One of the grave challenges of our times stems from the confrontation of colour between whites and non-whites. It is not a new problem, but events of our time have invested it with a special character and a new urgency. What is the setting in which the colour problem must be considered? Three factors, among others, are relevant and significant in this connection.

The first is the emergence on the world scene of the Afro-Asian nations, newly arrived at statehood and independence. With their new status went expectations of equality in treatment of blacks and whites. A second factor was the widespread acceptance in principle of the values contained in the Universal Declaration of Human Rights enacted by the United Nations. And a third factor is the pathetic recognition that everywhere we are moving too slowly in translating those values and principles into practice.

How shall we deal with the colour question? Many are the answers that might be offered. Let us see the answers that some have given.

There is, first of all, the South African solution. It consists of the policy of apartheid, euphemistically described as "separate development"—the whites here, the blacks there. In actuality it means white supremacy and black subordination, and that indeed is its purpose. It operates territorially. Blacks and whites live in separate areas. It operates economically, with the job reservation laws that reserve certain jobs for white people only. Apartheid operates politically. The right of franchise is the badge of a free people, but in South Africa there is an exclusively white parliament and almost total disfranchisement of the non-white population.

A harsh law can only be enforced by harsh measures. The methods of enforcement of apartheid are shocking to anyone who believes in a free society. Banning orders in the nature of house arrests, orders for detention

without trial, and similar repressive measures are pathetically common. I suggest to you that apartheid is no solution and that it cannot permanently endure. In a nation of eighteen million people, fourteen million of them cannot be kept permanently in a state of subjection. A nation organized for only one race is living on borrowed time.

There is the Enoch Powell solution. Last April the world was startled by the pronouncement of this Conservative Member of the British Parliament that coloured immigration to the United Kingdom should be stopped immediately and many coloured people already there should be sent home. Here too was apartheid, in a different sense perhaps, but still a manifestation of racism pure, undiluted, undisguised.

Who is the man who advocated so reactionary a policy? A recent profile on Enoch Powell by Frank Melville gives us some insight into his outlook and his character. No uncouth thug is Enoch Powell, but a cultivated and accomplished Greek scholar. He suffered a frustration early in his professional career when, after graduation, he failed to secure a teaching post in Britain's classical establishment and had to settle for a teaching appointment in Sydney, Australia. A poem that he wrote in the 1930s conveys something to us about him, though I am sure it would convey much more to a psychiatrist:

> I hate the ugly, hate the old,
> I hate the lame and weak,
> But most of all I hate the dead,
> Who lie so still in their earthen bed,
> And never dare to rise.

At the time when Powell put forward his racist policy he spoke with the authority not only of a Member of Parliament but also of a member of the Conservative shadow cabinet. This was happening not in Mississippi or Alabama, but in England, the cradle of modern freedom.

That this could occur in England was sad enough. But sadder still was the breadth of popular support which his utterance evoked. The opinion polls came down heavily on Enoch Powell's side. So too did the letters to the press. But there were countervailing forces of sanity and reason as well. Edward Heath, the Conservative Party leader, fired Powell from the shadow cabinet. Prime Minister Harold Wilson declared that Powell was "dragging politics into the gutter." The London *Times* said that Powell's was "an evil speech." Another editorial called it "the most disgraceful public utterance since the days of Sir Oswald Mosley," the man who had founded and led the British Union of Fascists in the 1930s.

Neither South Africa's nor Enoch Powell's way offers an acceptable solution. The only answer which a free society can accept to the colour problem is one which recognizes the dignity of human personality and which weighs all men in the same scale regardless of the pigmentation of their skin. Though the realization of the answer still eludes us, there are some signs of hope as well. On this continent civil rights legislation has sought to curb discrimination in housing, in public accommodation, in employment. The Supreme Court of the United States in a landmark decision has declared that segregation in education does violence to the American constitution. In truth what we have and what we see in this continent is not evil alone or good alone, but evil here and good there, injustice manifest in one area, justice in another, discrimination at this point, equality at another. For those who believe in freedom there is a challenge to be alert and responsive to all manifestations of injustice. But, as one writer has said, "Many men are capable of seeing and not seeing, of seeing and forgetting, of seeing and not caring, of seeing and doing nothing at all, of simply refusing to see, or of seeing something else."

We should try to avoid the tyranny of the majority outlook. Let me illustrate what I mean. Not long ago I heard a distinguished American Negro refer to a textbook in wide use in the United States for children in primary grades. In this textbook there was a picture of three men. One man was dressed in overalls, the second in an ordinary business suit, the third in a tuxedo. The simple question which the children had to answer was, "Which man is going to work?" According to the text, there was only one correct answer, namely the man in the business suit. But what of the child from the Negro ghetto, who saw his father in a business suit only when dressed for church on Sunday? Or the Negro child whose father was a waiter and who customarily wore a tuxedo to work? Strangers to the culture of the majority, these children were doomed to respond with the wrong answer. Surely the obvious lesson here is that those who are responsible for educating all should approach their task with greater sensitivity to the outlook and attitudes of the minorities within their midst.

And what of Canada? What is the application of the things I have said to our own country? On the issue of human rights how do we fare? Not as well as we should—as the Indian, the Eskimo, and the disadvantaged of all races will attest—but better, significantly better, than most nations.

Within our country two major groups and several minor groups are still learning the lesson of living together as Canadians. The problem is frequently made more difficult by counsels of extremism coming from two different quarters: from those who speak the language of group exclusiveness or

separatism on the one hand, and from those who would impose conformity to a fixed pattern on the other. But we are in truth a nation of minorities, each acknowledging only one allegiance, to Canada, yet all able to contribute something of their special cultural heritage to the common treasury of Canadian citizenship. And out of the interplay of group with group can come reciprocal stimulations and enrichments making for a healthier and more vibrant civilization.

For Canadianism to work and to be meaningful, what is required is a high degree of tolerance and of understanding. I do not plead for an abstract love of humanity. The lovers of humanity in the abstract can cause a great deal of trouble. As G.K. Chesterton put it in his jingle:

> O how I love Humanity
> With love so pure and pringlish,
> But how I hate the horrid French
> Who never will be English!
> ...
>
> The villas and the chapels where
> I learned with little labour
> The way to love my fellow-man
> And hate my next door neighbour.

Not that [this] is the Canadian ideal, but rather the determination to reject the dislike of the unlike, to be tolerant of everything except intolerance....

On a plaque in the home of a great Canadian were inscribed these noble words: "The 19th century made the world a neighbourhood. The 20th century must make the world a brotherhood." Two-thirds of the century has come and gone, but this glorious ideal is still only a vision. Yet if we believe in freedom and in justice we must never lose sight of that honourable goal, far away though it is. Let us not yield to despair, to a mood in which we begin to doubt our beliefs and believe our doubts. Let us rather strive with steadfastness and fidelity to bring the goal nearer and nearer...

For Sam Freedman, civil rights were not an issue confined to the decade of the 1960s, but represented a lifelong commitment. The cases brought to the appeal court and which touched on the protection of human rights are many. In one well-known case, *Regina v Daniels* (C.A., 1966), Sam, in a dissenting judgment, upheld the rights of Indians to

hunt wild birds, even though this right conflicted with existing legislation. Another case from the late 1960s, *Regina v Ballegeer* (C.A., 1968), involved the right of an accused man to consult his lawyer—a right, as Freedman points out, enshrined in common law and backed up by the Canadian Bill of Rights. Certain facts of this case, Sam says, "are disturbing to anyone who prizes the rights of individual liberty in a free society." In his original trial the accused, Ballegeer, charged with the relatively minor theft of two tires from his workplace in a weather station, had pleaded guilty and been given a suspended sentence. The case came to the Manitoba Court of Appeal when Ballegeer's lawyer appealed the conviction and sentence and requested a new trial.

JUDGMENT: Regina v Ballegeer[4]

FREEDMAN, J.A. (for the Court): ... Numerous decisions show that there is a heavy onus on an accused who, after pleading guilty in court and after having been sentenced, seeks leave to change his plea to one of not guilty and to be given a new trial. In my opinion, the accused has satisfactorily met this onus....

For the Crown it may be pointed out that the police obtained from the accused a signed statement which, if admissible, is a clear confession of guilt. The accused, on the other hand, in his affidavit filed upon this appeal sets forth facts which, if correct, clearly show that he is not guilty of the alleged offence. He further deposes to facts which indicate that the statement he gave to the police was induced by the holding out to him of hope of reward if he should sign it and by the threat of punishment if he should refuse to sign it. He adds that this statement was signed by him without the benefit of legal advice, indeed with legal advice (which he had sought to obtain) being actively and deliberately denied him by the police. It is this latter circumstance which, in my opinion, is the heart of the matter and is decisive of the disposition that should be made of this appeal.

The facts surrounding this aspect of the case are disturbing to anyone who prizes the rights of individual liberty in a free society. Among these is assuredly the right, on being arrested or detained, to retain and instruct counsel without delay. This is a right enshrined in English common law, vindicated by many judicial decisions of high authority, and clearly and unmistakably affirmed in the Canadian Bill of Rights.

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4 (1968) 66 WWR 570, 1 DLR (3d) 74.

There may be cases in which a debatable question arises as to whether the accused's right of communicating with his lawyer was unduly delayed or hampered by the police. Such a question would have to be resolved upon its particular facts, with due regard to matters of time, place, availability of means of communication, and the like. This, however, is not such a case; in my view, no debatable question arises.

The sorry episode which occurred here, in denial of the civil rights of the accused, may now be described:

Shortly after 9:00 p.m. on Friday, June 21, two constables of the R.C.M.P. came to the remote weather observation site of the department of transport at the city of Winnipeg, where the accused was employed as a meteorological technician. They informed the accused that he was being charged with break, enter and theft. He asked to be allowed to make a telephone call to his lawyer. It may be noted that there was a telephone in the adjoining room. His request was refused. Here unquestionably was a patent and deliberate denial to the accused of a legal right.

Another employee of the department of transport then came to relieve the accused. While the constables were talking with this other employee the accused went into the adjoining office and, without the knowledge of the constables, placed a call to his lawyer, Mr. Rees Brock, at his home in Winnipeg. Before he was able to receive any advice from Mr. Brock, one of the constables came into the office and demanded that the accused give him the telephone. Mr. Brock then asked the accused to let him speak to the constable so that he could ascertain the nature of the charge and obtain information concerning bail. The telephone was then handed to the constable, who informed Mr. Brock about the charge. What took place thereafter is best set forth in the following extract from the affidavit of Mr. Brock:

"I discussed bail with Constable Taylor and then asked to again speak to Ballegeer. Constable Taylor refused, saying he wanted to get a statement first and get the tires back. I told Constable Taylor that I wanted to advise Ballegeer not to make a statement until I could talk to him, but Taylor refused. I asked Taylor to relay my advice to Ballegeer, but he said he would not do so."

In the Crown's lengthy report on facts to this court no attempt whatever was made to controvert the foregoing allegation.

Here is a spectacle of a police officer wilfully, and alas successfully, frustrating the due process of law. What the constable did was wrong and unjustifiable, and his conduct cannot receive the sanction of the court. Why he acted thus, contrary to law and to the usual and accepted practice, may be

gleaned from a telephone conversation which took place later that night. At about 11:30 p.m. after the alleged confession had been obtained from the accused, the latter, still in custody, again phoned Mr. Brock. Again I quote from Mr. Brock's affidavit:

"Constable Taylor came on the phone to explain his earlier refusal to allow me to continue my discussion with Ballegeer and told me he had driven 130 miles to get a statement from Ballegeer."

The constable had travelled a long distance in the hope of obtaining a statement from the accused, and evidently he was not going to permit a lawyer's intervention to prevent that purpose from being realized. His excessive zeal resulted in a denial of the rights of the accused.

In his affidavit the accused points out that when he appeared in court he felt that his signed statement committed him to enter a plea of guilty. I may add that he appeared at the hearing without counsel.

I would allow the appeal, set aside the conviction and sentence, permit the accused to withdraw the plea of guilty that was entered, and direct a new trial.

The "confession" made by Ballegeer in this case was not clear-cut. There was apparently some colour of right to the tires. There was a question of whether in fact a *real theft* in law had occurred. In the Court of Appeal we did not get all the facts, because this case came to us on the issue of the right to retain counsel without delay.

Given the setting of this case, I took the view that any statement made to the police must not be admitted into evidence; that this was obtained from the accused in breach of his fundamental rights to consult his lawyer. When Ballegeer told the policeman he wanted to talk to his lawyer, the constable said, "Not until I get a statement from you first." That is a shocking thing for a policeman to say. In fairness to the constable, I shouldn't say that he was deliberating trampling on human rights. Perhaps the truth of the matter was that he didn't know the common law, or because of his long trip to get to the accused, he felt compelled to ignore it. Although our disposition of the matter was to direct a new trial, in all likelihood this was never proceeded with by the Crown.

The interesting thing is that over the following ten years or so at least, the *Ballegeer* judgment was cited in various provinces in certain cases, not on the same kind of issue, but involving the principle of the right of an accused person to have access to counsel at the earliest opportunity. What happened in the *Ballegeer* case was the deliberate frustration by an officer

of the law of the attempt of the accused to communicate with his counsel, something which was his right to do.

This sort of thing happens periodically. Eternal vigilance is the price of liberty. The battle is never completely won. We have to defend liberty whenever it is invaded from any quarter. We used to get cases of varying kinds along these lines, one of the most common being when a confession is obtained by third-degree methods, with the result that the accused says, "I signed the confession but I would have signed anything to make them stop beating me." In all these instances we are faced with the problem of adequacy of proof. There is a denial by the police of the resort to violence; there is an explanation by the police officer about how the accused may have sustained certain bruises on his body. And the issue has to be decided by a judge as to credibility. He may decide that the accused voluntarily confessed, or he may decide the opposite. If he says the confession was voluntary, it is admitted into evidence. If he finds it to have been induced, the product of duress, he excludes the confession. There might then be an investigation into the conduct of the police.

The police have no right to require an accused to say anything. The customary police caution begins with the words, "You are not obliged to say anything." I am not certain that the police officers, when they recite the caution, necessarily say it with the appropriate degree of careful articulation of each word. Some may speed through it.

There is seldom an interrogation of an accused person with a lawyer at his elbow, because if the lawyer knows anything at all, he will say to the accused, "Do not make any statement whatever." There might be occasions on which the lawyer wants the accused to talk, in circumstances in which, 1) the client is manifestly innocent and, 2) he wants to put an end to the whole matter then and there rather than go through a trial. In such circumstances the lawyer may encourage the accused to talk, but that is in circumstances in which there is no risk that he could possibly be found guilty. I regard that as exceptional rather than the usual kind of case.

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In the 1960s I managed to maintain the energy to handle the two demanding positions—of an appeal court justice and university chancellor—only by divesting myself of virtually any free time for doing

other things that I might have wanted to do. Someone once said that our lives are made up of the compulsory things and the voluntary. For me the compulsory things—which were not at all distasteful—were matters growing out of my obligations as chancellor: to attend a meeting of the Board of Governors, a meeting of the Senate, a meeting of the Honorary Degrees Committee, of which I was chair, a meeting of the student body. The way I was able to do it was to give priority to the compulsory things, leaving little for the voluntary—the evening at home with a good book, for instance. For this I have no regrets. My nine years of chancellorship were rich, rewarding years leaving me with treasured memories.

One of the great moments of my chancellorship came on the day when my son Martin was graduating from the Faculty of Law as the gold medallist—the top student in the class. When he was announced as the gold medallist—and everyone knew he was my son, because a story had appeared in the press a day or two earlier—it brought down the house. I didn't get the gold medal coming out of law school, and Martin did. He has since given concrete evidence supporting the early promise of his student days.

My guess is that he did feel pressure, as a result of my career, to do well in law. But I don't think the effect of it was to dwarf his talents, but it was rather to try a little harder.

Meanwhile I continued on as university chancellor, in the end serving three terms—nine years—during what was a turbulent era for universities, the 1960s. A chancellor could be as busy and involved as he wanted to be. Most chancellors interested themselves in the Board of Governors, but never attended any Senate meetings. My inclination was to participate in the Senate, which deals with academic matters, and from the beginning I set an objective for myself, which was to reform the pattern of the university government. I fought hard during my tenure to change the rule that prevented faculty members from being eligible to serve on the Board of Governors. Professors were regarded as employees only. In 1959 I was a lone voice. By 1968, when I stepped down as chancellor, a new *University Act* was in place and faculty members now sat with lay members on the Board of Governors.

In 1959 the Board of Governors of the University of Manitoba consisted of fourteen people made up almost entirely of lay members from the outside community—nine of them nominated by the Lieutenant-Governor in Council, three elected by the Alumni Association, and with

the president and chancellor as ex-officio members. No faculty member was entitled to be on the board; this was spelled out in the university statutes. I took the view that this prohibition was shameful and that it excluded from the topmost council of the university the people who had the greatest familiarity with the nature of the enterprise. Who knows the university better than the permanent members of the faculty? They were kept out.

Matters had come to a head in 1963, when Dr. [Richard] Hiscocks, chairman of the Department of Political Science, had resigned over this very issue. In a public statement at the time I argued that the prohibition was "a businessmen's approach to the academic community"—a statement that clearly shocked the current board.

In 1968, when I retired as chancellor, the new *University Act* was coming into effect the very next day. It provided for five faculty members and one student representative on the Board of Governors, which had twenty-three members in all, and seven student representatives among the Senate's eighty members. The whole picture had changed.

I was only one among many factors pushing for change. Things changed over the years, and ultimately the issue was decided by the flow of events. Once, when I made a speech to the Canadian Association of University Teachers in Charlottetown on university government, I gave the standard arguments against faculty representation—I think they were ten in number—and refuted each one of them. I was told later that Claude Bissell, president of the University of Toronto, read the speech in the *CAUT Bulletin* and sent it on to Henry Borden, chairman of his university's board, who said he wanted each board member to get a copy. The significant thing, I believe, was that mine was the first voice from the Board of Governor's side welcoming faculty participation on the board.

The plan to alter the structure of university government encountered much resistance—from presidents and boards, from editors of daily newspapers, from various sections of the general public. Change is a traumatic experience; one does not accept it instinctively. Most of the arguments raised in opposition were spurious and stemmed from fears that were without foundation.

In due course the opposition weakened to the extent of agreeing to the setting up of a special Commission to study the problem. The members of that Commission were Sir James Duff of England and Professor Robert Berdahl of California. After more than a year of study

and investigation they issued their report. It recommended change. The Duff-Berdahl report produced a new climate of thinking on university matters in Canada. At the University of Manitoba, former defenders of the status quo began to yield, some acting from conviction, some making a reluctant accommodation to the flow of events. A special committee was set up to consider how to implement the Duff-Berdahl report.

My interest in faculty's right of representation had been eventually enlarged to include the students, whose contemporaries by the end of this period were elsewhere in North America in open revolt. The late 1960s was a time of great student unrest. During my last years as chancellor the term "student power", which was being bandied about by students all over the world, suddenly made its presence felt on the University of Manitoba campus, though not in the form of illegalities or violence. It was a democratic process. I believe I may have played a restraining role. I was open-minded and willing to listen. The special committee set up after the Duff-Berdahl report worked on the issues over a period of about two years and consisted of representatives not just from the Board of Governors but also the staff association, the students, and the alumni. As a result, when we made our final recommendations—and in certain areas we had to compromise—to the government of Manitoba we could do so in the full confidence that the proposals bore the approval of all the constituent elements of the university. And in the end the students too got their representation on the Board of Governors and in the Senate. I believed firmly that students could help improve the quality of discussion at board meetings and perhaps, through their participation in university government, make the university a better institution.

Another prominent human rights issue of the late 1960s was the dismal situation of Canada's Native peoples. Downtown Winnipeg had a sizeable population of Aboriginal people, some of whom inevitably found themselves confronting the justice system. A memo sent to the Chief Justice calls attention to the need to protect their rights before the courts and provides a background glimpse of the daily tasks of the Court of Appeal.

MEMORANDUM

June 5, 1969
To: Chief Justice C. Rhodes Smith

On June 4, 1969, the Court consisted of Freedman, Guy, and Dickson. We dealt with nine sentence appeals. Of these, three had counsel and six appeared in person. Two in this latter group withdrew their appeals when their cases were called. The other four prosecuted their appeals on their own. Three of these four were Indians. It is primarily with reference to their appeals that this memorandum is written.

As has happened in the past, an Indian appearing in Court without counsel tends to be overawed, inarticulate, and almost inaudible. The three Indians who appeared before us on June 4th were precisely in this category. It was a task of the utmost difficulty to get from them any statement in support of their appeal. The Court sought to be patient and helpful; and indeed what we were able to extract from the accused was the product of our efforts, with a minimum of assistance from the accused. None the less the proceedings were unsatisfactory, and, worse still, manifestly appeared to be unsatisfactory. So much so that Mr. Lawrence Greenberg, who appeared as counsel for the accused on the last case on the list, commenced his remarks by suggesting, as an officer of the Court, that something should be done to enable the appeals of these people to be more satisfactorily presented. He recognized that legal aid had been applied for but had been turned down in these cases. But he pointed out that in the City Police Court a qualified representative of the Indian group (whether a designate of the department or of one of the Indian or Métis organizations, I do not know) was always present to assist the Court. Sometimes he would function as an interpreter. Sometimes he would speak for and on behalf of the accused.

We had a brief discussion on the subject in Court, with Crown counsel (Mr. Goodman) participating. I indicated that the matter would be brought to the attention of the Chief Justice in order that the full Court may consider the problem and see what steps can be taken to alleviate the situation.

You may take it from here.
[signed] S.F. J.A.

YOUTH—THE POLICE—AND COMMUNITY RELATIONS

[Address, April 24, 1970, Calgary, Alberta]

... I wish to refer to two or three cases which, even if not typical, are worthy of note as relevant to the relationship between police and youth.

The first, a case decided by the Manitoba Court of Appeal, concerned a young man named Heffer. He had come from Vancouver to Winnipeg, arriving July 9th. He had $4.00 in his pocket. He went directly to the Unemployment Insurance office, where he obtained a pink card and a piece of paper containing the address of a casual employment firm in Winnipeg. After spending the night in a church which offered such hospitality to young people, Heffer walked downtown the next morning intending to register for employment. He sat down with some other youths on the steps of the Centennial Centre to rest and smoke a cigarette. A few minutes later the whole group was taken into custody by a Winnipeg police detective. This detective had earlier observed one of the youths, not Heffer, begging nearby. Heffer was charged with vagrancy. My colleague, Mr. Justice Brian Dickson, in a very significant and liberal judgment, spoke as follows:

> The sociological phenomenon of peregrinating youth is of relatively recent origin in Canada but not in Europe where it has long since been the custom of many young people of little means to roam from place to place, aided in some countries by the provision of youth hostels where bed and breakfast can be had at little cost.
>
> It cannot be the intent of (the law) to stigmatize as criminal every young person who travels across the country without employment and with little money in his pocket.

Heffer was accordingly acquitted. The detective in this case, while looking for the young man who had been begging, had overzealously arrested not only him but also his companions. Perhaps the detective was there relying on guilt by association—a concept quite without validity. The Heffer case underlines the fact that membership in the hippie group does not deprive a person of his ordinary civil rights.

Let me deal for a moment with the question of holding prisoners incommunicado and denying them the right of access to counsel. Some years ago in Toronto, at the conclusion of a football game between the Toronto Argonauts and the Montreal Alouettes, a demonstration occurred on the field. In the resultant melee a stadium guard collapsed and died, as it was later determined, from a heart attack. Two young men, Wright and Griffin, were arrested and taken into custody by the police. A short time later Wright's lawyer came to the police station to see him. He was denied access to his

client. The father of the other young man also came to the police station to see his son. He, too, was denied access, the police taking the position that until their investigation was finished no person could see either of the young men. Holding these young men incommunicado was unjustifiable and wrong, and it later became the subject of a judicial inquiry presided over by Mr. Justice [Wilfrid Daniel] Roach of the Supreme Court of Ontario. Mr. Justice Roach, dealing with the question of holding a prisoner incommunicado, said: "We are told that such a practice exists behind the iron curtain. There is certainly no room for it under our system of freedom under the law." Concerning the denial of access to counsel, Mr. Justice Roach said: "To prevent an officer of the court from conferring with the prisoner ... violates a right of the prisoner which is fundamental to our system for the administration of justice."

There is a suggestion in the Roach report that the police were acting on the advice of Crown counsel. I doubt whether any Crown counsel would give such advice today. Our own Court of Appeal dealt with this very matter not long ago in the case of *Regina v. Ballegeer*, which, as our Court determined, involved an unlawful infringement of the well-established right of an accused to retain and instruct counsel without delay.

In this connection we hear from time to time that under some police practices an accused is entitled to make one phone call and no more. I do not know the source or authority for this so-called rule. It has no basis in law whatever. An accused person is never to be barred from communicating with counsel, and his rights in that regard are not forfeited simply because his first phone call may have failed to produce results.

In the last analysis, if an infringement of the rights of an accused person occurs, it is the courts which must stand forth as the guardian and protector of individual freedom.

On this whole subject of youth, the police, the relationship between them, and community relations in general, what is needed above all else is proper attitudes. Confidence is better than suspicion, hope than despair. I suppose that in that sense the matters I have been dealing with here are akin to some of the larger problems which face our country, notably the problem of group relations in our effort to establish a meaningful Canadianism that includes not just the two major language groups but also the many minor ethnic groups in this country.

Towards the end of the 1960s a murder case came before the Manitoba Court of Appeal that also raised questions of an individual's rights before the courts. A jury had acquitted Ruth Thelma Piche of

the non-capital murder of her common-law husband, Leslie Pascoe, even though, as Sam said in his judgment, "There is no doubt that Leslie Pascoe came to his death as a result of a rifle shot fired by the accused."[5] The Crown appealed, making an argument about the admissibility of a statement made by Piche. The argument turned on whether that statement was *inculpatory* (that is, it would incriminate) or *exculpatory* (it would clear or excuse a defendant from alleged fault or guilt).

Until the Freedman ruling, a grey area had existed in the law regarding statements of accused persons. The generally accepted principle had been that an accused person did not have to volunteer any information upon arrest, but that if a suspect did so volunteer, and if that information led to implication in the crime, the police had to prove at the trial that the accused had spoken voluntarily before the statement would be admitted as evidence. Where things got more complicated was in considering what should happen if the statement *did not* implicate the accused. "What if," as one newspaper account of the judgment put it, "it only revealed a possible motive or destroyed a possible alibi? Or, in other words, made it almost impossible for [the accused] to win the case? Under the law, such a statement could be admitted as evidence without any proof that it was a voluntary statement."

The majority of the Appeal Court judges decided in favour of the Crown, saying that Piche's statement should be admissible. Sam argued the contrary, and his dissent was later adopted by seven of the nine members of the Supreme Court of Canada, creating, as Cameron Harvey puts it, "a significant precedent respecting the admission of exculpatory statements by accused to the police."[6]

The case again illustrates Sam's penchant for going beyond the particular facts of the moment and looking ahead to possible changes in the law in the future. In essence he asked the Supreme Court to clear up the matter once and for all.

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5 *Regina v Piche*, [1970] 1 CCC 257, 69 WWR 336.

6 Cameron Harvey, ed, *Chief Justice Samuel Freedman: A Great Canadian Judge* (Winnipeg: The Law Society of Manitoba, 1983) at 39. This case is also discussed in The Honourable Samuel Freedman, "Admissions and Confessions" in RE Salhany & RJ Carter, eds, *Studies in Canadian Criminal Evidence* (Toronto: Butterworths, 1972) 95.

JUDGMENT: Regina v Piche[7]

FREEDMAN, J.A. (dissenting): ... The accused, who is 21 years of age, was living with Leslie Pascoe in a common-law relationship at 90 Sadler Ave. in St. Vital, Man. That relationship was periodically stormy and quarrelsome, and it had a tragic termination. There is no doubt that Leslie Pascoe came to his death as a result of a rifle shot fired by the accused. Indeed, at the opening of the trial, her counsel formally placed on record before the judge and jury the following admission:

> ... the accused Ruth Thelma Piche, admits that ... Leslie Harrison Pascoe died as a result of injuries sustained when struck by a bullet discharged from a .30-.30 rifle, which rifle at the time of its said discharge was in the hands of the accused Ruth Thelma Piche.

At her trial the accused testified concerning the events of the evening of October 31 and the early morning of November 1. Pascoe and she were quarrelling. She said he was drunk, abusive and repeatedly yelling at her. Finally he lay down on the couch in the front room and fell asleep. The accused then went into the bathroom. Depressed and dispirited she kept staring at a number of Pascoe's guns which were hanging there. She determined to put an end to everything by shooting herself. For that purpose she took one of the rifles and came out. She then decided to give Pascoe a goodbye kiss but as she started to walk towards him the gun went off. The bullet struck Pascoe and killed him. It is a fair inference from her version of the events that at this time she was in a state of bewilderment and shock, and that she did not know whether Pascoe was alive or dead. The cries from the bedroom of her five-year-old child may have brought her back to reality. She stated that she hung the rifle back in its place in the bathroom. She then telephoned her mother, saying that she and the child would come over to spend the night there—an action not without precedent in the violent and unhappy relationship that characterized the union of this unfortunate couple.

Her defence was that his death was the result of accident, under the circumstances above recited. After a trial that lasted four days the jury gave effect to that defence and acquitted her.

The main ground of appeal on which the Crown relies is that the learned trial judge erred in ruling that the written statement given by the accused to the police on November 2, 1968, was of an inculpatory nature and that

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[7] (1969) 69 WWR 336, [1970] 1 CCC 257.

therefore the Crown had to prove it was made voluntarily. When the Crown came to tender the statement, argument concerning its admissibility took place in the absence of the jury. Crown counsel submitted that the statement was exculpatory in character and was therefore admissible without any need of a *voir dire* or of proof that it was voluntary. Defence counsel contended that the statement was at least partly inculpatory in character....

After a lengthy *voir dire* ... the learned trial judge ... ruled that the statement was inadmissible....

The trial then continued, but without the statement in question being placed before the jury. The significance of this turn of events must now be pointed out. In the statement, while admitting the quarrels of the evening and her presence at 90 Sadler Ave. at the material time, the accused made no reference whatever to her shooting of the deceased. Rather the statement indicated that when she left the home at about 1:50 a.m. Pascoe was asleep on the couch. So the Crown contends that the exclusion of the statement resulted in a miscarriage of justice, since it deprived the Crown of the opportunity of submitting that the omission from the statement of any reference to the shooting pointed to a consciousness of guilt on the part of the accused. Further, the Crown says that the accused's defence of accident as submitted at the trial was an afterthought, since if the death had really resulted from accident the accused would have had no reason not to say so in her first statement to the police. Cross-examination on that point might have impaired the credibility of the accused's version of the event as related at the trial. But the exclusion of the statement made this impossible. The Crown accordingly asks that the verdict of acquittal be set aside, and that a new trial be ordered on which the Crown may as of right introduce the statement in question.

We should be clear on what the Crown's submission involves. The Crown asks for the introduction in evidence of a statement which the learned trial judge has, with justification, found to have been induced by persons in authority and which therefore could not qualify as voluntary. The finding of the court against voluntariness makes no difference, says the Crown. Voluntary or involuntary, the statement was admissible, because it was exculpatory. So we are being invited to set aside the jury's verdict of acquittal in order that on a new trial this involuntary, induced statement should be placed before the jury. Unless clearly obliged by law to do so a court, in my view, should be slow to accede to such a course....

It [is] desirable for me to add some observations on issues that become applicable if jurisdiction to hear this appeal exists.

One such issue is whether Hunt, J. was correct in treating the accused's statement as being in part inculpatory. Concerning this I acknowledge at once that part of the statement is clearly exculpatory. The accused's assertion that when she left the premises Pascoe was asleep on the couch is obviously exculpatory and non-incriminating. I have no doubt that the learned trial judge recognized this to be so. But it was on the basis of other portions of the statement that he concluded it was partially inculpatory. These inculpatory portions were specifically identified by the learned judge in his ruling which has been quoted above. One consisted of her admission that she was in the house at 90 Sadler Ave. at the material time when death could have occurred. Except for a child of five, Pascoe and the accused were the only two people in the house. Pascoe's death, occurring when and where it did, could in the circumstances incriminate the accused and no one else.

Another incriminating feature consisted of the accused's lengthy reference to Pascoe's harsh treatment of her, and specifically to his conduct on the evening in question, when he was mad at her, falsely accused her of getting involved with other men, and generally ranted and gave her "hell." Hunt, J. viewed this aspect of the statement as relevant to the issue of motive; and, so considered, it had inculpatory implications. I am unable to say he was wrong in this.

One other portion of the statement may here be mentioned. The learned trial judge did not refer to it in his ruling. In my opinion, he could have. It consists of the following paragraph from the accused's statement:

> Les was careless about the rifles he had, pretend he was shooting at something and sometimes left them loaded as he had shells in the house. They were kept in a rack in the bathroom, two guns and a black pistol and the rack had a drawer in the bottom where he had kept the ammunition. This was up high on the wall and Lisa couldn't reach but we could. I've had them down and I know how to open them—I've seen the bullets in them, in fact I had them down only last week. No one else has handled them to my knowledge except for a month ago when he showed them to Russel Shaver, his nephew.

Death having occurred as a result of a rifle shot, the admissions contained in the foregoing paragraph, taken in context with the statement as a whole, assumed at the very least a potentially incriminating character.

Incriminating statements may be of varying kinds. An assertion, "I killed him," is beyond any doubt inculpatory. It constitutes a straightforward confession of the crime itself. But matters falling far short of such a direct confession may sometimes also be inculpatory. We would have to consider and assess the facts in each case. If the accused's statement embodies an acknowledgement of some material fact or facts in the chain of evidence which the Crown must forge to establish guilt, it could well qualify as

inculpatory. In the present case the learned trial judge found the statement in question to be of this character. I would not disturb the conclusion at which he arrived.

I move to another issue. Assuming, contrary to the learned judge's ruling, that the statement was wholly exculpatory, is it then outside the rule? Does it become admissible without any proof that it was voluntary? Yes, say most Canadian judges. No, say a few dissenters. The jurisprudence on the subject is referred to in the judgment of my brother [Alfred Maurice] Monnin. But, somewhat surprisingly, till now there has been no express majority opinion on the point by the Supreme Court of Canada. Hence the question may still be regarded as open....

On this issue—unlike that which concerned the correctness or otherwise of Hunt, J.'s assessment of the statement as partly incriminatory, and which was essentially a question of fact—I entertain some diffidence in expressing an opinion. For this is truly a question of law, a decision on which may well have implications for the future. It might therefore seem presumptuous of me to take a position here, when in the circumstances anything I might say would necessarily be obiter. Accordingly I content myself with merely recording an observation or two on the passages in [John Henry] Wigmore on *Evidence*, 3rd ed., which are almost always cited by those who assert that statements or admissions falling short of confessions are outside the scope of the rule....

> (2) Exculpatory statements, denying guilt, cannot be confessions. This ought to be plain enough, if legal terms are to have any meaning and if the spirit of the general principle is to be obeyed.
>
> (3) An acknowledgement of a subordinate fact, not directly involving guilt, or in other words, not essential to the crime charged, is not a confession; because the supposed ground of untrustworthiness of confessions is that a strong motive impels the accused to expose and declare his guilt as the price of purchasing immunity from present pain or subsequent punishment; and thus, by hypothesis, there must be some quality of guilt in the fact acknowledged. Confessions are thus only one species of admissions; and all other admissions than those which directly touch the fact of guilt are without the scope of the peculiar rules affecting the use of confessions.

Because of the reliance placed by many Canadian judges on the views of this recognized American authority, it may be relevant to point out that in recent years in the United States there has been some movement away from the position Wigmore enunciated. In a comprehensive article in the *Harvard Law Review* ... entitled "Developments in the Law: Confessions," the editors addressed themselves ... specifically to the subtopic "The Scope of the Exclusionary Rules." After reviewing the case law on the subject, including the

most recent pronouncements by the Supreme Court of the United States, they conclude as follows:

> Thus, it seems that no distinctions among categories of defendants' out-of-court statements can constitutionally be made, and the test for admissibility must be the same for confessions, admissions, and exculpatory statements.

When *Piche* went before the Supreme Court of Canada in 1970, Chief Justice Emmett Hall, speaking for the majority, quoted extensively from Sam's judgment respecting the "main ground of appeal." He added, "The time is opportune for this Court to say that the admission in evidence of all statements made by an accused to persons in authority, whether inculpatory or exculpatory, is governed by the same rule and thus to put an end to the controversy."[8] The court thus established a right that had not previously existed, and which was a direct result of the Freedman judgment.

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8 *R v Piche* [1971] SCR 23, 74 WWR 674; quoted in Harvey, *supra* note 6 at 43.

Fig. 8