

Some Collected Speeches of Samuel Freedman

THE HONOURABLE CHIEF JUSTICE
SAMUEL FREEDMAN*

I. INTRODUCTION

These collected speeches, preserved in the Faculty of Law archives at the University of Manitoba, were given by Justice Freedman at various points in his career, at various places and on various occasions. They provide insight both into his thoughts and his rhetorical style. They are not presented here in any particular order, though his speech at his retirement gala is the last. We hope they are as interesting to the reader as they were to us.

II. SPEECH ON THE OCCASION OF HIS INSTALLATION AS CHANCELLOR¹

In this hour of glory and of exultation, I think it would be a salutary thing if I turned your thoughts and mine away from the present chancellor, and directed them, if only for a moment, to those who served before. To me, there is no better measure of the quality and the importance of this high office than the caliber of those that have graced it in the past. Five chancellors there were, and I knew four of them. Archbishop Robert Machray died in 1904 before I was born. For 27 years,

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¹ This speech was transcribed from an audio recording found in the University of Manitoba archives. The date of the speech is November 6, 1959, though Freedman was appointed Chancellor in June: see Cameron Harvey, *Chief Justice Samuel Freedman: A Great Canadian Judge* (Winnipeg: The Law Society of Manitoba, 1983) at 7, 190.

from the inception of the University in 1877 until his death, the Archbishop functioned with conspicuous distinction. In a real sense, his task was harder than anybody else's, because I must remind you that in those days the office of President of the University had not yet been created, and therefore the Chancellor had to function not only in that capacity, but also as a kind of quasi-President as well. In a real sense, Archbishop Robert Machray was one of the architects of this university, because without his active support, the untried experiment which grew into this institution which we call the University of Manitoba today could never have been launched. From 1877 then, until 1904, the years of infancy, the years of early growth and development, Archbishop Robert Machray served this institution and left it an established University. To one who would like to think that the office of Chancellor is crucial and decisive in the structure of a university, it comes as a somewhat sobering and disquieting thought to learn that for four years after Archbishop Machray's death the university functioned without a chancellor and, quite evidently, survived.

In 1908, the second Chancellor, Archbishop S.B. Matheson, was elected. He was chancellor during the latter part of his tenure of office while I was a student at this university, and therefore, perhaps, not unnaturally, whenever I think of past chancellors, it is the venerable and distinguished figure of Archbishop Matheson which most often comes to mind. Twice I came before him to receive degrees. I well recall that at convocations he was always addressed as "Most Reverend Chancellor." Most Reverend Chancellor. That is an eminence I shall never attain.

After 26 years of able and conscientious service, Archbishop Matheson retired to be followed by John W. Dafoe, one of the great Canadians of our time, a man who looked out of his window on Carlton street and saw the world—who, though not a university trained person himself, had a keen and sensitive appreciation of the function and importance of a university. For 10 years, from 1934 until 1944, at the time of his death, Dr. John W. Dafoe brought to this office not only the prestige of a great name, but also the gifts of a mind well stored, and of a heart that beat with affection for the university that he was proud to serve.

For its fourth chancellor, the university went to the judiciary. Needless to say, I knew Mr. Justice A.K. Dysart better as judge than as chancellor. Four things, said Socrates, belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide

impartially.² No member of the legal profession who practiced before Mr. Justice Dysart will deny that he possessed those qualities in a remarkable degree. And they served him equally well as chancellor, an office which he filled with honour and with credit during 8 years of university growth and university expansion.

My immediate predecessor, my good friend, Dr. Victor Sifton, took office, as you know, in 1952. Like at least one other chancellor before him, he came to this office after outstanding service on the board of governors of the university whose chairman he had been for some years. Both as Chairman of the Board of Governors and later as Chancellor, Dr. Sifton made an outstanding contribution to university affairs. He brought to the discharge of this office sound judgment, worldly experience, personal dignity, and grace. Best of all, he is very much alive, which, for Mr. Sifton, is just another way of saying that his service to, and interest in, the cause of the University are by no means at an end.

Well, in this line of succession I have been placed. There may be some who will think of Shakespeare's words: some are born great, some achieve greatness, and some have greatness thrust upon them.³ I can only hope that no one will be ungracious enough to recall what was said when Disraeli's private secretary was made a peer: "the worst appointment since the Emperor Caligula made his horse a consul."⁴ Well, my work as chancellor of this university—though I have been installed tonight, I have been in office since the order in council was passed on June 23—has brought me into touch with the work of this enterprise. And I may tell you that when one is brought into touch with the work of the University, he is impressed with the vastness and, sometimes, the complexity of the problems which face a modern institution of that kind. I've been attending meetings of the board of governors and of committees of the board, of the senate and of committees of the senate, and of many others. And one is faced with problems relating to staff, to curriculum, to students, to faculty, to government, to the general public. And there is one dominant impression that has been left upon my mind: one is convinced—

² Though this quote is commonly attributed to Socrates, it does not appear in any of Plato's dialogues.

³ From *Twelfth Night* Act II, Scene 5. See Stephen Orgel and A.R. Braunmuller, eds, *The Pelican Shakespeare* (New York: Penguin Books, 2002) at 458.

⁴ THS Escott, *King Edward and his Court* (London: T.F. Unwin, 1903) at 104.

if indeed one ever did need convincing—of the central and pivotal role which in such an institution is played by its president.

Not long ago I saw a statement—it may be familiar to those who are in academic life longer than I—which I think can have no application to the province of Manitoba. It dealt with a Dean. It defined a Dean, and it said, “A Dean is a person who doesn’t know enough to be a professor, but who knows too much to be a president.”⁵ Well, I think that can have no application to Manitoba in any sense, and I would like to pay tribute to, and to comment upon, the able and comprehensive knowledge of the myriad problems which fall within his administration which Dr. Saunderson possesses, and of the sane and well-balanced approach which he invariably brings to the consideration of those problems.

A university can mean different things to different people. An American educator, Dr. Samuel B Gould, has said: “It can be a center for sociable activity or a center for social consciousness. It can be a hunting ground for a husband, a convenient headquarters for doing nothing”—as it probably was in the case of the student who was seen to write in the flyleaf of his textbook: “in case of fire, please throw this in”—“it can also be a proving ground for effective living, a setting for meditative thinking, a fountainhead of wisdom.”⁶ For me, I should like to think that every true university is an instrument of light, a center of learning, a citadel of truth, in which professor and student alike are engaged in a joint quest to enlarge the boundaries of knowledge and to enrich the human spirit.

In such an institution, the role of the faculty is vital, and I should like to say just a word at this time about professors. In an age which is, at long last, becoming interested in the problems of education, the role of the educator is slowly beginning to be understood and appreciated. May I suggest that too often in the past our attitude to the teacher, to the professor, to the educator, has been somewhat ambiguous and contradictory. On formal occasions, such as at after-dinner banquets, we have extolled the creative and constructive role played by the teacher. But, these occasions over, we have in practice so often refused to accord to the teacher and the professor the rewards of prestige—yes, and of money—to which he seemed entitled.

⁵ The source of this quote is uncertain.

⁶ See Samuel B. Gould, *Knowledge is Not Enough* (Yellow Springs: Antioch Press, 1959) at 145.

But quite evidently, changes have come, and in my view more of them lie ahead. They are in line with a new attitude, a new approach, one in which interest in education is becoming deeper and more widespread. It has been said that no university is better than its faculty. I suggest it is something that we should always remember.

I would like to say something about the relationship between the university and the world outside. Every university is at once a part of the world and an island within it. The relations between the two can be, and usually are, reciprocal. "Town and gown" is more than a rhyming phrase. I suggest that it embodies an idea, this very idea of influence and inspiration, of stimulation and reaction, of challenge and response, if you will, which a university and a community around it mutually exert upon each other.

It was not always so. We know that in early days the role of the scholar was thought to be properly one of isolation. But we've moved away from this concept. We know that every university, our own included, cannot shut itself off from the world by a kind of Chinese wall. In this atomic age, in this space age, when a new dimension has been added to our lives, the university constituency cannot be indifferent to, but must be alive to, the influences which press in from outside.

But having said that, there are one or two observations which I should like to make which I think flow therefrom. If the university is a part of the world, should the education in the university be utilitarian? Should it be tested by whether it can be put to practical use in the world outside? Well, let me say at once that to train lawyers and doctors and scientists and agriculturists and engineers and dentists and pharmacists is a legitimate function of the university. There is nothing wrong or dishonourable or discreditable in a student wishing to obtain an education in the university which will equip him for a useful, practical role in the community outside. Indeed, that is a desirable thing.

The danger comes when we deify this doctrine of utility, when we exult it to the point that it crowds out every other value, when it shuts out those values, allegiance to which has always been the hallmark of every true university. In the name of utilitarianism, some universities include embalming, cosmetology, flower arranging, and supermarketry among the responsibilities of higher education. That, I suggest, is the "service station"

concept of a university as it has been called.⁷ In the name of utilitarianism, the humanities have sometimes been put upon the defensive. To the student who would take a course in Plato, or in Shakespeare, or in history, the utilitarian says to him, “show me its value in terms of immediate marketability.” It is against that attitude that I now speak, because it seems to me that it does violence to the concept of a university as a place of learning and research, a place where minds are trained, where intellectual curiosity is awakened and where a quest for truth is encouraged.

The humanities may not be a guarantee that a student will acquire money, but I suggest that it is enough that it will make their life richer and more meaningful. And my plea therefore is that the lawyers and the engineers and the doctors whom we send out into the world should be educated lawyers, and educated engineers, and educated doctors.

There are two other thoughts that I would like to offer in connection with the relationship of the university to the world outside. The first is this: when the university man, be he student or professor, deals with problems outside the university (as occasionally he will, as frequently he must), let him bring to their consideration the same passion for searching inquiry, the same objectivity, the same insistence upon truth as every true scholar brings to the consideration of the issues he deals with in the university. Indeed, that is the great merit of the university man’s participation in problems of the world outside.

And the other observation I should like to make is this: although the university man must look outward, although he must be alive and sensitive to the influences of the world outside, let him look inward as well, let him absorb the influences of the island within. Especially does this apply to the student: in that way he will increasingly appreciate the uniqueness of university life, the fact that it possesses attributes which are unavailable—or unavailable to the same degree, at all events—in the world outside. Above all that he will cherish the opportunity of moving in an atmosphere of learning among a community of scholars. For what does the student see when he looks to the outside world? He sees a world in which too often learning and intellectual attainments and scholarship are on the defensive; a world in which success is far too frequently measured in quantitative terms, in terms of the extent of one’s material possessions.

⁷ A term coined by Abraham Flexner in *Universities: American, English, German* (New York: Oxford University Press, 1930) at 44.

Not only that. He looks out into a world, the student of today, in which he may be asked to make a choice between two stark alternatives as though nothing else were possible: a choice between becoming a member of the beat generation on the one hand, or being a square on the other. The man who is beat, hip, cool, swinging, finds no insight from the past and sees no hope or promise in the future. All is bleak and hopeless despair. And the square, in the eyes of the beatnik? The square is the organization man, proud that he knows his place. The man in the grey flannel suit, one of the status seekers in the affluent society.

I would like to suggest that the training and discipline of a university atmosphere can convince the student that these alternatives are false ones. That it is possible for the young man of today to live a useful, creative, full life, resisting the temptation to have his individuality destroyed under the pressures for conformity, but yet not yielding either to the strident cynicism of the beatnik, or to the conservative reactionism of the square.

Mr. President, a visitor to one of the English Inns of Court, a temple of law and of learning, once commented on the fact that the door through which he had entered was built unusually low. His host said that this was designedly so, adding that all who entered that temple should be willing to bow their heads. With humility, with gratitude, and yet with pride, I too enter this temple of learning. On this day of convocation, in the presence of faculty, of students, of members of the administration, of members of the public and not least of all of the distinguished representatives of sister universities, may I proclaim my great joy in becoming a member of the university family, and in thereby entering a realm whose values are liberal, civilized and humane, where the impalpable things of life, such as truth and beauty and reason and morality are still esteemed and treasured. I am honoured to have become the Chancellor of our University.

III. SOME OBJECTIVES FOR THOSE WHO SERVE THE LAW⁸

A visitor to one of the English Inns of Court—a temple of law and of learning—once commented on the fact that the door through which he had entered was built unusually low. His host said that this was designedly so, adding that all who entered that temple should be willing to bow their heads with humility. I too enter a temple of learning, the William Mitchell College of Law, into whose fellowship at so high a level I have now been so graciously admitted. In the simplest words but with the utmost sincerity let me express my deep gratitude and profound thanks.

For this day of Convocation I have selected as my theme "Some Objectives For Those Who Serve The Law." My approach will be purely personal. I will refer to certain objectives which seem of significance to me. But my treatment of the theme is in no sense intended to be exhaustive. I have no doubt that other objectives, no less valid and no less pertinent than those to which I will refer, could be offered by many of you. But I submit those which I have selected with earnestness, with humility, and in the hope that in my reference to them you may occasionally hear an echo of your own thoughts, a reflection of your own ideals.

I take as the first of these objectives the necessity for civility. Not long ago Chief Justice Warren E. Burger, assuredly one of the most distinguished graduates of this College, called attention to the necessity for civility "if we are to keep the jungle from closing in on us."⁹ In recent years, in your country and in mine, we have encountered a new phenomenon. We may describe it as 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 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

⁸ The text of this speech comes from Freedman's typewritten notes found in the University of Manitoba archives. Accordingly, the date of the speech is June 10, 1973 and it was given at the William Mitchell College of Law in St. Paul, Minnesota.

⁹ Warren Burger, "The Necessity for Civility" (1975) 1 Litigation 8 at 8.

said, "Had I been an upright judge I would have had it!"¹⁰ 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 use the courtroom as a forum to publicize a political cause.

Let me say that the necessity for civility is particularly required in the conduct of so-called "political trials." These are trials wherein conflicting ideologies—social, economic, political—form part of the background of the case. These political trials have been accompanied by the emergence of what has been called "the new advocacy." Its exponents assert the right to take only cases they believe in, and once in them, they battle with all their hearts, identifying in a subjective way with the cause of their client, with the result that their performance is often shrill, rude, and undignified. Sometimes these counsel question the relevance to political trials of traditional standards of professional behaviour. In their eyes the ideological conflict which lies at the root of the trial seems to be reason enough for abandoning rules of evidence, canons of ethics, and codes of professional conduct. Contrast this approach with advocacy as we have traditionally understood it—with the lawyer who recognizes and observes that he is counsel, not stating his own view, but putting the case for his client in the best way he can; knowing that the counsel who is his adversary is doing precisely the same thing from the opposite point of view; the whole being designed to enable the Court, with the aid of both presentations, to arrive at a just result.

So let me stress the need for the continuance of one of the fine traditions of our ancient and honourable profession: the tradition that the practice of law, in court or out, be carried out in an atmosphere of civility. Vituperation of language or bitterness of spirit need not be a feature of proceedings between members of the bar. Rather one would wish to see those proceedings carried on in an atmosphere of mutual trust, of true confidence. Only in that way will we merit the tribute which Shakespeare

¹⁰ This anecdote has also been attributed to 17th century judge and politician Sir Thomas Richardson. See William J. Thoms, ed, *Anecdotes and Traditions Illustrative of Early English History and Literature* (London: John Bowyer Nichols and Son, 1839) at 53.

paid to our profession when he said: "Do as adversaries do in law. Strive mightily, but eat and drink as friends."¹¹

I turn to a second objective. It is the need for high standards of communication. Involved in this is an awareness of the integrity of the English language, a reverence for the integrity of words—the ability by tongue or pen to communicate one's thoughts and ideas with lucidity, with vigor, with grace. The educated advocate is generally clear and precise. He dare not leave any doubt about his meaning whether addressing the court, or writing an opposing lawyer, or drawing a conveyance or contract.

It is a magnificent thing to hear great ideas expressed in noble language. The law itself offers many examples. Take. Mr. Justice Holmes, dealing with the question of self-defence and whether a person assailed is bound to flee rather than slay his attacker: "Detached reflection cannot be demanded in the presence of an uplifted knife."¹²

Or Cardozo, asserting that a duty of care exists not only towards a person imperilled by the defendant's negligence but also towards one who comes to his rescue and is injured in the process: "Danger invites rescue. The cry of distress is the summons to relief."¹³

Or Lord Esher: "The court will not suffer its own officer to do a shabby thing."¹⁴

Or Lord Shaw of Dumferline, speaking of the doctrine of *res ipsa loquitur*: "If that phrase had not been in Latin, nobody would have called it a principle."¹⁵

Or Cardozo again: "The inn that shelters for the night is not the journey's end. The law like the traveller must be ready for the morrow."¹⁶

These illustrations come from some of the greater names of the law. Elegance of literary style may be denied to most of us, but at least we should recognize that the first essential of good writing is clarity. Happy

¹¹ William Shakespeare, *The Taming of the Shrew* Act 1, Scene 2 at line 276. See Stephen Orgel and A.R. Braunmuller, eds, *The Pelican Shakespeare* (New York: Penguin Books, 2002) at 156.

¹² *Brown v US*, 256 US 335 at 343 (1921).

¹³ *Wagner v International Railway*, 232 NY 176 at 179 (1921).

¹⁴ *Ex Parte Simmonds* (1886), 16 LR QBD 308 at 312.

¹⁵ *Ballard v North British Railway Co*, 1923 SC (HL) 43 at 56, 1923 SLT 219.

¹⁶ Benjamin Cardozo, *The Growth of the Law* (New Haven: Yale University Press, 1924) at 20.

the judge who can say, "I have been upheld, I have been reversed, I have been varied, but I have never suffered the ultimate indignity of being explained."¹⁷

Clarity of expression is no less desirable among members of the bar. Whenever I think of the good lawyer, I think of an ancient legend concerning a stern, just king who was known for the rigorous impartiality with which he administered the laws of the land. One day this king's son was charged with an offense, of which he was only technically guilty. It was a capital offense, the punishment for which took the form of having a huge rock thrown upon the convicted person's head. Everyone wondered whether the king would in this case set aside the law, particularly since the offense was entirely technical in its nature. As the day of execution approached, the king's soul was torn with anguish; and he came to his wise counsellor and put the problem before him. The counsellor said to the king, "Grind the rock into dust of finest powder, and let it fall gently upon his head."

Sometimes in court a case is presented in such a dull, heavy, ponderous way that the effect is indeed like the rock upon the head. What a delight it is, then, to hear the lawyer who says what should be said, who omits what should not be said, and who, without sacrificing any of the solid substance of his case, is able to present it so that it reaches the court in that welcome and agreeable way which is the hallmark of the great men of our profession.

I move on to another objective. It is to balance the claims of continuity and of change. In that regard we must recognize the organic character of the common law. You and I know that law tends to pay homage to the past, to look backward to precedent and the leading case. I am not unaware that there are good reasons why this should be so—that only by adhering to precedent can we have certainty and stability in the law. I acknowledge the need for certainty and stability, and I recognize the role which adherence to precedent can play in their attainment. But there are limits to be observed even in our quest for stability. "The law must be stable," said Roscoe Pound, "and yet it cannot stand still."¹⁸ In the words

¹⁷ The initial source of this quotation is unknown and it may be a Freedman original. It can also be found in the text of a lecture reproduced here: Samuel Freedman "The Law as Literature" (1984-1985) 49 Sask L Rev at 320.

¹⁸ Roscoe Pound, *Interpretations of Legal History* (Cambridge: Cambridge University Press,

of an Australian judge, “it is not better that the court should be persistently wrong than that it should be ultimately right.”¹⁹

If I may refer to judicial conduct, some judges like nothing better than to find in the law books a similar case, to feel then that their task is done, and then simply to rest their opinion or judgment upon that case. But cases are very seldom similar, and even when they appear to be so, their usefulness as applicable precedents in a different situation may still require examination. To question the present-day utility of an old case may involve breaking new ground, a task which some judges are loath to undertake. To them might be applied the two rules which a Cambridge professor²⁰ once enunciated in jest:

Rule 1: Nothing should ever be done for the first time.²¹

Rule 2: Nothing is ever done unless everyone is convinced that it ought to be done and has been convinced for so long, that it is now time to do something else.²²

Much preferable, I suggest, is the viewpoint of Lord Denning who said: “if we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on; and that will be bad for both.”²³

I am not seeking to undermine the doctrine of *stare decisis*, the doctrine that courts should abide by authorities. I say only that there are limits to its proper use, and that if it is rigidly and inflexibly applied the law itself will suffer. I acknowledge, of course, that lower and intermediate courts have less freedom in this area than a final court of appeal. If binding, an applicable precedent must be dutifully followed by the lower court, even if the tribunal does not agree with it. As Baron Alderson said: “I accede to the authority of that case—It does not convince me, it overcomes me.”²⁴ I confess, however, that I have always been captivated by

1923) at 1.

¹⁹ Isaac J in *Australian Agricultural Company v Federated Engine-Drivers & Firemen's Association of Australasia* (1913) CLR 261 at 278.

²⁰ F.M. Cornford, *Microcosmographia Academica* (Cambridge: Bowes & Bowes, 1922). Note that the “two rules” to which Freedman is referring did not originally appear in the same context.

²¹ *Ibid* at 21.

²² *Ibid* at 3.

²³ *Packer v Packer* [1953] 2 All ER 127 at 129, [1953] 3 WLR 33.

²⁴ *Meering v Hellings* [1845] 153 ER 661 at 712.

the refreshing candour of Baron Bramwell, who, refusing to follow one of his own earlier decisions, said: "The matter does not appear to me now as it appears to have appeared to me then."²⁵

Certainly an ultimate court of appeal is entitled to some latitude in assessing the value of earlier decisions in the light of current requirements. In that connection it is interesting to recall that about seven years ago the House of Lords announced it would no longer regard itself as rigidly bound by its own decisions. In my own country, the Supreme Court of Canada, without having made an express announcement on the policy of *stare decisis*, will depart from an earlier decision of its own, albeit rarely. And the Supreme Court of the United States, as you know, does not regard itself as bound by its earlier decisions, and in appropriate cases it will depart from them. Such an approach is to be welcomed. It attests to a recognition of the organic character of the common law, and to the necessity of making the judicial process responsive to the needs of a changing society.

I want to refer to a fourth objective, and it will be the last I will deal with today. The lawyer should strive for possession of learning beyond the law. To be learned in the law is a good thing. To be learned in and beyond the law is even better.

I should like to think that from broad knowledge, from a familiarity with other areas of learning, with other disciplines, will come a better sense of values, one which will insist upon high standards in all things, both in the profession and outside of it. One of the curses of this materialistic age is the tendency to be content with false values, the tendency to equate grandeur with worth.

Perhaps it may be felt that breadth of learning may be purchased at too high a price, that the lawyer who succeeds in acquiring broad knowledge may pay the price of a lack of professional competence. I am by no means sure that this is the case—that the lawyer whose learning is characterized by breadth will be less equipped for the fulfilment of his professional tasks than the lawyer whose learning is deep but narrow. But even if it were so, I still would adhere to my thesis. For even if breadth of knowledge does not constitute a formula for the acquisition of material gains and material wealth, I should like to think that it may still produce

²⁵ *Andrews v Styrap* (1872), 26 LT Rep 704 at 706 (Eng Ex Ct).

enrichments of a different kind, and that the educated lawyer will be conscious of the worth of these treasures.

I think in this regard of the ancient Hebraic tale of the man who was interested only in the acquisition of material things, the miser in the community, the man who as a result of such pursuits found himself completely disliked by everyone in the community. He came to the rabbi and asked the rabbi why it was that he was so unpopular. The rabbi said to him, "Look out of the window and tell me what you see." The man looked out of the window and said, "I see a man and a woman walking in the distance. I see children playing far away." And the rabbi said to him, "Now look into this mirror and tell me what you see." The man looked into the mirror and said, "I see myself." And the rabbi said to him, "In the window there is glass and in the mirror there is glass. But the moment that you add to one of them a little silver, you cease to see others and see only yourself."²⁶

Remembering the great words of Plato that "the essence of education is to learn to like the right things,"²⁷ I dare to hope that the members of our profession will refuse to worship the great God Mammon in place of sweetness and light.

Here, then, in one person's view are four objectives for those who serve the law: the necessity for civility, the need for high standards of communication; the need to balance the claims of continuity and change; and the need for learning beyond the law.

One final word to the graduates of this day of Convocation. To them I say: Aim high. Beware of the cynicism of the worldly-wise cynic. Not all the dreams of youth must end in defeat and frustration. There are great tasks to be done, great challenges to be met, great victories to be won. Mr. Justice Holmes said, "The College is the place from which youth starts out on the road to the eternal city." My wish for you is that your pilgrimage may be one of high adventure and that it will ultimately be crowned with glory.

²⁶ Freedman probably knows this story from S. Ansky, *The Dybbuk* (Los Angeles: Nash Publishing, 1974) at 75.

²⁷ This is not a direct quote but a paraphrase of Plato's views on education. See Allan Bloom, ed, *The Republic of Plato* (New York: Basic Books, 1968) at 63-96.

IV. YOUTH, THE POLICE, AND COMMUNITY RELATIONS²⁸

I hope it will not appear parochial of me to suggest that the keystone of a free society is the rule of law. Upon it all ordered freedom depends. What do we mean by the rule of law? The phrase embodies many ideas: 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 and inviolability of the ordinary individual and of the dignity of human personality; it aspires towards that higher morality in which law and justice will become one; and it recognizes that the courtroom, no less than parliament itself, remains the citadel and the sanctuary of our democratic faith.

We meet this evening during a week which has been specially designated as "Respect the Law Week." In calling upon us for the furtherance of that concept the sponsors of this occasion have focused particular attention upon the role of youth, upon the function of the police, and upon community relations in general. I shall try to keep my remarks within that framework.

Let me say at once that the law which the topic enjoins us to consider is not the civil but the criminal law. I take that to be a necessary result of the inclusion within the topic of the police function. So we shall consider tonight not law in general but a few aspects of the criminal law, particularly as they bear upon the relationship between youth and the police. These laws concern us all. They are enacted by parliament through our duly elected representatives, and they command the obedience of all of us. Inevitably, however, a small minority will disobey some part of the criminal law. That disobedience will call into play the police, the recognized agency and instrument for enforcement of the law. Police action will usually set in motion the machinery of the judicial process, involving a confrontation between the state and the individual designed for the determination of the issue of guilt or innocence. In that determination certain principles, hallowed by tradition and tested by

²⁸ The text of this speech comes from Freedman's typewritten notes found in the University of Manitoba archives. Accordingly, the date of the speech is April 24, 1970 and it was given in Calgary, Alberta, although the exact location is not specified in Freedman's notes. At the time of this speech, Chief Justice Freedman was simply Mr. Justice Freedman of the Manitoba Court of Appeal.

experience, will have paramount importance. I refer to the presumption of innocence, to the imposition upon the prosecution of the onus of proof, and to the requirement that such onus is not discharged except by proof beyond a reasonable doubt] the benefit of the doubt going always to the accused.

These principles command wide acceptance, and there is little agitation to do away with them. But not so with other aspects of the law. 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,²⁹ of Thoreau refusing to pay a general tax to a government that countenanced slavery,³⁰ of Mahatma Gandhi peacefully refusing to comply with laws in order to bring an end to British rule in India,³¹ and Martin Luther King openly but peacefully disobeying laws that deprived negroes of their rights.³² A former American judge, Justice Fortas, has written a perceptive essay on this theme.³³ Like him I shall look at this question of civil disobedience, to see if it is ever legitimate, and, if so, within what limits.

Let me first 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

²⁹ See John Milton, "Areopagitica" in Merritt Hughes, ed, "John Milton: Complete Poems and Major Prose" at 716.

³⁰ See Lawrence Rosenwald, "The Theory, Practice and Influence of Thoreau's Civil Disobedience" in William E Cain, *A Historical Guide to Henry David Thoreau* (New York: Oxford University Press, 2000) 153 at 154.

³¹ See Taylor C Sherman, *State Violence and Punishment in India* (New York: Routledge, 2010) at 39.

³² See Martin Luther King, Jr., "Letter from Birmingham Jail" in *Why We Can't Wait* (New York: New American Library, 1964) at 76.

³³ Abe Fortas, *Concerning Dissent and Civil Disobedience* (New York: New American Library, 1968).

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 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. Violence has a greater visibility today because of the agencies of communication, notably television. We have witnessed the spectacle of the streets becoming a battle ground on which to press demands of one kind or another. But whether new or not, and wherever exhibited, violence is as wrong as it is dangerous.

I am not unaware of the claim that violence is sometimes resorted to out of a sense that that is the only way of being heard. William James once said that "no more fiendish torture could be devised than when you speak, no one answers; when you wave, no one turns; but everyone simply cuts you dead."³⁴ None the less violence, even if proceeding from a sense of frustration, is still invalid and illegitimate. That does not mean it will not be resorted to. Accordingly to eliminate or at least minimize the occasions when violence will be employed as a last desperate measure, those who sit in the seats of power must always remember to keep the lines of communication open. A willingness to listen and negotiate today may avert crisis and disaster tomorrow.

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

³⁴ From William James, *The Principles of Psychology* (New York: Henry Holt and Company, 1890) at 293.

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 and his followers to obey the "white only" laws of the southern states? Dr. King openly declared that many negroes would disobey "unjust laws."³⁵ These he defined as laws binding on a minority but not binding on the majority.³⁶ 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, 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 Justice Fortas: "Thoreau was an inspiring figure and a great writer; but his essay should not be read as a handbook on political science."³⁷

I move on to a question which in recent years has proved to be particularly troubling and vexatious. I refer to the revolt of youth. That revolt may take several forms of active protest within the existing

³⁵ *Supra* note 32 at 82.

³⁶ *Ibid* at 83.

³⁷ Fortas, *supra* note 33 at 65.

framework of society, a deliberate opting out of society by turning one's back upon it, or entry into a subculture variously described as hippiedom, yippiedom, or some similar name. An aspect of that question that inevitably demands attention is the use of drugs—marijuana, L.S.D., and others.

I do not need to remind you that, especially with regard to marijuana, our law has been the subject of much controversy. At this very moment a special Commission under the chairmanship of Dean Le Dain of Osgoode Hall Law School at York University is examining the question. That Commission held public hearings in Calgary only last week. Its "report and recommendations" will be available in due course.³⁸ What those recommendations will be I have no means of knowing and no disposition to guess. Pending the results of that study in depth one must approach the subject with due reserve and caution. Accordingly I shall make only a few observations upon it.

I think it is fair to say that the prevailing judicial attitude emphasizes the distinction between the trafficker on the one hand and the mere user or possessor on the other. The former is justly dealt with more severely. Indeed, in assessing penalties for possession of marijuana, courts do not close their minds to the fact that in this area something approaching a social revolution has taken place, and that the one-time user may have come to the drug as a result of pressure from companions or from mere curiosity. On the other hand courts are not unaware of the dangers of drug use. Not long ago I came across this account of a young man who, on account of drugs, had reached the stage where he had to be sent to a mental hospital for observation. The psychiatric intake interview went like this:

Psychiatrist: How old are you?

Boy: You obviously want to know my chronological age. In your terms I am 19. However, in my reality, I have lived for 4,000 years. (Long dialogue about reincarnation and the cosmic view of life.)

Psychiatrist: Tell me about your family.

Boy: You are obviously referring to my mother, father, and two sisters. However, my real family is in a commune in Northern California. That's where my spiritual heart is. (Long dialogue about the Family of Man and Nature.)

Psychiatrist: Do you believe in God?

³⁸ Commission of Inquiry into the Non-Medical Use of Drugs, *Cannabis* (Ottawa: Information Canada, 1972).

Boy: I am God. God is in me. When I have had some good acid (LSD) I am tuned into the Universe. I can now tune into God and communicate with him without drugs.

Young men of today look with open disfavour upon the older generation. They see no hope from anyone over thirty. As a member indisputably of the over-thirty class, and as one who values much of the thinking and the contribution of youth, I dare to offer them a word or two of benevolent advice.

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 former Chief Justice Warren, seekers all for the betterment of human rights. Let our young people think of these things, with humility and without arrogance.

Further, let them not think that in this world 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.

Let me say a few words on the subject of police. It is surely not necessary to elaborate on the vital and pivotal role they play in maintaining the rule of law. In our country that role is performed efficiently, quietly, and well. Good performance is normal, and, alas, the normal is rarely newsworthy. It is when a slip occurs, when a mistake takes place, when the system momentarily falters and fails, that the communications media leap into action to publicize the event. Unless we keep that circumstance in mind we are apt to get a wrong and distorted impression of the true picture.

I do wish, however, 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.³⁹ He had come from Vancouver to Winnipeg, arriving July 9th. He had \$4.00 in his pocket. He went directly to the

³⁹ *R v Heffer* (1969), 11 DLR (3d) 229, [1970] 4 CCC 104.

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 were 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 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.⁴⁰

Heffer was accordingly acquitted. The detective in this case, while looking for the young man who had been begging, had over-zealously arrested not only him but 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

⁴⁰ *Ibid* at 234.

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 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."⁴¹ 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 *Reg. vs. Ballegeer*.⁴² There the accused, arrested at his place of employment, asked to be allowed to make a phone call to his lawyer. His request was refused. He went into an adjoining office and called his lawyer. Immediately after, the constable came into the other office, took the phone away from Ballegeer, spoke to the lawyer and expressly told him that he would not permit communication between the lawyer and Ballegeer until the police had obtained a statement. Our Court looked upon this as an unlawful infringement of the right of an accused to "retain and instruct counsel without delay."⁴³ 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.⁴⁴

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.

⁴¹ WD Roach, "In the Matter of an Investigation into the Arrest and Detention of Robert Wright and Michael Griffin," (1963) 4 LSUC Special Lectures 55 at 57.

⁴² *R v Ballegeer* (1968), 1 DLR (3d) 74, [1969] 3 CCC 353.

⁴³ *Ibid* at para 4.

⁴⁴ *Canadian Bill of Rights* SC 1960, c 44 at s 2(c)(ii).

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 tonight 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.

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. You remember G. K. Chesterton's 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.⁴⁵

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

⁴⁵ G.K. Chesterton, "The World State" in *The Collected Poems of G.K. Chesterton* (London: Methuen & Co. Ltd, 1933) at 16.

above all, to remember the great words of John Morley that “tolerance means 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.”⁴⁶

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.” More than two-thirds of the century have 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. Above all, let us remember and be sustained by the great words of Thomas Wolfe: “This glorious assurance is not only our living hope but our dream to be accomplished.”⁴⁷

V. SPEECH ON THE EVENT OF HIS RETIREMENT⁴⁸

In these last breathless days, many nice things have been said about me. There is a certain mischief in that. It arises not from the fact that these things were said, but rather in the fact that I’m beginning to believe them. It would be churlish on my part if I failed to give thanks in so many directions. First of all, for the surprise portrait. It looks like me, but I’m going to study it better later on.

I must give thanks first to the committee under my colleague Roy Maitis, who worked so hard planning all of the events of this farewell. To the members of the bench and bar, both local and elsewhere, who by their presence here have invested the occasion with a special significance. To

⁴⁶ John Morley, *The Life of William Ewart Gladstone* vol. 2 (New York: The MacMillan Company, 1904) at 137.

⁴⁷ Thomas Wolfe, *You Can’t Go Home Again* (New York: Harper & Brothers, 1940) at 741.

⁴⁸ This speech was given at Samuel Freedman’s retirement gala on April 9, 1983. The Manitoba Law Journal has previously published extracts from his written notes: see “Valedictory Response of The Honourable Samuel Freedman” (1983) 13 MLJ 241. The version reproduced here has been transcribed in full from an audio recording of his speech found in the University of Manitoba Archives, and as such there are some minor differences where Freedman chose to deviate from his own notes.

the participants in the program, the symposium, and how admirably each of them fulfilled his or her function. To the members of the public who came out in such large numbers, who made this send-off seem as important as something that was.

Thirty-one years ago yesterday, I was appointed a Judge of the Court of Queen's Bench of Manitoba. Memories of that time crowd in upon me. I will refer only to one of them at this time. Just after the announcement of my appointment, I received a telegram from the Department of Justice. It said: "Please send me your full Christian names." Now, we should not be too hard on the functionary who sent that telegram, doubtless in the same words as was customarily done. He was facing what we might call an unusual situation, one that required some amendment of the customary telegram. I hope I pointed him in the right direction for the future when I replied: "I have only one given name, namely Samuel."

And on the subject of names, I quickly encountered a phenomenon. My lawyer friends would say to me, "hello Sam—sorry, hello My Lord." And with my well-known modesty I would say, "Sam is just fine." But so many of them persisted in "My Lord," I knew that I would have to adapt myself to a new situation. And I confess it took me nearly a week to do.

I served on the Court of Queen's Bench for nearly eight years. I found the work interesting. Civil law, criminal law, especially the Assize Court work. During my 19 years at the bar I had done office work and court work, court work mostly civil but some criminal law too. I had appeared as defence counsel in conspiracy cases, motor manslaughter as we used to call that kind of offence, fraud, and the ultimate crime of murder itself. I appeared in only one murder case, *Rex v Walter Stoney*⁴⁹ and, under the compulsion of truth, I must tell you that Walter Stoney was convicted and hanged.

There was a strong case against Stoney, and the only possible defence was insanity. While he was in the hospital he had tried to commit suicide following the killing of which he had been charged. While he was in the hospital, he claimed we were trying to poison him there. I brought him a box of biscuits, he thought I was trying to poison him. That was our whole defence. The defence of insanity has seldom rested on more slender and more tenuous grounds. I had to deal with the question, whether I'd put

⁴⁹ This case is unreported.

him in the box? And I decided that I should do that. He was eager to go in the box. Indeed, several times from his place behind me in the prisoner's dock he was making mutterings of some kind or another. I decided I couldn't do worse, the case was lost. He was a sick man. I wasn't going to detain him very long on the witness stand. He came to the witness stand, I said, "you are the accused, Walter Stoney?" He said, "Yes." I said, "Will you tell us what happened on the day in question?" He paused, turned to the trial judge and said, "My Lord," turned to the jury box and said "Gentlemen of the jury"—he had seen how the police witnesses did it, you see—and then he says, "I don't want to go on with the case. I plead guilty." Never in the history of the court had anything like this happened in a murder case. When I addressed the jury, I said "nobody but a crazy man" would do it. But you know, the legal definition of insanity is a pretty strict one, and the jury concluded that he did not qualify as legally insane. I suppose the verdict was correct, even though Walter Stoney was really not playing with a full deck.

Well, the work in the Criminal area, I think, turned out to be helpful to me in jury trials when I was on the court of queen's bench. I've always had the feeling that the subtlest, most intricate part of a trial judge's duty is the necessity of charging a jury in a complicated criminal case on short notice. When the day of elevation is come from lawyer to judge, and when the trial judge is in the Assize Court, when he has to deal with evidence admissible against one accused but not against another, when he has to deal with corroboration, with accomplices, when he has to put the issues of fact with clarity and fairness to the jury, above all when he has to put the defence to the jury without, at the same time, demeaning it—as some judges have done—he will at that point give silent thanks that these things are not strange and alien to him because, when he was a lawyer, he did not disdain the practice of Criminal law.

When I was in the court of Queen's Bench, I handled a lot of divorce cases. This was under the old Act. Our law had not yet broadened out. There was only one ground for divorce, namely adultery. And the evidence and proof of adultery always took an understandable, acceptable, pre-determined line. It was pretty well the same in every case—evidence of the one party going with the respondent to a hotel, or a motel. In fact, it was so much each case like the other that we had a kind of presumption in fact which was no less sacred than, almost, a proposition in geometry. And you could put it thus: If a man and a woman spend the night in a hotel room,

the court is entitled to draw the inference that sexual intercourse took place between them. Unless, of course, they are husband and wife.

Looking back at my period of service in the court of queen's bench, I ask myself if there's anything of value that I can pass on to Verne Simondson, our latest recruit to the Court of Queen's Bench, and the younger people. I would say the wise use of the three Ps: Preparation, Politeness, Patience, is what a judge should have. Preparation: Always come to court with some knowledge through reading of the record of what the case is all about. Only then will you know what questions to put, and only then will you be able to deal with the legal issues on at least even terms with counsel. Politeness, that hardly needs elaboration. We know it best when we confront its opposite. If what the judge says to the lawyer would, if the lawyer said it to the judge, constitute contempt of court, politeness has for the moment disappeared. Any form of judicial discourtesy is to be avoided. Patience? Do not make up your mind too speedily. Keep your tentative conclusions to yourself unspoken. The testimony of the last witness may turn out to be the decisive evidence in the case. How unfortunate it would be if you had already declared yourself in the opposite direction and now must backtrack, must dig yourself out of the pit you had erected for yourself.

In 1960, I was elevated, or translated, to the Court of Appeal. A judge of a court of appeal performs a dual function. He is on the one hand a soloist, and he's also a member of an orchestra. He writes his judgment as soloist. In dissent, he has greater freedom than when he writes for the majority. I think we would all agree with that. Sometimes the dissent of today may become the law of tomorrow.

But, he is not only a soloist, he is a member of an orchestra. And that leads me to make the very valid point that in the Court of Appeal, what is important is a collegial atmosphere among the members of the court. That does not mean that a judge must surrender his right of independent thought, but he must remember that his colleagues also possess that same right, and that on controversial questions honourable men may honourably differ. What is important is the attitude and the spirit in which the matter is approached. In an appellate court, there's no room for rancour, for bitterness, for personal antagonism, for any kind of back-biting. When I was a young lawyer, I remember there was a feud between two judges of the Court of Appeal, a feud well-known within the bar and beyond. If you were appearing before the court, if Mr. Justice A said "I

agree with you,” you would know that in a minute or two Mr. Justice B would disagree. Hence it’s a special delight for me to say that over the 23 years in which I’ve been on the Court of Appeal for Manitoba, a collegial atmosphere—which is the hallmark of a good Court of Appeal—has been maintained. Individual views are, of course, asserted, often with vigour but never with antagonism. Points of view are pressed often with sturdiness but never with hostility. It’s been a personal joy for me over the last twelve years to preside over such a court.

How would I like that court to be remembered? What has it accomplished? I think a fair way of phrasing the question is, what has it tried to accomplish? “Tis not in mortals to command success, but we’ll do more, Sempronius, we’ll deserve it.”⁵⁰ We have tried to assert the priority of substance over form. We have tried to avoid giving judgment on the basis of technicalities. If there’s a choice between substance and technicality, if we possibly can, substance will win.

In line with that, we have tried to give the deserving litigant his day in court. If through error he has not filed a document in time, statement of defence, or notice of appeal, we will, if we legitimately can, extend the time and permit late filing. We have tried to recognize the wisdom and the applicability of the old saying, that “procedure with its rules is the handmaid, and not the mistress, of justice.” Procedural rules should be an avenue for the attainment of justice, they should never become a roadblock.

Soon the task of presiding over the Court of Appeal will be taken over by my friend and colleague, Mr. Justice Fred Monnin, who is very happy to see the cordial way in which we all greeted his name some minutes before. I wish for him a happy and fruitful tenure of his very high office.

One week from today, my tour of duty ends. I leave my post with two things very much in mind. The first, a pride in and allegiance to Canada. That’s always been a part of my continuing philosophy. I have never tried to keep secret my love affair with Canada. In assessing Canada, I foresee a danger from two possible sources. One is the danger of romanticizing on the theme of yielding to fulsome praise. Therefore let me acknowledge that Canada has had its blemishes, its hours of shortened vision, its mistakes, and its fools. That is to say, it is human. The other danger is to adopt the role of cynicism, to play the role of the perpetual fault-finder,

⁵⁰ Joseph Addison, *Cato: A Tragedy* (Cambridge: Chadwyck-Healey, 1994) at 5.

the eternal kicker, the person who regards everything Canadian as inferior. I find no allurement in this inverted patriotism, of this patriotism in reverse. Rather, I like to think of Canada at its best, a Canada which aspires to be tolerant of everything except intolerance. Which rejects the dislike of the unlike. Which prefers the role of moderation to counsels of extremism. A Canada which has accepted the goal of multiculturalism, a Canada in which two major groups and several other groups are making their contribution to the common treasury of Canadian citizenship.

And the second thought I have as I leave this post—no less a part of my continuing philosophy—is a recognition of the importance of a free society and of the rule of law as one of the instruments for its attainment. More than half a century ago in my law school days, I was struck by a passage in Will Durant's *The Mansions of Philosophy*.⁵¹ I went back to it the other day. It still has a message for those who believe in the rule of law. He said:

Here are two men disputing: One knocks the other down, kills him, and then concludes that he who is alive must have been right, and that he who is dead must have been wrong... Here are two other men disputing: one says to the other, "Let us not fight - we may both be killed; let us take our difference to some Elder of the tribe, and submit to his decision. It was a crucial moment in human history! For if the answer was No, barbarism continued; if it was Yes, civilization planted another root in the memory of man: the replacement of chaos with order, of brutality with judgment, of violence with law."⁵²

In those words the author is identifying and paying tribute to the role of third-party judgment, to the instrument of peaceful arbitration. But was he not doing something more than that? It seems to me that in those words, he was also defining the role of a judge and the nature of the judicial process, because after all it's a short step from the elder informally arbitrating the dispute between the two men, to the judge formally on the bench trying to resolve the issue between contending litigants and, in that process, seeking justice according to law. In a free society based on the rule of law I like to think that the courtroom, no less than parliament itself, is a citadel and a sanctuary of our democratic faith. The task of building such a free society has never ended. It must be pursued with a sense of dissatisfaction. Not a dissatisfaction that flows from despondency or which is rooted in cynicism, but the dissatisfaction which is continuous because

⁵¹ Will Durant, *The Mansions of Philosophy* (London: Ernest Benn Ltd, 1929)

⁵² *Ibid* at 371.

the goal is high. To that task we should address ourselves with steadfastness, with fidelity, and with high-hearted resolve.

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