Introduction

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"An ex-chief judge quickly moves into the realm of the all-but-forgotten," Samuel Freedman told the *Winnipeg Free Press* when he retired as Chief Justice in 1983.

Maybe so, but today, some three decades after his retirement, and two decades after his death, it is not all that difficult to search out evidence of Sam Freedman's abiding stature—evidence that he has not been forgotten. Indeed, quite the contrary. Today, in his lifelong home of Winnipeg, when you go out to the University of Manitoba by bus you enter the campus by way of Freedman Crescent. When you walk up the stairs inside the Faculty of Law building, Robson Hall, you see a bronze bust of Sam Freedman prominently displayed on the second-floor landing. A few years back, when I visited the famous Kelekis Deli (now closed) on Main Street in North Winnipeg, I saw, on a crowded "wall of fame," a photograph of the judge. The woman behind the lunch counter mentioned how "Sam," as a young lawyer, helped Kelekis get its licence to serve food in the Depression days of the 1930s, when the business consisted of selling popcorn and chips from a converted laundry truck. Across town, deep in the files of the Provincial Archives of Manitoba, there is a letter from a colleague on another province's court of appeal in which the salutation "Dear Sam" is crossed out and "Dear Great One" is scribbled in.

In his time Sam Freedman was near-legendary for the wisdom, balance, and integrity of his approach to law and justice. He had both a compassionate and a robust sense of the law. Many of his most important judgments were dissenting views that went against the grain of current thought but represented a sharp sense of social justice, of concern for the ordinary citizen, and often the underdog. In his work in general he maintained a keen sense of human frailty, often expressed in a wry, self-critical fashion. He was, according to one short biographical account, "the model of a patient, courteous, kindly, humane judge."[1] He was also known as a creative judge, an activist judge.

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[1] Cameron Harvey, "Foreword" in Cameron Harvey, ed, *Chief Justice Samuel Freedman:*

"He was as good a jurist as this country has ever produced," said Rosalie Silberman Abella, then Justice of Ontario's Court of Appeal, a few days after the former judge's death in March 1993. "He was a humane intellectual, a wise populist, an unpretentious leader and a very funny man."[2] As his friend Arnold Naimark put it so eloquently, "There may be others whose contributions in a particular sphere were greater, but there was no one better able than he to discern in the turmoil of daily existence that which is essential for the continuity of civilized society; none more steadfast in displaying the human face of justice, and none who had a firmer grasp of the import of social developments for jurisprudence and the practice of law."[3]

Still, although he was described as "the perfect exemplar of the judicial temperament" and a man who epitomized the "patient splendor of the law,"[4] he was also always among the first to say that law and the justice system had their blemishes and would, indeed, never be perfect. "For we are dealing with a system that is admittedly fallible and imperfect and it is being administered by fallible and imperfect men," he said in his speech "Law and Justice—Two Concepts or One?" (reproduced in chapter 11, below). "Sometimes the system may falter or fail, and the result will be something less than justice."

Through a career that spanned half a century, Samuel Freedman was a skilled, steady, almost magical practitioner of law and jurisprudence. His work remains important today for the contribution he made to the building of a caring, fair society that places a high premium on the rule of a just and equitable law system. It is the kind of essential community- and nation-building work that, before all else, calls out to be remembered, not forgotten.

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A Great Canadian Judge (Winnipeg: The Law Society of Manitoba, 1983) v at v.

2 The Honourable Rosalie Silberman Abella, "Equality, Human Rights, Women and the Justice System" (Encounters on Human Rights Lecture Series, delivered at the Faculty of Law, McGill University, 10 March 1993), (1994) 39:3 McGill LJ 489 at 501. The speech was dedicated to Sam Freedman.

3 Arnold Naimark, "In Memoriam: Samuel Freedman", eulogy, typescript, Winnipeg, 8 March 1993.

4 *Ibid.*

"This was a man," Rosalie Abella said, "who never forgot who he was, where he came from, and how lucky he was to be who or where he was."[5] Freedman was born in Russia in 1908, arrived in Winnipeg with his family three years later, and grew up in the city's North End, an area with a high concentration of struggling Jewish immigrants. "I was brought up under the spur of honourable poverty," Freedman says in his account of his early years. The other products of roughly that same era in North Winnipeg include economist and public servant Sylvia Ostry, historian Bernard Ostry, nuclear chemist Leo Yaffe, political scientist and Oxfam chairman Meyer Brownstone, pharmacist and politician David Orlikow, writers Adele Wiseman and Miriam Waddington, and entertainer Monty Hall. North Enders had to work harder, Freedman says. They had to work "125 per cent to achieve what a south-ender could with 80 per cent." As one account of Jewish achievements on the prairies noted, the Jews in Western Canada were able to move "upward in society more easily than in other parts of Canada because on the prairies they were seen as only one of many ethnic groups, none of which was considered a threat to WASP dominance."[6]

Freedman's entry into law came almost by accident. It was his second choice as a career: if he had been successful in a bid for a Rhodes Scholarship in 1928 he would have gone into the study of the Classics. Freedman started out practising the profession in the Depression era of 1930s' Winnipeg and over time covered law "in all its aspects." In the Assize Court he handled drivers' cases, including motor manslaughter, as well as theft, conspiracy, and even murder. In his characteristic deadpan way he told one interviewer: "I acted for the accused in one murder case, *Rex v Stoney*. I regret to tell you that he was hanged."

Freedman became a judge of the Court of Queen's Bench in 1952. At the time he was one of the youngest judges in Canada and the first Jew to be appointed to the Bench in Manitoba. He was the second Jew in Canadian history to be appointed to a provincial superior court. He was appointed to the Manitoba Court of Appeal in 1960 and became Chief Justice of Manitoba in 1971, retiring in 1983. In 1959 he became

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5 Abella, *supra* note 2.

6 Anthony Astrachan, "On the Broad Prairie", *Present Tense: The Magazine of World Jewish Affairs* 2:4 (Summer 1975) 34.

Canada's first Jewish university chancellor, when he was appointed to that position at the University of Manitoba.

"I wanted to be a judge from the moment I had contact with the law. It was the work of the court, in settling disputes between opposing parties, that attracted me," Freedman said in an interview. Practise it he did, with relish. During his thirty-year judicial career Freedman delivered more than eleven hundred judgments. His judgment in a key obscenity case in 1963–64 established what is said to still stand as the best guide to a definition of the all-important "community standards" on censorship (see chapter 7). A couple of years later his one-man royal commission into the new problem of "railway run-throughs" was acknowledged by *Canadian Transport* magazine as "a contribution to union freedom and industrial harmony." (See chapter 8.)

Prime Minister Lester Pearson had appointed Freedman to investigate the issue of railway run-throughs and make recommendations, after a wildcat strike of twenty-eight hundred CNR workers in 1964. Apparently, soon after the Prime Minister got in touch with him, Freedman's mother advised, "Sam, don't write a report that will make people lose their jobs." In his findings, Freedman clearly followed that advice, but more importantly he delivered an analysis of the relationship involving labour, new technology, and the workplace that would not be out of place forty years later, at the beginning of a new century. When the report was issued one newspaper opined that, "many labor experts" considered it to be "the most controversial and far-reaching labor document of the past decade."[7]

Among other things, Freedman stated in the run-through report: "The old concept of labour as a commodity will not suffice; it is at once wrong and dangerous. Hence there is a responsibility upon the entrepreneur who introduces technological change to see that it is not effected at the expense of the working class." His conclusion: "Employees should have the right to negotiate technological changes that would affect their livelihood."

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There are two kinds of judges, Freedman once said: "The judge of caution and the judge of valour. I hope that I can be remembered as a

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7 *The Winnipeg Tribune* (18 Aug 1966), Winnipeg, Provincial Archives of Manitoba (previously found at the Faculty of Law Archives, University of Manitoba).

judge of valour." The material collected here tells the story of Freedman's life and work—which is also a story of Canadian law and society through half of a century. After Freedman's death, the *Winnipeg Free Press* stated in an editorial: "His words and wisdom will continue to inspire generations to come."[8]

It is my hope that *A Judge of Valour: Chief Justice Samuel Freedman—In His Own Words* will nourish that inspiration. The following pages bring together only a fraction of the immense body of Freedman's work, which consists of everything from the ubiquitous court judgments that were his daily work for decades to the speeches, government reports, letters, and other writings on which he seemed to work so tirelessly.

The core of this book, though, is an unfinished autobiography that Sam Freedman started late in life. I had become friends with Sam and his wife, Brownie, through family connections in Manitoba, and in the summers we would often meet up at Clear Lake, in Riding Mountain National Park, north of Brandon. Sam and Brownie invariably spent their summers in a rented cottage in the Mooswa Bungalows, and they were good friends of my in-laws, the Cristalls. I remember someone saying, "This is the Chief Justice of Manitoba." He undoubtedly said, as he always did, "Just call me Sam." In any case, like everyone else who ever met Sam, I was drawn to him by his easy ways, and his seemingly easy intellect—but especially his easy way with a joke. From that time on we met summer after summer on our near-annual trips out to the lake.

In the summer of 1983, I remember, a friend of ours came out from Toronto and got into a golf game with Sam. It was an experience she never forgot—though she met him only that one time. For years afterwards she would always ask how Sam Freedman was doing. He had that effect. "I was golfing with a woman at Clear Lake not long after I went on the Bench," he once told an interviewer. "Years later I met her again and she reminded me of something I had said to her. It was: 'I hope the day will come sometime when people will say, Sam Freedman was a son of a bitch of a judge, but could he hit a golf ball!'" His passion for golf was legendary. (He would list his hobbies as "walking, golf, and reading.")[9] "I love the game, but I'm no good at it," he said more than once.

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8 "Samuel Freedman", Editorial, *Winnipeg Free Press* (9 March 1993) A6.

9 See *Dictionary of International Biography*, 1976-77 edition, biographical notes (July 1975), Winnipeg, Provincial Archives of Manitoba (box 75, file no 3, May–July 1975).

On a visit to Clear Lake in the summer of 1992, Sam and Brownie told me about the autobiography Sam was trying to write, and they wondered if I might in some way be able to help with it. They had already sent a partial draft of the autobiography out to some readers, and to a friend at a Canadian publishing house. The two or three responses all indicated that it was not publishable as it was—it would "need more work," as they say in publishing, with a gentle edge of understatement. Before I could find the time to do anything more related to the project, Sam died, in March 1993, leaving the autobiography unfinished.

By that point the manuscript—which Sam titled "Concentric Loyalties"—was only 118 double-spaced pages long, with the last forty or so pages in the form of rough notes rather than completed text; it was not enough substance to form a book, but enough, I believed, to turn into a book if it were combined with other materials that Sam had produced. A couple of years later I decided to take on this project. Luckily, Dr. Lorne Brandes of Winnipeg had, years earlier, carried out a long, highly detailed taped interview with Sam—in all there were about twelve hours of conversation on the tapes—and those sessions provided additional material that could be spliced into the autobiography. A comparison of Sam's manuscript and the Brandes tapes made it obvious that Sam himself was using the Brandes tapes as the basis for his own writing. Indeed, that appears to have been Lorne Brandes' intention from the start. In an article published shortly after Sam's death, Brandes wrote of his friendship with the Freedmans and of how, "early on," he "got the notion that it might be a great idea to tape conversations" with the judge. Sam, Brandes wrote, "had always hoped to publish his memoirs, and I suggested that the audio tapes might serve as a framework for a future autobiography (sadly, for reasons of health, a book he was never to write)." The recording sessions began "on a cold, crisp January evening," but not before Mrs. Freedman had treated the two principals to some tea and biscuits. What directly followed was a typical "Freedman moment":

> After "wiring" him and myself, I asked Sam to say a few words so that I could set the sound levels. He complied, then insisted that I play back the tape immediately.
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> A look of consternation crossed his face as he heard his voice. "I sound so 'tsecrochen' (broken down)," he protested. "Sam," I replied, "if we are going to have to stop the tape every few minutes for you to listen and complain, this will

take more time than either of us may have." A hearty, good-natured laugh later, he agreed to begin.[10]

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Most of the existing autobiography concerned the very early years, with little (except in the form of notes) about his life after the early 1930s. Starting from that base, I added other words that came directly from Sam; starting with the wealth of words in the Brandes interviews, but also adding pieces from a chapter on Sam Freedman in *The Worst of Times, The Best of Times*, a book about Winnipeg's North End by Harry and Mildred Gutkin.[11] In addition to a few other shorter interviews (see "Sources"), I also drew on Sam Freedman's words as they appeared in speeches, letters, news clippings, and published articles. There was also a wealth of information in personal scrapbooks (beginning 1927, provided to me by Mrs. Brownie Freedman), and other audio and videotapes. I have added a few minor bridging sentences or phrases, organized the material into chapters, and inserted epigraphs, but otherwise the book is almost entirely "as Sam said it." I have included annotations where it seemed necessary or useful to fill out the picture.

The resulting book's subject matter includes the personal story of Russian Jewish immigrants making a place in Canada; struggles against anti-Semitism; law and education; civil and human rights; judges as makers or interpreters of law; labour issues; censorship; law and Canadian democracy; the October Crisis of 1970; and constitutional issues.

A Judge of Valour documents, then, the life and work, thought and wisdom, of this judge who was widely considered to be among Canada's greatest, a man known both for his influential judgments and the eloquence of his language and thought. Sam Freedman, said former Ottawa mayor and social worker Charlotte Whitton, "had a delicacy of appreciation and expression in our language that was clear as crystal and as brilliant." In life as well as in his judgment writing and speechifying he was a plain speaker, someone who made words count, and who most often

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10 Lorne Brandes, "A Very Special Relationship", *The Jewish Post & News* (25 March 1993) A9.

11 Harry Gutkin with Mildred Gutkin, *The Worst of Times, the Best of Times* (Markham, Ont: Fitzhenry & Whiteside, 1987).

applied them with a fair portion of humour.[12] Unfortunately the printed format won't allow us to hear, for instance, the slight, ironic tone, the slowly drawn-out phrasing that approaches a chuckle, as he says, in speaking of going to see the pornographic movie *The Resurrection of Eve* in New York, "In the spirit of scientific research I wanted to see what was being shown in other places—and maybe I was just being human." He was famous for his "deliberately measured delivery," as his friend William Neville once put it.[13]

Always, with Sam Freedman, there was the humour. In his "A Creed for Lawyers" (chapter 6, below) he counsels "the development of a sense of humour" as a basic necessity for those involved in the law. The humorous stories he told, and the stories about him, are legion, and some of them are scattered through this book. On a TV interview at the time of his retirement Sam said: "I think people expect a judge to be a stuffed shirt, and that is something I am not, I do not want to be. I see nothing wrong in having brunch at the Salisbury House or in doing any of the other things that many other human beings do, and I shall try to continue to be myself." To which Brownie replied: "You can't fight with this man. He doesn't fight. I might try to quarrel with him, but he doesn't allow it. Just calmly, easily, says nothing. Very judicial."[14]

The constant thread throughout this book is that unique Freedman way of seeing the world: applying an essential fairness to all human beings, no matter their position or walk in life, always taking into account what he called "the human factor."[15] Sam Freedman's account is of a happy life, of pleasant memories and forward progress, a belief in the basic goodness of people. That philosophical but optimistic viewpoint permeates these pages: his belief that reasonable people outnumber the crackpots (of which

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12 Letter from Charlotte Whitton to Maurice Wright [nd], Winnipeg, Provincial Archives of Manitoba (box 101, file no 17), re comments she made on a TV program about the "most distinguished Canadians".

13 William Neville, "The Good Man in Public Life", news clipping, no source, undated, published shortly after Freedman's death.

14 Interview of Sam and Brownie Freedman (15 April 1983) on *24 Hours*, CBC Television, Winnipeg, on the occasion of Sam Freedman's retirement.

15 Val Werier, "Samuel Freedman Was a Judge of Valor", *Winnipeg Free Press* (13 March 1993) A6. Werier, on the railway inquiry, says that Sam Freedman told him "that the inquiry would not be based chiefly on legal points nor on economics, because the balance sheet does not give all the answers. The human factor had to be considered. This was broad social outlook."

he came across more than a few in his career as judge). It is an attitude combined with an understanding of law at its deepest and most complex levels, combined with what one writer called an "awesome talent."[16]

The positive attitude, the sense of goodwill, extended towards the country that his parents adopted: its democratic basis, its potential benefits for all who live therein. The attitude extended to a faith in government—in the idea that governments could "act with vigilance and wisdom"—an attitude that has now become less prevalent in an age of mistrust of government and the push to downsize, to opt out of government responsibility for the nation's problems. He took a positive approach, for instance, towards the country's immigration policies. He once said those policies "were to bring to our shores many people from Europe and other lands."[17] This despite the documented prejudice of the country's leaders, as evidenced by their statements and their administrations' policies on Jewish immigration from the nineteenth century until the midpoint of the twentieth.[18] Sam Freedman quotes Sir Wilfrid Laurier as saying, "The nationality of Canada will be freedom." He could just as easily have quoted the critics of Canadian policy. But he didn't; his positive, optimistic approach led him to Sir Wilfrid. Freedman consistently plays down—though he doesn't ignore—the prejudices of Canadian society and its leadership, and applauds the progressive values—those values which, he admits, may not be fully realized but which are part of the "objectives" that are "constantly ... before us as a glorious ideal," and towards the attainment of which the society has long been working, and is still working today.

The picture we get is of a man dedicated to his craft, a storyteller steeped in political and judicial history, a person of immense energy and achievement founded in a consistently enduring liberal temperament. In his unfailingly polite way he speaks out against materialism, cynicism, against apartheid in South Africa. His undying faith in logic based on "facts" is tied to a sympathetic recognition of human frailties and

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16 Dale Gibson & Lee Gibson, *Substantial Justice: Law and Lawyers in Manitoba 1670-1970* (Winnipeg: Peguis Publishers, 1972) at 299.

17 Samuel Freedman, "A Free Society and Its Instruments" (The North Lecture, delivered at Franklin and Marshall College, Lancaster, Penn, 27 October 1966); see chapter 9, below.

18 See e.g. Irving Abella, *A Coat of Many Colours: Two Centuries of Jewish Life in Canada* (Toronto: Lester & Orpen Dennys, 1990).

weaknesses. In the pursuit of justice he believes above all in the great need, as he puts it, "to balance the claims of the individual and the claims of the group .... Involved in this is a wholesome understanding of the need to preserve one's individuality against the pressures of conformity. It includes the right of honest dissent from prevailing points of view. Socrates expressed it thus: 'The unexamined life is not worth living.'"[19]

Reflecting, for instance, in 1968 on the troubled times of the student revolts, he would say, firmly, "I place myself on the side of the students." But he tempered this position: "Student power may be acceptable, student tyranny never .... 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."[20] Despite his record on defending individual rights of citizens—whether students, railway workers, striking mall employees, or alleged murderers—both in the Court of Appeal and in public forums, Sam Freedman as judge would hold firm on matters involving the safety and perpetuation of state institutions. This tension—between individual rights and protection of the state—would come immediately to the fore in the crisis of October 1970 (see chapter 10).

But in a world in which definitive answers to human problems are elusive, Sam Freedman seemed always to see signs of hope and encouragement. He became known as "a kindly philosopher who points the way to a good way of life."[21] Sam Freedman's words present an anatomy of judging and justice, not just as those key elements of society have been in past practice, but also as they might be sometime in the future: as an ideal, as an aspiration to greatness—as a firm and abiding example of the justice system at its very best, a system striving always to do the right thing.

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19 Samuel Freedman, "Summary of Convocation Address of Chief Justice Samuel Freedman", typescript, prepared for an address given at the University of Western Ontario, Friday, 8 June 1973.

20 Samuel Freedman, "Some Reflections as the Year 1968 Ends" speech typescript, Winnipeg, Faculty of Law Archives (Sam Freedman file, place and date unknown); see chapter 9, below.

21 "Man of the Year: Mr. Justice Samuel Freedman", *The Octagonian of Sigma Alpha Mu*, 45:4 (November 1957) 9.

Fig. 1