



CITIZENS *for* PUBLIC JUSTICE
2005 Annual Meeting

My Idea of Canada

Thomas R. Berger

former Justice of the Supreme Court of British Columbia

Thursday, June 2, 7:30 p.m.
Killarney Park Mennonite Brethren Church
6426 Kerr Street, Vancouver

INTRODUCTION of Thomas Berger

by Wally Braul, lawyer and CPJ Board member for British Columbia and the Yukon Territories.



It's my privilege to introduce Tom Berger tonight.

For more than 40 years, Tom has been one of the preeminent legal figures in the history of this province. He was counsel for the Nisga'a in that famous case, the Calder Case. Many of you will know about that case, in 1968, before Aboriginal cases became the fashion that they are today. After many years of struggle, the Supreme Court of Canada decided in favour of the basic arguments being made by Tom and Calder on behalf of the Nisga'a people. That case today still is the template for many recent decisions such as *Delgamuukw* (*Delgamuk*). In many senses that is the foundation.

Tom has headed many inquiries. The Mackenzie Valley Pipeline Inquiry is perhaps the most prominent. That inquiry, as we all know, dealt with the Mackenzie Valley pipeline project in the mid 1970s. The pipeline project drew many parties together and ultimately, after a long process, Mr. Berger made a number of recommendations. One of those recommendations, the most lasting one, has been that there will be no pipeline project coming through that valley until land claims are settled. That still has been the legacy of the Berger Inquiry as much as anything else. Tom's report, *Northern Frontier Northern Homeland*, I found out, is the best selling document ever published by the government. It still is essential reading material for many courses across Canada.

Mr. Berger's public intervention in 1981 was instrumental in the inclusion of Aboriginal rights in the new Canadian Constitution of 1982.

Tom wrote *Fragile Freedoms*, a book, a study on human rights and dissent in Canada which was published in English and in French. In 1983 he was commissioned by the Alaskan State government, or rather the Alaskan Native Review Commission sponsored by two international organizations of Aboriginal Peoples. The report was published as *Village Journey*.

In 1986, Tom returned to practicing law in Vancouver. In 1991, he wrote *A Long and Terrible Shadow*, a book examining European values and Native rights in North and South America from 1492 to 1992 published in English, French, Japanese and Spanish. In 1991-1992, he traveled to India on behalf of the World Bank as chair of a panel to consider some environmental damage associated with a polluted dam project. Two years ago he wrote *One Man's Justice*, an account of his work as a lawyer. Mr. Berger holds honorary degrees from 13 universities and received the Order of Canada in 1990.

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I'd like to speak a moment or two about the Berger Inquiry. He certainly has influenced people of my generation. For example, Canadians across the country stopped to listen to CBC radio reports – live reports, no less – from the Mackenzie Delta of the Berger inquiry proceedings. It was remarkable, in those days, that CBC would actually broadcast live reports, every night, for several hours. Many Canadians listened with great interest; this was a part of Canada we had no idea even existed. This would not have happened without Tom's patience and wisdom in conducting an inquiry that, without doubt, received the support of all Canadians – northerners and southerners.

I happen to do some work in northern Canada as well and some of the people I work with in the North West Territories are people who are leaders of the communities, former premiers of the NWT. They were influenced largely by appearing before the Berger Inquiry when it traveled from one small village to another, set up plywood sheet tables under tents and heard testimony. Those teenagers who presented testimony at that time are now leaders of the communities up there. I spoke with one leader this afternoon, who spoke with great admiration for the style and results of the Inquiry.

Tom Berger has also had a very significant influence on CPJ. In many ways, CPJ was formed by members who felt they needed to be part of an organization to participate in the Berger Inquiry and other matters. Many of our founding members participated before the Berger Inquiry. And in fact, CPJ successfully went to court in 1980, challenging the appointment of a chairperson to the National Energy Board on grounds of bias. They won that case.

So, Tom, welcome here. We look forward to your talk very much.



MY IDEA OF CANADA by Thomas Berger

Well, thanks Wally and friends. It's very pleasant to be here on a warm summer night.

Wally mentioned these things that have come my way, deserved or undeserved, honorary degrees and the Order of Canada and so on. It always reminds me of a story my father told. I became a judge of the

Supreme Court of BC when I was 38, which in those days was kind of youthful to be a judge, and my father, who had been in the RCMP on the Prairies in the old days, said to me, "Well now, remember Tom, you're a judge now and I know you know a lot of law, but there's a lot of folks out there on the farm and on the street and in the bush, they know a little bit too."

He told me a story about a case, I think it must have been apocryphal, but he wanted to make a point. He said, there was a case before a new judge on the Prairies, in a little town, a young man charged with stealing a horse. The evidence looked pretty strong. The jury of prairie farmers knew the young man and they didn't really want to convict him – he hadn't been in trouble before. The judge, after the evidence had been heard, summed up the law and he sent the jury to consider their verdict. When they came back, he said, "have you reached a verdict?" The foreman said, "Yes – we find the defendant not guilty but we think he should give the horse back." And the new judge, preening himself on his knowledge of the law, said to the jury in a patronizing way, "Well, Mr. Foreman and members of the jury, that's what we call in law an inconsistent verdict. I'll have to ask you to retire to the jury room and reconsider." So they went back and a few minutes later they returned. He said, "Have you reached a verdict?" "Yes, your Honour, we find the defendant not guilty and we've decided he can keep the horse."

So, perhaps I've learned something since those days and as, Wally said, the work I've done in various inquiries has taken me not only to Canada's Mackenzie Valley and the Western Arctic, but also to Alaska and to India and in the late '90s to Chile. The farther you go from Canada, the more you begin to think about Canada in contrast to all the other places that you see. A year ago I was asked to go to Cambridge University in England to give the inaugural lecture in their new Canadian Studies Program. So I had to think about what I ought to say to them and I'll just give you the short version without the footnotes that I gave at Cambridge last year.

I told them that I had recently presided at a citizenship ceremony in Vancouver in the great rotunda of the court house. It was a ceremony for new Canadians and I welcomed

80 new citizens from 37 countries, from every continent and every race with a multitude of religious beliefs. Today in Vancouver, 30 percent of the population is of Chinese descent, 10 percent of South Asian descent. On the East Side of the city, the majority of school children speak English as a second language, and similar changes are taking place across Canada.

This isn't the country I grew up in.

I was born in Victoria quite a few years ago, I grew up in B.C. and then on the Prairies and then came back to study here in Vancouver. I've been here ever since. But this isn't the country I grew up in. It's altogether different, a kaleidoscope of diversity.

I think it is a country for the 21st century.

Canada emerged from the British Empire. When the British retreated from their empire, they sometimes left warring people sharing a single country to sort out their own conflicts – Hindus and Muslims in India, Arabs and Jews in Palestine, and Catholics and Protestants in Ireland. These disputes remain unsettled today, half a century or more following the departure of the British.

Canada consists of two peoples, two founding peoples, English speaking and French speaking. The French were the first Europeans to arrive in Canada; they set up an initial settlement at Port Royal in 1607 and then a permanent settlement at Quebec in 1608. The British by that time were already ensconced at Jamestown, in what is now Virginia. The British and the French waged war for a century and a half to determine which of them would be dominant in North America; they were the great powers of the day. And as we know, the issue was determined at the Battle of the Plains of Abraham in 1759.

The British tried, for a while, to assimilate the people of Quebec. There were only 60,000 of them living in what was then called New France. But those attempts failed, and the British finally decided that the right thing to do would be to acknowledge the right of the French colonists to their own language, their own legal system and their own way of life.

Those 60,000 have grown into six and a quarter million French speaking people living in Quebec and, all together in Canada, eight and a half million Francophones. These two societies, English and French speaking, have much in common, but they have significant linguistic and cultural differences and the creative tension between these two societies is the distinctive characteristic of the Canadian political scene.

But these differences no longer threaten either side. As Pierre Trudeau once said, "The die is cast in Canada, that neither of our two language groups can force assimilation on the other." And we have acknowledged in Canada, neither can force the other to stay. With the rise of the sovereignist movement in Quebec, Canada has been willing to allow

Quebecers to vote themselves out of the country. The referendums held in 1980 and 1995 were defeated, although the latter referendum came painfully close. Now, through the Clarity Act and the judgement of the Supreme Court of Canada in the Secession Reference – a tour de force of judicial statesmanship – the conditions have been enunciated under which Quebec might leave.

But this is something quite distinctive about us, we made it clear. There isn't going to be a war over this. It's going to be done democratically. If you want to leave, you can vote yourselves out, but of course, now there has to be a clear question and a suitable majority. Given this, historians of the British Empire, looking back, can claim Canada as a success. We entered two World Wars at Britain's side and in aid of France – our contribution to both world wars was a remarkable one and some historians believe that it was our contribution to the two wars that led us to believe in a distinct Canadian identity.

So where does Canada stand today in the roll call of nation states? Canada is not ethnically defined even though our notions of democracy and due process may have evolved in the ethnically-defined nation states of Europe. Canada is not such a nation state because we have two great societies – two nations if you will – a million or more Aboriginal people in our midst claiming a measure of self-determination, and millions of new Canadians, those people from 37 different countries whom I welcomed to Canada a year ago at the Court House – immigrants of every ethnic and racial background and every political and religious persuasion.

I think diversity has become the essence of the Canadian experience and it is our strength. It's not a weakness. We're not addicted to bogus patriotism. We believe in diversity. We believe in being a good citizen of the world. Now, remember this speech is my idea of Canada and you might even say my *ideal* of Canada. It doesn't mean we live up to it all the time, but it's something to which we aspire.

May I suggest there's been a Canadian contribution, a distinctive contribution, to the legal and political order which represents something essentially Canadian. In 1982 Canada adopted a new Constitution and a Charter of Rights. In doing so, we severed the last formal link to colonial dependency. Far more important, however, this exercise in constitution-making has forced us to articulate our idea of Canada. For a constitution isn't merely a means of settling present disputes, it is a legal garment that reveals the values that we hold. It is a document expressing that decent respect which the present owes to the past and is, at the same time, addressed to future generations.

The Supreme Court of Canada's two greatest tasks in recent years, I think, have been the interpretation of the Charter of Rights and the elaboration of Section 35 of the Constitution which was adopted in 1982, the same year that the Charter of Rights was adopted. Section 35 is the provision of the Constitution enshrining Aboriginal Rights and Treaty Rights.

(Our Supreme Court is unusual in that it has 9 members, 4 of them women. The Chief Justice herself is a woman, Beverley McLachlin, who comes from this province (British Columbia). I should say that when I served on the Supreme Court of British Columbia, when I was appointed in 1971 at 38, I was the youngest person appointed to that court in the 20th century until Beverly McLachlin came along who was appointed at 37 and then had a meteoric rise to the post she now holds, and which she occupies with great distinction.)

The Supreme Court has dealt with a number of issues of human rights and freedom. Let me just mention one that probably doesn't occur to us very often out here in British Columbia where we have the smallest percentage of French-speaking Canadians of any province. There is a provision in the Charter of Rights that guarantees linguistic rights. Minority language education must, under Section 23 of the Charter, be provided out of public funds where numbers warrant. So what does that mean?

The Supreme Court had to figure out what that meant. In a case from PEI in 2000, the province had approved instruction in the French language for francophone students in grades 1 to 6 living in the town of Summerside, but the instruction was not actually offered in Summerside. The province offered to bus the students to Abram's Village, a one-hour bus ride each way. The local francophone school board said no, we want classes here in Summerside. The dispute went to the Supreme Court of Canada, which held that Section 23 conferred a right on the francophone community in Summerside to have their children educated in their mother-tongue in their own community. The court said that Section 23 was intended to enable the francophone minority communities in English-speaking Canada to survive and to flourish. The province was ordered to provide funds for French language education in Summerside instead of bus tickets to a school in another town.

I think that although the French and English languages are constitutionally protected and thus stand on a different footing from the languages of other ethnic groups in Canada, they are in a sense a bulwark for those other languages by negating the idea of a monolithic culture. Constitutional protection of French and English makes the way easier for other languages. Thus, official bilingualism and biculturalism is not a rejection but an affirmation of multiculturalism, of the idea of Canada as a mosaic, a country where diversity is cherished.

The Supreme Court has had to deal, in recent years, with the issues of equality raised under Section 15 of the Charter which provides that every individual has the right to the equal protection of the law without discrimination and in particular, without discrimination on the ground of race, national or ethnic origin, colour, religion, sex, age and physical or mental disability. And the most salient issue of equality rights today relates to discrimination against homosexual persons.

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In 1995 the Supreme Court held that the list of prohibited grounds of discrimination in Section 15, the equality provision of the Charter, is not exhaustive and that sexual orientation is included under that section. And three years later, in a truly extraordinary decision, the Supreme Court found that Alberta's Individual Rights Protection Act violated Section 15 because it did not include protection for homosexual persons and should be enforced as if that were a prohibited ground of discrimination, even though it was not included in the statute.

The province's failure to include protection for homosexual persons in Alberta's human rights statute, along with the protection afforded to other minorities, was held to be itself a violation of the Charter. Many faiths have weighed in on the question whether the rights of homosexual persons should be acknowledged, but the point I want to make is that Canada is a secular country. Religious belief informs the arguments advanced on questions of public policy, but every attempt to translate religious dogma into law has had no success in electoral politics. When I say that we are a secular country, we believe in diversity of religious belief. My father came from Sweden; he was a Lutheran because everyone in Sweden was a Lutheran by law in those days. You were born into the Lutheran Church whether you liked it or not. I was raised as an Anglican, I was married in the Catholic church, my daughter married a lawyer who is Jewish, and her children are being raised in the Jewish faith and my son went to Japan to teach for 10 years and married a Japanese woman, who is a Buddhist. Well, our family has lived up to the ideal of diversity that I proclaimed, at least in the sphere of religion. I think that our experience is one that is commonplace in Canada today.

We will continue to argue about these great questions of human rights and fundamental freedoms. Inspired by religious faith, or inspired by humanist faith, we will be arguing about these things for the rest of our lives. And that's in my view not a bad thing because in a sense these issues can never be resolved. They will continue to be the subject of inquiry, debate and controversy. This will be a disappointment to those who crave certainty in these matters, who wish for a tidy world in which no one challenges prevailing certitudes or who seek a formula to reveal the necessary outcome of present confusion.

When I was in high school, the leading Canadian novelist was a man named Hugh MacLennan. He was an Anglophone who taught at McGill and lived in Montreal. He wrote *Barometer Rising* and *Two Solitudes*. But I still remember him being interviewed about a then recent controversy between Quebec and the federal government, and he was asked, "well, what about the Quebec problem?" And he said, "What do you mean what about the Quebec problem? That's not a problem, that's like saying life is a problem." He said our destiny is to work out the relations between these two great societies in Canada, just as in my view it is our destiny as well to work out the relations between the dominant European-based society in Canada and the Aboriginal peoples of our country.

That brings me to the question of Aboriginal rights because the Supreme Court has in the last 30 years been working out that issue. Wally was good enough to mention my role in the Calder case, the case brought on behalf of the Nisga'a that was determined by the Supreme Court in 1973. Let me just remind you of how much things have changed. In 1969, Prime Minister Trudeau, speaking in Vancouver, was asked about Aboriginal rights. Trudeau said our answer is no. We can't recognize Aboriginal rights because no society can be built on historical might-have-beens. He was a man, unusual in politics or in any other walk of life, who had thought about these things. In 1973, four years later, when the Supreme Court decided that there was a place for Aboriginal rights and Aboriginal Title in Canadian law, he changed his mind. That was something he wasn't famous for – he didn't often change his mind – admitting that perhaps he'd been mistaken in the first instance.

As a result, the federal government in 1973 announced that it would negotiate the settlement of land claims everywhere in Canada where no treaties had been made. Land claims settlements, modern-day treaties, have been made since the mid 1970's in James Bay and northern Quebec, the NWT, Nunavut, the Yukon, and now in BC with the coming into force of the Nisga'a treaty in 2000. These new treaties, reached in the last 30 years, now cover half the landmass of the country.

When I speak of these conversions by leading political figures on the road to Damascus, or wherever it occurred, you will all remember Gordon Campbell. As Leader of the Opposition he brought a lawsuit seeking to have the Nisga'a treaty set aside on the ground that the provisions for Nisga'a self-government were unconstitutional. The Nisga'a Treaty had been adopted in 2000 in the federal Parliament and in B.C. His case went to court and Mr. Justice Williamson of the Supreme Court of B.C. upheld the treaty and the provisions for self-government for the Nisga'a.

Mr. Campbell, of course, went on in 2001 to be elected premier. Since the province was a party to the treaty, it was a tricky thing for the Premier to continue with his lawsuit against the Nisga'a and the province. In any event, in due course he changed his mind about the treaty and became very much in favour of the treaty process. In fact, I heard him say just the other day that he believed in the idea of the province working with First Nations, on a government-to-government basis. That from a man who, a short four and a half years ago, said that he was adamantly opposed to the idea of Aboriginal self-government.

I think all of this goes to show that we are a pluralist, not a monolithic nation. It means Canada is sometimes a difficult country to govern. There is no easy consensus. It would all be simpler if we spoke the same language, if all our children went to the same schools, if we all held the same religious beliefs, if we were all of one colour. But we are not.

I think it is our good fortune that we are not all of common descent, that we do not speak one language only. We are not cursed with a triumphant ideology; we are not given to

mindless patriotism. We could be the prototype nation state of the 21st century in which a citizen's identity does not have to be authenticated by a spurious nationalism. We have had a national flag only since the 1960s, we have no national wax works, we cannot always agree on the words of our national anthem. To some, all of this is regrettable. They say there must be an overarching national ideal arising from a stirring encounter in our history. But I think it is no bad thing. There are, after all, 150 countries or more fully accoutered with flags and anthems – millions ready to march in support of this or that spurious cause. I don't think we need any more. We must remember there can be no unified idea of a national identity, for diversity is what freedom is all about. No free country can have a single unified idea of itself. If it did, it wouldn't be free.

I ask you the question, what could be more relevant to the contemporary world? Everywhere, and within every nation state, there are peoples who will not be assimilated and whose fierce wish to retain their identity is intensifying as industry, technology and communications forge a larger and larger mass society.

I did mention the contributions of Canadians in World War I and II because I think in both wars our contribution was greater on a *per capita* basis than that of the United States. There have been changes in the role of our armed forces since then. Most Canadians refer to that expanded role as coming under the heading of peacekeeping. In the last 50 years we have been engaged as peacekeepers in a multitude of UN missions from Haiti to the Golan Heights, not to mention our role as part of NATO operations in such places as Bosnia and Afghanistan.

I was asked last November to go the Royal Military College in Kingston to receive an honorary degree. I accepted. But after the Commandant had put the phone down at his end I looked out the window and I thought, why are they asking me? Maybe they've got the wrong Berger, I don't know. But I got there and the Dean of Arts... by the way, the Royal Military College has about a thousand students. They're all required to become fluent in English and French before they graduate... the Dean of Arts said, "This is the last Liberal Arts university in the country." He said, "We invited you because you are regarded as a defender of human rights and minority rights." He said, "We try to instill in our students at this college who are going to be the officers in Canada's forces that their job as peacekeepers around the world is to uphold the idea of human rights and to defend the interests of minorities." He said, "That's the ideal we are seeking to observe."

And I thought, well, that means there is an ideal of interest, in a sense, between what we are trying to build here at home and what the Canadian forces are trying to do abroad. And so their ideal exemplifies our own idea of Canada. It is that idea, which from the time of General E.L.M. Burns, commander of the UN truce supervision organization which oversaw the 1948 cease-fire in the Middle East, through the time of General Roméo Dallaire, commander of the UN assistance mission in Rwanda, that the Canadian forces have brought to many disputed frontiers. The Canadian forces were present at the

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creation of peacekeeping, shared in its many successes around the globe, and witnessed its most agonizing moments (as we know from what General Dallaire has told us).

Whether we are here or abroad, we can serve an idea of Canada that may be useful, perhaps inspiring in the world. Because I believe that if two great language communities, together with a multitude of peoples from Europe, Asia, Africa and Latin America and the First Nations, can live together in peaceful occupation of half a continent within a great federal state, this idea of Canada may offer a measure of hope to a fractured world.

When I met Wally tonight we were talking about the fact that I once appeared in the Supreme Court of Canada when I was a very young lawyer with F.R. Scott, who was a famous lawyer, law teacher, and poet. He once wrote and I'd like to leave you with this thought: "If human rights and harmonious relations between cultures are forms of the beautiful, then Canada is a work of art that is never finished."

And I have finished. Thank you very much.

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Citizens for Public Justice was founded over 40 years ago by Canadian justice-oriented Christians who believe that governments (and all other institutions) have a responsibility for the common good.

CPJ responds to God's call for love, justice and stewardship in the understanding and discussion of Canadian public policy issues, primarily on the issues of poverty, refugee concerns, and faith and public life, to help promote citizenship in Canada.

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