

Berger: A lifetime devoted to Native justice

By Bill Hess
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Thomas R. Berger sits at a bare table in a large, otherwise empty room surrounded by other empty rooms, and remembers how he first became involved with Native legal issues. "I worked with an older lawyer who was the dean of the criminal bar in Vancouver," the recently retired British Columbia Supreme Court judge recalls his early years of law practice.

"Tom Hurley. His wife was a person who had devoted her life to helping the Native people of British Columbia. She founded the first Native newspaper, 'The Native Voice,' in British Columbia. She always had her husband defend Native people.

"When he died, she came into my office. 'Now you will have to defend all the Native people!' she said. She was an imposing woman, and she smacked her cane across my desk! It was not a matter open to debate!"

That memorable beginning led Berger into a career which would see him get involved in some of the most important Native rights cases to come before the Canadian Courts, would send him on many extended journeys into the Canadian North to determine the impacts of a gas pipeline across pristine wilderness and tundra vital to the local subsistence lifestyle, would lead to his taking a controversial stand as a judge to insure that aboriginal rights be included in Canada's constitution, and which has now brought him to Alaska to chair the Alaska Native Review Commission.

The commission was founded by the Inuit Circumpolar Conference to take an objective look at what is happening in the lives of Alaska Natives in the wake of the Alaska Native Claims Settlement Act of 1971, and to make recommendations for future action as 1991, the year Native lands and stocks are scheduled to become alienable and taxable, approaches.

Berger's appointment, and the commission itself, has been met with both delight and skepticism. Different Alaskan delegates to last summer's ICC General Assembly in Frobisher Bay, N.W.T., such as Calista's Oscar Kawagley and NANA's John Schaeffer, praised the move as one which would bring out the feelings of villagers who often are not heard from.

Sam Kito, chairman of the Alaska Federation of Natives, Inc., expressed concern about possible conflicts between recommendations made by Berger and those made by AFN on the 1991 issue. Berger's study could "enhance or detract" from AFN's efforts, Kito said.

"I think I have to be equally concerned about both," Berger notes both his skeptics and enthusiasts.

"If, at the end of the whole



Judge Thomas R. Berger, who is heading up the Alaska Native Review Commission, and his wife Beverly Crosby. Beverly will be traveling with her husband as he visits Alaska Villages.

PHOTO BY BILL HESS

process," Berger says, "I can write a report, and the people here say to themselves, 'that's right, he got it right!' And if they say 'that's the direction we should choose,' if I do that, then I will be very happy."

In his native Canada, Berger has won the approval of the aboriginal people several times. After he took up Mrs. Hurley's charge, Berger found she not only brought criminal cases, but also Native leaders who wanted to discuss issues of sovereignty, and aboriginal hunting and fishing rights.

In 1965, Berger argued a test case before the Supreme Court of Canada where the court upheld the treaty hunting rights of the Indians of Vancouver Island. Both the federal and provincial governments had until then refused to recognize the treaty rights.

In 1971 Berger argued what has become known as the "Nishga Case" before the Canadian Supreme Court. Berger was able to convince the court to uphold the concept of aboriginal rights under Canadian law. "That is the leading case in Canadian jurisprudence on Canadian aboriginal rights," he notes proudly.

As 1971 drew to a close, the then 38-year-old Berger became the youngest justice named to the British Columbia Supreme Court in this century. Then, in 1974, he took a deep step in Native issues when the government appointed him commissioner of the Mackenzie Valley Pipeline Inquiry.

Berger's role: to determine the social, environmental, and economic impact of the proposed Arctic Gas pipeline.

The pipeline would cut across the North Slope of Alaska from Prudhoe Bay, cross the Northern Yukon, and then slash through the Mackenzie Delta. It would pass through animal, bird and fish habitat vital to both the Inuit and Athabaskan people of the area.

Berger would spend a year and a half traveling to 35 villages throughout the Mackenzie Valley and the Western Arctic, as well as the regional centers of Yellowknife and Inuvik. He would hear testimony from 300 "expert" witnesses, and from hundreds of villagers intent on expressing their own expertise.

Berger would have each village appoint its own interpreter. Every testimony would be translated; those delivered in English or French to the Native tongue of the village, and those delivered in the Native tongue to English and possibly French.

Although he was coming in as a representative of a government which could approve a project which would greatly impact the subsistence lifestyles of the people, Berger says he was always warmly received. Sometimes, he shared villagers' homes, and most often he shared in their dishes of caribou, muktuk, moose and other Native foods.

"The people understood that I was coming to hear what they wanted to say," Berger explains his positive reception. "They had a lot to say, and it was usually well said. I think they realized I was genuinely concerned to know their feelings and their thoughts.

"You couldn't help but become profoundly aware of the

deep conviction the Native people had that their whole future was tied up with the land; the protection of the land, the preservation of the land. It was there, you felt it again and again."

The hearings attracted a great deal of media coverage in Canada, Berger recalls, saying this proved to be good for the Native people. "It gave the Canadians in general the opportunity to rediscover the Native people instead of stereotyping them," he explains. "They discovered they were hearing from real people!"

Although the project was most challenging, and sometimes left Berger stranded for longer than he intended to stay when bad weather would shut down all flights leaving a village, he recalls it as a challenge he felt he must answer.

"It seemed to me that I was the man on the spot," he explains. "I was there, if I didn't do the job properly, it wouldn't get done. I realized that Native people throughout Northern Canada were looking to me to write a report that could give guidance to the government.

"I felt, 'well, if I don't do my best to insure that the government and the Canadian public understand what is at stake here, I'll be letting down an awful lot of people, including myself.' Once having set my hand to the plow, I had to complete the furrow."

And when the furrow was completed, Berger found the results "satisfying."

"The recommendations I had made had by and large been carried out by the Canadian government," he explains. The Arctic Gas pipe-

line was rejected, with an alternate route following the Alaska Highway approved instead. Highway approved instead. Berger had recommended that an international park be created straddling Alaska and the Yukon.

In 1978, Canada withdrew nine million acres of the Yukon from industrial development to establish Canada's first wilderness park. Across the border, the U.S. in 1980 set aside the greater portion of the Arctic National Wildlife Range as wilderness.

Canada recently adopted a new constitution. Before doing so, a clause guaranteeing aboriginal rights for Canada's Inuit and Indian people was stricken from the new document.

Berger found himself in the center of controversy when he intervened to have the guarantee of aboriginal rights restored to the new constitution. "We found that in the U.S., judges had spoken out more often than in Canada," Berger remembers.

"In Canada, it caused quite a controversy. The main thing, though, is that aboriginal rights were restored to the constitution.

"The Chief Justice of Canada and I disagreed about the propriety of my intervening in the constitutional debate. It was one of those things in life that people have to agree to disagree on. Some issues in life can't easily be resolved."

Last April, Berger decided to retire from the court. "I had had 12 good years," he recalls, "but I decided that the time had come to leave.

"At 50," he laughs, "that's one of the last stations at which you can get off and into something new."

Berger was set to teach constitutional law at the Law School of British Columbia when the invitation to chair the review commission came from ICC. Some ICC personnel privately admit that they were somewhat skeptical that Berger would respond favorably, and Berger says he had his own doubts at first.

Then he looked into their plan, and decided it was well thought out and workable. "I thought it was something I could do; in life you want to be useful," Berger explains. "You want to have some influence for good on events. This seemed like just such an opportunity."

Berger plans to conduct hearings in Alaska much as he did in Canada; by going into different villages, and staying for as long as it takes to hear testimony from everyone who wishes to give it.

Some of his skeptics have mused that Canada is Canada, Alaska is Alaska, and Berger does not know what he is getting into. This may be a furrow to rip his hand from the plow.

"I've heard that before," Berger smiles.