



# yogi incognito

## the life and work of tom berger

### interview by don gamble

**T**om Berger has dedicated his life to ideals of justice, integrity and fairness. As a lawyer, politician, judge and commissioner of inquiry, Berger has repeatedly acted in the interest of those who have traditionally had little voice when up against powerful institutions. In doing so, he has challenged the powerful political and economic interests that commonly rule a country and its courts.

As a young lawyer in 1965, Berger took on the Nisga'a Indian Land Claim case, otherwise known as the Calder case, that was to settle land claims between the Nisga'a and the Government of British Columbia. The case rose to the Supreme Court where Berger delivered a landmark argument asserting Aboriginal land claims. Although the Court's decision initially wasn't a clear win for the Nisga'a, six months after the decision, Minister of Indian Affairs Jean Chretien announced a change of government policy: Canada now intended to settle Aboriginal claims. Berger, however, took little credit for the win; instead he spoke of the determination and perseverance of the Nisga'a people.

In 1971, at the age of thirty-eight, Berger was appointed to the Supreme Court of B.C. and began his twelve year career as a judge and head of inquiries. Ten years after his appointment, Berger spoke out about the importance of including Aboriginal rights in the new Canadian Constitution. Prime Minister Pierre Trudeau criticized Berger for being too political, and in 1983

Berger made the difficult decision to resign from the bench in order to speak freely on human rights issues.

He went on to spearhead precedent-setting, independent inquiries that would profoundly affect social policy in North America and around the world. In 1990, Berger received the Order of Canada. He has written three books and many influential reports. He holds honorary degrees from thirteen universities. In September 1999, Vancouver's Simon Fraser University gave Berger a Mahatma Gandhi-inspired award for his commitment to peace, justice and the environment. The Nisga'a have honoured him with the name Halaydim Xhlaawait, meaning Supernatural Being of the Mountain.

I had the good fortune to work with Tom Berger on the Mackenzie Valley Inquiry in Canada, as well as in Alaska and India. Throughout these adventures, I observed first-hand how one person, often in the face of seemingly impossible odds, can become a beacon of hope and a source of inspiration for many. Ordinary people often found their voices for the first time because they sensed that Tom Berger was someone who would listen, who would take time to understand, and then act according to the highest ideals of justice and fairness.

This past December, the Honourable Thomas R. Berger, OC, QC retired from full-time practice. On the eve of his retirement, I interviewed him about his life's work—work that has and will undoubtedly continue to embody the yogic ideals of service. D.G.

1966



photo by Fred Schiffer

**Berger's private practice in Vancouver**

1974

From 1974 to 1977, Berger heads the Mackenzie Valley Pipeline Inquiry to determine the socio-economic and environmental impact of a proposed gas pipeline that would run from Alaska through Canada to Chicago. After more than three years of hearings in villages across northern Canada, and after examining the testimony of engineering, environmental and social science experts, Berger comes to a conclusion that startles government and business interests alike—what was billed as the world's largest-ever engineering project should not proceed as planned. It is never built.

Berger's inquiry process changed the face of environmental and social impact assessments in Canada and quickly became the international standard by which other impact assessments were judged.



photo by Don Gamble

**Berger conducting a hearing in a village in Northern Canada**

*Don Gamble: Your life's work has been devoted to law and justice. What drew you to law?*

Tom Berger: When I was in high school I realized that I either wanted to be a teacher, a lawyer or a journalist. By the time I had spent a year or two at university, I had decided that I would choose law. All of these professions have one thing in common—they involve using language; they involve communicating ideas, speaking and writing. I've tried other things but I've always returned to law which is, I suppose, my first love and my last.

*DG But why law? What is the attraction?*

TB Well, I believe it is an opportunity to do some good in the world. I have had the good fortune to take on cases and causes in which I believed. I've often felt that I was on the side of the angels, and that is what has led to my returning always to the law. You have to make a living, and if you can make a living in a way that gives you real satisfaction and offers an opportunity to be useful to others, well, that's a real bonus.

*DG You have a history of taking on cases even when there was no prospect of your fees being paid. What inspired you to take on these cases?*

TB I've been around the legal profession for four decades now and I have quite a few flecks of grey in my hair, and so naturally other lawyers have brought cases to me where they felt they were at a dead end. A few years ago a lawyer from Prince George, Charles Lugosi, came to me with a case on behalf of a little girl. The mother had gone into the Vancouver General Hospital for an abortion but the procedure had resulted in the birth of a baby. The child, even though viable, had been left to die, and as a result was brain damaged and quadriplegic. There was a cover-up by the hospital.

In 1994, when Mr. Lugosi came to see me, there was only the faintest prospect of success, but I thought it was a case that I really ought to take. All the lawyers in our office devoted themselves to that case for four or five years. Finally, on the eve of trial, the hospital caved in and we settled the case. It's public now. The settlement was the largest ever made on behalf of an infant. It made us feel very good that we had made a difference in that child's life and in the life of her adoptive parents. Every

time the parents brought the child in to see us—her name is Ximena—we realized that we couldn't let go of this case until we'd fought it out to the end.

*DG Do you see the law then as an instrument of social policy?*

TB The Calder case in 1973—in which the Supreme Court of Canada upheld the place of Aboriginal rights in Canadian law—changed federal policy. That case has led to treaty-making that has gone on for twenty years now, culminating in the Nisga'a treaty. When the courts uphold Aboriginal rights, the public begins to understand that these aren't ephemeral ideas, they aren't something that was invented by clever lawyers on a dull day. These rights are real, they are tangible and they are important.

Currently I'm engaged as lead counsel in British Columbia's lawsuit against the tobacco companies. The province is seeking to recover health care costs that it's had to put out for victims of tobacco-related disease over the last forty years. That's a case that I think before it's over could very well turn out to be a significant instrument of social policy.

*DG You've attracted an unprecedented number of cases related to what we call social justice, cases that are precedent setting in many ways, such as the Calder case. Do you see a difference between law and justice?*

TB Law is laid down by parliament and the legislatures. Judges decide case by case on the law to be applied as disputes come before the courts. I think justice is an ever receding objective on the horizon, and lawyers are always struggling to reach that objective in any given case. If a case is won, the belief is that justice has been served; if a case is lost, the belief is that justice has not been served—that's the perspective of the lawyer. I concede that in some instances I may have won or I may have lost and the cause of justice wasn't advanced or retarded. However, in some cases I really do at the end of the day feel that I have the right to say, "you know, I've done something worthwhile here."

For instance, about ten years ago I represented a woman who'd been a victim of brainwashing at the Allen Memorial Institute in Montreal. In the late fifties and early sixties, a scientist named Ewan Cameron was

in charge of the institution and conducted mind-altering experiments on patients. He did it with the backing of the CIA and Canada's federal government. We sued on behalf of Linda Macdonald, who had gone in there for post-partum depression and emerged having lost the recollection of her whole life before she went in. Twenty-five years later, she read a story in the paper about these experiments, realized what must have happened to her, and came in to see us. Her case became a struggle that went on for several years until the federal government agreed to compensate her and many others. Linda Macdonald was, and is, a courageous woman. It was a privilege to represent her.

Kim Campbell, who was then the Minister of Justice, did the right thing in that instance. She said, "We think that this should never have happened. The federal government bears a measure of responsibility, and we're going to compensate all of these people." We had done something that had served the cause of justice. We weren't just reading about it or writing about it, or reflecting in a philosophical way about it. Cases like Linda Macdonald or Ximena Renaerts, the little girl I was speaking of, they aren't just putting a human face on the cause of justice, they are the cause. If you can win on their behalf, then justice will have been served for them and perhaps for others.

*DG These kind of cases, I mean as noble as it is to take them on, it's not common.*

TB When I took them on, I felt that there had been a terrible wrong committed and something had to be done about it. If I didn't do it, it is likely that nobody else would have. I think, as well, that when you're trained in the law, when that's your business, these kind of cases pose a challenge. You think, damn it, I can do this, I can show that the law will serve the cause of justice. There is a professional fascination that I think lawyers should plead guilty to.

*DG Is it a personal fascination as well?*

TB I think so. In fact, now that I'm looking back over my career, I'm astonished at what has been achieved by just a small law office. I remember when we first took on the Nisga'a case. It went to the Supreme Court of Canada, and it's known as Calder vs. Attorney General

## 1983

Invited to Alaska by the Inuit Circumpolar Conference and the World Council of Indigenous Peoples, Berger heads a two-year review of the implementation of the 1971 Alaska Native Claims Settlement Act. After visiting sixty-two villages and towns and listening to the testimonies of hundreds of Eskimos, Indians and Aleuts, as well as legal experts and scholars, Berger suggests changes that would properly accommodate those who had become so embittered by the imposition of the original legislation. His report, *Village Journeys*, and his process of consultation, becomes influential in other countries with Aboriginal peoples, including Australia, New Zealand, Finland, Norway and Canada.



photo by Bill Hess

## 1991

Berger is asked by the president of the World Bank to co-chair the first independent review in the Bank's history—an examination of the controversy surrounding the implementation of resettlement and environmental protection measures for the multi-billion-dollar Narmada River project in western India.

In 1992, his report declares the project to be fundamentally flawed and points to the Bank's and India's failure to follow their own policies to protect the environment and the millions of people affected by the project. The Bank withdraws funding and, in response to the internal problems highlighted by the review, a permanent Inspection Panel is established to monitor Bank performance.



photo by Don Gamble

Berger visiting people displaced from their homes by the Narmada River project

of B.C. Back in 1966, four Nisga'a leaders came from the Nass Valley to see me. I had a small office in Vancouver, I practised by myself and the rent was \$120 a month. I had a secretary and my mother acted as my bookkeeper. From that little office, the whole land claims industry developed. Looking back on that and some other cases where we were able to plough new ground, I'm amazed. I think it helped that I was young and tireless and not fully aware of all the obstacles that were to come.

DG *Social justice is of utmost importance to you. Why?*

TB We may not have people in Canada who are oppressed, but we have people who are vulnerable, we have people who are liable to be discriminated against, we have people who have not had any reason to be certain of their foothold in society. I think that all such people are entitled to be protected by the law, and I really do intend to do my best on their behalf.

Many people have asked me why I spent my life in social justice causes. It is an impossible question to answer. I do remember when I was a boy my father was in the RCMP. During the early years of the Second World War the Japanese Canadians were interned solely on the grounds that they were of Japanese descent. They were Canadian citizens, but they were taken from their homes in the Greater Vancouver area, their assets were seized, and they were interned in camps where they remained until a year or two after the war was over. There was only one Member of Parliament—Angus MacInnis, a Vancouver MP—who protested against this in the House of Commons. In 1942, during the months after Pearl Harbor, this was not something that made you very popular in Vancouver, or in British Columbia, or even in Canada. I couldn't have been more than nine or ten years old and I remember my father saying that this Mr. MacInnis was a very courageous man. I think that stuck with me over the years. I've been interviewed a number of times in the last year or so, and I've dredged that particular recollection up from my boyhood, and maybe it did influence me.

DG *Your first book was called *Fragile Freedoms*. Are you saying that our rights and freedoms all hang by a fairly thin thread?*

TB I think we all have to remember that our freedoms

are fragile and we have to keep working to defend them. People depend on the entrenchment of freedoms in the Charter of Rights, whether they are disabled, whether they are visible minorities, or persons accused of crime. The Charter of Rights is there to make sure they are all treated fairly.

Aboriginal peoples are protected under section 35 of the Constitution Act. This is the same series of constitutional amendments that gave us the Charter, but the recent progress of the Nisga'a treaty through the legislature of British Columbia and through the Parliament of Canada shows that even today there are a lot of people who are unwilling to acknowledge Aboriginal rights. They happen to have those rights because they were here first, this was their country. Joe Gosnell, the president of the Nisga'a Tribal Council, runs into a buzzsaw of folks who portray the same attitudes of the people in British Columbia a hundred years ago who said, "We're not going to acknowledge Aboriginal rights or treaty rights. You may have been here first, you may have had your own political community, you may have had your own religion, your own languages, your own economy, but all of that's in the past, and it doesn't cut any ice today." Well, that is opposed to the whole current of the development of human rights around the world.

*DG Where, in your view, are human rights rooted?*

TB Some would say these are ideas about human rights that men and women have developed over the centuries and that however we got to them, whether they are religiously inspired or whether we reasoned our way to them, that's where we are. I'd be hard put to assign a single source to my own views. If you see someone being beaten on the street, you will go to their assistance. You don't have to have a copy of the Bible or the Koran at hand to decide what's right and what's wrong in those circumstances. If you see someone starving, you know you've got to help them.

The question of rights becomes more subtle as you deal with situations involving the rights of accused persons, the rights of trade unionists, the rights of Aboriginal people. How do you integrate those rights into the larger fabric of society? In Canada we're always struggling with these questions.

Somebody once said to Hugh MacLennan, the great Canadian writer, "What about the Quebec problem?" And MacLennan said, "You know, that's like saying life is

a problem. It isn't a problem, it's an experience." I think that's a very good phrase. Years from now we will still be struggling with these questions: What are the rights of the French and the English in Canada? How do we find a place that's fair for all of our minorities? What is the true extent of Aboriginal treaty rights for the First Nations? Those are things that I think in the end are going to mean more than the Gross National Product or the wars between the federal and provincial governments over who is going to administer the health care delivery system.

*DG You are just on the eve of retirement, so what's next for you? In the yogic sense, you're just entering the most productive period of your life. Do you see it that way?*

TB I'm really only semi-retiring. I'm still going to be doing the case against the tobacco industry. There are now some challenges in the courts to the Nisga'a treaty. I'll be defending that treaty on behalf of the Nisga'as. I hope to write a little bit about some of the things I've done in the past by way of the public service, and my work in the Mackenzie Valley, Alaska and India. I don't think I've got anything profound to say about my life and my work, but I hope that the overriding impulse has been one of service, to help the people I set out to help in the first place. And I think I've been able to live by that credo, in a kind of a bumpy sort of way.

*DG Do you have any regrets, when you look back over forty years?*

TB Any regrets? No, no regrets. I'm not saying I didn't make mistakes, and that I didn't make a lot of unsound choices, but about the general course of my life and work, no regrets. ॐ

Don Gamble, a former engineer and environmental activist, now works with ASCENT magazine as marketer and financial advisor. He has many interesting friends, like Tom Berger.