

SAMPLE CHAPTERS

AUTHOR **DREW ANN WAKE** EDITOR

AGAINST THE ODDS

THE INDIGENOUS RIGHTS CASES OF THOMAS R. BERGER

“The impact of the Berger Inquiry Report lends credence to the idea that Indigenous voices should be heard and taken into account in decisions that affect Indigenous Peoples and our Land.”

—*Chief Justice Shannon Smallwood
Supreme Court of the
Northwest Territories*

ESSAYS BY **THOMAS R. BERGER** QC QC OBC

FOREWORD BY **HAMAR FOSTER** KC

WITH **MICHAEL JACKSON** KC, **JEAN TEILLET** LL.M.

DALEE SAMBO DOROUGH PH.D., **SHAZNAY WAUGH**, **LINDA MacCANNELL** MFA

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THOMAS R. BERGER



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THOMAS R. BERGER

Drew Ann Wake, *author and editor*

Thomas R. Berger QC OC OBC, *author*

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Afterword by Shaznay Waugh



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Against the Odds was written
in honour of the Indigenous leaders
who joined Tom Berger
in seeking paths to
justice and equity in Canada.
We have learned so much from you.



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FOREWORD

Hamar Foster KC



I AM HONOURED to have been asked to write the Introduction to Drew Ann Wake’s quite wonderful book *Against the Odds*. I appeared as counsel before Tom Berger on two occasions when he was Mr. Justice Berger of the Supreme Court of British Columbia, worked on couple of projects with him when he returned to the practice of law, and came to regard him as a friend. So it is a pleasure to see his career, and the Indigenous people who inspired him and played such a central role in everything from his first case to his last (and so many of the highlights in between), set out so effectively in one volume. But *Against the Odds* is about more than this.

Section 35 of the *Constitution Act*, 1982, states that the “existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” Since then, a host of developments, notably the Supreme Court of Canada’s decisions in the Delgamuukw and Tsilhqot’in cases, have fleshed out what those words mean.

Against the Odds is mainly about what it was like before those words were enacted into law.

Indigenous Peoples have been asserting their rights in this country from the beginning. However, as their populations decreased due to epidemics of smallpox, measles, and other illnesses, and as their roles as traders and

military allies diminished, they were gradually marginalized in the consciousness of most non-Indigenous people. Czech novelist Milan Kundera aptly noted, “The first step in liquidating a people ... is to erase its memory Before long a nation will begin to forget what it is and what it was.... The world around it will forget even faster.”

As this book documents, however, there were remarkable people who did not forget. Even before the events described here, there were many such people. In British Columbia, for example, delegations were sent and petitions addressed to the colonial authorities within a few years of the colony’s founding in 1858. And after the turn of the last century, these initiatives included delegations to Rome, Ottawa, and London, England. The Cowichan lodged their petition with the Imperial Privy Council in 1909, followed by the Nisga’a petition in 1913. Citing the Royal Proclamation of 1763 and other legal authorities, organizations such as the Indian Rights Association, the Interior Tribes, and the Allied Indian Tribes of British Columbia maintained pressure on provincial, federal, and imperial governments for three decades.

But there were political, legal, and financial obstacles that stood in the way. Then, in 1927, Parliament not only made it effectively illegal to raise funds to assist tribes or bands making claims against the government, but also had a committee of the Senate and House of Commons dismiss the Allied Tribes’ request to have their claim referred to the courts. So, this sort of effort had to go underground, and the world largely forgot.

However, when the ban on fundraising and other restrictions were lifted in 1951, the campaign for rights

was revived. *Against the Odds* is the story of a hugely important part of that revival. It is the story of so many remarkable Indigenous people: the hunters in the White and Bob case, the Nisga'a tribal leaders in the Calder case, the Dene, Métis, and Inuvialuit of the Mackenzie Valley Pipeline Inquiry, the Alaskans in *Village Journey* (the report of the Alaska Native Review Commission), the people at the heart of the Supreme Court of Canada's decisions in the *Manitoba Métis Federation v. Canada* and *Nacho Nyäk Dun et al v. Yukon*, among others.

It is also the story of a remarkable non-Indigenous man, Tom Berger.

I wonder whether young people today understand how novel it was in 1964 for a lawyer to seek to overturn the convictions of two Indigenous men for illegal hunting, citing a treaty that, until then, almost no one had heard of.

At the time of the White and Bob case, aboriginal rights or title were not being taught in law schools. Certainly Tom had never heard them mentioned in his law student days.

It was also unusual to hold the sort of inquiry that Tom presided over in the Northwest Territories in the 1970s, and to conduct it the way he did. Not content to stay in the south, requiring people to come to him, he travelled throughout the North, visiting every community, bringing the inquiry to them. As Berger told a documentary maker:

What the people of the North are forcing us to do is re-examine the economic religion of our time,

that there should be an ever-expanding cycle of growth and consumption, that material well-being is the most important thing in life. They don't share those goals with us. They've made that clear to me. And that makes us uneasy.

Uneasy or not, he listened, he heard what was being said, and he recommended that no pipeline be built until land claims were settled.

George Manuel, a founder of the World Council of Indigenous Peoples and a giant in his own right, said that Tom's Mackenzie Valley Pipeline Report was "the best statement on Indian rights to come from any government since the Europeans first came to Canada."

In December of 2020, Tom Berger argued his last case, representing the Peter Ballantyne Cree Nation in the Saskatchewan Court of Appeal—by video link. Tom died four months later, on April 28th, a month after celebrating his 88th birthday. But he, and those he listened to and worked with, live on in this book.

—*Hamar Foster KC,*
Victoria BC, 2024

PREFACE

OPPORTUNITY OF A LIFETIME

Drew Ann Wake



ON THE AFTERNOON of May 7, 1976, I walked into the Vancouver office of Justice Thomas Berger. It was just days before the first southern hearing of the Mackenzie Valley Pipeline Inquiry and the office was alive with speculation. Was the issue of a pipeline corridor along the distant Mackenzie Valley of interest to urban dwellers? Or would the hearing room sit empty?

Although I was a novice reporter, the judge was not a stranger to me. I had spent the previous six months covering the Inquiry hearings in Dene and Inuvialuit communities in the Northwest Territories. I had filed reports to “Our Native Land”, a weekly radio program from the CBC, designed to communicate news of interest to First Nations across Canada. I was a junior member of the news corps that covered the Inquiry, but I was happy—deliriously happy—that I had been given the opportunity to cover an important and divisive national debate.

In general, the Inquiry did not encourage members of the media to interview Judge Berger. With a few key exceptions, reporters were asked to cover the testimony given at the hearings. The Judge’s views, we were often reminded, would be made public when he issued his final report.

But when I visited the Judge's office in June of 1976, he startled me by asking whether I would be interested in interviewing him. I said "No, thank you." I thought the real issues at the inquiry were being raised by the Dene and Inuvialuit who spoke at the community hearings in the North. They described with great insight how the construction of the pipeline would damage their land, the wildlife on which they depended, and their hopes for a just land claim settlement. As I spoke I became increasingly enthusiastic: I wanted my radio reports to show how Indigenous and environmental organizations were making their voices heard through the inquiry.

Suddenly I realized that I was turning down an invitation that any reporter in the country would be delighted to accept. I fell silent. Tom, gracious as always, said I should continue my work from my preferred perspective.

Thus we began a forty-five-year conversation about balancing the impact of lawyers and political activists on Indigenous rights in Canada. How did those two approaches intertwine? How did they differ?

In the last months of Tom's life, I was reminded of that early conversation as we sat and combed through his boxes of correspondence and speeches. Once again Tom surprised me. He handed me the chapters of an unfinished book with a note: "Do with these what you will."

Issues of Justice

I decided to revisit the conversation we had explored that day forty-five years before, when I visited him in his office. In this book, *Against the Odds* I have attempted to weave together Tom's passion for the role the legal system can play in gaining justice for First Nations with my own conviction

that the courage and determination of Indigenous families, leaders and communities have forced Canadians to address these issues. Over the last half century, First Nations leaders and their legal advocates have collaborated on strategies to transform the way Canadians understand issues of justice toward First Nations. I hope this book captures some of the remarkable moments in that transformation.

Acknowledgements

I am deeply grateful to many colleagues and friends who have assisted with this volume. The Berger family has provided crates of speeches, newspaper clippings and correspondence so that I could follow the twists and turns in Tom Berger's legal career.

I also wish to thank more than a hundred First Nations families who have shared their memories. In British Columbia I am thankful for the time that the White family of the Snuneymuxw First Nation and the Nyce family of the Nisga'a First Nation have spent describing the challenges of those two landmark legal cases.

In the Northwest Territories, I am grateful to Martina Norwegian and Terry and Brian Jaffray for their invitation to share my audio recordings from the Berger Inquiry with students in schools in the Dehcho region. Our tour of the communities illustrated the passion that northerners have for their languages and history, passions that continue to the present generation. I have enjoyed a decade-long collaboration with Sharon Snowshoe and Arlyn Charlie at the Gwich'in Tribal Council Department of Culture and Heritage who continue to inspire fresh ways of encouraging young people to incorporate past and present.

I must also thank my colleagues in the south. Professor Michael Jackson KC, Special Counsel for the Berger Inquiry, has shared his photographs from the Mackenzie Valley Pipeline Inquiry. Linda MacCannell, photographer and friend, travelled the length of the Mackenzie River with me, capturing images of the once-youthful activists who have become distinguished Elders and leaders.

In Vancouver, my friends at Theatre of Fire have pushed for creative ways to tell these stories. In 2008, Daniel Séguin initially volunteered to digitize dozens of historic audio interviews, photographs and music. That turned into a sixteen-year task that has enabled us to recapture hundreds of interviews recorded over the last fifty years. Daniel and Markus Radtke have transformed audio and images into short videos that allow us to re-experience the speeches that captured key moments in the Aboriginal rights debate.

It has been a great pleasure to work with Dr. Lorene Shyba at Durvile & UpRoute. Her guiding hand, and her commitment to Indigenous rights issues, are remarkable. Thank you to the author of the foreword, Hamar Foster KC who was the first person to ask me, when we were teenagers: “Would you like to be a journalist?” I guess the answer is: “Yes.”

A heartfelt thank you to young Dene scholar Shaznay Waugh for the thoughtful afterword to this book. I hope that, like Shaznay, other young people—future community organizers, future lawyers—will be inspired by the commitment and determination of their predecessors who overcame great challenges to achieve the advances detailed in these pages

—*Drew Ann Wake*
Vancouver, British Columbia, 2024

PART I
THE EARLY YEARS



“It was the first shot fired by the Aboriginal people of Canada
in their campaign to reclaim Aboriginal and treaty rights.”



CHAPTER ONE

THE WHITE AND BOB CASE

Drew Ann Wake



WHEN 15-YEAR-OLD LEONARD WHITE rolled out of bed before dawn on the morning of July 6, 1963, he was thinking only of the hunting trip that lay ahead. He had no idea that the events of the day would plunge his family into a landmark legal case that would alter the rights of Indigenous Peoples in Canada.

The White family's farm nestled in the forest on traditional Snuneymuxw land south of Nanaimo, British Columbia. There, Leonard's parents, Clifford and Audrey White, raised their nine children on food from the farm and the forest. It wasn't an easy life. When the children were young, Audrey would bundle them up, take them to the barn and lay them on the hay with their bottles. Then, she would milk the cows and clean the stalls while keeping an eye on the sheep. She joked that her children grew up in the hay stalls.

As the children grew older, they took on some of the farm labour. They helped milk the cows and feed the chickens. They took milk cans down to the river and hauled them back up the hill filled with drinking water. In the summer, they tended a large garden and helped their mother can enough fruit and vegetables to last through the winter.

The White family set nets across the Nanaimo River just below the house, fishing for salmon. Leonard's sister, Jackie, remembers that her father would ask the children to carry the

salmon up to the house. “In those days I wasn’t very tall, so I’d drag the salmon up the hill for our dinner.”

Clifford White, like most men in the Snuneymuxw community, worked as a logger and a fisherman. He would be away for days at a time. When he returned, he would hunt for deer to sustain the family. His wife made pots of venison stew and ladled it into jars for the coming weeks. “We hunted deer because we needed to,” says Leonard. “One deer would last us a week. The jobs weren’t great so if it wasn’t for the deer and salmon, where would we be?”

But Clifford didn’t just hunt for his own family. Leonard recalls: “We had friends across the river and old people down the hill who couldn’t get out anymore. We’d give them deer and they loved us for that.” Leonard had learned to shoot when he was six, so by the age of fifteen he was making a contribution to iceboxes across the community.

On July 6, 1963, when his father and David Bob decided to go hunting, Leonard and a friend, Gerry Thomas, jumped in the back of the car. Together, they headed up a back road behind Mount Benson, which crossed traditional Snuneymuxw land. Over the next few hours, the hunters shot six deer. They cleaned the carcasses and packed the meat into the car. Then they headed home. But as they approached the farm, the local conservation officer, Franklin Greenfield, was waiting for them. Leonard’s sister, Jackie, remembers: “The conservation officer went up to my dad’s vehicle and said: ‘Cliffy, Cliffy, Cliffy.’”

Dad said: “What?” The officer said: “I see you’re at it again.” My Dad said: “I hunt for my family. I have to feed nine kids.” But his argument fell on deaf ears. Clifford White and David Bob were ordered to appear in court the next day.

All evening, Clifford and Audrey White discussed what to do. One option was that Clifford could base his defence on an oral history that had been passed down through generations of Elders for more than a century. This history held that in 1854, James Douglas, the Factor of the Hudson’s Bay Company and

the Governor of Vancouver Island, had negotiated a treaty with the Snuneymuxw people, ensuring their right to hunt and fish on unoccupied lands. The other option was that Clifford could plead guilty and face a fine that the family could not possibly pay. He would be sent to prison. Audrey would be left to find food for herself and nine children.

The younger children huddled around their parents as they debated. Heather White remembers: “We clung onto my mother. She was a tiny spitfire. She was shaking her finger, saying: ‘You can’t let them put you in jail. You go and fight, Clifford.’ You knew there was trouble if she called him Clifford instead of Cliff.”

By the time morning came, they had settled on a plan: the hunters would ask their lawyers to defend them in Magistrate’s Court based on what was sure to be regarded as a fragile legal argument: an agreement made more than a hundred years before.

Court Case in Nanaimo

When White and Bob met their lawyers to plan their strategy, they encountered a serious setback. The lawyers had never heard of the Treaty document that Clifford White and David Bob wanted to use as the foundation of their defence. When the case opened in court, their lawyer Mr. J. Wilson, asked Judge Lionel Beevor-Potts for an adjournment. He explained that the defendants had “a special interest” and the lawyers were having trouble obtaining instructions from their clients.

Judge Beevor-Potts noted that it had been more than two months since the two men had been caught with the deer, enough time to have assembled their case. Wilson countered that Snuneymuxw families had been away from their homes during the summer months, gathering food for the winter. But the prosecutor, Don Cunliffe, was emphatic: “I do not think that the Indian Race are entitled to special privileges in our Law Courts.”

When Judge Beevor-Potts ruled against an adjournment, Wilson asked to withdraw from the case. Clifford White and David Bob were left to defend themselves. Judge Beevor-Potts gave the men a three-sentence description of the legal process, and the hearing began.

The first witness was the conservation officer, Franklin Greenfield, who described encountering David Bob and Clifford White on the road a few miles outside Nanaimo. Two teenagers, Leonard White and Gerry Thomas, were in the back seat of the car. At their feet were three rifles, covered by an old blanket. When Greenfield opened the trunk, he found six black-tailed deer, still warm to the touch.

In response to a question from Cunliffe, Greenfield said that Clifford White's permit had expired in March. But Clifford White interrupted, saying that his last permit had been issued a year before, in 1962. He said it was very rare for Greenfield to issue a permit to a member of the Snuneymuxw community. Usually, when they went in to ask for a permit, Greenfield refused. "He said no, it is just for needy Indians. Who is Mr. Greenfield to decide who is a needy Indian and who is not?"

Clifford White told the court that he had visited Greenfield's office in 1963, trying to get a permit. Greenfield countered that he had sent a permit by mail: perhaps someone else had picked it up? The exchange ended in an impasse.

The second witness was James Dewar, a conservation officer who had stored the six deer in a freezer. He had brought the deer to Nanaimo for the hearing. Judge Beevor-Potts decided that the six cardboard boxes of deer meat should be brought into the courtroom and entered as exhibits.

Leonard White and his friend, Gerry Thomas, were sitting in the balcony. The teenagers had never been in a courtroom before and they found the arcane dress and language of the lawyers entertaining. But their amusement turned to shock when the conservation officer carried in six boxes of

deer meat. “I was upset to see those deer carcasses lying there, rotting away,” Leonard recalls. “They could have been on somebody’s table.”

Both Clifford White and David Bob declined to testify. The Indian agent for the Nanaimo band, Mr. Samson, had been expected to appear at the hearing, but he sent word that he had to travel to Victoria. Judge Beevor-Potts agreed that the hearing would be adjourned for a few days until he could appear. This gave Clifford White and David Bob valuable time to prepare a case based on the Treaty documents signed more than a century before. They contacted Joseph Elliott, who had collected and reviewed historical documents for the neighbouring Cowichan Union band. He agreed to testify.

When the hearing resumed, the Indian agent once again failed to appear. He sent a message that he was “disinterested in the case”. Clifford White took the opportunity to ask the court to hear from their witness. Historian Joseph Elliott from Cowichan had brought a photostatic copy of *Papers Connected with The Indian Land Question 1850-1875*. He read aloud a clause stating that traditional lands were to be kept for the use of the Indigenous people, not only for the current generation but for the generations to come. Moreover, the Treaty contained a sentence that was directly applicable to the White and Bob case. “We are at liberty to hunt on unoccupied land for game and fish and carry on as formerly.” On that note, the hearing came to a close.

Within minutes, Judge Beevor-Potts announced his decision. “I hold that the alleged Treaty as read by Mr. Elliott does not apply to this case. You are both found guilty as charged.” Then he added insult to injury, with a direct rebuke to the defendants: “It is on the face pure piggishness. You could have had permits for a reasonable amount.”

The rejection of the Treaty incensed Clifford White and he rose to defend the document. “Would that pact be called a liar?” But the judge was unmoved, ordering each of the men

to pay a \$100 fine or spend forty days in jail. David Bob found the money to pay the fine. Clifford White asked for a month to raise the money but the judge gave him two weeks. Unable to meet the terms, he was incarcerated in Oakalla, a prison on the mainland with a grim reputation.

In their coverage of the case, the Nanaimo newspapers used language borrowed from the cowboy movies that were popular at the time. An early article blazed with a headline: “Two Indians Challenge Powers of White Man”. By the end of the trial, the headlines had not gained much subtlety: “Pair Learn in Court: Old Treaty Worthless to Indians”.

The conviction left the White family in dire straits. Audrey White was left with no income and nine children to feed. The family was shaken by the loss of Clifford, the breadwinner. Heather remembers that her mother often felt so alone that she would scrub the floors, just to take her mind off her worries. She also recalls that the conservation officers would sit farther up the road with binoculars, watching. “If they spotted someone hunting or fishing, they would swoop onto our homeland.”

While his father was away, fifteen-year-old Leonard assumed some of the responsibility for putting food on the table. One morning before school started, he jumped into his father’s boat and headed out to check his nets. But the conservation officers were on watch. Leonard was picked up and the boat and nets were seized.

In a letter, his mother, Audrey, described what happened.

It was a Mr. Arnold Epps from Ladysmith (Fish Warden) that took the net and boat off of Leonard. Our son, Richard, saw him when he was taking the nets off of Lenny. So I went down and got after him. I told him he had no right doing that. I told Lenny to come back across to our side of the river on the boat. And Mr. Epps said that he couldn’t touch it. That he was taking it. So I told him that he had better bring him home. Which he did. I then asked him what he was going to

do with the net and boat. He said they usually get rid of them. He took it to Ladysmith.

A week later Clifford White passed on news from Nanaimo: conservation officers had caught a group of non-Indigenous hunters with an elk shot out of season. They were let off with a reprimand.

The Nanaimo Appeal

The case had sparked the interest of First Nations across British Columbia. Guy Williams, the leader of the Native Brotherhood of BC, recognized that the White and Bob case represented a serious challenge. Clearly, a case in the legal sphere was moving into the realm of the political.

Guy Williams was determined that the White and Bob case should be appealed. So he asked Maisie Hurley, the editor of the Brotherhood's newspaper, *The Native Voice*, to search for a lawyer who could mount an effective appeal of the White and Bob case. Maisie said she knew just the man.

The man Maisie Hurley had in mind was Thomas Berger, who had opened a one-man law practice in Vancouver a short time before. He often sought the advice of Maisie's husband, Tom Hurley, who was widely admired as a defence lawyer. "[Tom Hurley] was very generous with his time," Tom Berger recalled. "He would sit down with me and we'd go over my cases. I learned a lot, just soaking up his knowledge."

Many of Tom Hurley's cases involved Indigenous defendants, making him one of the few British Columbia lawyers with experience in the knotty dilemmas emerging at the time. Maisie Hurley had built her own remarkable career as the editor of *The Native Voice* by championing the First Nations of British Columbia. She made sure that the White and Bob case received extensive coverage.

The stories measured the impact that the case would have, not only on the defendants but on First Nations across British

Columbia. By the time the White and Bob case concluded in Nanaimo, Tom Hurley had passed away so Maisie Hurley sailed into Tom Berger's office, determined to recruit him for the appeal.

"[Maisie Hurley] was a formidable woman," Tom recalled. "She was dressed all in black, with horn-rimmed glasses, and she had a cane. She said, without any preamble: 'Now Tommy, you must defend the Indians.' And I had no choice in the matter."

When Maisie Hurley brought the White and Bob case to his attention, Tom Berger headed over to Nanaimo to meet his clients. The Snuneymuxw First Nation held a meeting so that Berger could gather a range of information about the history of the community.

"I talked to some of the Elders and they said: 'We have a treaty that allows us to hunt at any time of the year.' I'd never heard of the Treaty. I'd been to law school, and nobody there ever discussed any treaties on Vancouver Island. In fact, we never discussed the rights of Indigenous people at all."

Across British Columbia, First Nations began to organize in support of Clifford White and David Bob. In October 1963, leaders from the South Vancouver Island Allied Tribes set up a fund to meet the legal expenses of an appeal. The money was raised through donations, many from individuals who committed a few dollars. It was a fragile financial base to contest a landmark legal case.

In the two months that followed, Tom Berger worked feverishly to organize the argument that he would put before the appeal judge in December. First, he wrote the provincial archivist, Willard Ireland, to ask if the archives held any historical materials related to the treaty that Joseph Elliott had read aloud during the September hearing. Ireland wrote back to say the Provincial Archives had a Register with the Treaty materials published in 1875 under the title *Papers relating to the Indian Land Question*. He noted that in most of these

documents, the terms of the treaties were fully described, followed by the signatures of members of the band in the form of a long row of X marks.

But Ireland had found a problem. In the case of the Saalequun purchase, the inscribed wording outlining the terms of the Treaty was missing. This blank space was followed by a line of x marks representing the signatures of 159 members of the band. But there was hope. A note, written in pencil, was pinned to the page. The note read: ‘A similar conveyance of country extending from Commercial Inlet, 12 miles up the Nanaimo River.’ This geographic designation matched the traditional lands of the Snuneymuxw people. Was it wise to submit this document, with its empty space, as evidence? Tom Berger felt that it could be submitted if the Provincial archivist was willing to appear as a witness and to bring the *Register of Land Purchases* with him. He added that the archivist might prefer to be summoned by subpoena, so he wouldn’t appear to be partial. Willard Ireland agreed.

Berger also elicited the assistance of an anthropologist from the provincial museum, Wilson Duff. In a letter, Duff pointed to a way that the case might be strengthened. “My impression is that your present conception of native title is based on usufruct, the right to use the products of the land. My conception is that native title is based on clear-cut Indian concepts of ownership of the land.” He pointed out that the case had been made in that way before the US Court of Claims. He suggested the framework could apply equally to the northern coast of British Columbia. At Berger’s request, Duff also agreed to testify.

Early in November, Tom Berger wrote to Clifford White and David Bob, asking them to travel to Vancouver on November 23, to discuss the case. Neither man appeared. Days later, letters arrived from each of the men, apologizing that they had not had the ferry fare. “I was not able to get a hold of any money,” wrote Clifford White. “I have been out of work for a while now.” In light of the straitened finances of

the appeal, Tom Berger arranged to meet with White and Bob, and two representatives of the Southern Vancouver Island Allied Tribes, in Nanaimo on the evening before the trial was to begin. This gave them only a few hours to meet face-to-face before the hearing began.

The appeal captured the attention of reporters, who continued to treat the case as a media spectacle. On opening day, the *Nanaimo Daily Press* reported that “Indians formed the majority of the spectators in the courtroom today where the hatchet buried nearly 112 years ago was not only dug up but was sharpened, ready for battle.”

Crown prosecutor Don Cunliffe took the position that James Douglas had been acting in his role as Chief Factor of the Hudson’s Bay Company when he signed the agreements. “I do not think that Mr. Douglas was empowered to enter into any treaties with the Indians,” he said. “The land sale conveyances were a furtherance of company policy which he carried out in the capacity of Chief Factor, not as Governor. I think the defendants are after the best of both worlds.”

In his final argument, which lasted three hours, Berger took a position that came from his initial conversations with Elders of the Snuneymuxw First Nation. The Elders had told him that they had Aboriginal title. That enabled Berger to make a double-barrelled argument. “When we appealed I said: We’ve got this treaty. But if you say we don’t have a treaty then we have Aboriginal title. Which is it going to be?”

In March of 1964, Judge A.H.J. Swencisky’s concluded:

...the vested rights of the Indians have never been taken away. I hold that the agreement between Vancouver Island Indians and the Crown was a solemn document with all the status of a settlement or contract.

The White family celebrated by going out hunting. The men shot an elk which provided enough meat for the many relatives and friends who stopped by with congratulations.

The Provincial Appeal

Shortly thereafter, the Crown announced an appeal to the British Columbia Court of Appeal. Five judges reviewed the arguments and as 1964 drew to a close, their ruling was made public.

Judge Sheppard wrote for the two judges who dissented. He stated that the Royal Proclamation of 1763 did not apply to Vancouver Island because the Island and its Indigenous population were unknown to the Crown until Captain Cook arrived in Nootka Sound fifteen years later. He also noted that the terms of the agreement with the Indigenous people in the Nanaimo area had not been written into the document. He concluded that the document submitted as Exhibit 8 “is neither in form nor in substance a treaty.”

Judge Davey wrote for the majority:

Considering the relationship between the Crown and the Hudson’s Bay Company in the colonization of this country... I cannot regard Exhibit 8 (the Treaty) as the mere agreement for the sale of land made between a private vendor and a private purchaser. The right of the two Indians to hunt the lands in question are preserved by *The Indian Act* and remain unimpaired by *The Game Act*.

He concluded that White and Bob were rightfully in possession of the deer carcasses.

Justice Thomas Norris was the third judge to weigh in. He submitted a carefully researched, 52-page judgment, calling on Indigenous rights documents going back as far as the British explorers Drake and Cook. As well, he cited legal cases from the United States, Nigeria, and India. He pointed out that the Douglas agreements were necessary to ensure that settlement took place peacefully. In the 1850s there were about a thousand settlers on Vancouver Island, moving onto lands that had supported some 30,000 Indigenous people for centuries. “The treaties were no mere scraps of paper,” he argued. They

provided the newcomers with the assurance of an orderly and peaceful settlement.

Judge Norris did not dismiss the document that James Douglas had given to the Snuneymuxw people to sign, despite the fact that the terms of the agreement were missing. “The unusual (by the standards of legal draftsmen) nature and form of the document, considered in the light of circumstances on Vancouver Island in 1854, does not detract from it being a treaty.”

But he went further, stating a strong opinion in support of the Indigenous right to gain food from the land.

This is not a case merely of making the law applicable to native Indians as to white persons so that there may be equality of treatment under the law, but of depriving Indians of rights vested in them from time immemorial, which white persons have not had, *viz.*, the right to hunt out of season on unoccupied land for food for themselves and their families.

Thus, in the 52 pages of his Reasons for Judgment, Justice Norris framed in legal terms the argument that Clifford White and David Bob had brought before Judge Beevor-Potts almost eighteen months before. The Sununeumuxw history, which had been passed orally through three generations, was vindicated.

Following the judgment, Tom Berger wrote a hopeful letter to Guy Williams of the Native Brotherhood of BC. “I think that Mr. Justice Norris’ judgment is the most important judicial announcement we have ever had in this province relating to the Aboriginal rights of native Indian people,” he wrote. If upheld in the Supreme Court of Canada, “it will mean that Indians in all parts of BC (except on Treaty 8 lands) will be able to assert their Aboriginal right to hunt and fish. If the federal and provincial governments want to extinguish these rights, they will have to make treaties, with compensation.”

The ruling did not ease the immediate concerns of the Snuneymuxw people. In the spring of 1965, an article appeared

in the Nanaimo newspaper, announcing that the Fisheries Department had closed all fishing until September to protect the declining fish stocks. Tom Berger wrote a letter to the Indigenous leaders in Nanaimo, outlining the favourable rulings they had won in court. He suggested that fishermen carry a copy of the letter with them as they headed off in their boats.

The Supreme Court of Canada

The decision was greeted with elation among British Columbia First Nations. But the leadership recognized that the case would almost inevitably be appealed to the Supreme Court. Mounting a strong case in Ottawa would be a formidable challenge.

Guy Williams of the Native Brotherhood of BC organized a meeting of chiefs from across the province, to raise money for the appeal. At the meeting, chiefs and councillors stood up, one by one, to make contributions on behalf of their people. Sechelt band councillor Clarence Joe framed their position succinctly: “This case does not only concern two members of a village, but all the Indians of Canada. If Vancouver Island loses this case, we will all lose our rights.”

Seven judges heard the case in the Supreme Court. T.G. Bowen-Colhurst argued the case for the Crown. The judges had reviewed the arguments beforehand and, after Bowen-Colhurst completed his statement, they informed Tom Berger that he did not have to reiterate his case. Without leaving the bench, the judges dismissed the appeal. The following day, newspaper headlines registered the surprise felt by many Canadians. An editorial in one Vancouver newspaper had the headline: “Indian Rights Restored... Forcing Whites to Bargain... From Weak Position.”

The writer of the editorial had interviewed fish and wildlife officers to gather their opinions.

Provincial conservation officers are frightened. They foresee chaos in game and fish management ... if the Indian privilege is abused. They are appalled to see one

ethnic group, as they put it, to be permitted to harvest indiscriminately two resources of such consequence to the province as a whole....

If anything is certain, as a consequence of the Supreme Court decision, it is that we are in for a lively season of wheeling-dealing between Indian and government with, for the first time, the Indians holding the whip hand.”

The news travelled across the First Nations of British Columbia at lightning speed. Against the odds, the case that Clifford White and David Bob had defended alone in a magistrate’s court in Nanaimo had found success in the highest court in the land. In Nanaimo, Snuneymuxw Chief Douglas White immediately began planning a potlatch to celebrate. He invited representatives of the British Columbia First Nations who had backed the appeal to the Supreme Court, recognizing that this was victory and would have ramifications for Indigenous hunters and fishers across the province.



A CONVERSATION WITH DOUGLAS WHITE III, LAWYER

While growing up, Douglas White III often heard about his family’s involvement in the White and Bob legal case. Over time, he became a lawyer, a leader of the Snuneymuxw First Nation and the chair of the First Nations Justice Council. In 2023, British Columbia Premier David Eby appointed Douglas White III to be Special Counsel on Indigenous Reconciliation.

“Clifford White was my grandfather’s first cousin. I’ve talked with him about the history of the White and Bob case over the years. He shared with me that there was a cat-and-mouse game with the conservation officer, who had a reputation for chasing down the Aboriginal guys hunting out of season.

So July 7, 1963 was a day that had been many months in the works, Clifford White and David Bob knew they were being chased by the conservation officer and it happened to be that day when he caught them. They were charged with hunting out of season and the next day they had to answer the charge in court in front of Magistrate Beevor-Potts.

Clifford White had to advocate for himself because the lawyers for the Canadian legal system abandoned him and David Bob in the trial. The lawyers asked for permission to step back from representation because they didn't want to have to talk about treaty rights when they didn't know what this crazy Indian was talking about.

This was the end of a long struggle for Indigenous rights—by the Allied Indian Tribes of BC, the great Squamish leader, Andy Paull, the great Haida leader, Peter Kelly—they were the great advocates in the early years of the twentieth century. That culminated, unfortunately, in the effective criminalization of advocacy. *The Indian Act* was amended and modified to prohibit anyone from seeking to raise money to hire a lawyer to advance a land claims issue. So all of that legal knowledge was suppressed. It was only maintained through the Native Brotherhood of BC and Maisie Hurley's newspaper, *The Native Voice*.

What gave Clifford White the courage and the strength to stand up in the courtroom and talk about a treaty history that at that point had been denied for 110 years? When representing himself, Clifford White put forward his own oral history about the Treaty relationship. He also asked an Indigenous historian, Joe Elliott, to come forward to share the Treaty history as well. So in a remarkable way, that oral history of the Elders was there at the very outset. Unfortunately, that trial ended in a conviction.

Tom Berger called this the first shot fired by the Aboriginal peoples of Canada in their quest to re-establish recognition and respect for their Aboriginal and treaty rights. This was an important moment at the outset of fifty hard years of fighting in the courts to give shape to basic issues: what an Aboriginal right is, what Aboriginal title is, what treaty rights are.

I asked Tom: Where did that come from? Because in the fall of 1963, he had no precedents to follow. He said: "I was asked to sit down with the Elders and I heard what they had to say about the Treaty and the

relationship to their territory. That became the foundation for his arguments in *White and Bob*.

When we finally won, it was a remarkable thing to look at the newspapers. At the outset, they said things like ‘Indian versus White Man in Court’. It was novel. Everyone was amazed that this fight was emerging in a Canadian courtroom. When the Snuneymuxw were ultimately victorious, there was a lot of celebration. This was a vindication of a very long process of advocacy.”

NORTHERN ALBUM

PHOTOS BY MICHAEL JACKSON AND LINDA MacCANNELL



BELLA T'SELEIE

Special Counsel Michael Jackson captured photos of the people he met and worked with in the North, including Bella T'Seleie.



David Nasogaluak's trapline ran 300 kilometres across Banks Island.
He was shocked at the damage done to the land by oil companies.

ABOUT THE AUTHOR/EDITOR

DREW ANN WAKE



Drew Ann Wake is a filmmaker and new media producer who began her career with CBC North and the National Film Board in Yellowknife. She covered the Berger Inquiry from 1975-1977 and then worked on the independent documentary, *The Inquiry Film*, which won the Canadian Film Festival award for Best Documentary. Drew Ann also works as a museum designer, developing exhibitions in Canada as well as in the US and the UK.

SAMPLE CHAPTERS

“This is the story of many remarkable Indigenous people: the hunters in the White and Bob case, the Nisga’a tribal leaders in the Calder case, the Dene, Métis, and Inuvialuit of the Mackenzie Valley Pipeline Inquiry, and the Alaskans in the report of the Alaska Native Review Commission.”

—Hamar Foster KC, from the foreword

AGAINST THE ODDS

THE INDIGENOUS RIGHTS CASES OF THOMAS R. BERGER

Author and Editor: Drew Ann Wake

Foreword, Hamar Foster KC | Afterword, Shaznay Waugh

The book includes chapters by Thomas R. Berger QC QC OBC, Michael Jackson KC, Jean Teillet LL.M., and Dalee Sambo Dorrough PhD

AGAINST THE ODDS chronicles Thomas Rodney Berger’s significant contributions to Indigenous rights advocacy in Canada and the United States. Mid-career, Berger led the Mackenzie Valley Pipeline Inquiry, conducting over thirty community hearings in the Northwest Territories to ensure that First Nations’ voices were heard. Later, he also led public hearings on the Alaska Native Claims Settlement Act. The book includes “Northern Album,” a gallery featuring previously unpublished colour photographs of the Dene and Inuvialuit by Michael Jackson KC and Linda MacCannell.

Photo of Bella T’Seliei (right).



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