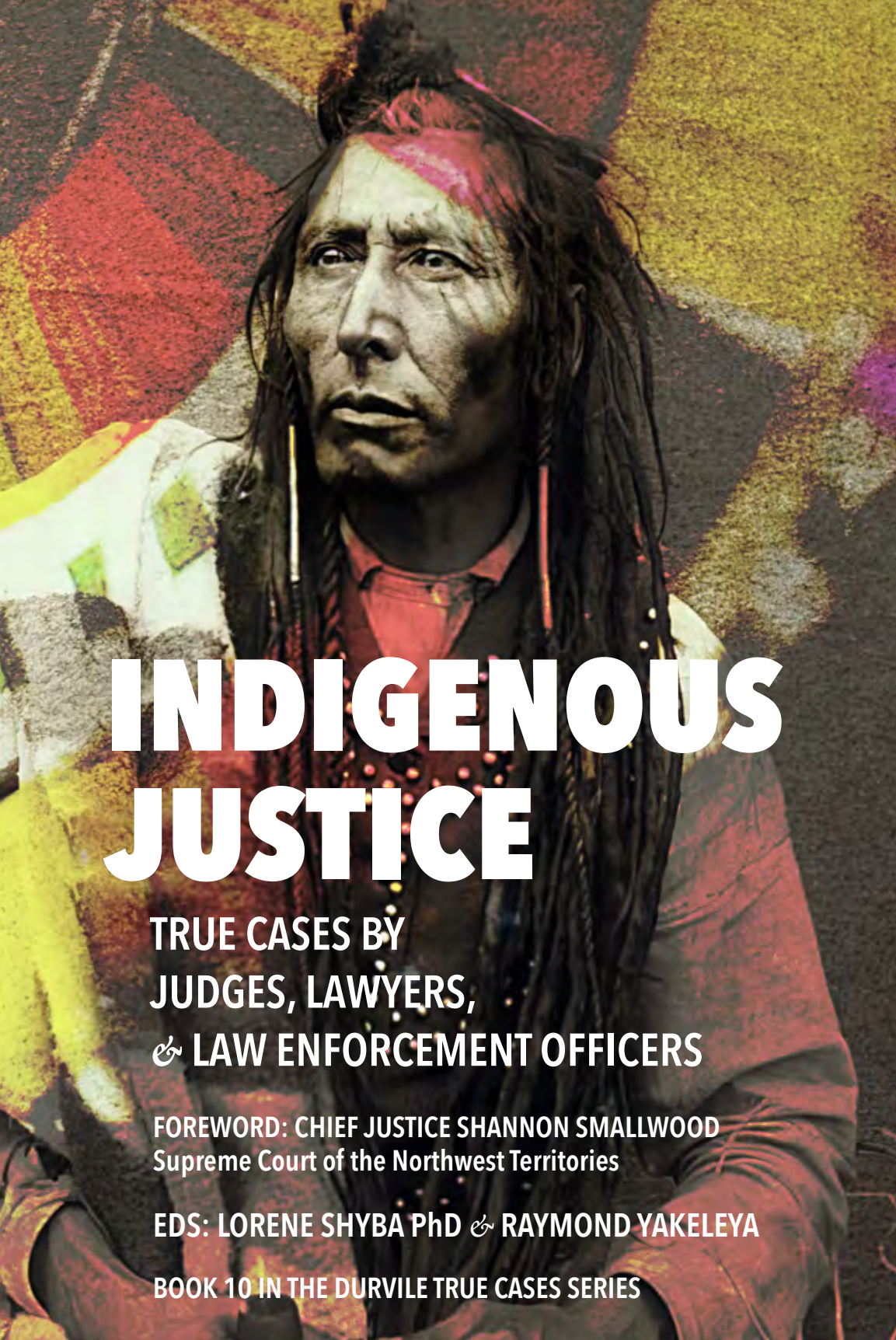

INDIGENOUS JUSTICE

TRUE CASES BY JUDGES, LAWYERS, & LAW ENFORCEMENT OFFICERS

FOREWORD: CHIEF JUSTICE SHANNON SMALLWOOD
Supreme Court of the Northwest Territories

EDS: LORENE SHYBA PhD & RAYMOND YAKELEYA

BOOK 10 IN THE DURVILE TRUE CASES SERIES

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This book is for
legal and law enforcement professionals
who dedicate themselves to providing
compassionate and reliable services
to Indigenous clients.

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FOREWORD

Chief Justice Shannon Smallwood
Supreme Court of the Northwest Territories

I WAS HONOURED TO be asked to write a foreword for this book, *Indigenous Justice: True Cases by Judges, Lawyers and Law Enforcement Officers*. I have read and enjoyed many of the preceding books in the Durvile True Case series and the topic of Indigenous Justice is one that is near to my heart.

As a child growing up in Fort Good Hope in the 1970s, Indigenous justice and the debates swirling around the prospect of oil and gas development in the Northwest Territories were not concepts that I had any awareness of or any notion of their importance to the people of my hometown or the Northwest Territories in general. The impact of the Mackenzie Valley Pipeline Inquiry, as discussed by the Honourable Justice Thomas R. Berger, was one that resonated with my community and for Indigenous Peoples throughout the North. For many, the impact of the Berger Inquiry Report, *Northern Frontier, Northern Homeland* lent credence to the idea that Indigenous voices could and should be heard and taken into account in decisions that affect Indigenous Peoples and their lands. More than 40 years later, development on Indigenous lands continues to be a challenging issue facing Canada and Indigenous People are regularly consulted throughout the process.

The chapters in this book touch upon the involvement of Indigenous persons in the Canadian justice system as told by judges, lawyers and law enforcement officers who have

dedicated their careers to working in the justice system and who, as a consequence, have regularly dealt with Indigenous persons.

Anyone who has a passing familiarity with the criminal justice system is well aware that Indigenous Peoples are greatly overrepresented in Canadian prisons. Almost 25 years ago, the Supreme Court of Canada in *R v Gladue* considered the circumstances of Indigenous offenders in the justice system and recognized what had been said by the *Royal Commission on Aboriginal Peoples* in 1996: that the Canadian criminal justice system has failed the Indigenous Peoples of Canada.

The issues facing Indigenous persons involved in the criminal justice system, whether as accused persons, offenders, victims, witnesses, or family members are highlighted in the chapters of this book. Indigenous persons frequently meet challenges navigating and understanding the justice system and often encounter barriers like racism and systemic discrimination, which many other groups do not face.

Since the Supreme Court of Canada's decision in *Gladue* in 1999, the over-representation of Indigenous People, particularly Indigenous women, in Canadian prisons has only gotten worse. It is a situation that has persisted despite the directions given to sentencing judges by the Supreme Court of Canada in *Gladue, R v Ipeelee* and other cases.

At the same time, awareness of the issues facing Indigenous Peoples has greatly increased and entered everyday conversation in Canadian society. The *Report of the Truth and Reconciliation Commission* (TRC) brought the legacy of residential schools to the forefront. The need for reconciliation with Indigenous Peoples is widely recognized across Canada.

Reconciliation will require that we each play a role. No one group, organization, institution, or government can effect reconciliation on their own. It will take society as a

whole to ensure reconciliation occurs in Canada. Within the justice system, every judge, lawyer, law enforcement officer, and others involved in the justice system will need to do their part.

Reconciliation will take time and commitment; it will not occur in my lifetime. As the TRC said in their final report, it will take many heads, hands and hearts working together at all levels of society in the years ahead. It took a long time for the damage to be done, so, it will take a long time to fix it. As the daughter, granddaughter, and niece of residential school survivors, the legacy of residential schools is one that casts a long shadow.

There are different views about what is required to achieve reconciliation and the TRC calls to action provide some guidance. The path to reconciliation and what is required may differ for some. Indigenous People themselves might have different views amongst themselves about what is required. Every Indigenous group comes from a different place, from a different traditional territory, from a different language and culture, with many shared experiences from residential schools and the impacts of colonialism but every Indigenous person has experienced these things in their own, unique way.

Reconciliation will require that we become aware of what has happened in the past and acknowledge the harm done to Indigenous People. Many of the chapters in this book shed a light on the challenges faced by Indigenous persons in the criminal justice system and their resilience and vulnerability in the face of adversity. Only by learning about the experiences of Indigenous People in the criminal justice system in the past can we move forward.

Mahsi Cho.

— *Chief Justice Shannon Smallwood*
Supreme Court of the Northwest Territories, 2023

INTRODUCTION

MINDFUL OF CULTURE & TRADITION

Indigenous Justice, Book 10 in the Durvile True Cases series, is comprised of chapters written by the very legal and law enforcement professionals to whom we dedicated this book: judges, lawyers, police, and parole officers, both Indigenous and non-Indigenous, who have supported and continue to support First Nations, Métis, and Inuit Peoples through their trials and tribulations with the criminal justice system. We have chosen an image of Cree leader and peacemaker *Pîhtokahanapiwiyin* for the cover of this book because of the strong connection that many of the stories have to the province of Saskatchewan, and notably the Battleford area, Also known as Chief Poundmaker, *Pîhtokahanapiwiyin* was born around 1842 in Rupert's Land near the present day Battleford. He played a significant role in the events leading up to the North-West Resistance of 1885, an event mentioned by both Eleanor Sunchild KC and Brian Beresh KC in this book as a battle formerly known as "the Rebellion." The resisters were eventually defeated by federal troops, the result being the permanent enforcement of Canadian law in the West, the subjugation of Plains Indigenous Peoples, and the conviction and execution of Louis Riel.

After the resistance was suppressed by the fledgling Canadian government, Chief Poundmaker was arrested and charged with treason. He was later released, but died just months later, on July 4, 1886. He is remembered as a skilled diplomat and peacemaker who worked tirelessly to improve

the lives of his People. In 2019, Prime Minister Justin Trudeau formally exonerated Chief Poundmaker of the treason charges, the exoneration being part of a broader effort to recognize and reconcile the historical injustices that Indigenous Peoples have suffered. Poundmaker's story serves as a reminder of the importance of recognizing the injustices of the past and working to build a more just and equitable future.

In recent years there has been a growing movement to return artifacts taken without permission from Indigenous communities. In 2023, artifacts dating from 1886 belonging to Poundmaker were returned to his descendants in a repatriation ceremony at the Royal Ontario Museum. The museum transferred his ceremonial pipe and a saddle bag back to his family members.

Other museums are also repatriating stolen artifacts. The Royal Alberta Museum recently returned artifacts from its collection to the Athabasca Chipewyan First Nation, and internationally, the UK-based Buxton Museum returned their entire collection of First Nations artifacts to the Haida and Blackfoot communities.

Returning sacred objects from museums to First Nations aligns with early steps of support from the Vatican to reflect on the dignity and rights of Indigenous Peoples. The Vatican's recent rejection of the *Doctrine of Discovery*, a legal concept that justified Europeans claiming Indigenous lands, shows that dispossession of land was not legal and calls into question the manner of colonization. (*Says Raymond),*

> The *Doctrine of Discovery* was like the thieves' bible. Sensible minds have moved in and called it for what it was, thievery and crimes against humanity. The land was ours and at first contact with whiteman, it was as if we were nothing. It was all about the resources and it's hard to sell the bones of your people.

• • •

Indigenous Justice is written by legal and law enforcement professionals who share stories that provide perspective into their belief in the principles of reconciliation. How might these same principles extend into other important professions such as education, urban planning, and cultural industries such as fashion and art?

From the perspective of librarians and information professionals, Métis Nation citizen Colette Poitras says that the priority is to make sure that all community members can access the Truth and Reconciliation Commission's (TRC) report and findings. In addition, she recommends that librarians purchase and provide books written by Indigenous authors and provide an inclusive space and programming opportunities that support Indigenous ways of knowing and being. Poitras facilitates Indigenous culture and history training and often hears that Canadians have missed out on learning the true history of Canada. Poitras says,

> Learning about the First Peoples of this country make all people richer by knowing more about the land on which we live and the Indigenous ways of knowing and being. It creates dialog and an ongoing relationship which includes respect and reciprocity. It makes individuals and society more tolerant, inclusive and empathetic. The sacred values of love, respect, honesty, humility, truth, wisdom, and courage are values that make society strong. These are values that everyone benefits from and that can lead to true reconciliation.

Dr. Frank Deer, Kanienkeha'ka from Kahnawake and professor of Indigenous Education at the University of Manitoba, believes that to be supportive, university faculty leaders should consider how Indigenous knowledge might be used in their own academic areas of endeavour and commit to change for the benefit of students and communities. For instance, what do they believe they are actually doing when making a land

acknowledgement? What does reconciliation mean to them? When asked how people might benefit from understanding Indigenous ways, he comes to the conclusion by saying, "Indigenous Peoples are an important part of Canada's demographic, so coming to understand our experiences and identities will lend to the harmony within our social fabric." Dr. Deer believes that there is an important journey in formulating a new relationship between Indigenous and non-Indigenous people, and it must include a sense of our shared history.

Bob Montgomery, citizen of the Métis Nation, is the Indigenous Engagement Coordinator at the Beaver Hills Biosphere, a UNESCO Biosphere Reserve east of Edmonton. Montgomery says, "Only now in the ten-year wake of Idle No More and eight years after the TRC is western science starting to publish papers that acknowledge the brilliance of Indigenous environmental consciousness that exists in our worldviews and languages." When asked how the general public might benefit from his environmental work, he says, "It's quite simple really, Indigenous Peoples have lived on this land for millennia and it is in everyone's best interest to listen to them and follow their guidance on how to live harmoniously here." As an analogy we might all be able to relate to, he adds,

> You wouldn't spend an evening at a friend's house and immediately redesign the plumbing and the garden; there is knowledge already there of how things work in situ. Sometimes our communities are reluctant to share sacred or treasured information because of legacies of having their knowledge taken and sold for profit, never receiving any recognition or compensation. That is the legacy of colonialism. So if you are lucky enough to learn from Indigenous Peoples, follow their lead, make sure they are always included and compensate them and their communities fairly for the immense efforts they have made to keep that knowledge alive through all the violence they've endured.

Urban environments can also benefit by following the guidance of Indigenous Peoples. Crystal Many Fingers, Blackfoot academic and Indigenous landscape strategist for the City of Calgary, says, "When it comes to Indigenizing urban community space, there are levels of respect that must be addressed." Many Fingers, describes the first level as,

> Engagement with all leadership of the Treaty Nations whose territorial land is under proposal. This engagement with leadership, Chief and Councils, may take time, but it is essential to work cooperatively with them to validate their support and respect their values. This must not be rushed, as is often the case under a colonial approach.

Secondly, she insists upon familiarity with the Assembly of First Nations (AFN) Principles of OCAP (ownership, control, access, and possession).

> This means that First Nations control data collection processes in their communities and own, protect, and control how their information is used. Access to First Nations data is important and First Nations determine, under appropriate mandates and protocols, how access to external researchers is facilitated and respected.[1]

When it comes to how the public can benefit from the implementation of Indigenous ways in city planning, Many Fingers expresses that, "The public needs to be given opportunities to learn about the rich history and ways of being of the land that they live and work on."

In the significant field of arts and culture, beading artist Trudy Wesley from the Stoney Nakoda First Nation says this regarding non-Indigenous people wearing Indigenous fashion:

1 The Assembly of First Nations (AFN) Principles of ownership, control, access, and possession (OCAP) can be found by scanning the QR code in the margin above.

> If people wear Indigenous beading or other fashion elements without understanding, it could be considered cultural appropriation. On the other hand, many Indigenous artists create clothing and other cultural items that are meant to be shared and enjoyed by all people. Non-Indigenous people should strive to be respectful and mindful of Indigenous cultures and traditions, and should try to learn about the cultural significance of any items they wish to wear.

Dene artist and author Antoine Mountain summarizes this recommendation:

> Strive to be a cultural ally, become familiar with Indigenous rights and ways of being. Be enchanted with and spiritually uplifted by Indigenous cultural content in the Arts.

• • •

As an editorial team, we have a dedicated interest in the North. It has been a privilege to work with Chief Justice Shannon Smallwood of the Supreme Court of the Northwest Territories on the foreword for this book, and the lead chapter in this book, by the late Hon. Mr. Justice Thomas Berger, is about the sanctity of the lands of the North. Entitled "The Mackenzie Valley Pipeline Inquiry," this important speech from history reflects back on Justice Berger's decisions in the 1970s that prioritized the hunting, fishing, and trapping economy of the First Nations Peoples over pipeline construction, with its negative environmental implications. We are grateful to Beverley Berger, Erin Berger and Drew Ann Wake for giving us permission to print the transcripts of this significant speech. It was presented by Justice Berger to the "World Conference of Faith, Science and the Future" at the Massachusetts Institute of Technology (MIT) in 1979.

The Honourable Nancy Morrison writes in the introduction to her three stories in this book,

> It was not until 1966 when I first read the *The Indian Act* that I began to realize the inequities and often-horrific abuses suffered by Indigenous Peoples and the need for society and our laws to make the necessary changes. Our society, laws, and justice system have shown they can and do evolve. The need and work must continue. I remain optimistic.

It is in the light of this optimism and the hope of rectification of wrongs that we gathered the stories of injustice and suffering for this book. Impacts of the Treaties and residential schools form a deep backstory to many of the heartbreaking chapters: Catherine Dunn's chapter about a family shattered by domestic violence; Judge John Reilly's chapter about adjudicating crimes committed as a result of traditional lands taken away; and Joseph Saulnier's defence of a boy who was born suffering from the effects of his mother's heavy drinking.

Also seen in the book, though, are vibrant stories of recovery and rehabilitation through the discovery and implementation of Indigenous Ways of Knowledge. Constable Val Hoglund's story "The Unwitting Criminal: Alone but Full of Hope" for example, about the recovery of a drug-addicted homeless teen, offers hope within the title itself, and Hon. John Z. Vertes' story, "The Case of Henry Innuksuk" is about a community in Nunavut that became an active participant in the justice system through Inuit healing techniques.

Some of the stories in this book, previously published in the Durvile True Cases anthologies, have been thoughtfully brought up to date by authors Hon. Kim Pate (The Story of S), Doug Heckbert (Getting FPS# Off Our Backs), and Hon. Nancy Morrison (Three Stories). The copyright page lists the stories that have appeared in previous books.

Our approach to decolonial scholarship with this book has been to follow the editorial principles and best practices of what has become known as the "Younging Style Guide."[2] Notwithstanding, we allowed the inclusion of authors' colonial terminology in circumstances when authors reflect on their memories of the past, or when the chapter material, or quotes from other texts, were written in earlier times.

If people were to ask us what we hope readers will come away with from *Indigenous Justice*, we say,

> The belief that the legal professionals and law enforcement officers in this book truly give a care about reconciliation with Indigenous Peoples and that they'll spread this good work among their peers.

To reflect on Colette Poitras' advocacy earlier in this introduction, we, as publishers, commit to the sacred values of love, respect, honesty, humility, truth, wisdom, and courage, because, "We give a care too.

— Dr. Lorene Shyba, co-editor &
Raymond Yakeleya, co-editor,
Calgary and Edmonton, Alberta, 2023

2 Gregory Younging, *Elements of Indigenous Style: A Guide for Writing By and About Indigenous Peoples.* (Edmonton, AB: Brush Education. 2018).

PART I

THE JUDGES AND SENATOR

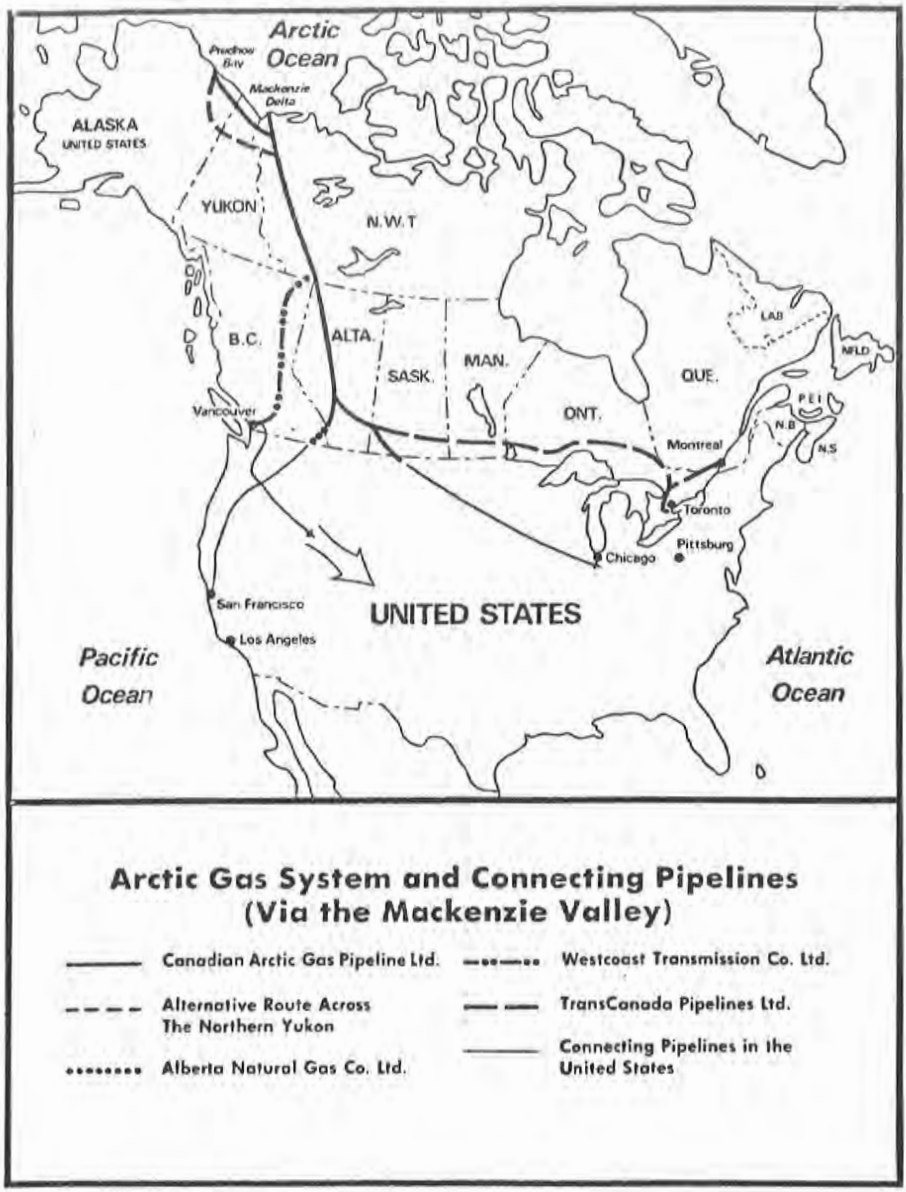
HON. THOMAS R. BERGER

HON. NANCY MORRISON

HON. JOHN REILLY

HON. KIM PATE

HON. JOHN Z. VERTES



Map A. Original Arctic Gas pipeline plan, transporting gas from Prudhoe Bay across the north slope of Alaska and the Northern Yukon to the Mackenzie Delta, connecting with a pipeline transporting gas from the Delta and then run south along the Mackenzie Valley to the Alberta border and thence to cities in Canada and the US.

ONE

The Hon. Justice Thomas R. Berger

THE MACKENZIE VALLEY PIPELINE INQUIRY[1]

Science and technology confront us with choices whose consequences are not easy to foresee. We know that science and technology can change our world. We used to think that the changes wrought by science and technology would be altogether benign, but in recent years another view has begun to take hold: that the advance of science and technology—especially large-scale technology—may entail social, economic, and environmental costs that must be reckoned with.

So, when the oil and gas industry proposed that a gas pipeline be built from the Arctic to the mid-continent, along a route from Alaska through Canada—along the Mackenzie Valley to the Lower 48—the Government of Canada appointed a Commission of Inquiry to examine the social, economic, and environmental impact of the proposed pipeline.

The Mackenzie Valley Pipeline Inquiry[2] may well be unique in Canadian experience, because for the first time we sought

1 This paper entitled "Science and Technology as Power" was presented by The Honourable Mr. Justice Thomas R. Berger of The Supreme Court of British Columbia, Commissioner, Mackenzie Valley Pipeline Inquiry 1974 to1977, to the "World Conference of Faith, Science and the Future" at the Massachusetts Institute of Technology (MIT), Cambridge, Massachusetts, on July 20, 1979.

2 The Inquiry was established on March 21, 1974. Hearings began on March 3, 1975, and were completed on November 19, 1976. The report of the Inquiry was handed in to the Government of Canada on May 9, 1977.

to determine the impact of a large-scale frontier project before and not after the fact.

The pipeline was to be built by Arctic Gas, a consortium of Canadian and American companies. They wanted to build a pipeline to transport gas from Prudhoe Bay across the north slope of Alaska and the Northern Yukon to the Mackenzie Delta, where it would connect with a pipeline transporting gas from the Delta and then run south along the Mackenzie Valley to the Alberta border and thence to metropolitan centres in Canada and the United States *(see Map A on page 8)*.

The Arctic Gas pipeline project would be the greatest project, in terms of capital expenditure, ever undertaken by private enterprise, anywhere. The Arctic Gas project would entail much more than a right-of-way. It would be a major construction project across our northern territories, across a land that is cold and dark in winter, a land largely inaccessible by rail or road, where it would be necessary to construct wharves, warehouses, storage sites, airstrips—a huge infrastructure—just to build the pipeline. There would have to be a network of hundreds of miles of roads built over the snow and ice.

The capacity of the fleet of tugs and barges on the Mackenzie River would have to be doubled. There would be 6,000 construction workers required North of 60° to build the pipeline, and 1,200 more to build the gas plants and gathering systems in the Mackenzie Delta. There would be 130 gravel mining operations. There would be 600 river and stream crossings. There would be pipe, trucks, heavy equipment, tractors, and aircraft. We were told that if a gas pipeline were built, it would result in enhanced oil and gas exploration activity all along the route of the pipeline throughout the Mackenzie Valley and the Western Arctic.

The Government of Canada decided that the gas pipeline, though it would be a vast project, should not be considered in isolation. The Government made it clear that the Inquiry was

to consider what the impact would be if the gas pipeline were built and were followed by an oil pipeline.

What I have said will give you some notion of the magnitude of the Inquiry. I was to examine the social, economic, and environmental impact on the North of the proposed pipeline and energy corridor. The merit in such a comprehensive mandate is plain: the consequences of a large-scale frontier project inevitably combine social, economic, and environmental factors.

So, there was to be a public inquiry. The issues were to be canvassed in public. But how could the public participate effectively in the work of the Inquiry? After all, the Mackenzie Valley and the Western Arctic constitute a region as large as Western Europe. Though it is sparsely settled (only 30,000 people live in the region), it is inhabited by four Peoples: White, Indian, Inuit, and Métis, speaking six languages: English, Slavey, Loucheux, Dogrib, Chipewyan, and Eskimo. They were all entitled to be heard. *(Editors' note: The Northwest Territories [NWT] recognizes 11 official languages. Languages referred to in this chapter are now known as North Slavey Dene, South Slavey Dene, Gwich'in, Tlicho, Chipewyan, and Inuktitut).*

Governments have lots of money. So does the oil and gas industry. So do the pipeline companies. But how were the Native people going to be able to participate? How was the environmental interest to be represented? If the Inquiry was to be fair and complete, all of these interests had to be represented. A funding program was established for those groups which had an interest that ought to be represented, but whose means would not allow it. On my recommendation, funding was provided by the Government of Canada to the Native organizations, the environmental groups, northern municipalities, and northern businesses, to enable them to participate in the hearings on an equal footing (so far as that might be possible) with the pipeline companies—to enable them to

support, challenge, or seek to modify the project. These groups received $1,773,918. The cost of the Inquiry altogether came to $5.3 million.

In funding these groups, I took the view that there was no substitute for letting them have the money and decide for themselves how to spend it, independently of the Government and of the Inquiry. If they were to be independent, to make their own decisions, and present the evidence that they thought vital, they had to be provided with the funds, and there could be no strings attached. They had, however, to account to the Inquiry for the money spent. All this they did.

Let me illustrate the rationale for this by referring to the environment. It is true that Arctic Gas carried out extensive environmental studies, which cost a great deal of money. But they had an interest: they wanted to build the pipeline. This was a perfectly legitimate interest, but not one that could necessarily be reconciled with the environmental interest. It was felt there should be representation by a group with a special interest in the northern environment, a group without any other interest that might deflect it from the presentation of the case for the environment.

Funds were provided to an umbrella organization, "The Northern Assessment Group" that was established by the environmental groups to enable them to carry out their own research and hire staff and to ensure that they could participate in the Inquiry as advocates on behalf of the environment. In this way, the environmental interest was made a part of the whole hearing process. The same applied to the other interests that were represented at the hearings. The result was that witnesses were examined and then cross-examined not simply to determine whether the pipeline project was feasible from an engineering point of view but to make sure that such things as the impact of an influx of construction workers on communities, the impact of pipeline construction and corridor development on the hunting, trapping, and fishing economy of the

Native people, and the impact on northern municipalities and northern business, were all taken into account.

The usefulness of the funding that was provided was amply demonstrated. All concerned showed an awareness of the magnitude of the task. The funds supplied to the interventors, although substantial, should be considered in the light of the estimated cost of the project itself, and of the amount expended, approximately $50 million by the pipeline companies, in assembling their own evidence.

The Inquiry held two types of hearings: formal hearings and community hearings. The hearings went on for 21 months.

The formal hearings were held at Yellowknife, the capital of the Northwest Territories. At these formal hearings, expert witnesses for all parties could be heard and cross examined. The proceedings resembled, in many ways, a trial in a courtroom. It was at Yellowknife that we heard the evidence of the experts: the scientists, the engineers, the biologists, the anthropologists, the economists—people from a multitude of disciplines, who have studied the northern environment, northern conditions, and northern peoples. Three hundred expert witnesses testified at the formal hearings.

At the formal hearings, all the parties were represented: the pipeline companies, the oil and gas industry, the Native organizations, the environmental groups, the Northwest Territories Association of Municipalities, and the Northwest Territories Chamber of Commerce. All were given a chance to question and challenge the things that the experts said, and all were entitled, of course, to call expert witnesses of their own.

In recent years the Government of Canada has carried out a multitude of studies on the North. These studies cost $15 million. The oil and gas industry carried out studies on the pipeline that we were told cost something like $50 million. Our universities have been carrying on constant research on northern problems and northern conditions. It would have been no good to let all these studies and reports just sit on the shelves. Where

these reports contained evidence that was vital to the work of the Inquiry, they were examined in public so that any conflicts could be disclosed, and where parties at the Inquiry wished to challenge them, they had an opportunity to do so. It meant that opinions could be challenged and tested in public.

At the same time, community hearings were held in each city and town, settlement, and village in the Mackenzie Valley and the Western Arctic. There is a tendency for visitors to the Mackenzie Valley and the Western Arctic to call at Yellowknife, the centre of government, and at Inuvik, the centre of the oil and gas play in the 1970s. They see very little else. But there are 35 communities in the region. And the majority of these communities are Native communities. In fact, the Native people constitute the majority of the permanent residents. I held hearings at all of these communities. At these hearings, the people living in the communities were given the opportunity to tell the Inquiry in their own languages—and in their own way—what their lives and their experience led them to believe the impact of a pipeline and an energy corridor would be.

In this way, we tried to have the best of the experience of both worlds: at the community hearings, the world of every day, where most witnesses spend their lives, and at the formal hearings, which was the world of the professionals, the specialists and the academics.

In order to give people— not just the spokesmen for Native organizations and for the white community, but all people— an opportunity to speak their minds, the Inquiry remained in each community as long as was necessary for every person who wanted to speak to do so. In many villages, a large proportion of the adult population addressed the Inquiry. Not that participation was limited to adults. Some of the most perceptive presentations were given by young people, concerned no less than their parents about their land and their future.

I found that ordinary people, with the experience of life in the North, had a great deal to contribute. I heard from

almost one thousand witnesses at the community hearings: in English (and occasionally in French), in Loucheux *(Gwich'in)*, Slavey *(North Slavey Dene and South Slavey Dene)*, Dogrib *(Tlicho)*, Chipewyan, and in the Inuit *(Inuktitut)* language of the Western Arctic. They used direct speech. They seldom had written briefs. Their thoughts were not filtered through a screen of jargon. They were talking about their innermost concerns and fears.

You may say, what can ordinary people tell the planners and the policy-makers in government and in industry? The conventional wisdom is that a decision like this should only be made by the people in government and industry: they have the knowledge, they have the facts and they have the experience. Well, the hearings showed that the conventional wisdom is wrong. I found that ordinary people who lived in the region had a great deal that was worthwhile to say. We discovered what should have been obvious all along: that the judgment of the planners and policymakers at their desks in Ottawa and Yellowknife might not always be right.

The contributions of ordinary people were important in the assessment of even the most technical subjects. For example, I based my findings on the biological vulnerability of the Beaufort Sea not only on the evidence of the biologists who testified at the formal hearings but also on the views of the Inuit hunters who spoke at the community hearings. The same is true of seabed ice scour and of oil spills: they are complex, technical subjects but our understanding of them was nonetheless enriched by testimony from people who live in the region.

Let me give another example: when North America's most renowned caribou biologists testified at the Inquiry, they described the life cycle, habitat dependencies, and migrations of the Porcupine caribou herd. Expert evidence from anthropologists, sociologists, and geographers described the Native peoples' dependency on caribou from a number of different perspectives.

Doctors testified about the nutritional value of country food such as caribou, and about the consequences of a change in diet. Then the Native people spoke for themselves at the community hearings about the caribou herd as a link with their past, as a present-day source of food and as security for the future. Only in this way could the whole picture be put together.

The testimony of the people at the community hearings was of even greater importance in connection with the assessment of social and economic impact. The issue of Native claims was linked to all of these subjects. At the formal hearings, land use and occupancy evidence was presented in support of Native claims through prepared testimony and map exhibits. There the evidence was scrutinized and witnesses for the Native organization were cross-examined by counsel for the other participants. By contrast, at the community hearings, people spoke spontaneously and at length about both their traditional and their present-day use of the land and its resources. Their testimony was often painstakingly detailed and richly illustrated with anecdotes.

The most important contribution of the community hearings was, I think, the insight it gave us into the true nature of Native claims. No academic treatise or discussion, no formal presentation of the claims of Native people by the Native organizations and their leaders, could offer as compelling and vivid a picture of the goals and aspirations of Native people as their own testimony did. In no other way could we have discovered the depth of feeling regarding past wrongs and future hopes, and the determination of Native people to assert their collective identity today and in years to come.

The Inquiry faced, at an early stage, the problem of enabling the people in the far-flung settlements of the Mackenzie Valley and the Western Arctic to participate in the work of the Inquiry. When you are consulting local people, the consultation should not be perfunctory. But when you have such a vast area, when

you have four different peoples speaking six languages, how do you enable them to participate? How do you keep them informed? We wished to create an Inquiry without walls. We sought, therefore, to use technology to make the Inquiry truly public, to extend the walls of the hearing room to encompass the entire North. We tried to bring the Inquiry to the people. This meant that it was the Inquiry, and the representatives of the media accompanying it—not the people of the North—that were obliged to travel.

The Northern Service of the Canadian Broadcasting Corporation (CBC) played an especially important part in the Inquiry process. The Northern Service provided a crew of broadcasters who broadcast across the North highlights of each day's testimony at the Inquiry. Every day that there were hearings, they broadcast both in English and in the Native languages from wherever the Inquiry was sitting. In this way, the people in communities throughout the North were given a daily report, in their own languages, on the evidence that had been given at both the formal hearings and the community hearings. The broadcasts meant that when we went into the communities, the people living there understood something of what had been said by the experts at the formal hearings, and by people in the communities that we had already visited. The broadcasters were, of course, entirely independent of the Inquiry.

The media, in a way, served as the eyes and ears of all Northerners, indeed of all Canadians, especially when the Inquiry visited places that few Northerners had ever seen, and few of their countrymen had even heard of. The Inquiry had a high profile in the media. As a result, there was public interest and concern in the work of the Inquiry throughout Canada.

When the Inquiry's report, entitled *Northern Frontier, Northern Homeland*, was made public on May 9th, 1977, it was a bestseller, and remained on the Canadian bestseller list for six months.

The pipeline issue confronted us in Canada with the necessity of weighing fundamental values: industrial, social, and environmental, in a way that we had not had to face before. The Northern Native people, along with many witnesses at the Inquiry, insisted that the land they have long depended upon would be injured by the construction of a pipeline and the establishment of an energy corridor. Environmentalists pointed out that the North, the last great wilderness area of Canada, is slow to recover from environmental degradation: its protection is, therefore, of vital importance to all Canadians.

It is not easy to measure that concern against the more precisely calculated interests of industry. You cannot measure environmental values in dollars and cents. But still, we had to try and face the questions that are posed in the North of today: Should we open up the North as we opened up the West? Should the values that conditioned our attitudes toward the environment in the past prevail in the North today and tomorrow?

The North is immense. But within this vast area are tracts of land and water that are vital to the survival of whole populations of certain species of mammals, birds, and fish at certain times of the year. This concern with critical habitat lay at the heart of my consideration of environmental issues. I urged that the Northern Yukon, north of the Porcupine River, be designated a national wilderness park.

Let me tell you why. The Northern Yukon is an arctic and subarctic wilderness of incredible beauty, a rich and varied ecosystem: nine million acres of land in its natural state, inhabited by thriving populations of plants and animals. This wilderness has come down through the ages, and it is a heritage that future generations, living in an industrial world even more complex than ours, will surely cherish.

If you were to build a pipeline from Alaska along the Arctic coast of the Yukon, you would be opening up the calving grounds of the Porcupine caribou herd. This is one of the

last great herds of caribou, 110,000 animals, in North America. Every spring they journey from the mountains in the interior of the Yukon to the calving grounds on the Arctic coast. There, they are able to leave the wolves behind, they can forage on cotton grass, and they can bear their young before the onset of summer mosquitoes and bot flies.

In late August, as many as 500,000 snow geese gather on the Arctic Coastal Plain to feed on the tundra grasses, sedges, and berries, before embarking on the flight to their wintering grounds.

They must build up an energy surplus to sustain them for their long, southward migration to California, the Gulf Coast, or Central and South America. The peregrine falcon, golden eagle and other birds of prey nest in the Northern Yukon. These species are dwindling in numbers because of the loss of their former ranges on the North American continent and because of toxic materials in the environment. Here, in these remote mountains, they still nest and rear their young, undisturbed by humanity.

The proposal by Arctic Gas to build a pipeline across the Northern Yukon confronted us with a fundamental choice. It was a choice that depended not simply upon the impact of a pipeline across the Northern Yukon but upon the impact of the establishment of an energy corridor across it. This ecosystem, with its magnificent wilderness and scenic beauty, has always been protected by its inaccessibility. With pipeline construction, the development of supply and service roads, the intensification of the search for oil and gas, the establishment of an energy corridor, and the increasing occupation of the region, it would no longer be inaccessible to man and his machines.

The wilderness does not stop, of course, at the boundary between Alaska and the Yukon. The Arctic National Wildlife Range in northeastern Alaska, contiguous to the northern Yukon, is a part of the same wilderness. In fact, the calving grounds of the Porcupine Caribou herd extend well into

Alaska, along the coastal plain as far as Camden Bay, a hundred miles to the west of the international boundary; the area of concentrated use by staging snow geese, by nesting and moulting waterfowl and by seabirds, also extends far into Alaska. So, the future of the caribou, of the birds— of the whole of this unique wilderness region—was a matter of concern to both Canada and the United States.

Let me refer to another international resource, the white whales of the Beaufort Sea. I recommended that a whale sanctuary be established in Mackenzie Bay. In summer the white whales of the Beaufort Sea converge on the Mackenzie Delta to calve. Why? Because the Mackenzie River rises in Alberta and BC and carries warm water to the Arctic. So, the whales, some five thousand animals, remain in the vicinity of the Delta throughout the summer, then leave for the open sea. For these animals, the warm waters around the Mackenzie Delta, especially Mackenzie Bay, are a critical habitat, for here they have their young. Here in these warm waters, the whales stay until the calves acquire enough blubber to survive in the cold oceanic water. Nowhere else, so far as we know, can they go for this essential part of their life cycle. Dr. David Sergeant of the Department of the Environment, Canada's leading authority on white whales, summarizing his evidence to the Inquiry stated:

> ...the population of white whales which calves in the Mackenzie is virtually the whole of the population of the Beaufort Sea. I postulate that simultaneous oil and gas activities throughout the whole Delta in July each year could so disturb the whale herd that they would be unable to reproduce successfully. In time, the herd would die out. If we wish to maintain the herd, we must initiate measures now which we can be certain will allow its successful reproduction annually.

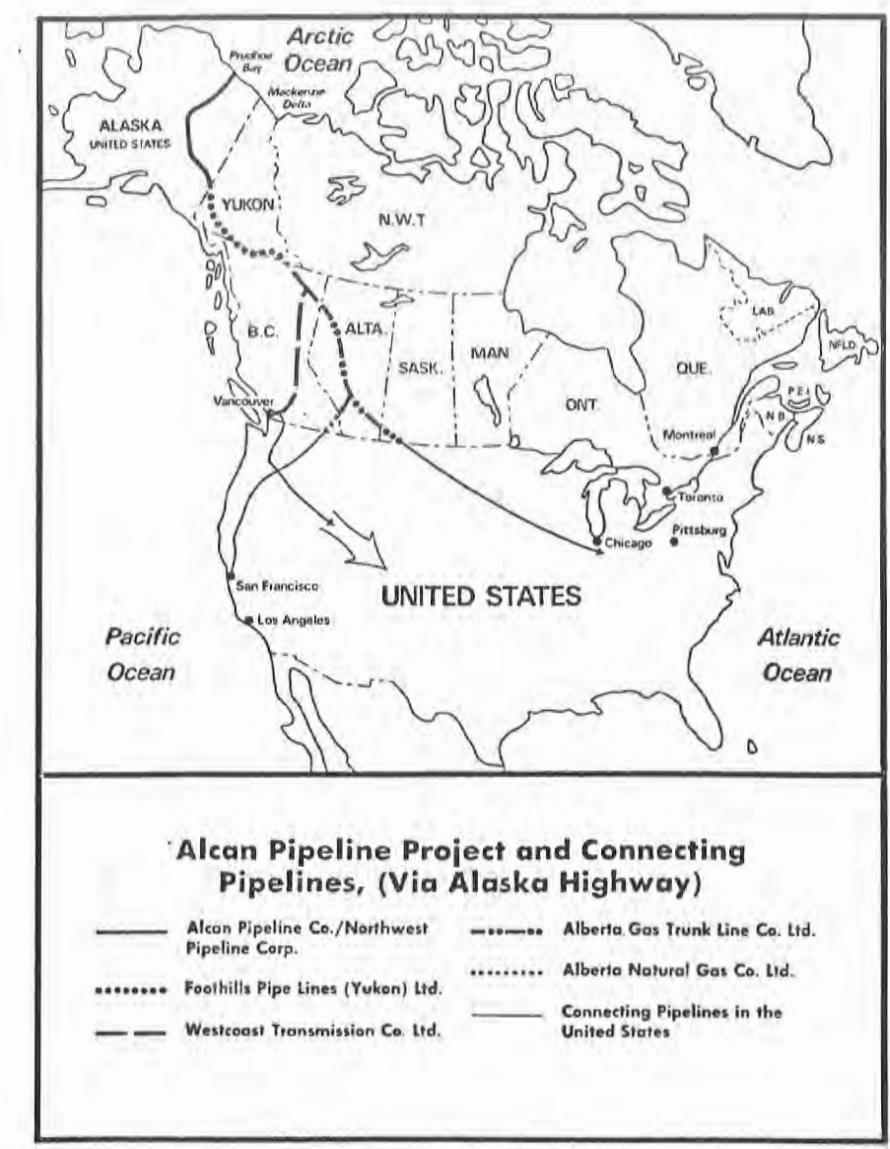
Is a whale sanctuary in west Mackenzie Bay a practical proposition? What will its effect be on future oil and gas

exploration? Will it impose an unacceptable check on oil and gas exploration and development in the Mackenzie Delta and the Beaufort Sea? We are fortunate in that the areas of intense petroleum exploration, to date, lie east of the proposed whale sanctuary, both offshore and onshore. A whale sanctuary can be set aside, and oil and gas activity can be forbidden there without impairing industry's ability to tap the principal sources of petroleum beneath the Beaufort Sea.

We in Canada have looked upon the North as our last frontier. It is natural for us to think of developing the North, of subduing the land, populating it with people from the metropolitan centres, and extracting its resources to fuel our industry and heat our homes. Our whole inclination is to think in terms of expanding our industrial machine to the limit of our country's frontiers. We have never had to consider the uses of restraint, to determine what is the most intelligent use to make of our resources.

The question that we and many other countries face is: Are we serious people, willing and able to make up our own minds, or are we simply driven, by technology and egregious pattern of consumption, to deplete our resources wherever and whenever we find them?

I do not want to be misunderstood about this. I did not propose that we shut up the North as a kind of living folk museum and zoological gardens. I proceeded on the assumption that, in due course, we will require the gas and oil of the Western Arctic, and that they will have to be transported along the Mackenzie Valley to markets in the metropolitan centres of North America. I also proceeded on the assumption that we intend to protect and preserve Canada's northern environment and that, above all else, we intend to honour the legitimate claims and aspirations of the Native people. All of these assumptions were embedded in the Government of Canada's expressed Northern policy for the 1970s.



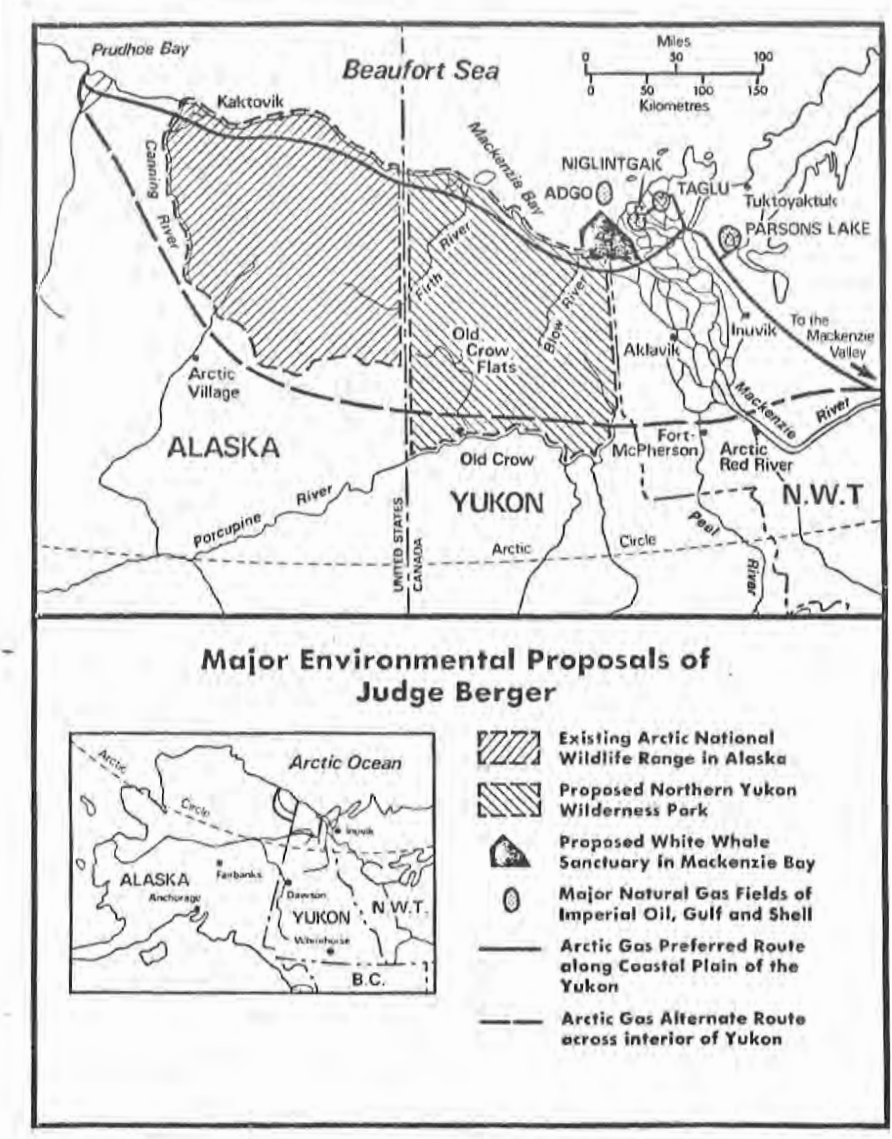
Map B. Alternate pipeline plan, allowing for an international wilderness park in the Northern Yukon and Northeastern Alaska. Construction of this pipeline, along the Alaska Highway, would not threaten major populations of any species.

I sought to reconcile these goals: industrial, social, and environmental. I proposed an international wilderness park in the Northern Yukon and Northeastern Alaska and urged that no pipeline cross it, but at the same time, I indicated that the Alaska Highway route, as a corridor for the transportation of Alaskan gas to the Lower 48, was preferable from an environmental point of view. This route lies hundreds of miles to the south and to the west of the critical habitat for caribou, whales, and wildlife which I sought to preserve. Construction of a pipeline along the Alaska Highway route would not threaten major populations of any species. If a pipeline has to be built, then it ought to be along this route *(see Map B on page 22)*. I proposed a whale sanctuary in Mackenzie Bay, but I limited its boundaries to waters where no discoveries of gas or oil have yet been made (*see Map C on page 24)*.

I recommended the establishment of bird sanctuaries in the Mackenzie Delta and the Mackenzie Valley. Oil and gas exploration and development would not be forbidden within these sanctuaries, but it would be subject to the jurisdiction of the Canadian Wildlife Service.

I advised the Government of Canada that a pipeline corridor is feasible, from an environmental point of view, to transport gas and oil from the Mackenzie Delta along the Mackenzie Valley to the Alberta border. At the same time, however, I recommended that we should postpone the construction of such a pipeline for 10 years, in order to strengthen Native society, the Native economy—indeed, the whole renewable resource sector—and to enable Native claims to be settled.

This recommendation was based on the evidence of the Native people. Virtually all of the Native people who spoke to the Inquiry said that their claims had to be settled before any pipeline could be built. It should not be thought that Native people had an irrational fear of pipelines. They realized, however, that construction of the pipeline and establishment of the energy corridor would mean an influx of tens of thousands of



Map C. Justice Thomas Berger proposed a whale sanctuary in Mackenzie Bay, limiting its boundaries to waters where no discoveries of gas or oil had yet been made.

white people from all over Canada seeking jobs and opportunities. They believed that they would be overwhelmed, that their Native villages would become white towns, and they would be relegated to the fringes of northern life.

They realized that the pipeline and all that it would bring in its wake would lead to an irreversible shift in social, economic, and political power in the North. They took the position that no pipeline should be built until their claims had been settled.

They believed that the building of the pipeline would bring with it complete dependence on the industrial system, and that would entail a future which would have no place for the values they cherish. Native people insist that their culture is still a vital force in their lives.

The culture of Native people amounts to more than crafts and carvings. Their tradition of decision-making by consensus, their respect for the wisdom of their Elders, their concept of the extended family, their belief in a special relationship with the land, their regard for the environment, and their willingness to share—all of these values persist in one form or another within their own culture, even though they have been under unremitting pressure to abandon them. Their claims are the means by which they seek to preserve their culture, their values, and their identity.

The emergence of Native claims should not surprise us. After years of poor achievement in our schools, after years of living on the fringes of an economy that has no place for them as workers or consumers, and without the political power to change these things, the Native people have now decided that they want to substitute self-determination for enforced dependency.

Settlement of their claims ought to offer the Native people a whole range of opportunities: the strengthening of the hunting, fishing, and trapping economy where that is appropriate; the development of the local logging and lumbering industry;

development of the fishing industry; and of recreation and conservation. I urged in my report that in the North, priority be given to local renewable resource activities—not because I feel that such activities are universally desirable, but because they are on a scale appropriate to many Native communities. They are activities that local people can undertake, that are amenable to local management and control, and that are related to traditional values. But that need not exclude access to the larger economy—where large-scale technology predominates.

It will take time to learn these claims, especially as regards their implications for Native people entering urban life. Nevertheless, some elements are clear enough: for instance, Native people say they want schools where children can learn Native languages, Native history, Native lore, and Native rights. At the same time, they want their children to learn to speak English or French, as the case may be, and to study mathematics, science, and all the subjects that they need to know in order to function in the dominant society. These proposals are not limited to a frontier or rural context.

It is not only we in Canada who must face the challenge that the presence of Native peoples with their own languages and their own cultures presents. There are all the countries of the Western Hemisphere with their Indigenous minorities—peoples who will not be assimilated, and whose fierce wish to retain their own common identity is intensifying as industry, technology, and communications forge a larger and larger mass culture, extruding diversity.

The judgments that we had to make about these questions were not merely scientific and technical. They were at the end of the day value judgments. It is impossible—indeed, it is undesirable—to try to lift scientific and technological decisions out of their social and environmental context, to disentangle them from the web of moral and ethical considerations which provide the means of truly understanding the impact they will have.

What I have said will give you some idea of the magnitude of our task. The Inquiry had to weigh a whole series of matters, some tangible, some intangible. But in the end, no matter how many experts there may be, no matter how many pages of computer printouts may have been assembled, there is the ineluctable necessity of bringing human judgment to bear on the main issues. Indeed, when the main issue cuts across a range of questions, spanning the physical and social sciences, the only way to come to grips with it and to resolve it is by the exercise of human judgment.

The Government of Canada rejected the Arctic Gas pipeline proposal and decided that, if a pipeline were to be built, it should be along the Alaska Highway route, that is, along the alternate route that I urged be considered. Now the Government of Canada and the Government of the United States have agreed on the construction of a gas pipeline along the Alaska Highway route.

I think a fuller understanding of the northern environment emerged during the course of the Inquiry. The proposals made for the creation of an international wilderness park in the Yukon and Alaska, for a whale sanctuary in Mackenzie Bay, and for bird sanctuaries in the Mackenzie Delta and the Mackenzie Valley have attracted widespread support in Canada and the United States. There is a felt need and a perceived responsibility to preserve critical habitat for caribou, whales, wildlife, and wilderness, and there is an understanding of the special vulnerability of migratory species in the North to industrial advance. The foundations have been laid for the development of a firm policy designed to protect the northern environment. In fact, the goal lies within our reach.

The Government of Canada announced in July last year *(eds.—1978)* that it was withdrawing the Northern Yukon, north of the Porcupine River, an area of 9.6 million acres, or 38,700 km. (15,000 square miles) from new industrial development with a view to establishing the area as Canada's first

wilderness park, subject to traditional Native hunting, fishing, and trapping activities in the area. The Carter administration has proposed that the Arctic National Wildlife Range on the United States' side of the International Boundary should be designated wilderness. Canada has established a scientific committee on whales. The committee is examining the proposal I made for the establishment of a whale sanctuary in Mackenzie Bay.

As to Native claims, the decision not to build the Arctic Gas pipeline gives us and the Native people, the time to achieve a fair settlement of Native claims in the Mackenzie Valley and the Western Arctic—an opportunity to meet what I believe is Canada's greatest challenge in the North.

It will take time to settle these claims They constitute the foundation upon which future development of renewable and nonrenewable resources in the North can take place. Settlement will not be easy to achieve. There is a quite natural tendency for governments to look upon Native claims as something which can be settled swiftly around the table by men and women of good will—to regard Native claims as a problem to be solved, as a clearing of the decks to enable large-scale industrial development to proceed. But here, perceptions differ. For Native people, their claims constitute the means of working out the institutional relationships between themselves and the dominant white society. For them, it is not a problem to be solved but the means to the preservation of their culture, their languages, and their economic mode—the means by which they can continue to assert their distinct identity in our midst and still have access to the social, economic, and political institutions of the dominant society.

The settlement of Native claims ought to provide the means to enable Native people to thrive and Native culture to develop in ways denied to them in the past; the means to ensure that they know who they are and where they came from. They can become hunters, trappers, fishermen,

lawyers, loggers, doctors, nurses, teachers, or workers in the oil and gas fields. But most important of all, the collective fabric of Native life will be affirmed and strengthened. The sense of identity of individual Native people—indeed, their very well-being—depends on it.

This is an unusual, perhaps unprecedented outcome—a recognition that industrial goals do not at all times and in all places take precedence over environmental values and Native rights. The pipeline debate is, in one sense, over. But it has precipitated another debate, a debate about some fundamental issues which were thrown into relief by the pipeline proposals: the need of the metropolis for energy, the implications of the advance of the industrial system to the frontier, the protection of the northern environment, and, above all, the rights of the Native people. Canadians perceived in these questions something that was basic to them all: a broad moral and ethical dimension.

Since the Industrial Revolution, we have thought of industrialization as the means to prosperity and wellbeing. And so, it has been to many people and to many parts of the world. But the rise of the industrial system has been accompanied by a belief in an ever-expanding cycle of growth and consumption. We should now be asking whether it is a goal that will suffice. Ought we and our children continue to aspire to the idea of unlimited growth? And, equally important, ought the Third World to aspire to this goal?

Our belief in an ever-expanding cycle of growth and consumption conditions our capacity and our willingness to reconsider or even contemplate, the true goals of the industrial system. There is a feeling that we cannot pause to consider where we are headed for fear of what we shall find out about ourselves. Yet events are pressing hard upon us.

Until 1875, the principal source of energy on this continent was wood. From 1875 until 1950, it was coal. Since then, our principal source of energy has been oil and gas. In

the last 15 years *(ed. 1962 to 1977),* world use of energy has doubled. North America now uses about five times as much energy as is consumed in the whole of Asia, and per capita consumption is about 24 times higher. The United States each year wastes more fossil fuel than is used by two-thirds of the world's population. According to the Energy Research Project at Harvard Business School, the United States uses a third of all the oil used in the world every day. A seventh of the oil used in the world every day is used on U.S. highways.

Certainly, if anything is plain, it must be plain that we on this continent shall have to get along with a smaller proportion of the world's energy and resources. This entails a reconsideration of conventional wisdom. I am not urging that we dismantle the industrial system. It has been the means to the material wellbeing of millions and an engine of prosperity for many countries. But I do say that we must pause and consider to what extent our national objectives are determined by the need for the care and feeding of the industrial machine.

To a large extent, we have conditioned ourselves to believe that the onward march of industry and technology cannot and must not be impeded or diverted. Our notions of progress have acquired a technological and industrial definition. Even our terminology has become eccentric. Those who seek to conserve the environment are described as radicals, and those who are undertaking radical interventions in the natural world think of themselves as conservatives.

Thus, the debate about the future often tends to become a barren exchange of epithets.

The issues are, in fact, profound ones, going beyond the ideological conflicts that have occupied the world for so long; conflicts over who was going to run the industrial machine and who was going to get the benefits. Now we are being asked: How much energy does it take to run the industrial machine, where does the energy come from, where is

the machine going, and what happens to the people who live in the path of the machine?

I have said that we believe in an ever-expanding cycle of growth and consumption. This is the secular religion of our time.

The great agency of change throughout the world is industrial man. He and his technology, armed with immense political and administrative power and prepared to transform the social and natural landscape in the interest of a particular kind of society and economy, have a way of soon becoming pervasive. Industrial man is equally the creature of East and West. And of the Third World too. Many of the governments of the Third World share our commitment to endless growth, even though they may have no real prospect of achieving it. And this is so, whether they purport to share the ideology of the West or call themselves Marxist.

Our ideas are still the ideas of the mid-19th century: the era of the triumph of liberal capitalism and the challenge of Marxism, the era of Adam Smith, and the Communist Manifesto. Both of these creeds are the offspring of the Industrial Revolution. Capitalism (and I include under this heading all the regimes of the industrialized democracies as variants on the capitalist economic model) and communism constitute two forms of materialism competing for the allegiance of people in the world today. Neither has yet come to grips with the necessity for rethinking the goals of the industrial system. Yet the consequences of large-scale technology, out of control, can be seen around the world: tankers cracking up on the beaches; the ongoing destruction of the tropical rain forests of the Amazon; infant formula being sold indiscriminately in the Third World; the mining of soils in many countries.

Can the nations of the Third World achieve the levels of growth and consumption that have been achieved by industrialized countries? If they cannot—if the consumption

of natural resources at a rate necessary to enable them to do so (not to mention the concomitant increase in pollution) is not possible in a practical sense—then what? We have been unwilling to face up to the moral and ethical questions that this would raise for all of us.

Thomas Rodney Berger QC OC OBC was a Canadian politician and jurist. He was briefly a member of the House of Commons of Canada in the early 1960s and was a justice of the Supreme Court of British Columbia from 1971 to 1983. In 1974, he became the royal commissioner of the Mackenzie Valley Pipeline Inquiry, which released its findings in 1977. He was a member of the Order of Canada and the Order of British Columbia. Justice Berger died on April 28, 2021.

TWO

The Hon. Nancy Morrison

THREE STORIES

As an ardent member of the law profession and judicial system for over 50 years, it is difficult for me to relate stories in our courts and in our laws of willful blindness, discrimination, abuses, and lack of respect. But the need for awareness of the problems precedes necessary law reform.

In 1958, as a first-year law student, I began to understand the lack of rights, respect, and remedies accorded females in society and the law. It was not until 1966, when I first read the *Indian Act* that I began to realize the inequities and often-horrific abuses suffered by Indigenous Peoples and the need for society and our laws to make the necessary changes. Our society, laws, and justice system have shown they can and do evolve. The need and work must continue. I remain optimistic.

KAMSACK, THURSDAY, 10 A.M.

1966. Kamsack, Saskatchewan

It was Thursday, an autumn day, and I was headed for Kamsack. The poplars had turned yellow, and the harvest was almost finished. I knew my case, an impaired driving, would not be called until later in the morning, so I could listen to Bruno Gerussi's radio program until 10:00 a.m., then go into the courtroom. The building also housed the local RCMP detachment and cells.

Kamsack is a picturesque prairie town in Saskatchewan where the Whitesand River joins the larger Assiniboine River, the aboriginal and early trappers' highway through the prairies. I had just begun practising law in Saskatchewan after three and a half years in Ontario, and although I was comfortable doing criminal and civil litigation, I felt I was the new kid in town who had to establish her own credentials.

The courtroom was filled. Thursday was court day in Kamsack. Mostly Indigenous people and RCMP officers filled the small courtroom. North of Kamsack are First Nation reserves, the Cote First Nation, the Keeseekoose First Nation and the Key First Nation.

The judge was a younger man, bright, and with a good sense of humour. I took out my yellow pad to start a letter while I waited for my case to come up. It would be a while, from the look of the court docket. A couple of quick matters were dealt with, which I tuned out, and then his case was called—an older Indigenous man from one of the reserves, who had been in the RCMP detachment cells overnight. The RCMP officer who was serving as clerk of the court called out his name.

The man stood up on shaky feet and was brusquely told to come forward. The man looked unwell, and confused. A woman got up from the courtroom and came toward the front of the court with great hesitation, saying, "He is my father. He does not speak English or understand much. Can I help him?"

Everyone was quiet in the courtroom. There was a nod of assent from the judge. The woman stayed beside her parent, very still. Where was the interpreter? You cannot conduct a case unless the accused understands every word that is spoken in the courtroom. That was so basic it never occurred to me that there were courts conducted otherwise. There was no court interpreter here.

No longer tuning out, I began to watch. The clerk/officer picked up the information and bellowed out the charges against the old man in a rapid singsong fashion, words so familiar to

the officer they had achieved a rhythm. Being drunk in a public place and drinking off the reserve seemed to be the charges, but I missed the exact words, they were spoken so quickly.

The man looked bewildered. His daughter murmured briefly to him, but she did not look as if she had caught all that had been read out so quickly.

"Do you understand the charges?" Silence. The old man's eyes were downcast, and he looked ill.

"Do you understand the charges?" More insistent this time. The daughter tried to murmur to her father, but he still looked bewildered, humiliated.

"How do you plead? Guilty or not guilty?" The confusion seemed to increase for the old man. The audience sat very still. They could not help their neighbour. Some of them were next. The miserable couple standing were on their own.

Irritation and impatience were beginning to show on the judge, and the police. It would be a long morning if this kept up.

"Note that as a 'not guilty' plea and present your case," instructed the judge. A police officer was called to the witness stand, sworn in, and gave his evidence in a quick and professional manner to the court. He related when and where the previous night he had apprehended the accused, related how very drunk he had found him to be, and how he had placed him in the cells for the night.

The man and his daughter were still standing. They had not been invited to take a seat. There was no effort to ensure that the old man had understood the testimony of the officer or that it was fully interpreted; there were no pauses for any translation. The daughter murmured to her father, but not enough to match the words of the policemen.

"Do you want to ask the policeman any questions?" The look of confusion increased. A shrug from the judge, along with a look on the man's face that showed he begged to be left alone, in a place far from the courtroom.

"All right, step down," the judge said, dismissing the police

officer who had given the evidence. That was the evidence for the Crown. The Crown's case was closed. I sat stunned. The accused had not followed everything, as far as I could see. Worse, I had failed to jump up and intervene as a 'friend of the court'.

"Do you wish to present any evidence on your own behalf?" Why were they yelling every time the clerk or the judge spoke to him?

"Do you want to testify?" A shrug to the daughter, then some murmuring between the two, both looking confused. The impatience of the court was becoming more obvious.

"All right, come forward. Come and take the stand. Come forward." This from the judge, motioning for the accused to come ahead into the witness box.

The daughter gently pushed her father forward and he was waved into the witness box. The daughter stayed behind, still standing, unsure of where she should go, but no longer at her father's side, no longer talking to him quietly. The judge did not invite her to come closer so she could interpret for her father.

A Bible was thrust into the old man's hands, and the clerk officer bellowed to him, "Do-you-promise-to-tell-the-truth-the-whole-truth-and-nothing-but-the-truth-so-help-you-God?" It was run off like a round from an M-16, all one long word. The old man's downcast eyes looked up briefly. The officer yelled out the oath once again, even faster this time, if that were possible.

Silence from the man and his daughter.

A questioning look was exchanged between the officer who was prosecuting the case and the judge. A wry shrug from this judge, whose sense of humour I had once admired. This was also a judge who enjoyed a close personal relationship with most of the police officers, a difficult position for any judge, in any community.

The accused stood there, seemingly unable to understand

what he was supposed to do in the witness stand, still clutching the Bible that had been put in his hands.

Then the judge said it.

"Give him a mickey to swear on. He'll understand that."

The policemen all laughed, and so did the judge. No one else in the courtroom did. I was appalled.

The man gave no evidence. He was convicted. The judge said to him, "I've told you, every time you are convicted of one of these offences, the fine goes up another five dollars. This time it is $65. In default of payment, five days in jail. Do you have the money to pay the fine?" The daughter told the court that her father did not, so the old man was taken back to jail.

Kamsack, Thursday, 10:00 a.m., where there was an absence of respect, fairness, due process, and justice in a courtroom by those entrusted with the law.

What was this about? Indians not being allowed to drink? This was 1966. I knew nothing about the *Indian Act*, a statute never mentioned at law school. On returning to Yorkton after my case finished, I stopped by our office and picked up a copy of the *Indian Act* to take home and read that evening. It was an epiphany. As fine a piece of apartheid legislation as one could hope to find in the world. One law for whites, another for subjugated Indians.

It was the beginning of my understanding that minority rights extended far beyond women's rights. I became aware of *The Indian Act*, but not the residential schools. Residential schools were virtually unknown then to all but government officials, administrators of the *Indian Act*, the churches involved and the Indigenous communities themselves. The enforced enrollments in those schools were still being mandated when I began practising in Yorkton. I knew nothing about them. The last residential school to close in Canada was in Saskatchewan in 1996, the Gordon Residential School.

My aboriginal clients never spoke of their time or treatment in those schools. The schools were never mentioned

in Pre-sentence Reports ordered by the courts. The existence, mistreatments and cruel legacy of those schools did not become public knowledge or understood until decades later. That belated understanding continues.

AN UNUSUAL JURY TRIAL

THE 12 PERSONS who serve on criminal juries come from all walks of life. There are 12 brains and 12 life experiences. Most accused persons facing serious criminal charges choose trial by jury. Jurors bring the street and common sense into the courtroom, and sense of justice. And once in a while, they give a surprising, even perverse, verdict, because to do otherwise would not be fair, or conform to justice as they see it.

Anyone who has served on a jury will tell you it was challenging—usually unforgettable.

This was an unusual attempt murder case before a jury in Yorkton, Saskatchewan, in February 1961. The accused, Sterling Brass, was a young man from the Key Indian Reserve, now the Key First Nation, north of Kamsack.

The charge against Sterling Brass was that on August 19, 1960, he attempted to murder Dennis K. by shooting him with a 30-30 Winchester rifle.

Dennis K. was another young Indigenous man from the same reserve, who had been disenfranchised and banned from the reserve for violent behaviour. Bernice Cote, who was living with Sterling Brass at his parents' home at the time of the offence, had previously lived with Dennis K. Her testimony in a previous court case was that Dennis K. had beat her and slashed her face because she had been getting letters from Brass. Dennis K. had told Bernice Cote he was going to get Brass "sooner or later." She passed the threats on to Sterling Brass.

On finding out that Dennis K. had returned to the reserve, Brass went home to borrow his father's 30-30 Winchester and drove to the house on the reserve where Dennis K. was said

to be. He confronted Dennis K., demanding several times he come outside. Dennis K. refused and taunted Brass to go ahead and shoot. Brass shot him.

At the preliminary hearing on October 4, 1960, a friend of Brass testified that immediately after the shooting, "I just heard him say if I get hung, plant flowers on my grave." Sterling Brass handed the rifle to his friend, asking it be returned to his father, then drove away.

The next day at 6:45 a.m., Sterling Brass knocked on the door of the building in Kamsack where the RCMP cells were located. A civilian matron was on duty, with a female prisoner in the cells. Brass told the matron he had murdered Dennis K. and that he wanted to give himself up. He said he wasn't running away from the law. The matron did not believe him at first and told him to come back when the police were there. He refused to go and said he would wait. Brass insisted he wanted to give himself up to the police, as "Honest to God, I murdered Dennis K., and I don't know if he is dead or alive." So he sat on the steps, to wait. The matron called one of the officers who came over shortly and found Brass, still waiting, on the steps.

When RCMP Constable D. B. MacDonald arrived, Sterling Brass told him he felt he had killed Dennis K. He said he had no idea where or by what means or how he had got himself into Kamsack. He wanted to go down into the cells. MacDonald testified that the accused seemed to be very tired, sighing, and there was a slight smell of liquor.

Dennis K. did not die from the single shot. The bullet entered and exited his body. He spent over three weeks in hospital but made a full recovery.

Sterling Brass was committed for trial at the preliminary hearing and remained in custody for six months until the jury trial took place in Yorkton. The trial, before Mr. Justice C.S. Davis of the Court of Queen's Bench, took three and a half days. The jury came in with a surprising verdict of not guilty of attempted murder, but guilty of common assault, the lowest

possible included offence under the *Criminal Code of Canada*. In 1961, that jury would have been all male and all white.

On February 16, 1961, Mr. Justice Davis imposed a sentence of two years less a day.

From the Provincial Jail for Men in Prince Albert, Saskatchewan, Sterling Brass gave notice of his appeal against sentence. Acting on his own behalf, he set out his grounds for appeal:

> I served six months on remand in Regina jail before I was sentenced. I was given the maximum sentence for common assault charge and the six months were not considered, which I had already served. If I should serve my complete jail term I will be released in October 1962, which is a bad time for me to find any work as I have no profession or trade. I am a labourer. If the six months were to be considered I would be out in the spring of 1962 which would give me enough time to be prepared for the winter.

Brass, 22 at the time, had a grade 6 education and worked as a labourer, often on nearby farms.

When there was an appeal from sentence, the Court of Appeal Registrar would write the presiding judge, as he did in this case on March 22, 1961. The Registrar wrote to advise Judge Davis of the appeal against sentence, adding the usual, "I shall be obliged if you will forward to me for the Court of Appeal such comment on this case as you may see fit to make." Not all judges saw fit to comment, but Judge Davis did in this instance.

Part of his letter to the Registrar, dated March 28, 1961, follows:

> This young man is certainly living up to his name. If justice had been done he would now be serving a term in the penitentiary of considerable duration. The

decision of the jury was manifestly perverse as Brass should have been found guilty of attempted murder, with which he was charged. I am satisfied that two things brought about the verdict of common assault; firstly, before I could stop him counsel for the accused had read to the jury the section of the Code which sets out the penalty is life imprisonment for the offence charged, and secondly, the man who was shot was a useless rogue. The jury evidently figured they would not take a chance on having the accused (a very presentable young man) go to the penitentiary for having taken a pot-shot at a rogue. In fact, after the jury had been out for quite a time they came back and asked what the maximum penalty was for common assault. I told them (namely two years) although this is not usually done. They returned and promptly came back and found him guilty of common assault.

It was admitted by the accused's counsel at the trial and fully substantiated by the evidence that at the time of the shooting the accused was neither drunk, insane nor in a state of blackout. The defence was that of "diminished responsibility" and based on the English case *R v Bastian.* However, that case was founded on the *Homicide Act* 1957, section 2, which has no counterpart in Canada. In other words, the accused offered no defence known to law in this country and accordingly, I have no hesitation in saying that the verdict was perverse.

I might add that when I asked the accused if he had anything to say why sentence of the court should not be pronounced on him his counsel replied quite frankly that he had expected his client to have been convicted as charged and had intended to call as a witness in mitigation of sentence the Rev. Taylor who was to have told the court that the accused was considered

> by him as a candidate for the Ministry—the Anglican Ministry. However, in view of the verdict he did not call any character evidence. Incidentally, the accused had two previous convictions against him of some less serious offences. On May 1, 1957, he was found guilty of breaking and entering and sentenced to one year in jail. He appealed the sentence and the Court of Appeal on the 9th of September of that year reduced the sentence to six months.
>
> The accused is an extremely good-looking young Indian and conducted himself at court with great decorum which obviously impressed the jury. On the other hand, his victim was a hard-looking customer with a bad reputation whose liquidation would scarcely cause a ripple. So it would seem that the verdict was based not on the law or the evidence but on some sort of abstruse natural justice.
>
> I gave the accused the maximum (less one day) for the offence with which he was found guilty because I could not conceive a more drastic case of "common assault." I feel satisfied that the jury in all its compassion intended that Brass should receive the maximum.

Following that letter from Judge Davis, the sentence appeal of Sterling Brass was denied by the Saskatchewan Court of Appeal. One might feel Davis should have given Brass credit for the six months served in pretrial custody. But perhaps Davis was balancing that decision with a decision he made near the end of the trial, a decision that favoured Brass.

When Brass's lawyer was giving his summation to the jury at the end of all the evidence, the lawyer read out the section of the *Criminal Code* for attempt murder, including the penalty "liable to imprisonment for life." It is a serious breach of rules governing criminal jury trials that jurors

not be informed of the penalties of the charges before them. Jurors are to rule on the evidence before them, not decide on sentencing. That breach by the lawyer for Brass would normally have triggered an immediate declaration by the judge of a mistrial. Davis, an experienced trial judge, obviously chose not to make such a ruling. Had he done so, it would have meant a significant delay for a new trial, and more pretrial time in custody for Sterling Brass.

What became of Sterling Brass?

Inquiries indicated that Sterling Brass became a respected leader in his community. *The Saskatoon Star Phoenix* provided further information.

Sterling Brass died January 1, 2009, in his 71st year. His obituary of January 5, 2009, tells the life story of a man of dignity, integrity, and humour—a leader, a musician and a warm family patriarch. He was survived by his wife, Edna, 2 daughters, 2 sons, 14 grandchildren and 4 great grandchildren. Another son had predeceased him. Sterling had been a storyteller, with a passion for music, especially old time fiddling, going nowhere without his violin.

Born on the Key Indian Reserve, Sterling Brass was one of the countless Indigenous children sent to a residential school by the local Indian agent. He tried to run away to escape the abuses, only to be returned. It was a harsh beginning, as with so many.

The life Sterling Brass carved after the trial was one of service and leadership: Chief of the Key First Nation, time with the Department of Indian Affairs, Tribal Representative of the Yorkton Tribal Council, a Vice-Chief of the Federation of Saskatchewan Indian Nations, Chair of the National Aboriginal Trappers Association, and Chair of the Waneskewin Heritage Park. He worked for the New Democrats, was Liaison Officer for Saskatchewan Environment, and finally, was Director of the Saulteux Healing and Wellness Lodge on the Cote First Nation.

Sterling Brass left a proud and lasting legacy with his large and loving family, his triumph over adversities, and his example and service to his First Nations and country.

And long ago, a jury brought their best instincts and sense of justice into a courtroom.

THE SUBLIME BLANCHE MACDONALD

My appointment as a judge to the BC Provincial Court in 1972 had demonstrated, suddenly, there were slots for females in the law profession. But just one at a time. It was also a time when strong women were working together to bring attention and reform to the inequities plaguing women and all minorities. In Vancouver, Blanche MacDonald was one of those strong women.

The sublime Blanche MacDonald, with the gift of making everyone she encountered feel special, was beautiful, loving, smart, and a born entrepreneur. She was a Cree Métis woman, proud of her identity and heritage. By age 29, Blanche had established her eponymous modelling and fashion agency in Vancouver in 1960. That business has continued in various forms long after her early death in 1985, from cancer.

Blanche was committed to women's rights and the rights of Indigenous Peoples, particularly women. On March 7, 1978, Blanche and Pauline Jewett, a former Member of Parliament and then President of Simon Fraser University, appeared before the Royal Commission on the Incarceration of Female Offenders. The Commission was set up by the BC Government following serious allegations of sexual misconduct, fraud and other complaints occurring at the Women's Prison at Oakalla.

Blanche and Pauline were presenting a brief on behalf of an ad hoc Citizens Advisory Group. Their stated concerns were "The needs of women in prison with special emphasis on the Native Indian women." Their objective was to facilitate the integration of these women into society and their communities

after incarceration. Their brief suggested, "the majority of women's offences can be categorized as either lifestyle-related or self-destructive offences, e.g. prostitution, alcohol and drugs."

They were seeking more community involvement to assist these women, including re-entry homes where needed. Their brief stated: "It is a truism in Canada that native Indian people are vastly over-represented in our prisons, far out of proportion to their numbers in the general population. The question of why this discrepancy exists has never been a subject of enquiry..."

This was 1978, 45 years ago.

Their recommendations included "a community based residential facility staffed by native Indian women," and that native Indian women be encouraged to apply for such positions. Also that there be an affirmative action program for all staff with ongoing in-service training and job upgrading skills. It was the stated hope that the objectives would develop positive feelings about being native and being female by encouraging identification with native culture, and contact with other women who could serve as positive role models. There was a recognition that these women needed to increase their knowledge of health, nutrition, parenting, financial matters, education, job training, and access to other services.

The recommendation continued, "We focused our attention on the problems of native women in prison because we felt that inadequate attention was being paid to their condition." There were 11 women in this ad hoc group that Blanche MacDonald, Pauline Jewett, and others spoke for. The group included three social workers, two lawyers, and a sociologist. Four of the eleven were Indigenous, including Blanche.

I was having dinner with Blanche and Pauline the day the *Royal Commission on the Incarceration of Female Offenders Report* came out in June 1978. In spite of Pauline's famous shepherd's pie, it was a grim evening. Still sitting as a judge on

the Provincial Court, I was not involved, but very interested. I was one of those tasked with sending people to our prisons. The Commission wrote:

> This Commission is not convinced that there is a problem of great magnitude regarding native women in the prison system.... The Commission does not see any special problem presently surrounding the incarceration of native women.

For Blanche, those findings were particularly galling. She had worked with women in the prisons and in her community; she knew the problems. She knew these women at a deep and personal level; these were her sisters, her aunties, her grandmothers.

A few days later, in the British Columbia Legislature, commenting on the *Commission Report*, Rosemary Brown, who was the first black woman elected to a provincial legislature in Canada, rose to point out the problems faced by Indigenous women in prison. Her list included cultural isolation, discrimination against natives, the misleading statistics on who is identified as native, and the disproportionate number of native women in our prisons.

When Rosemary spoke to the Legislature on June 8, 1978, she said, "The whole impact of the justice system on Native Indians of both sexes is one that's always been a disgrace in this country." My friends were tilting against unforgiving and overwhelming windmills.

Later in June of that year, I accompanied Blanche on a trip to Haida Gwaii, home of the Haida Nation, then called the Queen Charlotte Islands. We flew into Skidegate for the historic raising of Bill Reid's carved totem pole, "Tribute to the Living Haida." It had taken Reid, the renowned Haida artist and carver and his assistants two years to carve the gigantic pole. We all watched in awe as dozens of men manually

raised the totem pole before the longhouse in the Village of Skidegate. A potlatch followed that evening. It was an unforgettable experience.

It was a Friday, May 11, sunny and warm. It was Blanche's birthday. I called to wish her a happy birthday. "Is anyone taking you out for lunch? No? Let's go to Umberto's Il Giardino. My treat."

I called Rosemary Brown to join us. Back in practice at this point, I cancelled my Friday afternoon at the office. It was going to be one of those Vancouver Lotusland Friday lunches. Then Blanche called to ask if her older brother, Wylie Brillon, could join us. Wylie, a successful fisherman out of Haida Gwaii, was in town. Blanche adored him, and it was easy to see why.

It was a splendid lunch. We were almost the last to leave the restaurant. As we sat in the near-empty restaurant, it suddenly occurred to me: "I'm the only white person at this table."

"That's right, Nancy. How does it feel?" asked the wicked Rosemary, leaning forward with a now-you-know smile.

A lawyer, arbitrator, and judge, as well as a political activist and feminist, Nancy Morrison practiced law and adjudicated in Ontario, Saskatchewan, British Columbia, Yukon, and Northwest Territories. As a judge, she served for nine years on the British Columbia Provincial Court and 15 years on the Supreme Court of British Columbia. Raised in Yorkton, Saskatchewan, she now lives in Vancouver, BC. Her memoir Benched: Passion for Law Reform *was published in 2018 in the Durvile Reflections series.*