

***Fragile Freedoms: Human Rights and Dissent in Canada*, Thomas R. Berger, Toronto: Clarke Irwin, 1981. Pp. xviii, 298, \$17.95 (cloth), \$11.95 (paper).**

Fragile Freedoms is an historical examination of the treatment of a significant number of minorities in Canada. Mr. Justice Thomas Berger believes that Canada's record with respect to minorities is unspectacular. He says that as Canadians, we have "no justification for being smug"¹ but on the other hand have "no reason to flagellate ourselves".² Nonetheless, Berger is optimistic. He hopes that, because of his examination, Canadians will come to "understand better what kind of world must be created to foster human rights and fundamental freedoms".³

Berger suggests that the system Canada needs to foster human rights is a "regime of tolerance". It would recognize diversity and the rights of minorities to express and act upon their rights. It would also acknowledge that Canada had its origins in two great societies which came to lands inhabited by aboriginal peoples. Berger further feels that the political danger of intolerance would arise for Canada if "a single dominant people were to regard the state as its own political instrument."⁴

A continuing problem in Canada's political history is the working out of relations between the English and French-speaking peoples. The first three chapters of the book concentrate on the expulsion of the Acadians, the Métis rebellion, and finally the separate school issue, sketching the early history of the relationship between these two societies. The remaining chapters (except chapter 7, Democracy and Terror, which deals with the October Crisis) concentrate on the treatment received by other minorities from Canada's political institutions. Chapter 4 deals with the Japanese-Canadians and their banishment from coastal regions in British Columbia, chapter 5 deals with the Communist Party, while chapter 6 concentrates on the treatment of the Jehovah's Witnesses. Finally, chapter 8 deals with the history of the aboriginal rights claimed by the Nishga Indians.

The book makes interesting, if sometimes discouraging, reading. Minorities have had difficult times in Canada. On balance, the book is optimistic because minorities have always had spokesmen either from the majority or from within the political framework. The Supreme Court has

¹Thomas R. Berger, *Fragile Freedoms: Human Rights and Dissent in Canada* (Toronto: Clarke Irwin, 1981) at xii.

²*Ibid.*, at xii.

³*Ibid.*, at xii.

⁴*Ibid.*, at xiii.

sometimes made significant contributions in its judgments like those on behalf of the Jehovah's Witnesses and the Nishga Indians. Also, the fact that some of the problems raised by minorities have remained in the political limelight for as long as Canada has existed is, itself, a hopeful sign. In some countries such possibilities would not exist.

To give the reader some idea of the depth and breadth of Berger's analysis, a more extended discussion of three chapters follows.

Chapter Three, titled Laurier and the Separate Schools, recounts the erosion of section 93 of the British North America Act. The section provided that ". . . the provinces could not interfere with or abrogate rights to denominational schools already established by law by the Catholic or Protestant churches."⁵ The interpretations of that provision by the Supreme Court of Canada or the Privy Council were such that French minorities in New Brunswick, Manitoba and finally Ontario were unable to insist on public funding for separate schools allowing French Canadians to be educated in French. In addition to judgments of the Courts, Berger sets out legislative involvement at both provincial and federal levels which helped restrict the effectiveness of separate schools. Ironically throughout this time (indeed for over 100 years) Quebec in no way restricted funds to English Protestant Schools nor did it control the language of instruction in them.

During the controversy Sir Wilfred Laurier, on behalf of the French, consistently called for a "regime of tolerance". In a House of Commons debate he pleaded that the request for French education in Ontario not be rejected with the reply of the English that "You shall have an English education and nothing else."⁶ To this day we continue to search for tolerance between Canada's two great societies and the educational rights of minorities. The new Charter of Rights is a forward step although Berger notes that the interpretation of the crucial phrase "minority language education facilities" will have to be resolved by the Courts.

The advantages of Berger's use of historical detail are well displayed in his discussion of the Nishga Indians' pursuit of their aboriginal claims. In the chapter on the Nishga, Berger shows the extent and richness of the Indian culture. He quotes the French anthropologist Levi-Strauss who describes ". . . the Indian culture of the northwest coast as one of the great efflorescences of mankind."⁷ Berger then describes how the culture was ravaged. Reserve lands set aside for the Indians, although already inadequate, were reduced. The Indian food fishery was restricted. For 50 years, Indians, as well as Chinese and Japanese, were denied the right to vote in British Columbia elections. Despite these barriers the Nishga continued to

⁵*Ibid.*, at 59.

⁶*Ibid.*, at 86.

⁷*Ibid.*, at 228.

press their aboriginal claims for over 100 years even though the Indian Act of 1927 "made it an offense punishable by law to raise funds for the purpose of pursuing any claim of aboriginal title."⁸ Finally, in part as a result of the efforts of many Indian organizations, and of judgments of the Supreme Court of Canada in *Calder v. Attorney-General of British Columbia*,⁹ aboriginal claims came to be acknowledged. Berger approves of the attitude implicit in the judgment of Mr. Justice Hall; he had that "sense of humanity — that stretch of the mind and heart — that enabled him to look at the idea of aboriginal rights and see it as the Indian people see it."¹⁰ Berger notes that "Canada is committed to a fair settlement of Native claims . . . our tradition of tolerance has demanded that redress be made."¹¹ Once again we find echoes of a "regime of tolerance" as the answer to problems raised by Canadian minorities.

Canadians who have been confronted either at home or in the streets by Jehovah's Witnesses trying to sell the *Watchtower* or other publications would be surprised to discover how extensively the Witnesses have been harassed by political institutions in Canada. Many may remember the treatment they suffered in Quebec but Berger also carefully documents the abuses they suffered in other parts of Canada for over 50 years: the banning of their publications towards the end of the First World War; the failure to renew radio station licences without hearing; placing society property in the hands of the Custodian of Enemy Property during the Second World War. All of these actions seem harsh today.

Similar treatment in Quebec resulted in a remarkable series of cases before the Supreme Court. In these cases the Court set forth the principles to be followed if human rights are to be acknowledged and the "regime of tolerance" achieved. The chief architect of these principles was Mr. Justice Ivan Rand who was "profound, learned, eloquent and . . . unyielding in his devotion to civil liberties."¹² His judgments provided "a firm philosophical basis for the idea that the fundamental freedoms lie beyond the reach of legislative authority, federal or provincial."¹³

Berger quotes Justice Rand at length from a number of judgments on the Jehovah's Witnesses. The following passage from *Boucher v. The King*¹⁴ is typical:

⁸*Ibid.*, at 235.

⁹[1973] S.C.R. 313 (S.C.C.).

¹⁰*Supra*, footnote 1, at 246.

¹¹*Ibid.*, at 253.

¹²*Ibid.*, at 175.

¹³*Ibid.*, at 181.

¹⁴[1951] S.C.R. 265. (S.C.C.).

Freedom in thought and speech and disagreement in ideas and beliefs on every conceivable subject, are the essence of our life. . . . Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in morals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability.¹⁵

Berger notes, however, that the Supreme Court of Canada is not always on the side of dissenting minorities. He refers, with concern, to *Attorney-General of Québec v. Dupond*¹⁶ in which the majority of the Supreme Court upheld a city of Montréal ordinance "prohibiting the 'holding of any or all assemblies, parades or gatherings' on the public domain for 30 days."¹⁷

Berger believes, however, that "one of the happy results of the enactment of the Charter (of Rights and Freedoms) is that it will reverse the *Dupond* decision and enshrine fundamental freedoms as independent constitutional values."¹⁸

Given the range and variety of cases of minority mistreatment Berger examines, readers may be tempted to speculate why some minorities were more successful than others. Were the Jehovah's Witnesses successful in law because they presented no political threat to Canada's institutions? Were aboriginal people, like the Nishga, successful because they persisted over many decades? Were the courts reluctant to interfere on behalf of minorities because legislators declared a danger or threat to more general security?

Those who may want to challenge Berger's interpretation of the events that constitute the treatment of minorities will be pleased with his extensive bibliography listing in detail the literature relied upon.

In conclusion any Canadian looking for an engaging and readable introduction to the history and problems surrounding an understanding of human rights and the treatment of minorities in Canada will not be disappointed by reading *Fragile Freedoms*.

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¹⁵*Ibid.*, at 288.

¹⁶*Attorney-General of Canada et. al. v. Dupond* [1978] 2 S.C.R. 770 (S.C.C.)

¹⁷*Supra*, footnote 1, at 185.

¹⁸*Ibid.*, at 187-188.

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