TO THE FOURTH WALL*

Leslie Hall Pinder

It seems, even in the midst of this current event, that we are in an old photograph. As we talk someone is snapping a picture and we are immediately out of fashion, representing a time that has passed.

We are in a courtroom 60 in the British Columbia Court of Appeal. This is the first of four rounds which will culminate in the hearing of the Gitskan-Wet'suwet'en case. Nineteen lawyers are present.[1] The area in front of the bench is so crowded that once in, it's difficult to get out. There aren't enough places for the lawyers to sit. Other chairs have to be found, five judges preside.[2]

We don't see ourselves as being part of a time that will one day be viewed as quaint, obsolete or perhaps even dangerous. We think we are

---

* The title is a reference to the illusion in theatre of a room with four walls. The audience is behind the fourth wall. In courtroom 60, this is the gallery comprised mainly of aboriginal people. But to refer to the aboriginal people in court directly would be a major breach of form, like acknowledging the presence of an eavesdropper each party had invited without telling the other. The world of the courtroom is a self-contained, self-created place. In the title of this essay the eavesdropper is witness. I mean to address those behind the fourth wall who are also of non-aboriginal descent. In addition, the title is a slight play on George Manual and Michael Posluns's *The Fourth World* (Collier Macmillan, 1974) which calls for the creation of a new order in which both native and European cultures can survive.

[1] In this round, the main cases are *Regina v NTC Smokehouse et al* and *Regina V Lewis*. Eight of the lawyers represent the federal and provincial governments (and their supporting interveners in the case). Eleven lawyers represent the aboriginal people who were comprised of the Sheshaht, Squamish, Sto:lo, Secwepemc, Nlaka'pamux and Heiltsuk Nations. More lawyers will be present when the Gitskan-Wet'suwet'en appeal is heard, even though the same courtroom will be used.

[2] None of the ordinary court procedures fit either. In the midst of the Gitskan-Wet'suwet'en case, the trial judge, Judge McEachern, was appointed to the Court of Appeal. A special law had to be passed so that he could continue as the trail judge. After his judgment, he resumed his duties as the Chief Justice of the B.C. Court of Appeal, which is the court to which the appeal from his decision is heard. To avoid this apparent injustice, Judge McEachern has had nothing to do with any of these appeals. There is also the strange situation that the main lawyer for the province in the aboriginal cases (and the lawyer who argued the Gitskan-Wet'suwet'en case for B.C.), Michael Goldie, has now also been appointed to the same Court of Appeal. Of course he won't participate in the appeals in any way either. Ordinarily the Court of Appeals sits as a panel of three; here there are five (Justices Taggard, Lambert, Hutcheon, Macfarlane, and Wallace). The five-member panel was chosen in order of seniority and availability.

on the cutting edge, forging ahead, always at the front of the boat, always moving first into the future, never getting behind. But already we are behind. Our limited point of view bears the imprint of fashion as much as our hairstyles do. We will say to the incredulous children who will grow up and have to tend us, "Ah, but we were in style then."

Now we struggle with the most basic questions, and one of these is this matter of time.

In courtroom 60, the federal and provincial governments are referred to as the Crown. They sit on the right. The lawyers for the aboriginal people are on the left.[3] And while our submissions refer to modern methods of harvesting, seine boats, new constitutional provisions, sophisticated sonar devices to locate and count salmon stocks, the cases we are arguing are essentially a face-off between the settler government and the natives—between those who were here first and the immigrants who came to trade and then to stay.

But there is further mix up in time. For the most ancient rights, those held by aboriginal people, all the law is new. The early cases are citied but they have not aged well. The exceptions are the decisions of the U.S. Supreme Court in the early 1800s, where honest, almost wistful, insight is expressed by the Chief Justice when he describes the ambitions of the "great Nations of Europe" on their discovery of North America:

> The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence . . . . However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained . . . it becomes the law of the land . . . .[4]

The lawyers in courtroom 60 quote from handwritten documents, difficult to read.

"W.F. Whitcher wrote a letter to Alexander Campbell on January 23, 1866—I'm sorry My Lord, I can't make out the—"

---

[3] Right and left are, of course, relative terms. During *NTC Smokehouse* there is much discussion before the Court as to what the Reserve Commissioner meant in 1877 when he allotted a reserve on the "left bank" of the river. If he knew about surveying methods, he would mean that, facing upstream, the land was on his left. We don't know if he understood surveying methods. For my purposes, the bench is considered upstream.

[4] *Johnson v M'Intosh* (1823) 8 Wheaton 543, at 572 *et seq*.

We all strain to help, to be first to know.

"Fisheries," says Mr. Justice Hutcheon.

"Yes, I think you're right."

The judges are given letters that were written in the 1870s and 1880s by civil servants, ministers, Royal Commissioners, and Indian agents. These people had no idea that they would have a relationship to our time, that what they wrote would be kept and said out loud today in court. If only we had a photograph of them, we would immediately see how old-fashioned they are. Instead, their views are put forward as enduring ones which the Court should adopt and endorse.

The lawyer continues to read from another government letter:

> I am therefore to request that you will be good enough to cause Judge O'Reilly and the other Indian Agents in British Columbia to be instructed that they must use all their influence to make Indians under their supervision understand that in extending to them the valuable privilege they now enjoy of taking fish for their own use . . . such permission is not to be considered as a right, but as an act of grace, which may be with-drawn at any time, should it be found that it is abused, or used for other purposes than those for which it is granted, or in such a manner as to embarrass the action of this Department . . . .

"But this is only one-half of the story," interrupts the judge. "Like half a telephone conversation."

The lawyer replies emphatically. "No, it's not. This is the whole conversation."

And so the battle is joined between oral and written history: between a society that has feverishly composed letters about the native people, and the natives who didn't even know of the correspondence.[5] The courts, however, have kept the faith of a written tradition. So much evidence is discounted as hearsay.[6] And yet aboriginal elders are called

---

[5] For the Gitskan people, members of the society are charged with the duty to teach children the oral history. This is contained in the adaawk. The adaawk tell who is entitled to the fishing places, which house has the creeks and mountains; they tell where to get food, what songs are important and when to sing them. They are evidence of ownership and jurisdiction over the territory. "In Gitskan law, all adaawks are true." Transcript, p. 190. "The most important thing in Gitskan is to have an adaawk." Transcript, p. 235.

[6] A strange thing is happening now. Because of recent cases about disclosure of documents, lawyers don't' want their clients to write things down. No one should make notes, or confirm things in writing because it may have to be revealed to the other side. Everyone should just remember what was said. But of course that requires different sort of attention: listening, remembering; we're out of practice. These cases that laud a written over an oral culture may revitalize in us a tradition that has been disdained.

to the witness stand to testify about events that occurred before the coming of the white man. The rules of the common law are strained to the breaking point attempting to cope with this different way of getting at the truth.

And in courtroom 60 the window-washers start their work. They seem to be present for all the major cases. It would be impossible not to notice them: at first the long brushes descend awkwardly from nowhere and clang against the windows, and then the actual bodies of the men, balanced on a platform; they wand away the dirt on the outside. But this legal work requires such attention that its blind focus scatters everything. Window-washing is obliterated.[7] And humor is scattered as well. What is left behind is somewhat pitiful. If a judge says something with even a tincture of levity, we all laugh uproariously, not because we are sycophants but because we are nervous and relieved.

(Once when I was in court and the Crown was making his submission, there was a small earthquake. I could sense some concussion a little way off and then the quake shivered into, through and out of the room. I looked up to see if anyone else had noticed. One of the three judges was also looking around and our twin reactions finally bumped into one another, and we nodded, very slightly, to confirm what we had just experienced. Otherwise, the earthquake was not acknowledged.)

The lawyer at the podium is now talking about the rights of native people. He says those rights are located in aboriginal time. They are from "time immemorial," from "time out of mind." He is declaring that time as past. It has not kept up. There has been a lapse and aboriginal time is in another dimension, another zone.

I think to myself: we have tried to keep the people asleep in an aboriginal past which is still drifting somewhere and is not now; they are not now. We think we have cleared our title of a burden, so that we can be free to take what they have.

But they aren't asleep, nor have they been.

The lawyer is talking about Section 35 of the Constitution which protects "existing aboriginal rights." Almost as soon as this provision was enacted in 1982, lawyers started to play tricks with it. They argued that the box full of protected rights was, unfortunately, empty, all of them having been extinguished. The Constitution protected a coffin, and an empty one at that. This trick was overruled by the Supreme Court of

---

[7] The "Oh Canada" noon horn is also ignored; the lawyer, in the midst of his submission, talks right through, it doesn't exist, although what he is saying can't be heard at all.

Canada in 1989[8], but other devices have followed. Now the Crown's lawyers maintain that while aboriginal rights exist, there are no aboriginal people. The territory is empty. Looking down from an aeroplane flying high above the land, the judge declares an absence.[9]

But it is not just the land that is empty. The aboriginal people themselves are *terra incognita*.

> Some of [the histories] . . . exist only in the Memory of the [Gitskan-Wet'suwet'en People] . . . I can only mention the high points of these less precise classes of history and I must leave it to the social scientist who are just beginning their journeys of discovery into the vast and largely uncharted *terra incognita* of the unwritten histories. I wish I could know what they will discover. (Judgement, p.17).

I marvel at the theory that the Aztecs couldn't see Spain's boats on the horizon because they had never seen such boats before and therefore they didn't have a mental concept to fit their actual experience until it was too late. And I think: we can't see the aboriginal people yet; we haven't discovered them after all this time. Perhaps that's why we don't really count what they have told us about themselves as information. We haven't heard it.

Instead we have created abstractions. Those of us who are not cynical are romantic; we revere an idea. We speak about the honor of the Crown; we believe in that honor; we will uphold it towards "our natives." And yet, we don't want aboriginal rights to be located anywhere, to be grounded, to have a territory to which they adhere. We don't want them to get in our way.[10] And the land occupied by the Indians becomes "unoccupied land"—timelessness becomes spacelessness. The Indians'

---

[8] *Sparrow v. The Queen* (1990) 70 D.R.L. (4th) 380.

[9] "The total [Gitskan-Wet'suwet'en] territory is a vast, almost empty area . . . ." (Judgement, p. 11) "The most striking thing that one notices in the territory away from the Skeena-Bulkley corridor is its emptiness. I generally accept the evidence of [non-Indian] witnesses . . . that very few Indians are to be seen anywhere except in the large river corridors. As I have mentioned, the territory is, indeed, a vast emptiness." (Judgement, p. 12)

The Court in the Gitskan-Wet'suwet'en case held that the Royal Proclamation of 1763 did not apply to B.C. because the land was *terra nullius*, or *terra inconnue*. The aborigines are either effaced from the land or assimilated to it "leaving a blank page" on which the white man could write his hopes and dreams. Land was only a spatial condition. The natives were part of the land's "useless original contents" and their "assimilation to the landscape amounted to the same thing as their effacement from it." *See* Patrick Wolfe, *On Being Woken Up: The Dreamtime in Anthropology and in Australian Settler Culture*, 33 (2) Comparative Stud. Soc'y & History 197 (1991).

[10] The Crown argues aboriginal fishing rights exist, but they are only access rights. They have no territorial dimension.

hunting territory is transformed into "waste lands;" even the idea of "waste," when we talk about it, takes on an uncertain virtue.[11]

The lawyers argue that aboriginal title is not a real title.

And the developmental metaphors starts of "higher" and "lower." Are the aboriginal people sufficiently developed, civilized and "high" enough on the scale of social order to be considered as having a human society? Is their title real, like ours, or is it a phony title that is easily overwhelmed by advancing civilization? Exactly what kind of title do the First Nations claim? Is it a title that competes with the title to *my* house? Are they going to take my land?

We pride ourselves on our macho title, so absolute that we can ruin what we have. Like cantankerous benefactors who despise their heirs, we can destroy our property and leave nothing. First Nations are told: show us that you have that kind of title, those proprietary rights.[12]

This challenge has been put forth before. During the Calder case, Wilson Duff, the anthropologist called as an expert by the plaintiffs, was closely questioned by Mr. Justice Gould about whether the Nishgas's aboriginal title was fit to be recognized by the Court.

> "I will give two more characteristics of ownership, the right to destroy it at your own whim, if you like, and the other, that the exclusive

---

[11] Judge McEachern said that once land had been clear-cut logged the Indians could re-enter it again until it was needed for another purpose by the Crown, at which point they would have to leave again. He describes the area of the clear-cut logging in the Gitskan-Wet'suwet'en territory as creating a "moonscape." However, he believes that even with clear-cute logging there is still the possibility of regeneration, the possibility of redemption. He was "encouraged to notice on my travels through the territory that areas logged as recently as three to six years old are starting to showing signs of regeneration." (Judgement, p. 12).

[12] One of the other indicia of true ownership is that land can be "alienated," estranged. The common law has developed the concept of ownership into a title that is mainly individual (rather than collective) and is so absolute that everyone has the right to destroy what they own. By contract, aboriginal rights are most often "of the community;" they belong to the group. Inherent in these rights is the idea of stewardship—of being a trustee of property or resources for others—of being a welcomed guest. This is, however, a generalization, as concepts of ownership differ from one First Nation to another.

The common law is distinct from statute law. The common law is the unwritten law that developed over hundreds of years in Britain, and is now part of the law of Canada. A statute is more temporal and is passed by a government, either the legislature or parliament. There is always a question as to whether a particular statute overrides any part of the common law. Now, of course, with the Constitution and the Charter of Rights, we have chosen to write down the values we hold. The Constitution is the supreme law of the country, and every other law (common law or statute) must be consistent with the Constitution.

> possession should be of indeterminable time . . . . Now, the right to destroy at whim, set fire to your own house . . . would a group within the Nishga have the right, if the buildings at the mouth of a certain river had been in their exclusive use some time and they will say, 'Let's set fire to it,' would the tribe prohibit that?"

And closely connected with this absolute, singular, destructive title is the issue of greed. It emerges again in courtroom 60. Some lawyers argue that if the Indians build an economy based on their aboriginal right to fish, then they will take all the fish. The lawyers day, "This case is not about aboriginal rights, it's about money. There is no limit to a person's appetite for money."

And trailing our own greed is this strange ambivalence we have about ourselves. Perhaps, as with out title to the country, we revel in our ability to ruin. We adore that which is doomed, even if it is our own civilization. Periods of history in which some great nation is passing away hold a desolate fascination for us. And one of the most resilient images we have created within the frontier metaphor is the idea that, while we have a higher civilization, with well-developed rationality, science, round wheels, horses and written words, we spread contagion.[13] Aboriginal people cannot survive contact with us.[14] They are fine until

---

[13] Many of the badges of civilization, as we of European culture understand that term, were indeed absent. The plaintiff's ancestors had no written language, no horses or wheeled vehicles, slavery and starvation were not uncommon . . . there is no doubt that aboriginal life in the territory was, at best, 'nasty, brutish and short.'" (Judgement, p. 13).

[14] Robin Fisher observes that, "The feeling that interior people, who had fewer contacts with Europeans than coastal people and who were therefore less degraded, was common in other British colonies" as well as in British Columbia. The future slot for Indian people, and their only hope, was to have a settled agricultural existence; Indian policy was completely geared toward forcing the aboriginal people towards the achievement of this end. The Indians who most closely approached this idea were the coastal people, with their fixed village sites. In a form of projected self-hate, these were the people most disrespected by the settlers. Fisher notes that, "Colonists were aware that western contact was as likely to be degrading as elevating to the Indians, and they despised those Indians who succumbed. The lingering hangover of the noble savage idea meant that the settlers still had a surreptitious regard for the Indians who still roamed wild and free." Robin Fisher, CONTACT AND CONFLICT: INDIAN-EUROPEAN RELATIONS IN BRITISH COLUMBIA, 1774-1890 84-85 (Vancouver: University of British Columbia Press, 1977).

To the missionaries, the Indians always had a future, but it was in terms of ceasing to be Indians and closely imitating the whites. The missionaries thought they could be saved from extinction if they were quickly turned into Europeans. They "could be saved, even though their culture would be destroyed." *Id*. at 142. Both "settler and missionary believed that the Indian was degraded by contact with 'civilization.' Duncan thought that "unless something was done for the Indians of the Victoria area . . . they 'will [soon] have passed into the jaws of the insatiable destroyer.'" *Id*. at 142-43 (quoting Duncan to Church

they are contaminated by the white man. And the "undisturbed order" that existed before we came was Time Immemorial.[15]

Time Immemorial is fatally susceptible to contact.

This idea of contamination is commonplace in British Columbia, as well as in other territories with a colonial past: the Indian in contact with the white man was "doomed to disappear." Natives were talked of as a "dying race."[16] It is almost disturbing for some to find that the aboriginal nations have survived and are tormenting our present. There is a residue of disbelief, almost fury, that we should not yet have closed off this aboriginal time, that the Indians are maintaining that we are on their land.

And because they have physically survived, something else must be meant by our belief in their extinction. It seems that it is some "transcendental mentality" of the aboriginal people that will die out on contact with us.

We have to decide for ourselves who we are and what defines us. Are we highwaymen, robbers, corrupters? Who are we? The aboriginal people must decide for themselves as well. And we all do so in a hundred small ways, every day. One way our society defines itself is through what its lawyers say in court. So far, to me, we seem like a society of robbers.

And while we are scrambling to mend our relationship with the earth by re-assessing information we have previously dismissed or ignored, the courtroom remains locked inside this old photograph, holding in captivity values that should long ago have become extinct. And yet what is taking place here has moving parts, seems current,

---

Missionary Society 14 May 1861, Church Missionary Society Archives).

[15] W.B. Spencer commented on the work of the missionaries at Alice Springs in Australia, saying that the attempt to "improve" the natives led only to degeneracy. Baldwin Spencer, "Through Larapinta Land: A Narrative of the Expedition," in Baldwin Spencer (ed.), REPORT ON THE WORK OF THE HORN SCIENTIFIC EXPEDITION TO CENTRAL AUSTRALIA 1-136, at 111 (London: Dula and Co., 1896)(as quoted in Wolfe, *supra* note 10).

There are similar comments in British Columbia. As Robin Fisher notes, "The Indians were largely irrelevant to the aims of the settlers," and in any case, it was thought that they were shortly destined for extinction. So, as far as many of the settlers were concerned, the Indians had no future. Fisher, *supra* note 15, at 211.

[16] There is a particularly poignant reference in a medical doctor's 1947 report concerning the Dunne-za Cree. He said that these "Indians deserve out special sympathy because their virtual extinction seems certain." These are the people who still live in the northeastern part of British Columbia about whom Robin Ridington and Hugh Brody have written so effectively. But the presumption of extinction went beyond any particular ill health or disease. *See* Special Joint Committee of the Senate and the House of Commons, *Minutes of Proceedings and Evidence*, 1947, no. 9, p. 403; Spencer, *id*.

affects the present, just as the judgment in the Gitskan-Wet'suwet'en case affects the present.

We thought the lake in winter was safe, when suddenly something rears up, cracks through the ice and scatters all the skaters.

As a legal description of the judgment, this is a gross and unfair exaggeration. An as emotional description of what has happened, it is an understatement.

In this judgment, there is a high value placed on adaptation. The judge says that the Indians' only problem, their only failure, is that they didn't adjust to changing circumstances, and ours that we didn't help them "make their way off their reserves," which we created for them. "The difficulties of adapting to changing circumstances, not limited land use, is the principal cause of the Indian misfortune."[17]

If failure to be improvisational can lead to conquest, we are in danger. The lack of improvisation and adaptation in the courtroom is breathtaking because this is a strange, supernatural animal with which we are contending now. Arrows fly up and fall to wound the warriors instead of the enemy. What seems to be at the periphery, reverberates back into the centre, and it shakes the central core.

In the Gitskan-Wet'suwet'en case, 28 May 1987, Mary Johnson is on the witness stand for the second day in a row. Ultimately, she is cross-examined for days by two Crown lawyers. Under direct examination she is asked the names of fishing sites on the Skeena River. She mentions a site called "an skiis Wiiget." She is asked what that means.

She says Wiiget put on the skin of a swan and went out on the water to bring the swans over to the shore. "But he was so greedy and tie the foot of so many swans and the swans felt something about their foot, so they all fly and they were taken up into the air." Wiiget was also taken up into the air. He fell and landed on a rock. "And the rock nearly cover him, just his face can't move. All his hands were covered and all the animals came and looked at him and he ask help, but they can't help him. But when a link comes a long—"

The judge interrupts. "I think you should cut this off, Mr. Grant. This really isn't going to be of any help."

Mr. Grant: "I am only asking her why that site is named . . ."

The judge: "Oh, I understand that. And the name has something to do with a story that related to Mr. Wiiget and his greediness and swans

---

[17] The judge appears to be employing another euphemism here. "Limited land use" is the rough taking of aboriginal territory without treaties having first been made.

and things of that kind, but surely I don't need any more than that . . . ."[18]

So it begins again.

For a long time after the Calder case in 1973,[19] Indian people did not defend themselves against hunting or fishing charges on the basis of aboriginal rights. George Manuel was President of the Union of B.C. Indian Chiefs then. We are instructed never to raise the issue of aboriginal rights in court.[20] I didn't really understand why. He only said the courts were not ready. We also were not allowed to defend Indian people who were charged with selling fish because he said the Indian people weren't ready to have that right reinforced.

So much has changed. With ever-increasing regularity since 1982, aboriginal people in British Columbia have taken the issues that face them into the court.[21] The Gitskan-Wet'suwet'en, the Nishga, the Nlaka' pamux, the Coast Salish—they thought that if they finally spoke out, if they come to court every day and went through the horror of taking the witness stand—if they did what previous generations had hardly dared to do—then someone would listen. But the consequences of speaking out, especially in court, can never be anticipated.

On the stand, the Indians are asked "Haven't you got a driver's license? Don't you send your children to school? Don't you take advantage of the white system?" The questions reveal a pride and determination that western culture remains uninfluenced by the societies with whom we had first contact, and that only aboriginal people have been changed by us. Under such attack the Indian people start to

---

[18] Transcript, pp. 774-75.

[19] The case of *Calder v The Queen* was one of the first Canadian cases where aboriginal people themselves asserted their original title to the land against provincial Crown ownership. The case went to the Supreme Court of Canada where the decision was split. While all the judges agreed that aboriginal title was a viable title which had existed in British Columbia, three decided it had been lawfully extinguished by the Crown and three decided that it had not. After two decades, the Gitskan-Wet'suwet'en case will probably break the deadlock, although some would argue it was broken in *Sparrow*.

[20] By "we" I mean Louise Mandell and myself; at that time we were in-house legal counsel with the Union of B.C. Indian Chiefs.

[21] I believe that change in approach came about partly because of the patriation of the Constitution. Many First Nations opposed patriation, fearing that the ties with Great Britain and the promises made by the British Crown would be irrevocably severed. This apprehension was not surprising, as Governors of the Colony of British Columbia repeatedly told the aboriginal people that the Queen, the Great Mother, would protect them. With patriation, the decision was taken to put aboriginal title at stake, as the settler government was asking the British Crown to "perfect its title."

clam up. They shrink from the examiner. They feel guilty, but they don't know what they've done wrong. They don't come to court the next day. And as the cases move up through the courts, the Indian people become procedurally silenced. It is only the lawyers and judges who have voices.

The judges are told "The Hudson's Bay company brought trading to the Indian people; we gave trade to them"—as though trading was not a relationship between two peoples. The lawyers argue, "There is no aboriginal right to trade. Trading did not exist in aboriginal times; it was bartering, keeping kinship ties, that's all. It wasn't a real, commercial enterprise. (Was the thinking that all cultures are solitudes?)

When I was a child, my mother thought I was too absorbed with the past. My father died when I was eight years old. I couldn't understand what had happened. I was caught by his death, and I carried it with me. I wore it sometimes like a hat, sometimes like a brooch with a gem, sometimes like a rash. I carried it or it carried me. It was my sword, my shield, my poison; I was at times in danger of become overwhelmed, of not making it. My mother said, "get on with your life; forget the past." The past is gone.

But I know now that is not true.

As a society, we have not been able to deal with and get beyond our first contact with aboriginal peoples; we have not been able to learn from and assimilate that time. We carry it as a metaphor.

In the court cases the natives are required to prove their existence in the territory since "time immemorial." It is partly that requirement that leads the lawyers in the Gitskan-Wet'suwet'en case to rely on the Seeley Lake adaawk. Mary Johnson gave the evidence of what happened at Seeley Lake.[22]

After the fishing and hunting were finished and the people had nothing to do, the women camped at the lake. They caught trout.

> [T]hey learned the dances of the people and all the songs, and the way they move when they were dancing. So one time, one young lady cut one of these back bone [of the trout] and put it on her head as a decoration while dancing . . . . [S]he looked at herself [in the lake] and saw it was the the bone looks really, really beautiful and why she dances gracefully. So she ran and told the others . . . then they all got back bones and decorated their heads with it and some of the

[22] Seeley Lake is two kilometers from the Skeena River, a few kilometers down river from Hazelton.

> people . . . watch them and they didn't put a stop to it, and they smiled at what was going on.

When it was time to go home they heard a terrible noise.

> [S]ome really big trees were throwing about the top of the rest of the tall trees and [the people] just stood there wondering what happened . . . and this thing followed the little stream, tramping down the trees. And finally they see this great huge grizzly bear that they have never seen before . . . . And the warriors came out with their spears and arrows and hammers that are made with stone, to meet this grizzly bear . . . but he is a supernatural grizzly bear, they call him Mediik, and whenever they are shot him with an arrow, the arrow flies way up high instead and fall back down again and it hit the warriors and they were wounded. And this grizzly bear tramped them until they were crushed to the ground . . . . After that he turned and go into the water again . . . and disappeared into the lake. That's why the wise elders told the young people not to play around with fish or meat or anything because the Sun God gave them food to eat and they should just take enough to eat and not to play with it, that's why this tragedy happens to them . . . . They believe that it's the revenge of those trouts, because they played around with their bones.

As we learn how small the earth is, the storytellers come forward again to teach us how the world was made. We can't quite understand what the storyteller means, and yet we do.

Amongst so many other things, the adaawk is oral evidence of a slide that the scientists will show actually occurred at Seeley Lake. While that is not its major significance to the native people, if all the evidentiary links are made, the adaawk could prove that a Gitskan person must have been in the area at the time of the slide. It is necessary to date the slide.

A geomorphologist and palaeobotanist are called to the stand. They were brought in to dig test holes and conduct radiocarbon dating of macrofossil and pollen samples taken on either side of a clay band core removed from Seeley Lake. They establish that there was a great landslide in this area date 3380 years B.P., plus or minus ninety years.[23]

In his evidence, Dr. Gottesfeld, the geomorphologist, describes what he thinks would have happened when the Seeley Lake slide occurred:

> [T]here would be this great mud-charged mess of material coming down the valley, a great rolled wall of brown material, trees tossed

---

[23] B.P. means "before present," but "present" is not now, 1991-1992, but rather some time in 1950.

> around, just a swath of country-side being cleared that would come towards you. I am sure you would be frightened and run away . . . ." (Judgement, p. 64).

This is the language of the imagination, not of the laboratory. However, the judge, while he agrees he would be frightened, has trouble equating "a massive landslide to a grizzly bear."

> [T]he appearance of a bear in the course of such a slide may be understandable *post hoc* reasoning which does not affect the dating of the event . . . . The Medeek or supernatural portion of these adaawk is a matter of belief, or faith, rather than rational inference. . . . If these adaawk stood alone. . . . I could not conclude those present at the time of this event were necessarily ancestors of any of the plaintiffs. It is just as probable . . . that the story rather than the ancestors remained in (or returned to) the area. This demonstrates the difficulty of inferring details from such a generalized account. (Judgement, pp. 65, 66).

In the end, he refused to decide if the adaawk actually described a landslide. He didn't find any connection between the slide and "Gitskan presence." He ruled that oral traditions are not reliable and therefore oral history can only "fill in the gaps" left at the "end of a purely scientific investigation."

We have not yet been able to adjust to a science that no longer believes in the purity of the scientific method. The sepia tint to the photograph darkens.

Why are we so far behind? Long after the scientific method has been disavowed as the only way of getting at the truth, we hold it up as our golden bough. Long after most respected anthropologists view cultural change as a process whereby human groups share existing ideas, culture is being discussed in the courtroom as quaint practices that must be constitutionally protected for a private self. In this way, the Crown says, it is upholding its duty to preserve Indian culture.

How quickly even language becomes colonized. Indian people talk of self-government; then the Department of Indian Affairs adopts this language and says that's what we want for you. There is a period of confusion when the Indian leaders can't really communicate with one another because the meaning of the words has been scrambled. The effect is similar to counterfeit bills being introduced into a community. New currency has to be developed in order for there to be confidence in the exchange. There is, in the Gitksan-Wet'suwet'en judgment, something of the same effect when aboriginal rights are referred to and yet, early in the judgment, they are defined as the right to search for

food only. The rights contain no other relationship (to the community—which would be governance; to the land—which would be ownership).[24]

It is the myths of a society that unfold its essence. The symbol of the frontier is still our central myth.[25] The frontier is "free" and fertile land, the home of democracy and individualism. But there is a darker subtext to this mythology. On the way to an agrarian utopia, a war has to be fought; that battle has taken on the dimensions of a race war between civilization—as represented by the whites—and barbarism, as represented by the red savages.

We create special frontier heroes for these wars. At first there is the hero who reflects the romantic view that nature itself is the source of all wisdom and morality. He is indispensable to the conquest of the west; but ultimately he has no place in settle society and is incapable of adapting to it or unwilling to. Failing to adapt, like the natives, his fate is the same as theirs, which is extinction before the march of civilization.

Then came the military aristocrat; he had a future. He could survive in the wilderness, fight the Indians and not succumb. He dealt with a savage environment without developing savage traits; he did not forget that he was the "agent of order and progress."[26]

Now there is an inversion to the myth, as shown in movies such as *Dances with Wolves*. The army is the villain while at least half of the Indians have the virtue. And a new hero is on the scene: an innocent, the real representative of ourselves. He is captured physically by the Indians. But when the question is called and the time is up, when the

---

[24] It is in this context that, when the Judge finds that the provincial (rather than federal) Crown has fiduciary obligations, it seems like a hoax.

[25] *See* Richard Slotkin, THE FATAL ENVIRONMENT: THE MYTH OF THE FRONTIER IN THE AGE OF INDUSTRIALIZATION, 1800-1890 (New York: Athenaeum, 1985); REGENERATION THROUGH VIOLENCE: THE MYTHOLOGY OF THE AMERICAN FRONTIER, 1600-1860 (Middleton, Connecticut: Wesleyan University Press, 1973).

[26] George M. Fredrickson says that the fantasy of Indians being eliminated as a "final solution" to the Indian problem was "rarely recommended as a deliberate policy." Official ideology was pacific, progressive and allegedly benevolent, while it was the prevailing mythology which revealed the "strain of hatred and aggression." (*New York Review*, November 21, 1985). However, this strain is not simply in the country's mythology. In British Columbia, Frederick Seymour succeeded Sir James Douglas as Governor of the Colony of British Columbia. (Seymour had previously served as lieutenant-governor of British Honduras.) There was a killing at Bute Inlet in 1864, and Seymour successfully put down the conflict. He told the Colonial Office that in the event of a real emergency "I may find myself compelled to follow in the footsteps of the Governor of Colorado. . . and invite every white man to shoot each Indian he may meet." Seymour to Cardwell Oct. 4 1863 CO.60/19. These footsteps were also followed in the extermination of the Beothuk people of Newfoundland.

army relentlessly closes in, the hero is able to leave with another innocent/hostage. And the Indians are still doomed.

The judge seeks the savior of the civilized society on the edges of settlement, in the trading posts, at the edge of the wild. The fur trader who had the Fort on Babine Lake in 1822 is described as "one of our most useful historians." He told of the "primitive conditions of the natives" which were "not impressive." Life was at best, "nasty, brutish, and short."

It seems that the evidence of anthropology is not needed any more than the adaawk.

> [T]he anthropologists add little to the important questions that must be decided in this case. This is because, as already mentioned, I am able to make the required importent findings about the history of these people, sufficient for this case, without this evidence. Lastly, I wish to mention the historians. Generally speaking, I accept just about everything they put before me . . . .[27]

Anthropology is at the periphery; our history is at the centre. History has to do with fact; anthropology has to do with stories; stories are not trustworthy.

One of the early cases I did with my partner was for the Tsartlip people who have a practice of burning food for the dead. Elizabeth George had a dream that her great-great-grandfather wanted fresh deer meat. Her father, George Charlie, was a shaman. He performed the work of helping people pacify the anxious spirits of their ancestors. One of the ways was to burn food—transform it into smoke so that it could be taken to sustain the ancestors. As a result of the dream, Elizabeth George asked her husband and her brother to get some deer meat for her. They went to Pender Island, and early in the morning shot the deer that appeared. An islander, unable to sleep, heard the shots and called the wildlife officer. The men were stopped while boarding the ferry, charged and convicted of hunting out of season.

In preparing the case, the family took us to a burning. We drove in a 1964 Pontiac to a secluded place. And we waited. I finally asked who we were waiting for; someone was brining the wood. I became restless; I decided that I could help and I asked if I could gather some kindling. I was gently told no, just wait. Finally the wood arrived in a camper.

The precision with which George Charlie split the wood into strips, and then placed the wood into a shape which became a table, the grace with which the table was laid with dishes, cutlery, glassware, food, and

---

[27] Judgement, pp. 51-52.

then set on fire to become a burning barque was unimaginably beautiful and horrifying.

We fought the case on the basis of freedom of religion. We asked the trial judge if we could tape the evidence of Elizabeth George in her own language, while she was on the stand, so that it could be played back all at once and she wouldn't be interrupted in her telling. He said no, there was no precedent for that. As the native witnesses were called to the stand to reveal things they had never told to outsiders before, it was apparent that the judge was uncomfortable. He interrupted every hearsay answer, every witness who said, "we do this because my grandfather told me . . . ." The Indians hesitated. Their answers became shorter and shorter until they finally stopped revealing their dreams and the nature of the burning. The judge ultimately ruled that the aboriginal people had the right to believe whatever they wanted, but would be convicted if they practiced their beliefs "against the law." The right exists; it simply isn't located anywhere.

I look out of the window of courtroom 60. We are amidst the buildings in the downtown core, and there is such a long depth of field to what I see that is has the effect of dissolution. I think of my father, and wonder for the first time if he was terrified on the day that he died; he must have been. The sharpness of the realization makes that day, thirty-five years ago, immediate. My sister called me a few weeks ago to tell me that in an encyclopedia stored in the basement, she found a letter my father wrote to his parents a month before he died. She read the letter to me over the telephone. Time future is contained in time past. Even if time is unredeemable, it is not lost.[28]

The lawyer making his submissions in courtroom 60 intends Time Immemorial to signify everything that was or remains aboriginal, and in doing so, Time Immemorial carries with it that which subjugates the natives. The idea of "aboriginal time," which we have invented, can be tracked; the trail ends up in Australia, in Dream Time. Dream Time and Time Immemorial both provide a "rationale for the seizure of territory occupied by nomads."[29]

---

[28] The "echoes" here are to T.S. Eliot's *Four Quartets*, Burnt Norton.

[29] In the McEachern judgement, he explains that "time immemorial" is the time when the memory of man "runneth not to the contrary" which "as everyone knows, is a legal expression referring to the year 1189 (the beginning of the reign of Richard II) as specified in the Statute of Westminster, 1275." (Judgement, p. 82). I am positive that this is not something everyone is aware of. Indeed, it's almost as though the judge has blown the cover on Time Immemorial by establishing a fixed date for it, and so must again obscure aboriginal time by making this date irrelevant and finding a new soporific. The judge rules that the burden on the Gitskan-Wet'suwet'en of establishing ownership from "time

Dream Time was used as the concept held by diverse people not because of any particular beliefs they espoused but because they were aborigines. It seems that the origin of the term's usage became intentionally obscured in order to enhance the credibility of the concept. It was appropriate that the concept which was the *sine qua non* of being aboriginal should have no beginning because aborigines themselves were a people without history.[30] History does not really begin until we have planted our flag in aboriginal territory.[31] Real time arrives with us. As a result, aboriginal people are relegated to a past that doesn't even count; they are kept there, unable to climb into the present.

> The evidence does not disclose the beginnings of the Gitskan and Wet'suwet'en people. Many of them believe God gave this land to them at the beginning of time. While I have every respect for their beliefs,there is no evidence to support such a theory and much good reason to doubt it.[32]
>
> . . . .
>
> It seems indisputable that the historic period began in the territory with the establishment of Fort Kilmaurs on Babine Lake by trader Brown in 1822.[33]

---

immemorial" is no longer significant and that they must only show they have been using the territory for "aboriginal purposes" for "a long, long time before the assertion of British sovereignty." (Judgement, p. 83). This "long, long time" ago restatement of the burden will likely not catch on. However, it does serve to underscore our almost fairy-tale attitude towards the "pre-history" existence of the aboriginal people.

[30] Wolfe very precisely locates the origin and development of the term Dream Time as being the anthropological invention of Baldwin Spencer (professor of biology at the University of Melbourne) and Frank Gillen (postmaster at Alice Springs), first appearing in the report of the Horn Expedition in 1896.

[31] The judge's reference to this being the beginning of the historic period is in keeping with the current hubris of anthropological metaphors. One of the functions of such metaphors is that we forget how tenuous our presence was in British Columbia for many years. As Fisher notes, "By 1852 as few as 435 emigrants had been sent to the colony, only 11 had purchased land, and another 19 had applied for land." Fisher, *supra* note 15, at 58. At the same time, aboriginal people, probably numbered 80,000 to 100,000. Despite this empty presence, Judge McEachern holds that before this time aboriginal title, through the *legerdemain* of British law, had been converted to a title which existed only at the "pleasure of the Crown" and that the Crown's pleasure was to extinguish that title through a mere "intention" to settle the colony. (Judgement, esp. pp. 241-42).

[32] Judgement, p. 17. The good reason to doubt it may be the settlers' belief that God gave the land first to us. See the passage quoted later by Judge McEachern in footnote 31 which establishes Britain's manifest right to take over aboriginal territory without the consent of or compensation to the natives.

[33] Judgement, p. 25.

Anthropological terminology eventually shifted to promote the a-historical nature of the aboriginal people. Dream Times became Dreaming so that even the concept of "time" was left out.

In Australia, as in Canada, the people who came to Indian territory did not, in the end, seek only to extract resources; they came to replace the indigenous society. The dreaming metaphor was particularly suited to this purpose. Colonization and settlement was a form of awakening. This is a common extension of the metaphor in the language of progress. We wake up. Something comes out of darkness. The changes required by progress are legitimated. But as Wolfe says, "what was to be aroused there was not the people but the land itself, which, having never felt the improving iron of cultivation, had yet to become property." Settlement rescues the land from disorder and dereliction,[34] "just as reason rescues consciousness from the chaos of dreaming." And in British Columbia, when reserve land was allotted in valuable locations, the settlers said the land was "locked up" by the Indians, as though wrongfully kept in custody.

The Dreaming complex "constituted an ideological elaboration of the doctrine of *terra nullius*, emptying the land so that settler and landscape formed a dual interaction with the characteristic proportions of mind over matter."[35]

In courtroom 60, one of the lawyers, encouraging a very limited view of aboriginal title, makes a distinction between various activities. To qualify as "truly aboriginal," practices must have a certain essential, almost transcendental quality of "Indianness." If something cannot reach this threshold, the activity become mundane, commonplace, mainstream. Aboriginal communities (and indeed any descendent of people who lived in aboriginal times) cease to be aboriginal unless they possess "Indianness."[36]

In the Tsartlip case, we were reluctant to reveal to the judge that at the burning conducted by the Charlie family, we saw vodka, whiskey,

---

[34] *See* Lord Egremont cited in Judgement, p. 92.

[35] Wolfe, *supra* note __, at 210.

[36] At one point Judge McEachern, while discounting the believability of the native witnesses, says "One cannot, however, disregard the 'indianness' of these people . . . ." (p. 48). He goes on to state, "The evidence satisfied me that most Gitskan and Wet'suwet'en people do not now live an aboriginal life . . . . As early as the 1850s the Gitskan, who had not previously seen a horse, quickly became adept at packing for the construction of the Collins Overland Telegraph . . . . Witness after witness admitted participation in the wage or cash economy . . . . Art Matthews Jr., (Tenimyget) for example, is an enthusiastic, weekend aboriginal hunter. But at the time of trial, he was also the head saw filer at the Westar sawmill at Gitwangak where he had been steadily employed for fifteen years, a graduate of the B.C. Institute of Technology. . . ." Judgement, p. 56.

steak, tobacco, even Chinese food, being burned. We were afraid that with these items the burning would be discredited, it would be unauthentic; it would lack the critical mass of "Indianness." We wanted something purely aboriginal, unconsciously believing that what is aboriginal and what is modern are contradictory.[37] But of course the people were not performing a ritual to celebrate the past. There were burning the food which the deceased relative actually ate; the food was really providing sustenance; they were paying a tribute.

Dreaming, like the native people themselves, invites antipathy because it is not rational or logical; it disregards sequence, regularity, certainty. The concept of a people organizing their lives around the central institution of Dreaming runs counter to the whole discourse of time, discipline and order. Being on "Indian time" is a joke that even the aboriginal people level against themselves. And the argument goes that if the Indians have an incapacity to distinguish between dreams and reality, between then and now, then their experience is not to be relied upon; it is not scientific, empirical, believable. They are listened to like children, or women, in the old days. As a society, we are ambivalent about dreaming, just as we are ambivalent about the feminine. Obviously, we are unclear about our relationship to children. Sometimes we are romantic, often we are brutal. Our sword is always double-edged.[38]

And the very relationship of balance between the aboriginal people and their land, which is a connection from which we could learn a great deal, becomes a rationalization—even a justification—for taking what they have. Judge McEachern quotes Lord Grey's justification for the Crown being able to take Indian territory because it is "waste lands," not having been subdued by the Indians.

> But so much does the right of property go along with labor, that civilized nations have never scrupled to take possession of countries inhabited only by tribes of savages—country which have been hunted

---

[37] It has been revealed that John G. Neihardt edited the transcripts of his interviews with Black Elk so that all references to things "modern" were scrubbed in the published version of *Black Elk Speaks* (Lincoln: University of Nebraska Press, 1961).

[38] Judge McEachern ruled that the Gitskan-Wet'suwet'en "have an unwritten history which they believe is literally true both in its origins and in its details. I believe the plaintiffs have a romantic view of their history . . . . They believe the lands their grandparents used have been used by their ancestors from the beginning of time . . . . When I come to consider events long past, I am driven to conclude, on all the evidence, that much of the plaintiff's historical evidence is not literally true . . . . It was obvious to me . . . that very often they were recounting matters of faith which have become fact to them . . . . I have different views of what is fact and what is belief." (pp. 48-49).

> over, but never subdued or cultivated . . . when our fathers went to America and took possession of the mere hunting-grounds of the Indians—of lands on which man had hitherto bestowed no labor—they only exercised a right which God has inseparably united with industry and knowledge.[39]

Lawyers for the First Nations have struggled with the appropriate language to describe aboriginal title. We have been afraid that if our clients were not able to say they "own" the land, then the judge might rule that the first asserted ownership of native land was by the colony. And so we scrambled to find concepts of ownership and dominion similar to fee simple title. We looked for evidence that the Indian nations "subdued" the land. We searched for a "corporate" entity within aboriginal society because that became the ticket now, what was needed to pass. We needed to prove the First Nations were "organized in societies since time immemorial."[40] We asked the anthropologists to write tomes detailing every ritual, past and present, of the clients whose title would be at stake: what they do at funerals, at weddings, at birthdays, during play, at mealtimes, at puberty. The society was turned upside down for evidence, so the people would pass the test of having a society, of being organized. And suddenly, we realized that this is a "please, sir" game; it was not a true test at all. It was a wall, not a door. The only method of proving aboriginal society pre-history is by way of oral evidence, which is devalued because our historians were not there to record it.

And then we realize that the test is nonsensical; there is no human society that is not organized, that would fail to meet the test. It is a tautology. We have been facing the difficulty of scientifically proving that the sun will rise tomorrow.

---

[39] This passage is quoted by Judge McEachern at pp. 102-103 of the Judgement. The writer is Colonial Secretary, Lord Grey, in 1846.

[40] This was the test first propounded in the case brought by the Inuit of Baker Lake in 1979 to try to prevent mining in their territory because they alleged the mining would destroy the caribou herds upon which they rely. This portion of the decision of Judge Mahoney has been repeated in innumerable cases. Anthropologists were once convinced that native cultures had been largely static prior to the arrival of Europeans. The *Baker Lake* test also required aboriginal people to prove *exclusive* occupation of a territory since time immemorial. This test can be met if there hasn't be much change either within the territory, the nation or between Indian nations. This is how the test, which is supposed to be a door, becomes a wall. We tell First Nations: You didn't change until we came along. We brought change. We brought progress. Everything you have originates with us, not you. You win, you lose.

What really is going on here? It is stupefying to think that that is has taken four years of evidence, and $5.5 million to prove the Gitskan-Wet'suwet'en people used their territory before the settlers came along. The ordinary person is dumbfounded. What really is the issue?

The issue is brutality. We are not yet convinced we have reached a state of human development free from savagery. We are back at the Las Casas debate. That debate still rages within us and within this courtroom.

In the midst of the battles against the aboriginal people in the Americas, the Emperor of Spain, Charles V, summoned a council in 1550 to consider the justice of Spain's conduct. For the first time in history, the Emperor ordered a halt to the military campaigns until there could be a debate on the issue of whether it was right to use force against the "newly discovered peoples." There were two proponents in the debate. One group was represented by Juan Giles de Sepulveda and the other by Bartolomé de Las Casas.[41] Over the course of the year, from 1550-1551, the men presented their opposing cases before the council of theologians. The main argument centered on whether the Indians of the Americas were barbarians "in the strict sense," meaning men of "inherently savage and evil instincts, incapable of governing themselves . . . ."[42] If so, Spain was, according to the dictates of Aristotle, justified in hunting such people down "like wild beasts in order to bring them to the correct way of life."[43] Las Casas argues that the Indians did not belong to that class; he based his case on his own experience of having lived among the natives for thirty years, maintaining they were "very docile and very apt for all the arts and very skillful in the liberal arts."[44] Taking the contrary position was Sepulveda, who had never been to the Americas. He based his argument entirely on the writings of Fernandez de Oviedo "whom Las Casas regarded as a prejudiced witness with preconceived ideas about the Indians."[45] Oviedo also possessed Indian slaves.[46]

---

[41] See Angel Losada, "The Controversy between Sepúlveda and Las Casas in the Junta of Valladolid" in Juan Friede & Benjamin Keen (eds.), BARTOLOME DE LAS CASAS IN HISTORY: TOWARD AND UNDERSTANDING OF THE MAN AND HIS WORK, 279-307 (DeKalb, Illinois: Northern Illinois University Press, 1971).

[42] *Id*. at 284.

[43] *Id*. at 285.

[44] *Id*. at 285-286.

[45] *Id*. at 286.

[46] There is still a debate today as to whether or not anthropologist, called as expert witnesses in land claims cases, can give reliable evidence if they are relying only on documents rather than first-hand experience within aboriginal communities. See Paul Pryce, "The Manipulation of History: A Critique of Two Expert Witnesses," a paper

The council failed to reach any positive conclusions.The military campaign resumed.

It is a though we are still half afraid that as a society we have inherently savage and evil instincts, and we are incapable of truly governing ourselves. We hold this mirror up to every other society we encounter and project our fear.

My friend said that being a woman who practices law feels like being in a family made up of brothers. The father is there, but the mother has died. This has something to do with the songs of the adaawk that can't be sung or heard in the courtroom, and the stories that can't be told. It has something to do with the endless Las Casas/Sepulveda debate.

At first, when the news of what had happened to the children in the residential schools started to come out, some of the bishops attempted to console the natives for the horror of that experience. But the church has now banged its door shut. The blinds are drawn. We can hear hammering within. The doors are being boarded up, on the inside. The bishops say, "we must remain silent on the advice of our lawyers." The law takes over again.[47]

In ridding the savages of their savagery, the arrows we project fly way up and fall back again to wound the warriors instead of the beast.

In courtroom 60 we create a theoretical, demilitarized zone. Not only do we shake the mechanism out of the clock, and meaning from the

---

presented to the CASSCA Conference, University of Western Ontario, 10 May 1991. Referring to and quoting a Crown expert witness in a recent case, Pryce says the witness "does not use linguistics or physical anthropology and disregards both archaeology and oral history because she 'believes they provide little useful information about the relevant issues.' In fact, she chooses 'not to dwell on prehistory or "time immemorial"' but instead limits her resources exclusively to written documents." The witness had done not field work amongst the Gitskan, Wet'suwet'en or Heilstuk.

[47] The issue of time also surfaces in relation to limitation periods. After a certain varying number of years, depending on the cause of action, a person loses their right to sue, even though a wrong was done and a harm suffered. While the running of the time is delayed in many circumstances if you can show that you were "under a disability," the Province of British Columbia has a law (which is being challenged in some land claims cases) creating an "ultimate limitation period" of 30 years. While the safeguard of time is necessary because of the fragility of memory, that a cause of action should be extinguished after 30 years is wrong. The courts always have to deal with problems of memory. Most often these difficulties aren't even so much with memory but with point of view. Conflicts in evidence arise not because memories fade, but because people have entirely different perspectives on an event. A different event happens to each person. That is not something that time will resolve. More than anything, the legal process needs to adapt to this fact. It also seems to take an extraordinary long time for human beings to really deal with anything that happens to them. Certainly 30 years isn't that long. Sometimes generations go by.

words, we also reject our own immigrant status in the battle for time-depth on the land. And, having tried to put the natives to sleep, we don't acknowledge that the events that happened to them on contact also happened to us. Our forefathers were there.

The lawyers talk; the judges talk. The rhythms of their speech are patterns of ritual. There is an incantation in the sounds, in the way of all rituals that entrance. This is a legal mass. When I emerge from the ritual, as I do from time to time, I am conscious that behind the fourth wall, awake and watching us, there are others. I want to wake up, I want all of us to wake up. The time is now.