

WHEN A LAWYER BECOMES A NOVELIST

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The title of this paper could just as well be called “When a Novelist Becomes a Lawyer.” It works both ways. I’ll be suggesting that the core task for a writer and a lawyer—or at least a litigator—is the same. It doesn’t seem possible that proposition could be true. After all there are no writer jokes of which I am aware.

I’ll give you some of my credentials, as a writer and a lawyer that enable me to make this claim. I do this to locate us just off the coast called “achievements” before we pull up anchor and head into deeper, less chartered waters—always a little nerve-racking. You want to know that the captain has her license to sail the boat.

I also want to talk about metaphors. I think I’ve racked up at least three so far.

As a young litigator, junioring on a trial, I watched the senior lawyer draw a line down the blank page on a notepad. On the left side he wrote the evidence being given by the witness on the stand. On the right side were notes for cross-examination, mainly arrows, stars or acronyms such as B.S. It became my practice to do the same. But in the space on the right I put a different kind of note. I might write “the Judge looks like a bird—a parakeet” or “the witness is pale—wants blood.” In other words, the left side was the lawyer (corresponding, I suppose to the left brain). The right side was the author.

I have symbolically split the page in this essay. I’m going to move back and forth between being a lawyer and being an author. To continue the nautical metaphor, we are on a swaying boat.

On the right side of the vertical lined page: I have published three novels, one of which was nominated for the Governor Generals award in Canada. Critics in the *New York Times* and Britain’s *Time Out*, *The Observer*, *The Independent*, and the *Times Literary Supplement* presented favorable reviews of my novels. Margaret Atwood ventured that I was a writer of “great talent and sensitivity.” My latest book was given a starred review in *Publishers Weekly*.

On the left side, the lawyer: I have appeared before the Supreme Court of Canada a dozen times and successfully argued cases there. If you mentioned my name to the Chief Justice of the Court, she might repeat what she once said to me: “How extraordinary to be skilled in both the discursive and literary realms.”

It's curious how many writers were going to become lawyers:

—Goethe (who knew about pacts with the devil and wrote about them in *Faustus*)

—Henry Fielding (who knew about a roll in the hay)

—Frederico Garcia Lorca (killed by the fascists in the Spanish Civil War)

—John Cleese (of Monty Python fame)

—Richard Forde

They started on that path, and then something happened to them. The first year study of law is probably what happened to them.

One writer who narrowly escaped the fate of becoming a lawyer, Franz Kafka wrote: *A book should be an ice-axe to break the frozen sea within us.* Now that's a metaphor.

I've enjoyed writing about lawyers from both their point of view and that of clients. In this passage from *Indulgence in the Afternoon*, a novel I've just completed, a well-known actress is in the midst of a difficult family law dispute. She's meeting with her lawyer, Wally Linklater. The opposing lawyer—the lawyer of her former partner—is Cassidy Dalliwell.

Today, instead of calling him Cassidy Dalliwell, Wally referred to him as “the lawyer on the other side,” as if he lived across a dank, muddy river of uncharted depths and uncertain currents. [Wally] was obsessed with him as one would be of a foe whom it was oracled he would have to fight and conquer. Dalliwell lived on the other side, in a place where the light was from smoky fires, just at the edge of things, a place of incantations and secret rituals. A place of ethical ambivalence. Wally Linklater would raid that village and maim its king.

Like all foes, Wally also had a fondness for him and a desire for his continued health, safety and vitality. [Wally said] “I bet he has a shopping cart full of arguments. You'll see, that will be his downfall because he's looking for any check-out aisle with a cashier ready to scan the bar code. That's not smart. That's not what we're going to do.”

Lucinda felt left out of this battle. She was paying the bill to enable this ancient game to ensue between combatants who, after her, would find others to fund their favorite blood sport. She was cranky.

A few years ago, when I was asked why I became a lawyer, my immediate response was that I'd been negligent. There's something alarming (even to a lawyer) about being a lawyer. As when the Canadian writer, Michael Ondaatje told a friend of mine: "I have never knowingly slept with a lawyer."

My negligence was the sort that leads to a charge of driving without due care and attention; in this case, the car was my life. I was destined to be a novelist. I had no intention of becoming a lawyer. But I was distracted. My life sort of ran me into the ditch of the law. And I stayed there for a good many years.

Here are more particulars. I was out of grad school, working on my first novel and I needed money. I got a job at the police department because I thought it would be interesting and gritty. Then I grew curious about the legal system. I became a court reporter. It was dead easy. All I had to do was to sit in court, turn on a recording machine, and take enough notes so I could find the location of the evidence if anyone wanted it played back, which they seldom did. All day long the police served up one story after another: of murder, rape, theft, breaking and entering, fraud. The budding novelist in me thrived. At night I wrote poems and short stories. By day the criminals kept coming through the door, along with the victims, a vast array of hangers-on, and always the lawyers and the judges. Gradually, I realized that everyone, including me—we were all entangled in the law.

I'd spend lunch hours in the prosecutor's library looking up cases cited in court and the meaning of phrases like *nunc pro tunc*.¹ I eventually followed the tug of the law to university, and then into practice. Two novels and twenty-eight years later, I escaped permanently into writing.

I've been fairly contented with that somewhat glib response as to why I became a lawyer—I was *negligent*—until a few years ago when I first began to give shape to this essay. It really is extraordinary how long it takes to figure out why one does anything.

If I take an ice-axe to my story, there is quite another way of putting it. Until I was eight years old, I was a bright, happy girl. I took dance lessons. I played the piano. I was the prima ballerina in the family—a kind of tom-boy princess. My father was the King. He was a doctor and a healer. He had just finished his residency, specializing in treating

¹ *Nunc pro tunc* is an example of the magic of the law. It means "then for now." A judge can make an order *nunc pro tunc* and it is as if that which should have happened did happen. *Voilà*..

ailments to the major sense organs: Eye, Ear, Nose, and Throat. We didn't have much money but we were living in the centre of a small, dynamic, secure and known world. Every day I was full of a boundless joy.

And then the unexpected happened. My thirty-six year old father died from a massive heart attack. I had never known death before: the inexplicable, cataclysmic earthquake that disappears your love. Within a year, my mother married again, this time to a handsome man with power and connections. We moved across the city, into a different house; I went to a different school. I didn't know anybody.

Figuratively, the country in which I lived had another ruler; there was a new order and I didn't understand any of it. Nor did I belong. I didn't know the rules, how they were made, or who made them. As three more children were born, my place of privilege and security was taken up by others. I was uncertain, confused and hurt. I had lost my patrimony, my old country.

Fifteen years later, I studied well, coming 9th in my class of 200 at law school, and I finally knew something of the legal rules and how they were made. I knew about the Court of Star Chamber and the Court of Equity. I seemed to have made my way back into the centre of things. I was the sole female litigator in a large, prestigious firm.

And then the unexpected happened—again.

I was going to my first firm dinner with all the other lawyers. It was being held in an exclusive men's club. As we were walking down the street, one of the junior associates said to me: "I'll go in through the back door of the club with you." "Why?" I asked. "Because," he said, "women can't go in the front door. They have to enter through the servants' entrance." "I see. It's okay, thanks, I'll go through the front door."

He looked alarmed. But not as alarmed as I. I really didn't want to make a fuss. I was a brand new lawyer, just two weeks from my call. I couldn't possibly just submit to the old rules.

So I waited across the street, watching the male lawyers go in the front door. When I thought they'd all gone through, I climbed the steep granite stairs, looked at the heavy steel door, and pulled it open. In front of me were the backs of four men. Oh, I thought, this is why women can't enter here. There's a urinal.

I was a little out of my mind.

But it wasn't a urinal, it was a coat check. One of the four men turned around and looked at me; he was a senior partner of the firm. He resembled Alfred Hitchcock and his voice boomed, "There'll be hell to pay for this."

It didn't work out for this firm, having me as their first woman litigator.

Four months after I was edged out of the firm, George Manuel, who was to become one of Canada's great native leaders, asked me to work with him and his people.

Like most non-natives, I hadn't a clue about who these people were. Here's my protagonist, Alicia Purcell, in *Bring Me One of Everything* (we're now on the right side of the page):

In my upbringing in Vancouver, the native Indians were kept out of sight—or chose to hide—assembling at the rough blood and urine hotels along Hastings Street. I knew nothing about them: where they were from, what they cared about, and especially what had happened to them that they should be in this forlorn state. Theirs was the equivalent of an urban disaster.

In my ignorance, I thought the natives didn't have entitlement to any land except for the reserves which had been—I wanted to assume—generously set up for them. They didn't pay taxes. I erroneously believed they were being well looked after, except when they came to town, which was a mistake.

George Manuel took me into native peoples' communities, into their administration offices, into their homes. I learned about their history and I researched the law.

These were a people who'd had vibrant, thriving cultures, occupying their territories and living in harmony with their surroundings. They knew their land. In their creation myths, the origin of the world was located where they lived, and had always lived. They were the first people.

Suddenly, the strangers started coming. Backed by foreign governments, settlers took over the land that had been used and occupied by the natives. The natives were pushed out. Their cultures were shamed; the priests called them evil. Their societies were decimated. The effects were like an earthquake—cataclysmic and inexplicable.

Back on the right side of the page: In the novel, *Bring Me One of Everything*, Alicia Purcell thinks about what she's read in anthropologist Austin Hart's diaries:

[A]t the time of first contact there were fifty Haida villages and a population of over 30,000. In 1915, as a result of traders giving blankets to the natives which were infected with smallpox, and because of other diseases, they numbered 588. . . . I tried to absorb the enormity of the deaths for the Haida. Nobody had died on me in a long time . . . To experience, in a generation, most of your family, your friends,

dead—how could anyone get up in the morning, or even stand? They showed courage even to be drunk on skid-row.

This next passage is from Austin Hart's fictional diary when he imagines what happened to the native people he met:

It started with a visitor who came into your house, sat at your table, ate the food that you offered and at the end of the meal, said—working at his teeth with the toothpick you gave him—'Now to the business at hand. This is not your house. You must leave.' He starts to clear the dishes away, but instead of putting them in the sink, he's putting them in a box and into a truck in the yard where there are many more people just like him. They remove the remains of the food, the pots and pans, and put them in the truck, then the chairs and eventually the table. The man drives off calling 'we'll be back, we won't tell you when but we'll be back to take the rest, because everything is ours. There will be more of us next time. You don't belong here anymore.' You are stunned. Your sister is stunned.

One day your children go out to play in the morning and they don't come back at night. You learn that your son and daughter have been put in the truck and taken away. You sit in the corner. They come to get you as well and you are brought here to this barren place. You can't find your children.

When the children are returned they are speaking a different language. They are taken away again by the man who is no longer a stranger to you. Each time they come back, your children understand less and less of what you say to them. Everyone sits alone at night in front of wet, blackened logs soaking in the rain. You don't have a shelter. You cannot make a fire.

Something like this happened to these people.

This is where I am.

We are now on the line that cuts the page. Although monumental for me, and I realize quite insignificant in comparison to what happened to the native people, the shape of my story became fully entwined with theirs, as unlikely as that may seem. It has taken many years for me to understand this. And, I'm still working on it.

I was able to empathize with their being kicked out of their homeland by brutal forces stronger than they. How battered they were, in exile in their own land, being ruled by laws which declared them foreigners. Simply acquiring their daily bread by hunting and fishing made them outlaws. They were fenced out of their own lives, and relegated to the margins. This is the story in *Exodus*, in *The Maha-barata*, in Homer's *Odyssey*. In a small way it was my story. It is the story many of us carry.

Along with two other women—and then a handful of young lawyers—I began to channel all my passion, knowledge and creativity to use the legal tools I had to help these people.

Most of our colleagues and friends said: Don't take it on. The fight is useless and thankless. Don't rock the boat. There's lots of room for innovation in corporate law.

But because we were young and fearless—and because the native people were so inviting and so generous—with ways of thinking unlike my own, with traditions and rituals spiritual in nature—we were pulled in, we were adopted—we were trained. We came to know how all of this had happened.

There's been some mistake here, I thought. We have to fix this.

On the left side of the page: We started with a simple question—how is it that the government occupies the land of the original inhabitants without conquering them or paying for what they have taken?

This question existed at the very edge of things. It existed at the boundaries, outside usual conversation. And yet, once asked, even though it was posed in the hinterlands, the question reverberated back to the very centre, to the foundations of the King's house.

There were no theories. There was no law. There was no theory of law. There was no framework. It was, in legal terms, a *terra nullus*. The land wasn't *terra nullus*, the law was. How were we going to find a foothold? Where could we start?

Our job was to establish that aboriginal title had never been lawfully extinguished. It led to a lot of hard fought, difficult and exasperating, exhilarating litigation.

As lawyers we asked of the government in the courts: How is it that you claim this land as yours? The question was inconvenient and unwelcome to those occupying the house. Because although treaties were entered into with the natives in all parts of Canada (just as in the U.S.), in the Province of British Columbia there were virtually no treaties.

On the right side of the page: I started to notice the plentiful figurative expressions used in the law. Of the five senses which could be used to convey information, it is sight which has been in favor with the legal shape-makers. We "observe" the law. Actions are seen "in the eye of the law." Lower court decisions are "reviewed." In response to the law's abstractions, we imagine the law in visual terms: it is a "body," a "structure," a "seamless web." Ownership is described—imagined—as a "chain of title." The law is absorbed with light and darkness: there are "bright lines" between legal doctrines; we resort to "black letter" law, one can have a "color of right." Perhaps most telling about the domination

of the sight metaphor is that Justice must be blind, because otherwise she may be prejudiced.

For us to succeed as advocates for native peoples, we had to confront the dominant metaphors. The sensory faculty of sound—not sight—was the Trojan horse we insinuated into the discourse. The entitlement to speak, as well as to be heard, would carry the newly established rights. This was especially important because not only had the First Nations' voices been silenced, the foundation of their cultures—as with so many indigenous peoples—is based on orality. If we could create law which required their voices to be heard, our clients would be ushered back into the kingdom from which they had been expelled.

I noticed the need for these new metaphors most sharply during a test case on the existence of aboriginal title called *Delgamuukw v The Queen* (1984-1997).² It became the longest trial in the history of western jurisprudence. Mary Johnson, an elder from a tribe in northern B.C. (Gitskan), was on the stand. Evidence of her oral history was being led as proof of her people's jurisdiction over their territory. In her traditions, a ceremonial song was sung at a particular fishing site when her people were gathered there. Despite the significance of the song to the case, the trial Judge didn't want to hear it.

"I have a tin ear," Judge McEachern said. "It's not going to do any good to sing to me." Indeed, it didn't do any good. He ruled that aboriginal title in B.C. had been extinguished and was no more. We won the case on appeal to the Supreme Court of Canada. Judge McEachern's ruling was overturned, largely because he did not accept First Nations' evidence as being on an equal footing with written records. The courts were required to adapt the rules of evidence in order to give due weight to the "aboriginal perspective." In other words, the legal system must "come to terms with the oral histories of aboriginal societies."

Together with our clients, my colleagues and I stood in front of that massive, closed door, and gradually we shaped the law which pried it open just a little so we could get a purchase on it, and then, case by case, we swung it wide. The original inhabitants of the land were let back into the house.

The voices of the native peoples can no longer lawfully be silenced. The Supreme Court of Canada has ruled that the law of aboriginal and treaty rights is the reconciliation of those rights with the needs of the non-Aboriginal peoples. In court these days, counsel for the natives are talking about re-establishing a relationship of harmony between the cultures. The metaphor of singing continues.

² 1991CanLII 2372 (BC SC).

Metaphors are part of our deep structure. When the existing metaphors have become rigid and won't let in other perspectives, they must change or the law will ossify (a metaphor about the rigidity of bone). To expand the metaphors to let in the other senses—from sight to sound—is to let in more of the world, in every way. It is to let in more stories.

In order to prevail in any case which shakes up the house and re-arranges the furniture, lawyers need to hear a bell which resonates with their lives, and to follow the sound. They need to be touched by the predicament, perhaps even the tragedy, of their clients' situation. In short, lawyers need not only use their intelligence, but all five senses, to plumb the depths of the big story: theirs and their clients. And to put that into figurative language which wakes everyone up.

That is also what a writer needs to do to shape the narrative in a novel. Nothing less than that.

A lawyer must not be sentimental about their clients' state or enamoured with their legal arguments. As a novelist you must not be sentimental about your characters or enamoured with your prose. You are pushing back injustice; and you are confronting incoherence. It's important to be fearless and to not avert your eyes.

One way or another, we come into the law as into a profound narrative. Sometimes we get muddled about the plot; sometimes we quit before the third act. But there's a reason being a lawyer is referred to as a "calling." How anyone becomes a lawyer can be an interesting story. Its roots are deep. It's this story—being on a path—that every lawyer has to offer to their clients; a story that becomes part of the work we do.

It's taken me a long time to understand the themes in my life and how they were inter-connected with my clients. Once I got an inkling of that, I became a better lawyer, and a better writer. It's still dawning on me. And the shape needs to be simplified to its essence.

"My Lords this is a case about dispossession."

"This novel is about what happens when love turns to hate, and everyone turns to the law."

There are many things to accomplish on an earth that abounds in misdeeds. Don't waste your time on the trivial and the superficial. Pay attention—your intuition will help lead the way. Intuition can make the difference between a good lawyer and a great one; it can be found in the making of a haunting novel and a haunting legal brief.

I want to end on the right side of the page: A judge friend of mine recently told me that a lawyer must feel passionately about the case

they are conducting “but at the same time have the heart of a lizard.” I was reminded of what Thomas Mann said about writers:

The look that one directs at things, both outward and inward, as an artist, is not the same as that with which one would regard the same as a man, but at once colder and more passionate. As a man, you might be well-disposed, patient, loving, positive, and have a wholly uncritical inclination to look upon everything as all right, but as an artist your daemon constrains you to ‘observe’ to take note, lightning fast and with hurtful malice, of every detail that in the literary sense would be characteristic, distinctive, significant, opening insights, typifying the race, the social or the psychological mode, recording all as mercilessly as though you had no human relationship to the observed object whatever.

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