LESLIE HALL PINDER

THE CARRIERS OF NO

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I have been thinking about different kinds of announcements.

If someone comes up to me and says "I have bad news to tell you" I prepare myself for the kind of news I have heard before. I know what it might be; I start to imagine what has happened.

Or if someone says "I have good news": a different body set, expecting something good, knowing beforehand, being ready.

But if someone says "I have strange news to tell you," that's different.

I have an urgent desire to tell you something and at the same time I am afraid you might become embarrassed and then I might be embarrassed. That embarrassment comes from not being able to place the information; it is strange . . . it is an imposition . . . I don't want the strangeness to be repeated again.

After four years in the courts, Chief Justice Allan McEachern of the Supreme Court of British Columbia had completed his reasons for judgement in the Gitksan-Wet'suwet'en land claims litigation.

At his direction, all the lawyers who had worked on the case were told to meet at the courthouse at 7 a.m., March 8, 1991. We would be sequestered for two hours with the decision and then set free to announce our respective interpretations of the case and its consequences.

I drove over the Burrard Street Bridge, listening to the radio, telling myself the story of driving to the courthouse to receive judgement in the Gitksan-Wet'suwet'en land claims trial.

There were a great many lawyers at the courthouse at 7 a.m.

First, counsel for the province were called forward. Then those of us on the legal team for the aboriginal people were led by another sheriff through doors, down halls, through doors, corridors, inner places I had never been, the judicial back-alleys of the courthouse — a cavernous, circuitous, confusing route. Into a jury room. At the centre of some place, in the middle of some thing.

It was a large, windowless, dimly lit room. Copies of the judgement had been set out on the oval table. Three hundred and ninety-four pages. Each lawyer took one of the volumes. We had carefully strategized the division of issues between us so that we could cope with the massive text in the short period of time allowed.

But it took less than three minutes for all of us to realize that the case for the Indian people had been decimated.

Two hours later we were led back out of that room, through the judge's entrance into a courtroom and out into the Great Hall. I saw one of my clients, a Secwepemc woman, standing across that vast space. She started to come towards me, smiling. She had a wide smile as she moved toward me almost floating. And my movements became weightless and slow as I shook my head no, and faster as I put my hands up and said "no," pushing so she would go back. There was a sniper on the top of the roof and she didn't know he was there. I had seen him. I had seen him on the inside; he had climbed the stairs to the top of the building, he was on the roof and he had a gun. I pushed her so that she would get down, lie low, there's a sniper. And she slowly stopped coming towards me and turned, confused, as she started to move away. "It's a brutal judgement," I said. Hide. It's all over. Protect yourself.

The decision is a devastation. The judge ruled that the rights of the Gitksan-Wet'suwet'en—and indeed the rights of all aboriginal people in B.C.—had been extinguished by the colonial government intending to bring settlers into their territory.

He decided that the land was seldom able to provide the Indians with anything more than a primitive existence. He said it wasn't the Indians' land being taken from them which destroyed their sense of identity, nor did the introduction of alcohol, epidemics and limited economic opportunities result from lack of access to their land. "There is much wood left in the territory" he concluded; the Indians should still be able to sustain themselves. After land has been clear-cut logged, it becomes "useable again" and the aboriginal people may

then re-enter the land "for subsistence purposes until such time as it is dedicated [by the Crown] to another purpose."

But it is not even the result of the decision which makes it so devastating. There have been major defeats before, as well as victories. It is the contents of the reasoning, it is what the judge says about knowledge, about information, about who we are as a society which has stunned me. I want to tell you about that.

In what I say I mean no disrespect to Judge McEachern. I don't think he is unique. In what he says and believes he represents the best of what we have to offer.

The case is referred to as the Gitksan-Wet'suwet'en case because of the two Indian nations represented. The case bears the name of one of the house chiefs, Delgamuukw. The high chief who carried the name Delgamuukw died before judgement. Now his brother has been passed the name.

Judge McEachern was embarrassed throughout the trial and he told us that. The first time he mentioned it was when the lawyers for the Gitksan-Wet'suwet'en asked that the case be heard mostly in Smithers, so that the judge would be in the Indian people's territory, so that they could readily come to the court.

The judge said that he was judicially embarrassed by the request.

I started listening to that word and when people used it.

He was embarrassed by the length of the trial. He was embarrassed at the evidence that was called.

He was embarrassed when Mary Johnson, one of the elders, wanted to sing her song to him in court during the telling of her adaawk.

The adaawk is the oral history which carries the people's stories, their relationship to their territory, their spirit songs. It is the adaawk that the people wanted to tell the judge. It is their evidence, their proof, their case. It answered everything that the lawyers for the province put forward.

To embarrass means to make difficult by obstructions. Encumbered. An impediment.

Mary Johnson was telling the judge her adaawk. She said, "A brother and two sisters were travelling. The brother, Wildim waax, starved to death because they can't find anything to eat. And not long after he died, they heard the drumming grouse and the elder sister lay down near the log where the grouse drums. Whenever a grouse is drumming, he always comes back to the same spot where he drums, an old log covered with moss, and it's soft. So the elder sister hid herself underneath the moss beside the log, but she missed the grouse. Then the young sister lay down. She caught the grouse and they killed the grouse, so they sat down and they both cried. They remember their brother that's just died and they compose a dirge song."

And Peter Grant, the lawyer, says "In the telling of this adaawk, is this the place where you would sing the dirge song?" Mary Johnson says yes. The lawyer says, "Go ahead you can sing the song."

And the judge says, "Is the wording of the song necessary?"

The lawyer says, "Yes."

And the judge says, "I don't want to be skeptical, but I have some difficulty in understanding why the actual wording of the song is necessary."

The witness says, "Do you want me to sing the song?"

The lawyer says, "Yes."

And the judge says, "Are you going to ask the witness to now sing the song?"

The lawyer says, "The song is part of the history, and I am asking the witness to sing the song as part of the history, because the song itself invokes the history."

The judge says, "How long is it?"

The lawyer says, "It's not very long. It's very short."

The judge says "Could it not be written out and the witness asked if this is the wording? We are on the verge of getting way off track here. To have witnesses singing songs in court is not the proper way to approach this problem . . . I just say, with respect, I've never heard it happen before, I never thought it necessary, and I don't think it necessary now. It doesn't seem to me she has to sing it."

And the lawyer says, "It's a song which itself invokes the history and the depth of the history of what she is telling. It is necessary for you to appreciate —"

The judge says "I have a tin ear, Mr. Grant. It's not going to do any good to sing to me."

Mr. Grant says "I would ask, Mrs. Johnson, if you could go ahead and sing the song."

And the witness says "It's a sad song when they raise the pole, and when the pole is half-way up they told the chiefs that pull the rope to stop for a few minutes, and they sang the song and they cried. If the court wants me to sing it, I'll sing it."

And the judge says, "No I don't, Mrs. Johnson. I don't think that this is the way this part of this trial should be conducted. I just don't think it's necessary. I think it is not the right way to present the case."

The lawyer says, "You can go ahead and sing the song now."

And Mary Johnson sings her song. She sings about the grouse flying. How the grouse gave himself up to die for the sisters to help them save their lives. "And today the young lady that caught the grouse stood at the foot of our totem-pole that we restored in 1973 and she is holding the grouse with tears in her eyes."

And when Mary Johnson has finished the judge says, "All right, Mr. Grant, would you explain to me, because this may happen again, why you think it was necessary to sing the song? This is a trial, not a performance."

Mr. Grant says that the Gitksan-Wet'suwet'en expressed their ownership of their territory through their regalia, their adaawk, and their songs.

The judge says, "I don't find that a persuasive argument at all. It is not necessary in a matter of this kind for that song to have been sung, and I think that I must say now that I ought not to have been exposed to it. I don't think it should happen again. I think I'm being imposed upon and I don't think that should happen in a trial like this . . . I see no reason whatsoever why it was necessary to ask her to sing that song. Go on with the evidence, please."

In a trial the word embarrassed describes the feelings you have when something is being presented which is unacceptable. It is the visceral effects of the disallowed, of that which does not fit our idea of information, knowledge, fact. It is the body's discomfort at being at the edge of a path.

The judge was embarrassed by the adaawk.

His judgement reflects the idea that everyone in west-

ern society sees things objectively; and everyone who belongs to an aboriginal society sees things in a subjective, romantic, biased way.

The judge had "serious doubts about the reliability of the adaawk as evidence." Oral traditions are not reliable. "Even when employed carefully, memory ethnography can only provide totally accurate information for relatively short time spans, usually one hundred years at the very most." Therefore oral history can only "fill in the gaps" left at the "end of a purely scientific investigation." Further, "I am able to make the required findings about the history of these people" without the evidence of the anthropologists. There were also flaws in the archaeological evidence because "any aboriginal people could have created these remains."

The plaintiffs' evidence was discounted, reduced, diminished, sometimes even in a kindly way, "reluctantly without intending any affront to the beliefs of these peoples."

But the evidence of a life-long non-Indian resident of the territory was taken as truth. He hadn't heard the Indians say they claimed ownership of the territory. He hadn't noticed many of them on the land.

The judge also accepts the documentary evidence of the journal kept by the white trader at the Hudson's Bay Company. He is "one of our most useful historians," who had a Fort on Babine Lake in 1822 and described the "primitive condition of the natives." That condition was "not impressive."

"Many of the badges of civilization, as we of European culture understand that term, were indeed absent. The plaintiffs' ancestors had no written language, no horses

or wheeled vehicles, slavery and starvation were not uncommon, wars with neighbouring peoples were common, and there is no doubt that aboriginal life in the territory was, at best, 'nasty, brutish and short.'"

The Gitksan-Wet'suwet'en people, with their extraordinary art, the vast and visible manifestations of their culture, are described as having a "low level of civilization."

In the face of others' disbelief, in the face of others discounting them, not accepting what they have to say, some aboriginal people go into themselves with their information and their knowledge. They withdraw; they take back their stories. They move to higher ground. They don't tell their stories. They are careful who receives the wisdom.

An elder from Bella Coola told me she would rather have her stories die than tell them to someone who wasn't ready to hear.

And an anthropologist told me that "without us there would be nothing left of aboriginal traditions."

With this court case, the rights of the aboriginal people have been extinguished.

Extinguished is a Latin word. Something is inflamed or on fire, and it is put out. Silenced.

It means to blot out of existence. To totally do away with; to annihilate, cut off, bring to an end. To kill.

The word is related to extinct. That which has ceased to burn or shine. Vanished. Without progressive succession. Having no living representative. There is a vast emptiness.

Extinguish is not an embarrassing word. It is a word said with great gusto.

This idea of emptiness. The land is empty. How often the judge says this. "The most striking thing that one notices in the territory away from the Skeena-Bulkley corridor is its emptiness . . . The territory is, indeed, a vast emptiness."

In Hugh Brody's film *Hunters and Bombers*, the colonel said of Northern Quebec and Labrador that it is the best place to practice low level flying because the country is empty.

But the country is inhabited by Innu.

The judge says, "If the land is substantially empty now . . . then I believe it was also empty for aboriginal purposes at the time of contact." Their rights over empty territory are easily, bloodlessly, put out.

After the judgement I am thrown back. I go to the library. I buy books. I yearn for something that is part of my cultural traditions which will answer the worldview in this judgement. I am searching for some wisdom which would not leave me feeling so bereft. I am still looking. I bring my search here.

I find a book by Henry Nash Smith about the symbolism of the American West. A reviewer says that the book is devoid of Indians because "the author took as the dominant view of the frontier the classic concept of it as a vast emptiness awaiting peaceful occupation by agrarian pioneers."

Other books show the image of our frontier hero: a man revered for his ability to deal with a savage environment but not to succumb to such savagery, not to forget that one is the agent for one's own culture, representing order

and progress. I find Slotkin saying American history is viewed as a "heroic scale Indian war, pitting race against race and the central concern of the mythmakers is with the problem of reaching the 'end of the frontier.' " This comes together in the notion of the 'last stand.'

The frontier of violence is between civilized whites and red savages. It is a myth peculiar to our culture.

Who is it that defends civilization against such chaos in the perpetual war between civilization and savagery?

In the books, the noble pathfinders who view nature as the source of all wisdom are doomed, just as the natives are doomed. Such people have to face extinction before the march of civilization because they were incapable or unwilling to adapt.

Adapt.

The judge says "it is obvious [the Indians] must make their way off the reserves. The difficulties of adapting to changing circumstances, not limited land use, is the principal cause of Indian misfortune."

Now, in court, the combat-lawyers for the government sneer. In a new case they refer to the limited reserve land which the Indians have as "free land the Indians got." They unveil their contempt.

Then I am embarrassed. I am ashamed.

This judgement is the judicial equivalent of a nuclear winter. The face of civilization is barbaric.

After clear-cut logging leaves the land wasted and barren, it may be re-used by the Indians for sustenance purposes.

What counts as information now? What counts as fact? What can sustain us?

With more and more sophisticated technology we have

destroyed the stories. In court cases, we word search transcripts to reassemble the evidence; it doesn't resemble anything that was said, by anyone. We cut the words, even our written words, away from the context, and hold them up as pieces of meaning, hacked up pieces of meaning.

As lawyers we don't have to take any responsibility to construct a world. We only have to destroy another's construction. We say no. We are the civilized, well-heeled, comfortable carriers of no. We thrive on it. Other races die.

"I flew over the territory. I was struck by its emptiness."

This judgement has humiliated the people. I hear the Indian leaders say to one another "we must tell the children they are as good as anybody, that we aren't just dogs." There are tears in their voices but their eyes are dry.

As though it is not enough to defeat the enemy; they have to be degraded and humiliated too.

I have an old map from the 1860s and on it there is a place with an Indian name that is shown as a reserve. The elders know about it; they say the word; they give its meaning. The reserve is not on any of the new maps.

I call the library. I ask the man in the reference section if he can find any record of this place.

The librarian goes away.

I wait.

I think of him as a fisherman. Sometimes he uses a net, but now he is being asked to dive.

He is gone a long time. I wait. I keep looking at this map.

He is fishing with his hands for a name in the past that some one of us, from our culture, has written down.

And I think about Wilson Duff, an anthropologist and curator who sometimes spoke as if he personally knew the great Haida artist Charlie Edenshaw who died in 1924.

And in the end he was giving lectures, not as Wilson Duff but as Charles Edenshaw, talking as Edenshaw, being Edenshaw. Before Duff killed himself.

That's embarrassing. Mistaken, misplaced, in error.

The territory is empty. You must make your way off your reserves. I am embarrassed that you sing a song to me, that you believe your song has meaning.

There has come through here a purse seine troller and it has dragged the ocean with its net and the ocean is empty of life.

Diving for abalone, diving for the exotic fish. Or using nets that glisten, that sound like a fist full of pearls slicking on and slipping under the water. Catching knowledge. Catching information.

I am not talking about a soft, ill-defined impulse towards something liberal, gentle, and nice. I am talking about identifying ourselves with the best and the most rigorous of traditions; I am talking about taking out a net, re-stitching it, sewing it back together. I am not talking about being a lobster trap, a box with a small opening that only takes in what happens to lumber into it. But something muscular, something perhaps even embarrassing.

The Beaver people of Northeast British Columbia say of their prophets that "they know something." It is such a quiet acknowledgment of wisdom. It seems just right. It comes out of knowing nothing, being wide, open, full.

What if we really believed that we didn't know anything. We didn't yet understand anything. We didn't yet have any information. What if we didn't believe in our immortality.

There would be no embarrassment. There would only be delight. Delight exists at the place of encountering the unknown. We act as if we know everything; we hold close our meagre facts; we think we are immortal. We are mistaken. We don't believe any more in stories. Stories do not carry information or history; they carry a foolish old woman's song, a romantic urge to have things be the way they used to be. The children have no practice in catching and carrying with them the big stories, in singing. Our arms are thin. We have tin ears.

I'm sorry, says the judge. I don't want to discredit you or have you think I don't believe you, but I cannot accept what you say as fact.

I am waiting on the telephone. The librarian has been gone a long time, looking for what was written down. And I wait, hoping for information, for knowledge. Hoping that one time we wrote down a word in another's language, a place-name that carried a story, and that we put it on a map. The story will still exist, even if we didn't. It will only go further up, to higher ground, and we will be the losers.

Go right up to the edge of embarrassment, take yourself there, go over the edge. Information comes as a bird hitting the window, or as a fish. Go fishing. I urge you to go fishing.

Postscript

On June 25, 1993, the lawyers were once again sequestered to receive judgement from the Court of Appeal deciding on the appeal from Judge McEachern. The court was deeply divided. Three judges upheld the lower court, and two judges found in favour of the Gitksan Wet'swet'en. All the judges, however, ruled that aboriginal rights were not extinguished. They still exist, but they are diminished. The majority decided that as long as the native people live as their forefathers had lived, they have their original rights.

The Gitksan Wet'swet'en appealed the case to the Supreme Court of Canada, but in the summer of 1994 decided to try to negotiate a settlement with the Crown. The case has been adjourned.

"AS LAWYERS WE DON'T have to take any responsibility to construct a world. We only have to destroy another's construction. We say no. We are the civilized, well-heeled, comfortable carriers of no. We thrive on it. Other races die."

– LESLIE HALL PINDER

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