

“Time Immemorial” and Indigenous Rights: A Genealogy and Three Case Studies (*Calder*, *Van der Peet*, *Tsilhqot’in*) from British Columbia

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Abstract “Time immemorial” has operated as a legal fiction in the discourse of colonization, performing a genealogical function in the construction of “antiquity” and “legal memory” in English law, and repurposed in Indigenous rights cases in Canada. Beginning with a genealogical outline, this paper analyzes “time immemorial” in relation to Settler and Indigenous discourses of time, memory and the land in *Calder*, *Van der Peet*, and *Tsilhqot’in*.

“After all, it is important to remember that native [Aboriginal] title is not really a descriptor of Indigenous relationships to country, but a category of white law, and thus it must be understood from within the confines of that law.”

Shaunnagh Dorsett 2002:33

“The good translation gets you far enough into the other world to begin to see what you are missing. You take your translation device . . . and you watch it run out of meaning. You watch it fall apart. That’s my notion of cultural translation.”

James Clifford, “Interview with Brian Wallis,” qtd. in McCall 2011: 63

1. Introduction

This paper is a translation exercise. It begins with a review of the usage of “time immemorial” as a term of art and a legal fiction in English law particularly in relation to the property law doctrine of prescription or adverse possession with which it is closely associated. A colonial instantiation of “time immemorial” as a discursive matrix will then be considered in terms of three Indigenous rights cases from Canada. Moving from discussion of the first significant case focused on Indigenous rights in Canada (*Calder*) to one of the first cases to be decided by the Supreme Court of Canada after s.35(1) of the Canadian Constitution came into force (*Van der Peet*), and finally to a recent case soon to be considered by the Supreme Court of Canada (*Tsilhqot’in*), this paper investigates some of the ways in which the “translation device” of what Dorsett calls “white

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law” struggles with Nisga’a, Stó:lō and Tsilhqot’in concepts of time, land and narrative without considering the cultural and philosophical specificity of its own location and without recognizing that apparently similar terms may have very different meanings in Indigenous discourses and knowledge systems. Due to space constraints, the analysis undertaken here must necessarily be incomplete, sketching an outline of a different kind of map from the ones which preoccupied the court in these three cases. Dorsett argues that Indigenous nations assert their own origins but are heard by the court in relation to the court’s commitment to reproduction of *its own* relation to *its own* origin (Dorsett 2002). Even in cases like *Calder* and *Tsilhqot’in* where the court (or three of seven Justices in the former case) affirms Indigenous title while refusing on a technicality to declare it, the court’s Settler theory of time, land and narrative collides with the Indigenous knowledge systems and epistemology on which it claims to rule.

If not only what the court decides but how it writes is understood as consequential and law itself construed as rhetorical (White 1985), the discursive operations of “time immemorial” may be seen as an important index of the court’s reasoning about questions of time and memory which are fundamental to Indigenous rights cases. Whether embedded in *obiter* or highlighted in *rationes decidendi*, “time immemorial” performs particular kinds of cultural and epistemological work for the court, patrolling the constructed boundary between “before and after” (*Van der Peet* 247), policing “origin” and “time depth” (*Tsilhqot’in* 433). Insofar as they are imposed on Indigenous histories and narratives, Settler concepts of time and memory must be recognized as epistemologically and culturally specific if the court is to engage fully in the process of decolonization for which Judge Vickers calls in *Tsilhqot’in*. Systematic analysis of the usage of “time immemorial” is construed here as an important part of that process. Looking first at some aspects of the English genealogy of this genealogical term, this paper then turns to analysis of the discourse of “time immemorial” in *Calder*, *Van der Peet*, and *Tsilhqot’in* in order to study its imbrication in a prescriptive rhetoric, and to contrast it with Nisga’a, Stó:lō, and Tsilhqot’in teachings about reciprocal relations among time, the land, the ancestors, and stories. In contrast to the Settler metaphysical logic of time immemorial, Indigenous “worldview” and relationships with the land are understood, in the words of Chickasaw legal scholar James Sákéj Youngblood Henderson, as “not an act of imagination, but a series of teachings about a particular place and about the proper way to relate to a whole and irrevocable ecosystem.” (Henderson 2002:45)

2. "Time Immemorial" As A "Constitutive Rhetoric"

(White 1985)

The *Oxford English Dictionary* defines "immemorial" as "beyond memory or 'out of mind'; ancient beyond memory or record; extremely old," and traces it back to Suetonius (*memorialis*) and to the 16th c. French *immémorial* (*Litttré*). Cicero's phrase "*ex omni memoria aetatum, temporum, civitatum*" ("in the entire history of generations, of ages, and of communities," from *De oratore* 1.16.2–3, in May 2012:54) is often said to be equivalent to the English "from time immemorial" and the OED's examples of usage make the connection to the property law doctrine of prescription clear: "[i]n making [property] title by prescription and continuance of time immemorial" (Fulbecke, *Pandectes*, 1602); "[t]hey receive their binding power, and the force of laws, by long and immemorial usage" (Blackstone's *Commentaries on the Laws of England*, 1765); "[i]mmemorial usage, a practice which has existed time out of mind; custom; prescription." (*Wharton's Law Lexicon*, 1872)

Tracing "time immemorial" to the "nascent" English common law, legal historian Shaunnagh Dorsett has framed it in relation to the effort to construct a "genealogy for the common law which could be traced to a time before the Norman Conquest," and "to impose a unity and structure on English common law," and "translate medieval law to modern" in the early 17th century (Dorsett 2002:37). She describes the "English legal landscape" at the beginning of the 1100s as "pluralistic, fragmented and decentralized" and writes that by the 16th century, it "had become a morass of overlapping, often competing, jurisdictions and was characterized by an unwieldy common law writ system, [and] obsolete forms of action;" the issue of law reform was pressing (Dorsett 2002:36). Under the reformer Sir Edward Coke, "the once fragmented common law became the 'law of the land'" and "is still often described as owing its validity and continuing force to its origins in 'time out of mind' . . . [and the] concept of 'time immemorial' remains doctrinally central to parts of the common law, notably to the validity and enforceability of local custom." (Dorsett 2002:38)

A century later, Blackstone reviews the same history and focalizes the conjunction of oral law and "primitive" people:

"When I call these parts of our law *leges non scriptae* [unwritten laws, the common law], I would not be understood as if all those laws were at present merely oral, or communicated from the former ages to the present solely by word of mouth. It is true indeed that, in the profound ignorance of letters which formerly overspread the whole western world, all laws had little idea of writing. Thus the British as well as

the Gallic [Gaelic] druids committed all their laws as well as learning to memory, and it is said of the primitive Saxons here, as well as their brethren on the continent, that *leges sola memoria et usu retinebant* [they retained their laws solely by memory and usage].” (Blackstone 1765:64)

Unlike the written acts of Parliament, unwritten laws “receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.” (Blackstone 1765:65) Blackstone traces the common law back to “ancient lawyers” like Fortescue who “insist with abundance of warmth, that these customs [unwritten laws] are as old as the primitive Britons, and continued down . . . to the present time, unchanged and unadulterated.” (Blackstone 1765:65) Writing of the complex history of the English common law in relation to the arrival of such colonizers as “the Romans, the Picts, the Saxons, the Danes, and the Normans” and their incorporation of their own customs, Blackstone affirms that as the English language is, as a result of these crosscultural influences, “so much the richer, the laws are the more complete.” (Blackstone 1765:65) It was the unwritten English common law which “withstood the repeated attacks of the civil law or the new Roman empire” of law spreading over Europe in the 12th century and Blackstone appears torn between patriotic affirmation of the strength of the English common law as transmitted, on the one hand, and its associations with “ignorance” and “primitive people” whose mnemonic and legal skills seem insufficient to him in spite of his evident admiration. It is not surprising that, as legal historian John McLaren has written, Blackstone “provided a rich and flexible source of rhetorical and discursive inspiration to [British colonial] individuals and communities trying to make sense of their cultural identity in distant lands.” (McLaren 2010:74)

Reflecting his society’s theories of progress associated with writing, print-based civilization, and science, Blackstone is caught between a patriotic affirmation of the origins and strengths of the English common law and an ideological commitment to what, in consequence, must be construed as its limitations. He accomplishes this rebalancing by pushing back the historicity of the unwritten law to a place before the past of the nations he names, and to a past

“of higher antiquity than memory or history can reach: nothing being more difficult than to ascertain the precise beginning and first spring of an ancient and long established custom, Whence it is that in our law the goodness of a custom depends upon it’s having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary.”¹

(Blackstone 1765:68)

Blackstone's complex metaphor², derived from Littleton's *Tenures* ([1481] 1813: §170) where it is an attribute of prescription, transposes the river of time to the river of memory which may not run contrary to time as though memory were otherwise inclined to fling itself into a rising tide and be drowned by time. We cannot get back to the beginning of ancient customs, says Blackstone, yet it is those very customs which he associates with "goodness" and which exceed temporality in their persistence. Like Coke, Blackstone theorizes these customs as coming from the time of "higher antiquity," reaching toward a metaphysical origin *before* "memory and history," and originating in the "time before time" of the immemorial. Thus he circumvents the need to affirm the "primitive" foundations of unwritten law and avoids a politically charged linking of Enlightenment English law and colonial policy with the unwritten foundations of the common law and with "primitive" people. In a sense, "time immemorial" enables Blackstone to venerate the unwritten common law without having to respect the "ignorant" people who produced it.

Like a Platonic Idea, Blackstone's memory beyond memory is exemplified in the "goodness of a custom [which] depends upon it's having been used time out of mind" (Blackstone 1765:68), or so frequently that the custom's continuity no longer requires that it be kept "in mind." However, the test is not that the custom be kept in mind in order to be said to be remembered but, rather, that "memory . . . runneth not to the contrary," in other words, that a counter-memory or contrary-memory *not* intercede in such a way as to disturb the fiction of the uninterrupted course of memory. This ancient, uninterrupted course of memory is the legal fiction of "time immemorial," a sense of time so deeply embedded as to *not* require acts of memory to sustain it. Substrate of active memory, unscripted, unwritten, it is an enduring mnemonic presence which, Blackstone says, "gives . . . [custom, common law] it's weight and authority. . . ." (Blackstone 1765:68).

3. Prescription and the "Plane of Time"

(Pollock & Maitland 1898:II, iv, §1)

Prescription's roots are in Roman law and it was widely promulgated via the 6th c. legal textbook known as Justinian's *Institutes*. In Justinian's treatment of "usucapion and long possession" (*Institutes* II, title 6), prescription is defined in the fateful words, "things are lost or gained by time," or, as the *Civil Code of Québec* (S.Q., 1991, c.64) puts it, "Prescription is a means of acquiring [rights to

property] or of being released by the lapse of time. . . ." (8,1,1,2875) Legal historian Thomas J. McSweeney has studied the cultural and historical context of the language of property arising from Roman law and canon law which together formed the *ius commune* (common law) and "gave English its words *possession* and *property*." (McSweeney 2012:1157) Focusing on the legal treatises now known as *Glanvill* and *Bracton*, McSweeney traces the struggles to "reconcile English practice with Roman law" in these works, linking them to Justinian's *Institutes* and outlining some of the ways in which scholastic legal education in 12th c. England "taught the authors of these treatises to think about law . . . as an internally coherent system," a principle derived from Justinian's *Digest* with its claim that law "contained no contradictions." (McSweeney 2012:1154) Although this work of "legal translation" (McSweeney 2012:1155) produced uneven results, it did consolidate time and property in relation to a concept of fixed order, a point distilled some five centuries later by Maitland in his statement that the "most salient trait of our English land law is that '[p]roprietary rights in land are . . . projected upon the plane of time. The category of quantity, of duration, is applied to them.'" (Pollock & Maitland 1898: II,iv,§1) How may "time immemorial" be quantified and to what ends? The answer takes us to *Bracton* again.

Justinian had defined the time span of usucapion as after ten or twenty years, and prescription after thirty or forty years. However, *Bracton* elided these three temporal categories and used "prescription, usucapion, and possession for a long time as synonyms," thus bracketing specific lengths of time in favour of "immemorial usage." (McSweeney 2012:1193–4) The Statute of Westminster (1275) introduced a more drastic modification, establishing September 3rd, 1189 (the day on which Richard I ascended the throne) as the boundary between what is "before legal history and beyond legal memory" (*Webster's Unabridged Dictionary*), on one side, and what is in history and within the compass of legal memory on the other. In this transformation, "time immemorial" is on the far side of legal memory, before September 3rd, 1189, such that during this period of competing jurisdictions, the immemorial is consigned to a vacuous prehistory of brief benefit only to those whose documents satisfied the new evidentiary requirement. (Dorsett 2002:42–3) "Legal memory" becomes synonymous with *lex scripta*, written or statutory law, though not with the technology of print and the advent of the Gutenberg press some two and a half centuries later.

What is at issue in Richard I's decree is not writing but rather an imperial designation of which writing will signify and which will not. "Time immemorial" begins to encounter its own paradoxical inversion, having outlived its value as a boundary between patriotic

celebration of long legal memory and patriotic distancing of the emergent nation state from its own origins among "primitive" people whose *lex non scripta* was nonetheless venerated as foundational for English law. Thus on September 3rd, 1189 a new line is drawn in the sand of memory and yet another concept of origin articulated for the immemorial. If the pre-Classical time of memory before memory is no longer politically useful for the instauration of the state, "time immemorial" must catch up with itself and move to the far side of 1189.

As the axis of patriotism shifts away from a celebration of the oral mnemonic tradition of law and ancestors (Roman, Gaelic, and so on, as Blackstone writes), "time immemorial" is repurposed to serve the rhetorical and legal agendas of colonization. It becomes an adjunct of "*terra nullius*,"³ appearing sometimes as a nostalgic flourish in the direction of the phantasmatic past to which Indigenous peoples are violently consigned and sometimes as a proof of their location outside Settler legal memory. Thus the court relives its own history, encountering once again its own struggle with origin and memory now displaced onto the encounter with Indigenous legal orders and nations for whom the specular logic of prescription is inextricably associated with what Jacques Derrida called the "violence of the letter" (Derrida 1997:101) which is the imposition of Settler law.

4. Calder: "[A]s Far Back As We Can Remember"

(Calder 350)

The first significant case on Aboriginal rights in Canada, *Calder* marks the beginning of "Aboriginal conceptions of land and its use . . . [being] given primary attention by the judiciary." (Borrows & Rotman 2007:221) Suing for a declaration that their Aboriginal title had "never been lawfully extinguished," the Nisga'a "strategically . . . limited their claim to Aboriginal title, avoiding the more contentious and politically charged issue of self-government" (McNeil 2007: 150) which was subsequently taken up. In 1998 the Nisga'a Treaty was proclaimed, creating what McNeil has argued to be "the strongest precedent to date on self-government as an inherent Aboriginal right." (McNeil 2007:151) The question of title is organized into three issues in the judgement: "(1) whether Aboriginal title existed in the first place; (2) whether, in the case of the Nisga'a, this title had been lawfully extinguished; and (3) a procedural issue as to whether the Court had jurisdiction to grant such a declaration despite the fact that the Nisga'a had not secured

permission to sue the Crown, which at that time was still required in British Columbia.” (Godlewska & Webber 2007:4) Of the seven judges deciding the case, six affirmed that Aboriginal title exists “as a right within the common law, regardless of whether it had been recognized by the government or acknowledged in any treaty” (Godlewska & Webber 2007:5) though of the six, three affirmed title based on the “simple fact of prior occupation” while also finding title to have been extinguished. The other three justices based Aboriginal title on the common law of possession and on a “recognition that the title held by Aboriginal people prior to British sovereignty continues to persist in contemporary common law” and found no proof of extinguishment. (Godlewska & Webber 2007: 4–5) The case was decided on the question of *fiat* or permission of the attorney general of British Columbia. As Anishinaabe legal scholar John Borrows puts it, “[t]he Supreme Court of Canada found it lacked jurisdiction to decide the case in the absence of the Crown’s express willingness to be sued.” (Borrows 2007: 204)

Michael Asch has argued that *Calder* is also remarkable in the clarity and forcefulness of its rejection of the association of Indigenous peoples with colonial concepts of “primitive” and “unorganized” societies, ethnocentric stereotypes which recur in the appellate judgment and to which both Justice Hall and Justice Judson respond in their opposing decisions. (Asch 2007:106) For example, Justice Hall cites the following from the judgment under appeal: “They were undoubtedly at the time of settlement a very primitive people with few of the institutions of civilized society, and none at all of our notions of private property” (*Calder* 348) and he rebukes Davey C.J. for “in 1970, assessing the Indian culture of 1858 by the same standards that the Europeans applied to the Indians of North America two or more centuries before.” (*Calder* 348) Justice Hall is equally forceful in his statement that

“The Nishga tribe has persevered for almost a century in asserting an interest in the lands which their ancestors occupied since time immemorial. The Nishgas were never conquered nor did they at any time enter into a treaty or deed of surrender. . . . The Crown has never granted the lands in issue in this action other than a few small parcels. . . .” (*Calder* 346)⁴

However, in the passage quoted from the appellate decision, the association between the “primitive” and “our notions of private property” is not only reminiscent of Blackstone but also goes to a curious permutation of time immemorial’s progress in relation to the Statue of Westminster’s declaration of the beginning of legal memory. As if in compensation for the abrogation of the uninterrupted connection of memory to an antiquity of memory before memory, Davey C.J.’s assertion positions the Nisga’a nation in

terms of a Settler discourse of fixed domestic habitation as opposed to "roaming." Since the imposition of 1189 as the colonial "beginning" of Indigenous habitation would seem to stretch credulity further than Davey C.J. was willing to go, the condition that habitation be proved to have been *uninterrupted* substitutes for the "time immemorial" language of "from time whereof the memory of man runneth not to the contrary." As Ward and Walker put this point in relation to local customary rights in English law:

"In practice, proof of existence in 1189 is rarely viable, and the [English] courts are usually satisfied by evidence that the custom has existed *for a long time*. It must have existed *uninterrupted*, however, and any interruption of the custom since 1189 defeats its existence." (Ward & Akhtar 2008:3; my emphasis)

Through this dimension of "uninterruptability," time immemorial's earlier significations of a kind of metaphysical time beyond time, or timelessness in the sense of being free of the segmented time of daily routines and interruptions are reinforced. The presupposition of unbroken spans of time and unbroken time of habitation doubles over into a suspicion of what is styled by contrast as a nomadic or "roaming" way of life. Both a diasporic fear of displacement and a diasporic alienation from the land (the "wilderness" which preoccupied Canadian literature for decades) express themselves in this brief citation by Justice Hall from Davey C.J.'s appellate decision, a moment which would be of less importance were it not so powerfully echoed in *Van der Peet's* fetishizing of unbroken or mended chains of continuity and *Tsilhqot'in's* concerns about people whose home is the land rather than one fixed address.

The association of prescription with "time immemorial" is also echoed in *Calder* though here it is rejected in Justice Hall's analysis:

"The right to possession claimed is not prescriptive in origin because a prescriptive right presupposes a prior right in some other person or authority. Since it is admitted that the Nishgas have been in possession since time immemorial, that fact negatives that anyone ever had or claimed prior possession." (*Calder* 354)

Similarly, the Nisga'a are said to "possess a right of occupation against the world except the Crown. . . ." (*Calder* 353) As Dorsett and McVeigh remark of the circular logic of jurisdiction, the Crown asserts the tautology of its own right of occupation through its own legal system. (Dorsett & McVeigh: 2012) However, on this question, Justice Hall is consistent: the Aboriginal rights of the Nisga'a Nation to their territory were not extinguished upon colonization (whichever events and dates might be preferred as those signifying assertion of sovereignty). Thus the Nisga'a nation's immemorial usage and occupation claim locates itself in that "Time whereof

the Memory of Man runneth not to the contrary” until the arrival of the colonizers and their claim of “discovery.” However, contrary to Justice Hall’s argument, this may be construed as a prescriptive claim in the sense that the Nisga’a had been perceived by the colonizers in a manner similar to that summarized by Davey C.J. and thus, on the ground of their supposed “primitive” status, not accorded property rights. Compare McNeil’s analysis of “adverse possession” (prescription) in the context of “fundamental common law principles, by which interests in land ultimately depend on possession, not on the specific uses to which the land is put”:

“To acquire title by adverse possession [prescription], . . . a person must possess the land adversely to the dispossessed owner for the statutory limitation period. At the end of that period, which in some provinces is as short as ten years, the statute extinguishes the owner’s title. The adverse possessor becomes the owner, not by statutory conveyance but simply by being in possession of land to which no one else can show a better title. In other words, the possession itself is the source of the adverse possessor’s title.” (McNeil 1997:143)

McNeil rightly rejects this analysis in relation to Indigenous title, calling it “discriminatory because it means that Aboriginal peoples who may have been in rightful possession of their lands for hundreds or even thousands of years have a lesser interest than a wrongdoer who has acquired a fee simple title by as little as ten years adverse possession.” (McNeil 1997:153) Elsewhere, McNeil asks, “[i]s not reliance on the feudal doctrine of tenures, which had already lost much of its importance in Britain by the time Canada was colonized, counter-intuitive and prejudicial where Aboriginal title is concerned? Why does the known fact of the Aboriginal presence not take precedence . . .?” (McNeil 1999, in Borrows & Rotman 2007:264) McNeil provides the answer to his own question: discrimination.

In *R. v Sappier; R. v Gray* (2006), the court begins to meet this challenge, maintaining that “. . . the only ones capable of successfully advancing a claim based on discovery and occupation may be the Aboriginal peoples themselves, because they are the ones who could argue best that they first discovered and occupied the vacant territory many thousands of years ago.” (Borrows & Rotman 2007: 196) Whether many Indigenous peoples would construe their relation to the land in terms of common law doctrines of discovery and occupation (let alone of the land ever having been “vacant”) is doubtful but in this imperfect exercise in translation across knowledge systems, the court seems to recognize that prescription in relation to Settler incursion without consent by Indigenous peoples may be engaged when prior “Aboriginal presence” is acknowledged.⁵ However, legal recognition continues to engage the discourse of the

sovereign rather than the discourse of Indigenous legal systems and epistemologies, thereby reinscribing the colonial problematic which Asch has expressed as follows:

"[w]ere the courts to fully adopt the representation [of Indigenous peoples] of the Supreme Court of Canada [in *Calder*], they would, of necessity, open up a challenge to the political tenets that explain the legitimacy of the Canadian state, which are so sweeping and fundamental that no court would dare to do it on its own." (Asch 2007:109)

Justice Hall cites Marshall C.J. to this effect in the landmark American case, *Worcester v State of Georgia* [28] (1832):

"It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors." (*Calder* 384)

Marshall C.J. argues further that discovery "could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man." (*Calder* 386) Since archeological evidence (among other kinds of evidence) dates an Indigenous nation like the Nisga'a back well before 1138 and the short memory of English law, Marshall C.J.'s analysis has an empirical as well as a theoretical force which calibrates time immemorial to a point of defined beginning easily demonstrated by many Indigenous communities.

Clearly, this is not how Dorsett's "white law" understands this passage and it was not how at least three members of the *Calder* court understood the evidence about immemorial time presented to them by Nisga'a witnesses. Several decades earlier, translating their own sense of their thousands of years on their land from the Nisga'a language into the King's English, the Nisga'a had used the King's legal idioms and flourishes of turn-of-the-century formal English usage in order to communicate respectfully as befitting one Sovereign writing to another:

"From time immemorial the said Nation or Tribe of Indians exclusively possessed, occupied and used and exercised sovereignty over that portion of the territory now forming the Province of British Columbia which is included with the following limits, that is to say: - Commencing at a stone situate on the south shore of Kinnamox or Quinamass Bay and marking the boundary line between the territory of the said Nishga Nation or Tribe and that of the Tsimpshian Nation. . . ." (Nisga'a Petition 1913:240)

Contrast the petition's "King's English" with the spoken English of plaintiff Frank Calder, a Chief, respected orator and politician:

"Put it this way, in answer to your question, from time immemorial the Nishgas have used the Nass River and all its tributaries. . . . We still hunt within those lands and fish in the waters, streams and rivers, we still do, as in time past, have our campsites in these areas . . . and as far as we know, they have been there as far back as we can remember." (*Calder* 350, my emphasis)

Uninterrupted possession and habitation are here conveyed through Calder's use of emphasis, repetition and variation, the tools of the skilled orator who transposes from the court's idiom, "from time immemorial," to his own emphasis on "still." Using a parallel structure of repetition (we still hunt / we still do; as far as we know / as far back as we can), Calder heightens the temporal deixis⁶ of his statement, contrasting his own diction with the court's formal idiom at the beginning of his response: "Put it this way, in answer to your question, from time immemorial. . . ."⁷

Justice Hall quotes another example of transposition at length, this time from Nisga'a "spokesman" David Mackay who made this statement to the Royal Commission in 1888:

"It is not only during the last four or five years that we have seen the land; we have always seen and owned it; it is no new thing; it has been ours for generations. If we had only seen it for twenty years and claimed it as our own, it would have been foolish [for us to claim it], but it has been ours for thousands of years." (*Calder* 320, my emphasis)

In this elegant statement Mackay contrasts one knowledge system with the other in terms of temporal designations. Four or five or twenty years builds to "for thousands of years," "always", "for generations." Acceding to the Settler demand for quantification, Mackay endeavours to provide specifics but his focus is on directing the Commission's awareness to profound cultural difference. "It is not only during the last four or five years that we have seen the land. . . ." Seeing the land is not to be reduced to the span of a few short years; seeing the land, knowing the land, requires thousands of years.

Two different knowledge systems speak through the Nisga'a petition and the testimonies of Calder and Mackay on one hand and the court's divided analysis on the other. In *Calder*, the court struggles to absorb Nisga'a epistemology of time, land, memory and oral narrative back into itself as the translation device locks down between affirming and rejecting extinguishment of rights and settles its dilemma by opting for a "procedural" argument, the Nisga'a failure to ask for permission. Some three decades later, the challenge posed by David Mackay's "seeing the land" will be a precursor to the insistence in *Tsilhqot'in* on the telling of stories of the land, and on the "community of ancestors that is personified by

the land's present inhabitants" (Hunter 2010:38), core aspects of Indigenous epistemology. As the great Chickasaw writer Linda Hogan writes in *Dwellings*:

"Our elders believe this to be so, that it is possible to wind a way backward to the start of things, and in so doing find a form of sacred reason . . . that is linked to forces of nature. In this kind of mind . . . is the power of sky and thunder and sun . . . , a way of thought older than measured time, less primitive than the rational present." (Hogan 1995:19)

In *Van der Peet*, a case obsessed with time, the court will have an opportunity to contemplate not "sacred reason" but its own Settler concepts of time and history while thinking about salmon and Stó:lō genealogy.

5. *Van der Peet*: "[B]efore and After"

(*Van Der Peet* 247)

With the introduction of s. 35(1) of the Canadian Constitution in 1982⁸, the question of extinguishment of Indigenous rights changed significantly and *Van der Peet* is one of three cases to demonstrate its initial impact. Writing for the majority, Chief Justice Lamer states that "[a]boriginal rights existed [before s. 35(1)] and were recognized by the common law. They were not created by s.35(1) but subsequent to s.35(1) they cannot be extinguished." (*Van der Peet* 2) Thus "[s]ection 35(1) provides the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, customs and traditions, is acknowledged and reconciled with the sovereignty of the Crown." (*Van der Peet* 2)

This proved easier said than done in *Van der Peet*, a case concerned with the Aboriginal right to sell fish. Mrs. Dorothy Van der Peet, a Stó:lō woman, was charged with selling ten salmon caught by her husband and his brother under the authority of an Indian food fish license. Mrs. Van der Peet argued that she was exercising an existing Aboriginal right to sell fish, and expert evidence on the history and fishing practices of the Stó:lō people was adduced in detail. Chief Justice Lamer determined that Mrs. Van der Peet failed to demonstrate "that the exchange of fish for money [\$50.00 for ten salmon] or other goods was an integral part of the distinctive Stó:lō culture that existed prior to contact, and he dismissed the appeal." (Borrows & Rotman 2007: 134)

A version of the doctrine of continuity is central to this case and Lamer C.J. C. stresses that "[t]o be an aboriginal right an activity

must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right” and meet the “integral to a distinctive culture test” though “[t]hey may be an exercise in modern form of a pre-contact practice, custom or tradition” which must be of “central significance” to that society. (*Van der Peet* 2) Continuity in terms of “[c]ontact with European society” becomes the decisive moment, analogous to Richard I’s September 3rd, 1189 though leaving the crucial question of which date/s of which contact/s should be selected in relation to which kinds of aboriginal rights.⁹ But what does demonstrating “origins pre-contact” mean, particularly given the imbrication of colonial legal theories of origin with the strategic ambiguity of “time immemorial”?

Lamer C.J.C. is at pains to stress that the “concept of continuity is the means by which a ‘frozen rights’ approach to s.35(1) will be avoided. It does not require an unbroken chain. . . . A practice existing prior to contact can be resumed after an interruption.” (*Van der Peet* 2–3) Here the Chief Justice attempts to obscure the violent impact of colonization yet that break is Lamer’s justificatory moment for the creation of a schema whereby Indigenous peoples are located yet again in a chain of legal supplication to the courts in order to prove their own existence before the “arrival” of Europeans and thereby hope to secure the state’s recognition of their own pre-existing rights.

An essentialism which is less than strategic is Lamer C.J.C.’s solution to this problem which he articulates in terms of his claim that “[a]boriginal rights cannot be defined on the basis of the philosophical precepts of the Enlightenment” (*Van der Peet* 19) while at the same time proclaiming that these rights “arise from the fact that aboriginal people are aboriginal” (*Van der Peet* 19, Lamer’s emphasis) and he wishes to construe them as “Indians *qua* Indians.” Using a similar strategy, he cites with approval Justice Judson’s affirmation in *Calder* that “when Europeans arrived in North America, aboriginal peoples were already here” (*Van der Peet* 30, Lamer’s emphasis). On what grounds could an essence be required to prove its prior location or, indeed, be associated with the material circumstances of location at all? Like Justices Judson and Hall before him, Lamer C.J.C. turns to *Worcester v. Georgia* (1832) for the definition of aboriginal peoples as “the undisputed possessors of the soil, from time immemorial” and argues that this immemorial possession is “as relevant for the identification of the interests s. 35(1) was intended to protect” (*Van der Peet* 37) as it was for the adjudication of the claim in *Worcester*. Lamer appears to be arguing implicitly here in favour of immemorial possession by Indigenous nations whose possession was uninterrupted until the arrival of

Europeans, triggering a kind of retroactive construction of prior possession which the court chooses to see as broken. However, in mending the broken chain (whose associations with the history of slavery seem imperceptible to Lamer C.J.C.), Indigenous peoples must exercise caution lest evolution/change/modernization impact custom/practice/tradition to the extent that the court's "distinctive culture test" cannot be passed by "Indians" in spite of their inherent "Indianness."¹⁰

Crucial to the court's project of connecting Aboriginal rights to time in *Van der Peet* is the analysis of what is constituted as "ancestral" and of the connection to be established between "ancestral time" (*Van der Peet* 8) and European contact. For Lamer C.J.C., the first link is located within the French wording of s.35(1). Where the English specifies "existing aboriginal and treaty rights," the French adds an important word: "[l]es droits existants – ancestraux ou issues de traités" which he glosses as follows:

"The term 'ancestral,' which *Le Petit Robert I* (1990) dictionary defines as '[q]ui a appartenu aux ancêtres, qu'on tient d'ancêtres,' suggests that the rights recognized and affirmed by s.35(1) must be temporally rooted in the historical presence – the ancestry – of aboriginal peoples in North America."¹¹ (*Van der Peet* 32)

Taking this analysis a step further in *Le Petit Robert I*, "ancêtre" is defined as "[p]ersonne qui est à l'origin d'un famille, dont on descend," begging the question not of "historical presence" so much as of origin, indicative of the etymology of "ancêtre": from Old French *ancêtre*, from Latin *antecessor*, from *antecedere*, from *ante*, "before" + *cedere*, "go" (ancestors are those who go before one, into what is past, from whom one "descends"). However, the *Oxford English Dictionary* suggests a different temporal frame ("a person, typically one more remote than a grandparent, from whom one is descended") and both semantic and cultural differences in relation to the pastness of the past become apparent between French and English, let alone in relation to Indigenous languages and epistemology of time.

How far back does the court's diasporic imagination go? In *Worcester v. State of Georgia* (1832), M'Lean J. in his concurring decision describes the situation of "our [Settler] ancestors, when they first migrated to this country" and of their adoption of an allegedly "conciliatory mode . . . which was better calculated to impress the Indians, who were then powerful, with a sense of the justice of their white neighbours." (Borrows & Rotman 2007: 208) In contrast, the *Van der Peet* court is resolutely focused on "their ancestral customs and laws" (*Van der Peet* 321) and "their forefathers" (*Van der Peet* 266). Whatever the time established as "contact," "historical presence" is "ancestral" only insofar as the

genealogy satisfies the court's evidentiary standard. The "ancestral" is thus not the "immemorial" but rather within "legal memory" whether its inception be constructed as 1189 or "contact."

In her dissenting opinion, Justice McLachlin (now C.J.C.) intervenes in the analysis between origin and "historical presence," between going before in relation to an unspecified length of time compared with the relative proximity of a grandparent. Definitive in her rejection of Lamer C.J.C.'s insistence on tracing practices/customs/traditions back to pre-contact times in order for them to pass the "distinctive society" test, McLachlin J. states that continuity must be established between a modern practice and a traditional one:

"Most often, that [Aboriginal] law or tradition will be traceable to 'time immemorial' otherwise it would not be an ancestral aboriginal law or custom. But date of contact is not the only moment to consider. What went before and after can be relevant too." (*Van der Peet* 247)

Here the "immemorial" and the "ancestral" become strange bedfellows in McLachlin's effort to displace the court's theory of "frozen rights" and substitute a flexible approach which she associates with the "golden thread" of the "recognition by the common law of the ancestral customs and traditions [of] the aboriginal peoples who occupied the land prior to European settlement." (*Van der Peet* 263) Thus the court's struggles with legal fictions of time continue in the tradition of time immemorial's winding path, here meandering between chains with broken links, on the one hand, and golden thread associated with "before and after" on the other. In both cases the disconnect between the dead and the living reflects a Euro-Canadian concept of segmented time rooted in the Gregorian calendar which the court unreflectively takes as a universal rather than a culturally specific framework to which European languages have been adapted over millenia. Justice McLachlin's sense of "before and after" would elide Lamer C.J.C.'s distinct culture test with respect to time but the admission in Settler law that Indigenous rights are immemorial would be a very different argument from Justice McLachlin's association of Indigenous "law or tradition" with "time immemorial." In contrast, for Lamer C.J.C., "Indianness" only obtains in the "present" insofar as the court is satisfied that its particular manifestation in terms of practices etc. can be isolated in the "past." Thus the Indigenous past is imaged by the court as an archeological site and "ancestors" are not surprisingly said to be "crystallized" in what McLachlin J. dismissively refers to as a "magic moment" of frozen time. (*Van der Peet* 247) Time immemorial has once again served its

purpose of drawing a line in the sand, separating "before" and "after," and demanding that what is constructed as "ancestral" prove itself worthy of inscription in law's written memory, another dimension of what Borrows has called "sovereignty's alchemy." (Borrows 2002:79)

This is the process which anthropologist Bruce Miller describes as being "forcibly translated and rendered inert by a foreign disciplinary gaze." (Miller 2011:171) In the course of his analysis of *Oral History on Trial*, Miller incorporates Stó:lō teachings from Sonny McHalsie (Naxaxalhts'i), a Stó:lō cultural historian who describes his own community members' genealogical skills in a manner which strikingly contrasts the court's sense of genealogy:

"Some can go back ten or twelve generations in their genealogy. Seven to eight is the usual. The Mallowsays, fourteen generations. They are *still* connecting way back there about important points way back then. There is an important teaching of thinking about seven generations. The word *tomuk*, great-great-great-grandparent, is the same word as great-great- great-grandchild. The obligations run some seven generations backward and forwards. *The history is important in both directions to maintain the integrity of Indian names.*" (Miller 2011:98–9; Miller's emphasis)

McHalsie refers here to the system of names which are "ancestral prerogatives given by senior family members to those they think have the same qualities as ancestors who held those names." (Miller 2011:99) A knowledge of complex, lengthy and highly detailed genealogies and of important actions of previous name holders enables families to protect those names in the event that "[o]ther families may make claims to those names, especially those that are highly esteemed and greatly prized. . . ." (Miller 2011:99) Not only family names and genealogies but many forms of oral histories related to place names and to taking care of the land and of the ancestors are connected through the "[i]ntergenerational transmission of information." (Miller 2011:71) McHalsie stresses the epistemological complexity of the Stó:lō statement of core principles which expresses this principle of profound interconnectedness: "*S'ólh Téméxw te ikw'elo. Xolhmet te mekw'stam it kwelat*" ("This is our land and we have to take care of everything that belongs to us.") (Naxaxalhts'i 2007:85) It is not only the Stó:lō connection to the land over thousands of years of being sustained by it and caring for it that McHalsie's community designates here but the specificity of their responsibility for their land. He emphasizes that "[n]o one else has that responsibility" and elaborates the principle as follows:

"*S'ólh Téméxw* means 'this is our land' and it also means 'our world'; *Téméxw* is the word for 'world' or even for 'dirt' . . . So 'land' – *S'ólh Téméxw te ikw'elo* – 'this is our

land' or 'this is our dirt' or 'this is our world.' These are the same. . . . Through the place names we are able to see all the various uses that our people had for the land—right from the berry-picking spots on the tops of the mountains that had various names.”

(Naxaxalhtsi'i 2007:85–6)

Through place names, “history is connected to the ancestral names given to family members” (Miller 2011: 71), those names reaching back more than fourteen generations or even farther just as the community’s knowledge of the land through place names as well as hunting, fishing, gathering of berries, herbs and vegetables has connected them for thousands of years. By following different places, McHalsie says, one learns “where each place talks about different things that are out there in our land, in our world.” (Miller 2011:85) In the knowledge of place names is the enduring and sustaining connection to the words, teachings and wisdom of the ancestors alive on the land and in the Halkomelem language. In taking care of the origin or creation stories, the stories of family history, place names and the land, the Stó:lō community takes care of the ancestors.

Shxweli or spirit power connects the living to the ancestors across the generations and to the land: “[i]t’s in the rocks, it’s in the trees, it’s in the grass, it’s in the ground. *Shxweli* is everywhere.” (McHalsie quoting Rosaleen George, Miller 2011:72) Stories are recognized by listeners in terms of who told them previously such that “[t]elling the story connects to the *shxweli* of the deceased previous teller, it draws them [the ancestors] in.” (Miller 2011:95) Meaning spirit or life force, the Halkomelem word *Shxweli* speaks, for McHalsie, of the connection to a deceased previous teller of a story in terms of his own experience with that spirit power: “They’re right here with me [indicates his shoulder] when I mention their name. It’s a strength. It can be a source of power to mention their name [in oral footnoting], but you must say it [the story] the way they said it.” (Miller 2011:95, Miller’s parentheses) Between *Shxweli* and the *Van der Peet* court’s concept of *les ancêtres*, the gap in the translation process yawns wide.

6. *Tsilhqot’in*: “Since Ancestor Time”¹²

Tsilhqot’in is Clifford’s “good translation which gets . . . [the court] far enough into the other world [of Xen] to begin to see what . . . [it is] missing.” Like *Calder*, *Tsilhqot’in* was decided on a technicality though the court recognized that title had been proven in roughly half of the claim area. It remains to be seen whether the Supreme Court of Canada will uphold that decision when it hears the case in Fall 2013. An Indigenous land rights case on the same scale as its

great precedent, *Delgamuukw* (1991), the trial took 339 days and produced a lengthy judgement which endeavours to follow the *Delgamuukw* (1997) ruling concerning the admissibility of oral narrative evidence:

"Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents." (*Tsilhqot'in* 136, quoting *Delgamuukw* [1997] 87)

Judge Vickers writes that "[i]n order to truly hear the oral history and oral tradition evidence . . . , courts must undergo their own process of decolonization" (*Tsilhqot'in* 132) and he maintains that his "judgement features Tsilhqot'in people as they strive to assert their place as First Peoples" (*Tsilhqot'in* 20). Perambulating the boundaries, albeit digitally, Judge Vickers inscribes the "bright lines [without which] we are . . . left with a jurisdictional 'No Man's Land' [here, Crown land appropriated by the provincial government in the interest of forestry companies], a neutral place to which 'bad characters' may resort, knowing that jurisdictional uncertainty will render them safe from the interference of the authorities" (Dorsett 2007:140), especially if the "authorities" are themselves compromised. However, while defining the boundaries of the territory of the Xeni Gwet'in First Nation which was instrumental in bringing the action, Judge Vickers also reinstates the "sovereign and common law jurisdiction by reimposing the ordered grid of the Western map on the landscape," juridifying the relation to land and stopping on the cusp of recreating it in terms of Aboriginal title. (Dorsett 2007:156)

Tsilhqot'in provides a vivid demonstration of major differences between Settler and Indigenous epistemologies expressed in relation to mapping, memory practices, concepts of "stories," and understandings of genealogy in relation to the land. Although Judge Vickers is clearer on Tsilhqot'in concepts of land than he is on the other dimensions of the discursive matrix considered here in terms of "time immemorial," his judgement provides an important opportunity to investigate the court's theory of narrative in relation to time and memory. Less obviously encumbered with claims about the "immemorial" than *Calder* and, in particular, *Van der Peet*, *Tsilhqot'in* nonetheless exhibits the struggle to isolate a point in Settler time as the beginning of legal memory for an Indigenous nation which endeavours to mobilize a concept of dwelling to overcome the court's Settler resistance to "semi-nomadic" [sic] ways of living on the land as satisfying the required standard of sustained

occupation. In this case, horses provide an opportunity for the court to begin to bridge different understandings of dwelling.

Straddling the boundary between Settler and Tsilhqot'in memory traditions and challenging the court's Settler understanding of the division between "wild" and "domesticated", horses occupy the "contact zone" (Pratt 1991:199) between one set of cultural and temporal practices and another. As we have seen, this is a familiar role for "time immemorial" which operates as a kind of metaphysical benchmark for Judge Vickers. He writes that

"Tsilhqot'in witnesses acknowledge their ancestors did not enjoy the use of horses from time immemorial. They understand that horses are European in their origin. However, the plaintiff says that the capture and use of wild horses by Tsilhqot'in people occurred well before first contact." (*Tsilhqot'in* 1228)

Members of the Tachelach'ed /Brittany Triangle herd have been traced to "forebears" in 17th century Spain who escaped from colonial herds and made their way to the Tsilhqot'in plateau¹³ by the time of the first recorded Settler sighting by Alexander Mackenzie on June 1st, 1808. (*Tsilhqot'in* 1228) First contact in this case was established as 1793 and it is not difficult to see these two dates operating for Judge Vickers as an immemorial boundary analogous to September 3rd, 1189, implicitly opposing "European in their origin" to "Tsilhqot'in in their use." Adapting the "distinctive culture" test from *Van der Peet*, Judge Vickers is challenged to admit the possibility that a key term of the "Indianness" of the Tsilhqot'in people is not of Tsilhqot'in origin and thus not "ancestral" in either Settler or Indigenous senses of that word while also recognizing the importance accorded by Tsilhqot'in people to horses as a core aspect of their identity and way of life. Finding in favour of the plaintiff on this issue, Judge Vickers asserts the Indigenous principle of the "oneness of the earth, of animals and people" (*Tsilhqot'in* 418) and outlines the Tsilhqot'in temporal system:

- sadanx : "a legendary period of time which took place long ago. This was a time when legends began and when the ancestors, land and animals were transforming according to supernatural powers" (*Tsilhqot'in* 351);
- yedanx denilin : "a long time ago . . . includes the period of time prior to contact and the time period that is pre- and post-sovereignty" (*Tsilhqot'in* 352);
- undidanx : "recent history" (*Tsilhqot'in* 353).

Horses come from yedanx denilin and continue today in undidanx but what of the human ancestors?

Judge Vickers is clear that "Tsilhqot'in people living in sadanx or yedanx are all ?Esggidam [Ancestors]" and that in undidanx, the time of recent history, there are no ?Esggidam (*Tsilhqot'in* 355). He understands that the ?Esggidam lived in pit houses (*Tsilhqot'in* 370), maintained a trail network still in use today (*Tsilhqot'in* 897), participated in seasonal rounds (*Tsilhqot'in* 146), slept in tents at Biny Gwetsel (*Tsilhqot'in* 749) and fished at Biny Gwechugh (*Tsilhqot'in* 755). In the spirit of listening closely to stories, Judge Vickers also provides accounts of ancestors in relation to place names given in evidence and it is instructive to observe what he hears when told a story of a place like Gwedeld'en T'ay:

"Both Theophile Ubill Lulua and Minnie Charleyboy associate the campsite at Gwedeld'en T'ay with graves and drumming; the name means 'Indian Drum.' Theophile Ubill Lulua testified that Tsilhqot'in people are buried there and that you can hear them drumming. Minnie Charleyboy testified that no one drums there now." (*Tsilhqot'in* 752)

Judge Vickers' primary concern is to derive a fact pattern which will tie a place name to the map under daily construction in the courtroom, and eventually to his rulings about the boundaries of Tsilhqot'in territory. Here he records some of the details, apparently without noticing that he has been given the etymology of the place name, its sacred significance as a gravesite, its yedanx and possibly sadanx history, and an update to undidanx. Likely there is also irony in Minnie Charleyboy's final comment, given the context in the Settler courtroom. A Tsilhqot'in linguist could doubtless unpack more issues of translation from Tsilhqot'in (used by many community experts in testimony) and English and of linguistically-embedded cultural knowledge here as well. One aspect of such an analysis would concern Tsilhqot'in law in relation to grave sites and the ways in which this place name functions as a genealogy.

The issue here is how "law is recorded in the place names" such that from listening to a place name, a Tsilhqot'in person is able to learn "what happened at that place, who was involved, how it was resolved or dealt with, what was important in the event, and how this information applies to his or her behaviour. The place names also provided important information about the land itself, such as the type of vegetation, water and resources, and other conditions necessary to living and surviving on the land." (Napoleon 2013:13) Unbundled from the elements which Cree legal scholar Val Napoleon lists¹⁴, place names like Gwedeld'en T'ay become points on a map and are largely stripped of cultural significance in spite of Judge Vickers' awareness that through stories,

"[t]he listener is taught how the land was formed; the need to respect the land and all it has to offer; the bond between plants, animals and people; the rules that must be followed and the consequences of failing to follow those rules; places and events that shape the lives of Tsilhqot'in people; and all those matters of importance that provide substance and meaning to the life of a Tsilhqot'in person." (*Tsilhqot'in* 131)

While affirming "substance and meaning," Judge Vickers is less confident about what he refers to as the "legend of Ts'il?os and ?Eniyud," an origin story which "Tsilhqot'in people rely upon . . . to assert that they have occupied these spaces since the origins of the land itself. I do not challenge the sincerity of these beliefs. However, neither this legend nor the legend of Lhin Desch'osh can be taken as evidence that Tsilhqot'in people used or occupied those locations from the beginning of time." (*Tsilhqot'in* 174) Following the hermeneutic approach of Jan Vansina¹⁵, Judge Vickers maintains that "it is the underlying theme or lesson that provides consistency to the legend." (*Tsilhqot'in* 176, 178) While saying that he proposes to take this evidence into account and "to the extent that I am able, consider it from the Aboriginal perspective" (*Tsilhqot'in* 196), he nonetheless succumbs to Settler convention, writing "Try as one might, it is difficult to read these words [of Settler historical documents] and not see in them events as they really were." (*Tsilhqot'in* 203) Later, when assessing whether the vast area known as Tachelach'ed qualifies for Aboriginal title, Judge Vickers dates the relevant oral history evidence and writes that "It is extremely difficult to find oral history evidence to accurately connect to a period over 150 years ago" (*Tsilhqot'in* 793), thereby consigning to metaphor those oral histories which are not supported by "facts." Putting oral tradition evidence "on an equal footing" affords the option of cultural translation as a form of extinguishment familiar to the courts, or the option of seeing "what you are missing" and watching your translation device fall apart, as Clifford says. Preferring positivist "facts" after all, Judge Vickers seems to forget that interpretation is no more neutral than any other aspect of the court's operations.

For the Tsilhqot'in Elders and community experts who testified before Judge Vickers, stories are medicine, education, healing, survival, the sacred. As Chief Thomas Billyboy says, "the names of people . . . are in, and of, the land, come about through people's lives, and were [are] themselves powerful." (Williams: 792) In her statement of core principles of Tsilhqot'in epistemology in relation to the ?Esggidam, Tsilhqot'in scholar Linda Smith explains that

"[t]he ancestors are continuously present today on the landscapes. They have left us ancient names, hand tools, and trails. We bring them to life in singing their songs and telling their stories. We continue to use their language and we are acquainted

with their cherished places. The past and the present merge together into the future." (Smith 2008:15)¹⁶

Writing about another Dene (Athapaskan) nation, the West Apaches, anthropologist Keith Basso quotes community expert Charles Henry: "whenever one uses a place-name, even unthinkingly, one is quoting ancestral speech – and that is not only good but something to take seriously." (Basso 1996:30) Tsilhqot'in witness Thomas Billyboy makes a similar point when he says that "A legend is what our ancestors talk about. What happened. A legend is what really happened . . . I'd like to think like my ancestors did, what happened years back."¹⁷

It goes without saying that what Judge Vickers means by "[t]ime depth" has little to do with the statements of Linda Smith, Charles Henry and Thomas Billyboy though he does identify *dechen ts'edilhtan* (the laws of the ancestors, *Tsilhqot'in* 431) but proceeds to separate laws from "legends and stories" (in the section of the judgement called "Ethnographic Narrative") and from "time depth" (in "Summary of Evidence –Occupation). (*Tsilhqot'in* 433–35) The effect of this disposition of materials is to disrupt and invisibilize the complex interrelations among different kinds of stories and to obscure the outlines of the Tsilhqot'in knowledge systems, legal orders, and epistemology which were presented to him. The epistemological divide is particularly apparent in Judge Vickers' distillation of the various perspectives on the question of "stories", that is, oral narrative or oral history evidence. Judge Vickers' interpretive criteria are familiar to readers schooled in the European mode of literary analysis known as hermeneutics where "stories" are theorized as having:

- an "underlying theme or lesson" (*Tsilhqot'in* 178)
- "consistency" in theme and detail (*Tsilhqot'in* 55)
- "a message or moral" which instructs and informs (*Tsilhqot'in* 434)
- " 'truth' [which] can be elusive" (*Tsilhqot'in* 137)
- absence of "explanation" by the narrator (*Tsilhqot'in* 671)
- requirement that the listener "distill" and "apply meaning to his own life, a lifelong process" (*Tsilhqot'in* 671)

Fundamental to jurisprudence, hermeneutics also had a formative impact on ethnographic approaches to narrative though it has been largely superseded in contemporary ethnography as well as in literary theory. In fact, hermeneutics was designed to do exactly the work of interpretive colonization to which Judge Vickers puts it. It is the interpretive corollary of the "Eurocentric need to define boundaries" (*Tsilhqot'in* 645) which is productive of what the

Plaintiff refers to as the “postage stamp” (*Tsilhqot’in* 1376) approach to aboriginal land title. Problematizing “inconsistencies”, comparing ethnographic versions of origin stories with stories told to him by Elders in court, and seeking in vain for an authoritative if “underlying” meaning, Judge Vickers produces “postage stamp” interpretations of the sacred narratives shared with him, according to *Tsilhqot’in* protocol, in evening sessions of the court. What impact would a deeper and more systematic awareness of the complexity of “cultural translation” have had on a judgement which balks as its own “translation device” runs out of meaning and stops short of declaring title?

7. Conclusion

As a term of art in the discourse of colonization from its early history in the strategic construction of a past of “higher antiquity than memory or history can reach” (Blackstone 1765:68) to its boundary role in relation to “legal memory” to its renaissance in relation first to early medieval “primitive” people and later to Indigenous peoples, “time immemorial” has served the court well. A metaphor within a metaphor, performative of boundary operations in the domain of legal memory, pre/scriptive in relation to the land of those resignified as “primitive” and “Indians,” and associated with short-term ancestors and calendrical time in need of a time-out, its time-lapse mnemonics serve to reproduce its own Settler “forebears” moving in the shadowy realm of the diasporic legal imagination. Thus “time immemorial” as a legal fiction fulfills its potential whereby “a new situation is made ‘thinkable’ by converting it into familiar terms” in the process of colonization (Fuller 1967:71).

Etymologically, “translation”, *trans/latio*, is a passing across from one place to another. Perhaps the court may yet learn to recognize the boundary of its own brief, agonizing history in the place it calls Canada and acknowledge the “acts of [Indigenous] intellectual and rhetorical sovereignty” (Driskill 2010: 83) and their sovereign consequences which inform the three cases under discussion and their successors. In that spirit, the last words here belong to the late Gitxsan Elder James Morrison, *Txaaxwok*, who speaks of the “memorial song” or *limx oo’y* which connects the land to the people through the living work of memory:

“I can feel it today that you can feel something in your life, it memories back to the past what’s happened in the territory. This is why this song, this memorial song. . . . I can still feel it today while I am sitting here, I can hear the brook, I can hear the river run. This is what the song is all about. . . . To bring you memory back into that territory. This is why the song is sung, the song. And it goes on for many thousands of years ago. And that’s why we are still doing it today.”¹⁸

Notes

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¹ Cf. *Delgamuukw v. British Columbia* [1991] 3 W.W.R. 97 (B.C.S.C.): "I am not able to conclude on the evidence that the plaintiffs' ancestors used the territory since 'time immemorial' (the time when the memory of man 'runneth not to the contrary')." "Time immemorial," as everyone knows, is a legal expression referring to the year 1189 (the beginning of the reign of Richard II [sic], as specified in the Statute of Westminster, 1275. In any event, I think a plea of 'time immemorial' imposes too high a burden upon the plaintiffs." (Part 10, 3(a)) On the eschatological dimension of "time immemorial," see Adler (1989) and Stone (1993).

² Garner traces the phrase "to the 13th c. at the latest" though it is often attributed to Blackstone as well as to the King James version of the Bible (1611). Garner (2011) 555.

³ Lesaffer argues that "[w]hile occupation concerns *terra nullius*, prescription concerns territory over which another state had sovereignty before. However, there is common ground for the two concepts to stand on. In both cases, effective occupation of territory is involved. While in the case of *terra nullius* there is an analogy with the Roman concept of *occupatio*, in the case of prescription effective occupation in fact refers to the Roman concept of *possessio*." Lesaffer (2005) 49.

⁴ "The different spellings (Nishga/Nisga'a) reflect different periods in the transliteration of the name of the people of the Nass Valley." See Godlewska & Webber (2007) 246, f.2.

⁵ John Borrows writes that while the doctrine of prescription/adverse possession "may be attractive on one level because it justifies displacement in a seemingly peaceful way, on another level one would encounter problems in applying this concept to discount Indigenous legal traditions. Indigenous peoples have not generally acquiesced to the common law's purported replacement of their laws. . . . These facts make it difficult to construct prescription-like arguments for placing Indigenous legal traditions lower in the country's legal hierarchy." Borrows (2010) 19.

⁶ On temporal deixis see Fillmore (1997).

⁷ Stone (1993) notes that Elders "translate cultural referents into the political terms which are closest in meaning." (57)

⁸ "S.35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada." <http://laws-lois.justice.gc.ca/eng/Const/page-16.html>

⁹ My point here does not rely on Sept. 3rd, 1189 per se but rather on the Settler property law convention of requiring quantification via calen-

dical date, a convention which depends upon the Gregorian calendar which is culturally normative for the court but profoundly at odds with Indigenous epistemologies of time and with the spatiotemporal conventions of the languages of the Nisga'a, Stó:ló, and Tsilhqot'in nations.

¹⁰ Cf. McNeil (2010) 159–62.

¹¹ Perhaps Lamer C.J.C. is thinking of Slattery's comment that the word "existing" suggests that "those [Aboriginal] rights are 'affirmed in a contemporary form rather than in their primeval [sic] simplicity and vigour.'" Slattery (1987) 782. See also Slattery (1983).

¹² Gilbert Solomon's words, *Tsilhqot'in* Transcript, 16 March 2005, at 00009(37). In this case, the court appears to have decided that all words in the Tsilhqot'in language be cited without italicization, a practice which I have followed here for consistency's sake. Note also the court's unfortunate substitution of the interrogative sign? for the customary glottal stop symbol ʔ, a practice which renders words like ʔEsggidam (Ancestor) as ʔEsggidam.

¹³ See Wayne McCrory, "Independent Review of the Environmental Impact for Prosperity Mine," 10 April 2010, at www.ceaa.gc.ca/050/documents/43054/43054E.pdf. See also Bhattacharya (2012).

¹⁴ Napoleon refers in this passage to the Tłicho nation. However, her point is of broad application. Cf. Cruikshank (1998), Thornton (2008), Carlson (2001) and Carlson (2010).

¹⁵ Bruce Miller notes that Vansina's "early Africanist work came to be regarded as too rigid and literalist and based on particular formalized systems, leaving out many other forms of narrative." Miller (2011) 167. See Miller's analysis of Crown expert Dr. Alexander von Gernet's use of Vansina in *Tsilhqot'in*. Miller (2011) 118–43. See also Brownlie (2010) and Reiter (2010).

¹⁶ I am grateful to Linda Smith for permission to quote from her M.A. thesis.

¹⁷ *Tsilhqot'in* Transcript, 24 June 2005, at 00038 (22–40).

¹⁸ *Delgamuukw v. British Columbia* (1991) Transcript, 1988-04-20, 084-0023-24. See Napoleon (2009) 170–71 on this passage. See also Napoleon (2005). Space constraints have made it impossible to include *Delgamuukw* and its voluminous scholarship in this paper. While pointing toward that work, this citation honours the eloquent words of Txaaxwok.

Cases Cited

Calder et al. v Attorney General of British Columbia [1973] S.C.R. 313
Delgamuukw v British Columbia [1991] 3 W.W.R. 97 (B.C.S.C.)
Delgamuukw v The Queen [1997] 3 S.C.R. 1010
R. v Sappier; R v Grey (2006 2 S.C.R. 686
R. v Van der Peet [1996] 2 S.C.R. 507
Tsilhqot'in Nation v British Columbia 2007 B.C.S.C. 1700

References

Adler, William (1989). *Time Immemorial – Archaic History and Its Sources in Christian Chronography from Julius Africanus to George Syncellus*. Washington, D.C., Dumbarton Oaks Research Library & Collection.
 Asch, Michael (1997). Ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference*. Vancouver, University of British Columbia Press.

- Asch, Michael (2007). "Calder and the Representation of Indigenous Society in Canadian Jurisprudence." In Foster, Raven & Webber (2007), 101–110.
- Basso, Keith H. (1996). *Wisdom Sits in Places – Landscape and Language Among the Western Apache*. Albuquerque: University of New Mexico Press.
- Blackstone (1765). *Blackstone's Commentaries on the Laws of England*. <http://avalon.law.yale.edu/18th-century/blackstone>.
- Bhattacharya, Jonaki (2012). "Knowing Nas'lhiny (Horse), Understanding the Land: Free-Roaming Horses in the Culture and Ecology of the Brittany Triangle and Nemiah Valley." Ph.D. diss. (Waterloo).
- Borrows, John (2010). *Canada's Indigenous Constitution*. Toronto, University of Toronto Press.
- Borrows, John (2007). "Let Obligations Be Done." In Foster, Raven & Webber (2007), 201–215.
- Borrows, John (2002). *Recovering Canada – The Resurgence of Indigenous Law*. Toronto: University of Toronto Press.
- Borrows, John J. & Leonard I. Rotman (2007). *Aboriginal Legal Issues: Cases, Materials and Commentary*, 3rd ed. LexisNexis Canada.
- Brownlie, Robin Jarvis (2010). "Disciplining Orality: Alexander von Gernet and the Crown's Invalidation of Aboriginal Oral History in Canadian Litigation." At gsdl.ubcic.bc.ca/collect/firstnal/index/assoc/HASHc8d1.dir/doc.pdf.
- Carlson, Keith Thor (2001). Ed., *A Stó:lō Coast Salish Historical Atlas*. Vancouver, Douglas & McIntyre.
- Carlson, Keith Thor (2010). *The Power of Place, The Problem of Time – Aboriginal Identity and Historical Consciousness in the Cauldron of Colonialism*. Toronto, University of Toronto Press.
- Civil Code of Québec (S.Q., 1991, c.64). <www.justice.gouv.qc.ca>
- Cruikshank, Julie (1998). *The Social Life of Stories: Narrative and Knowledge in the Yukon Territory*. Vancouver, University of British Columbia Press.
- Derrida, Jacques (1997). *Of Grammatology*. Corrected edition. Trans. Gayatri Chakravorty Spivak. Baltimore & London: Johns Hopkins University Press.
- Dorsett, Shaunnagh (2002). " 'Since Time Immemorial': A Story of Common Law Jurisdiction, Native Title and the Case of Tanistry." 26 *Melb. U.L.Rev.* 32–59.
- Dorsett, Shaunnagh (2007). "Mapping Territories." In Shaun McVeigh, ed., *Jurisprudence of Jurisdiction*. New York: Routledge-Cavendish. 137–58.
- Dorsett, Shaunnagh & Ian Hunter (2010). Eds., *Law and Politics in British Colonial Thought – Transpositions of Empire*. N.Y., Palgrave Macmillan.
- Dorsett, Shaunnagh & Shaun McVeigh (2012). *Jurisdiction*. Hoboken, Taylor & Francis.
- Driskill, Qwo-Li (2010). "Doubleweaving Two-Spirit Critiques: Building Alliances between Native and Queer Studies." *GLQ* 16 (1–2) 69–92.
- Fillmore, Charles J (1997). *Lectures on Deixis*. Stanford, CSLI Publications.
- Foster, Hamar, Heather Raven & Jeremy Webber (2007). Eds., *Let Right Be Done – Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*. Vancouver: University of British Columbia Press.
- Fuller, Lon L. (1967). *Legal Fictions*. Stanford: Stanford University Press.
- Garner, Bryan (2011). *Garner's Dictionary of Legal Usage*, 3rd ed. New York: Oxford University Press.

- Godlewska, Christina & Jeremy Webber (2007). "The Calder Decision, Aboriginal Title, Treaties, and the Nisga'a." In Foster, Raven & Webber (2007), 1–33.
- Henderson, James Sákéj Youngblood Henderson (2002) "Postcolonial Indigenous Consciousness." *Indigenous Law Journal* 1:1–56.
- Hogan, Linda (1995). *Dwellings – A Spiritual History of the Living World*. New York: Touchstone.
- Hunter, Ian (2010). "Global Justice and Regional Metaphysics – On the Critical History of the Law of Nature and Nations." In Dorsett & Hunter (2010), 11–29.
- Knafla, Louis A. & Haijo Westra (2010). Eds., *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand*. Vancouver: University of British Columbia Press.
- Justinian (535CE). *Institutes*. At www.fordham.edu/halsall/basis/535institutes.asp
- Lesaffer, Randall (2005). "Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription." *European Journal of International Law* 16:1, 25–58.
- Littleton, Sir Thomas ([1481] 1813). *Littleton's Tenures in English: printed from the second edition of the Commentary of Sir Edward Coke, London 1813*. Gale.
- May, James M. (2012). *A Cicero Reader: Selections from Five Essays and Four Speeches with Five Letters*. Mundelein: Bolchazy-Carducci.
- McCall, Sophie (2011). *First Person Plural – Aboriginal Storytelling and the Ethics of Collaborative Authorship*. Vancouver: University of British Columbia Press.
- McLaren, John (2010). "The Uses of the Rule of Law in British Colonial Societies in the Nineteenth Century." In Dorsett & Hunter (2010), 71–90.
- McNeil, Kent (1997). "The Meaning of Aboriginal Title." in Asch (1997), 135–54.
- McNeil, Kent (1999). "The Onus of Proof of Aboriginal Title." *Osgoode Hall LJ* 37:4, 776–803.
- McNeil, Kent (2007). "Judicial Approaches to Self-Government since *Calder*: Searching for Doctrinal Coherence." In Foster et al. (2007), 129–52.
- McNeil, Kent (2010). "The Sources and Content of Indigenous Land Rights in Australia and Canada: A Critical Comparison." In Knafla & Westra (2010), 146–70.
- McSweeney, Thomas J. (2012). "Property Before Property: Romanizing the English Law of Land." *Buffalo LR* 60:4, 1139–98.
- Miller, Bruce Granville (2007). Ed., *Be of Good Mind: Essays on the Coast Salish*. Vancouver, University of British Columbia Press.
- Miller, Bruce Granville (2011). *Oral History on Trial – Recognizing Aboriginal Narratives in the Courts*. Vancouver: University of British Columbia Press.
- Napoleon, Val (2005). "Delgamuukw: A Legal Straightjacket for Oral Histories?" *Canadian Journal of Law and Society* 20:2, 123–55.
- Napoleon, Val (2009). "Ayook: Gitksan Legal Order, Law, and Legal Theory." Ph.D. dissertation, University of Victoria.
- Napoleon, Val (2013). "Thinking about Indigenous Legal Orders." In René Provost & Colleen Sheppard, eds., *Dialogues on Human Rights and Legal Pluralism*. Heidelberg: Springer. 229–46.

- Naxaxalhts'i [Albert Sonny McHalsie] (2007) "We Have to Take Care of Everything That Belongs to Us." In Miller (2007), 82–130.
- Nisga'a Petition (1913). In Foster, Raven & Webber (2007), 241–45.
- Pollock, Sir Frederick & Frederic William Maitland (1898). *The History of English Law Before the time of Edward I*, vol. 2, 2nd ed. Cambridge, Cambridge University Press 1968. At <oll.libertyfund.org>
- Pratt, Mary Louise (1991). "Arts of the Contact Zone." *Profession* 91: 33–40.
- Reiter, Eric. H. (2010). "Fact, Narrative, and the Judicial Uses of History: *Delgamuukw* and Beyond." *Indigenous Law Journal* 8:1, 55–79.
- Slattery, Brian (1983). *Ancestral Lands : Alien Laws : Judicial Perspectives on Aboriginal Title*. Studies in Aboriginal Rights, 2. University of Saskatchewan Native Law Centre.
- Slattery, Brian (1987). "Understanding Aboriginal Rights." *The Canadian Bar* 66:727–83.
- Smith, Linda Ruth (2008). "Suwh-tséghèdudinh: the Tsinlhqut'in Niminh Spiritual Path." M.A. thesis, University of Victoria.
- Stone, Helen (1993). "Living in Time Immemorial – Concepts of 'Time' and 'Time Immemorial': Why Aboriginal Rights Theory is Problematic in the Courts and around the Negotiating Table." M.A. thesis, Carleton University.
- Thornton, Thomas F. (2008). *Being and Place Among the Tlingit*. Seattle, University of Washington Press.
- Ward, Richard & Amanda Akhtar (2008). *Ward & Walker's English Legal System: An Overview*. 10th ed. Oxford, Oxford University Press.
- White, James Boyd (1985). *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law*. Madison: University of Wisconsin Press.
- Williams, Judith (nd). *High Slack – Waddington's Gold Road and the Bute Inlet Massacre of 1864*. Vancouver: New Star Press.