Two "White" Perspectives on Indigenous Resistance: Emily Carr's *Klee Wyck*, the RCMP, and Title to the Kitwancool Valley in 1927

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INTRODUCTION

There are at least three legal narratives that run on almost parallel lines through what was called, from the 1870s to the 1970s, the British Columbia Indian Land Question.[1] The first narrative is a First Nations one, invoking laws and cultures that proclaimed ownership of and jurisdiction over traditional lands and territories. Examples of this narrative include the determination of many of the Tsilhqot'in to exclude everyone other than Tsilhqot'in from their territory, a determination that culminated in warfare in 1864. It also comes through loud and clear in what the Gitanyow told the provincial and dominion authorities in 1927: that the Kitwancool Valley – all of it – was theirs, and that they wished to part with none of it. They accordingly resisted attempts to survey the land for reserves. Their resistance is the focus of this essay.

The second narrative was, for want of a better term, an aggressive settler one that regarded the first narrative as absurd. It was summed up neatly by the Victoria *Daily Colonist* in 1910. The Crown had acquired

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1 This phrase dates from at least 1875, when the provincial government reluctantly published British Columbia Legislative Assembly, *Papers connected with the Indian Land Question 1850-1875* (Victoria: Richard Wolfenden, Government Printer, 1875).

sovereignty over British Columbia ("BC") by settlement, and "the acquisition of that sovereignty extinguished *ipso facto* every right or claim that may have been held or enjoyed by present occupation or immemorial possession by any other sovereignty, people, or tribe."[2] This was no new principle, but was "as old as history itself."[3] On this view, resisting government surveyors was, as one RCMP officer in the Skeena put in 1927, "just like slapping the government in the face."[4]

This second narrative is no longer tenable. Although it was highly dubious even in 1910, it thrived primarily for two reasons. It was what most settlers wanted to believe, so it seemed like common sense. As well, the responsibility to acknowledge and protect Aboriginal rights and title was solely the Crown's. The doctrine of sovereign immunity prohibited anyone, Indigenous and non-Indigenous alike, from suing to assert rights against the Crown unless the Crown consented to such a suit. This prevented the courts from interfering and remained a legal requirement in BC until 1974.[5] No such consent was ever given, so between 1908 and 1911 the Laurier government attempted to have the BC government agree to a somewhat different procedure: a direct reference of the Indian Land Question to the courts.[6] Nothing came of this, either.

The third narrative was located somewhere between the first two. This narrative claimed that a version of Aboriginal title was in fact recognized by British and colonial law; that the principle asserted in the *Daily Colonist*

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2 JSH Matson, "Sovereignty" (23 June 1910) at 4, online: *Victoria Daily Colonist* <archive.org/stream/dailycolonist19100623uvic/19100623#page/n3/mode/1up/search/acquisition> [perma.cc/6965-LWZY].

3 *Ibid.*

4 Sgt. HE Taylor, RCMP to the Commissioner's Office, (25 August 1927), Library and Archives Canada (AC GR10, Vol. 11047, File 33-1) [Taylor, "Report regarding Kitwancool Indians"].

5 See the *Crown Proceedings Act*, RSBC 1996, c 89, first enacted on 1 August 1974. See also Hamar Foster, "Another Good Thing: *Ross River Dena Council v. Canada* in the Yukon Court of Appeal, or: Indigenous Title, 'Presentism' in Law and History, and a Judge Begbie Puzzle Revisited," (2017) 50:2 UBC L Rev at 293 [Foster, "Another Good Thing"].

6 For details see Hamar Foster, "We Are Not O'Meara's Children: Law, Lawyers and the First Campaign for Aboriginal Title in British Columbia, 1908-28" in Foster, Raven and Webber, eds, *Let Right Be Done: Aboriginal Title, The Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) at 61-84.

in 1910 was simply wrong; and that both Ottawa and the BC government were under a legal obligation to negotiate treaties in the province or, failing that, have the question determined in court. Sources for this view include the legal opinions provided to the Nisga'a and the Allied Indian Tribes of British Columbia between 1906 and 1928, the legal opinion of Ottawa's own lawyer in 1909, and the legal precedents and documents put forward in the Cowichan Petition that same year, and the Nisga'a Petition in 1913.[7] This third narrative was vindicated when the question finally did come before the courts, forty-six years after the prison terms imposed at Smithers in 1927 for resisting the reserve surveys.[8]

The essence of this third narrative was articulated quite early on by a delegation of Cowichan chiefs in 1866. They had come to Victoria to welcome and speak to the new governor of the colony, but he was absent, so they assembled instead at the local mission. Anglican Bishop George Hills served them biscuits and treacle, and made notes of what they had to say. The remarks of Comiaken Chief Suecahletzup are representative. "The river up which the salmon runs," he said, "and the rich soil on both sides of it, where we plant potatoes we wish to keep. Lands outside these lots we should be pleased to see the white man occupy," provided they pay for it.[9] In 1887 Nisga'a leaders said much the same thing to a royal commission. As Charles Russ put it, they were willing to give up much of their land, so long as what remained – together with a guarantee of certain rights to self-government – was confirmed by treaty. "We want," he said, "the words and hands of the chiefs on both sides, Indian and

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7 *Ibid*. See also Hamar Foster & Benjamin L Berger, "From Humble Prayers to Legal Demands: The Cowichan Petition of 1909 and the British Columbia Indian Question" in Foster, Berger & Buck, eds, *The Grand Experiment: Law & Legal Culture in British Settler Societies* (Vancouver: UBC Press, 2008) at 240-267 [Foster & Berger, "From Humble Prayers to Legal Demands"]. The Cowichan Petition is reproduced in *The Grand Experiment* at 261-67 and the Nisga'a Petition is reproduced in Foster, Raven & Webber, *Let Right Be Done*, *supra* note 6 at 241-45.

8 See *Calder v British Columbia (AG)*, [1973] SCR 313, [1973] 4 WWR 1 [*Calder*]. Technically, the Nisga'a lost this case because BC had not consented to the litigation and the consent requirement was not removed until 1974.

9 From notes by Anglican Bishop Hills of the "Speeches of Indian Chiefs, Nov. 14th, 1866 (about their lands), copy sent to Gov. Seymour, Dec. 10.66." This document is preserved in the Diocesan Archives, Victoria, British Columbia and I am grateful to Mrs. Mavis Gillie of Victoria for providing me with a copy.

Government, to make a promise on paper – a strong promise – that will be not only for us, but for our children and forever."[10]

What happened in the Kitwancool Valley in 1927 was, in essence, a clash between the first and second of these narratives. But before examining this remarkable piece of BC history, I need to address some terminological issues and provide some background.

First of all, terminology. Unlike "Inuit" and "Métis," in recent years the term "Indian" has fallen out of favour. It was, however, the term used by both Indigenous and non-Indigenous people for First Nations at the time. For example, when a number of Indigenous rights groups coalesced in 1916 to oppose certain government policies, they decided to call themselves the Allied *Indian* tribes of British Columbia. In my view, to refer to this organization as the Allied "First Nations" is simply inaccurate.[11] "Indian" also continues to be the correct and unavoidable term in many legal contexts even today, *e.g.*, when dealing with the *Indian Act* and section 35 of the *Constitution Act, 1982*. This provision recognizes and affirms the Aboriginal and treaty rights of the Aboriginal peoples of Canada, which it defines as including "the *Indian*, Inuit and Métis peoples of Canada."[12]

More specifically, the people and the village at the heart of the story told here were referred to as Kitwancool at the time, but the correct term now is Gitanyow. Depending on the context, I will use both terms in this essay. The Gitanyow are a Gitxsan people, which is to say a part of the larger "people of the Skeena" whose history is essential background to the

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10 British Columbia, Legislative Assembly, "Papers Relating to the Commission appointed to enquire into the state and condition of the Indians of the North-West Coast of British Columbia", *BC Sessional Papers* (22 February 1888) at 432-33. This request was rebuffed. The Nisga'a finally got their treaty 113 years later.

11 I make this point because on two occasions recently I have been asked - by non-Indigenous organizations - to change the names of the Allied Tribes and of the "Friends of the Indians of British Columbia" – both of which are actual early twentieth century organizations – in giving presentations. In my view, one can be respectful without resorting to this sort of distortion. Even today one of the most influential Indigenous organizations in BC is the Union of BC *Indian* Chiefs.

12 This is legally important because although "Indigenous" or "Aboriginal" people have Aboriginal rights, Indians, Inuit and Métis do not all have the same rights. The tax exemption in the *Indian Act*, for example, applies only to status Indians. It does not apply to non-status Indians, Inuit or Métis.

events at Kitwancool in 1927. Gitxsan territory is bordered on the north by the Tahltan, on the west by the Nisga'a and the Tsimshian, on the south by the Haisla and the Wet'suwet'en, and on the east by the Sekani. In addition to Gitanyow (Kitwancool), the Gitxsan villages that feature in the events that provide the background to what happened there in 1927 include Gitwangak (Kitwanga or Kitwangat), Gitsegukla (Kitsegukla), and Kispiox. The main settler community was and is Hazelton, which lies between Prince Rupert, at the mouth of the Skeena, and Prince George.

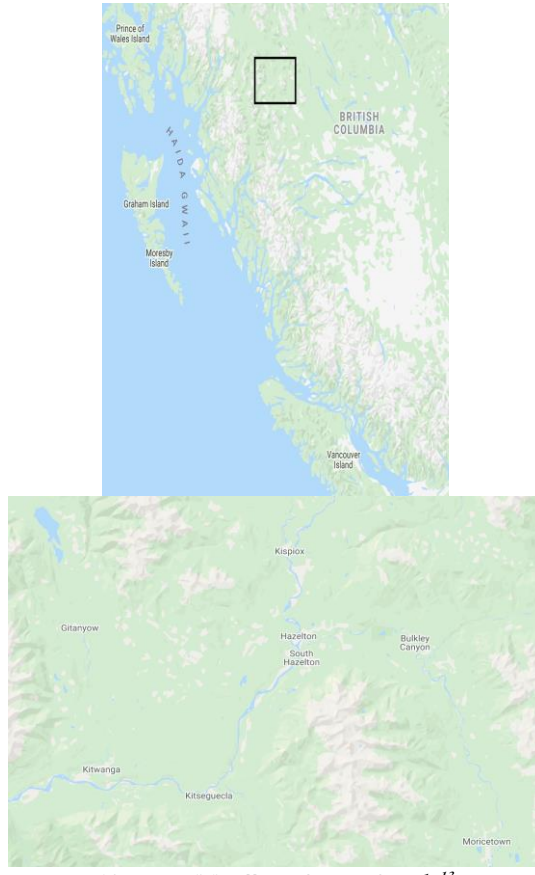

Figure 1: Map Data ©2020 Google [13]

13 Online: *Google Maps Styling Wizard* <mapstyle.withgoogle.com> [perma.cc/E6L2FL52].

THE BC INDIAN LAND QUESTION, 1906-1927

In the summer of 1928, Emily Carr visited the Gitxsan village of Gitanyow, which at the time was referred to in English as Kitwancool. She was excited about going there because, when she had travelled to the Skeena region of BC in 1912, she had been dissuaded from including Gitanyow in her itinerary because of its reputation for hostility to white people. The main reason for this was tension over settler encroachment on Gitxsan lands, and sixteen years later little had changed. However, even though a few months after her visit she told a friend that "there was more trouble; they threatened the surveyors with axes," she had ignored the warnings this time and hitched a ride on a wagon "with the chief and his son."[14] It was a difficult, seven hour journey, during which she noticed that one of the men in the wagon "seemed to be a hero."[15]

Figure 2: Emily Carr, Kitwancool (1928)[16]

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14 Emily Carr to Eric Brown (11 August 1928), cited in Gerta Moray, *Unsettling Encounters: First Nations Imagery in the Art of Emily Carr* (Vancouver: UBC Press, 2006) at 297 [Moray, *Unsettling Encounters*]. I will address the issue of whether axes were used below.

15 Emily Carr, *Klee Wyck* (Vancouver: Douglas & McIntyre, 2003) at 139.

16 Emily Carr, "Kitwancool" (1928), online: *Vancouver Art Gallery* <museevirtuel.ca> [perma.cc/5W6L-5A7F].

The previous year had been a bad one for those working for a settlement of the Land Question. The unfinished business included a host of issues, but three stand out. The first was the refusal of the provincial government to acknowledge and accept the legal concept of Indian title, as this right was then known. The second was the size and adequacy of the Indian reserves, whether any title and rights beyond the reserves were acknowledged or not. The third was the provincial government's insistence that even title to the reserves was only a right of occupation, and that if a band surrendered reserve land to the Crown in right of the dominion for the purpose of selling or leasing it, this simply perfected the province's underlying title, entitling it to the land or to the entire proceeds of the sale – a claim dating back to the establishment of the Joint Indian Reserve Commission (JIRC) in 1876 that no other province made.[17] Still, the issue with the most far reaching implications was title to traditional territories beyond the reserve boundaries. No treaties purporting to extinguish such title had been made on the BC mainland, and only a small part of Vancouver Island was affected by such treaties.[18]

Petitions and delegations protesting government land policies in the colony, and then the province, had been a feature of the province's history since the 1860s. But these had relatively little effect. I think that, for at least three reasons, the movement gathered steam after 1900, and attracted more attention. The first reason is that a new generation of leadership had emerged. An important factor is education. Destructive as residential schools were, many future leaders of the land claims movement attended them, improving their English and making contacts, sometimes for the first time, with like-minded members of other First Nations. One in particular – the Coqualeetza Indian Residential School at Sardis in the Fraser valley – stands out: Allied Tribes chairman Peter Kelly, Indian title

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17 This claim was based upon the unfortunately worded order in council providing for the establishment of the JIRC. Article 5 stated, in part, that reserves should be enlarged or diminished according to increases or decreases in population, and that "any land taken off a reserve shall revert to the Province." Article 5, OIC (1876).

18 The affected areas were the southern part of the Island from Swartz Bay to Sooke (11 treaties); Nanaimo (1 treaty); and the region around Port Hardy (2 treaties). On whether the written documents reflect what was actually agreed to, see Neil Vallance, *Sharing The Land: The Formation of the Vancouver Island (or 'Douglas') Treaties of 1850-1854 in Historical, Legal and Comparative Context* (PhD dissertation, Law, University of Victoria, 2016).

plaintiff and MLA Frank Calder, and Senator Guy Williams all attended it as young boys.[19] The second reason is that increasing immigration to the province was putting a great deal of pressure on traditional lands, even in parts of the province that were, compared to southern Vancouver Island and the Lower Mainland, relatively remote. The third is that a small – very small – number of lawyers were taking an interest in the legal case for recognizing Aboriginal title in BC, and these lawyers were slowly replacing missionaries as advisors.[20]

However, the BC government was adamant in its position that there was no such thing as Aboriginal title in the province, and it could shelter behind the centuries-old doctrine referred to earlier. Known as sovereign immunity from suit, it provided that a government could not be sued unless it gave permission for the litigation to proceed.[21] The BC government not only refused permission; it even opposed Ottawa's plan, unilaterally, to submit the issue to the courts as a reference case.[22]

Although it was preceded between 1901 and 1908 by a number of petitions and delegations – to Victoria, Ottawa, London and even Rome – the Cowichan Petition, asking that the title question be referred to the

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19 On Coqualeetza, see Paige Raibmon, "A New Understanding of Things Indian': George Raley's Negotiation of the Residential School Experience," *BC Studies*, no. 110 (Summer 1996) at 69-96. More generally see JR Miller, *Shingwauk's Vision: A History of Native Residential Schools* (Toronto: University of Toronto Press 1996), John S Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879 to 1986* (Winnipeg: University of Manitoba Press 1999), and, most recently, The Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Legacy* (Final Report of the TRC), vol 5 (Kingston: McGill-Queen's University Press, 2015).

20 See Foster, "We Are Not O'Meara's Children", *supra* note 6 at 64-66. O'Meara was both a missionary and a lawyer, thus combining the two professions that tended to annoy governments the most.

21 See Foster, "Another Good Thing", *supra* note 5.

22 A number of provinces took the position that Ottawa could not refer matters affecting provincial jurisdiction to the Judicial Committee of the Privy Council – the highest court in the British Empire – without provincial consent. Cautious to a fault, the Laurier administration referred this question to the Judicial Committee, which decided that no such consent was required. But by the time this decision was rendered, Laurier was no longer prime minister, and the moment had passed. See *Attorneys-General for the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, Prince Edward Island and Alberta v Attorney-General for the Dominion of Canada and the Attorney-General for the Province of British Columbia)*, [1912] AC 571, 3 DLR 509.

Judicial Committee of the Privy Council in England, was a turning point. Drafted after consultation with the Cowichan by lawyers J.M.M. Clark, K.C., and Arthur E. O'Meara – with the assistance of missionary Charles M. Tate – it was lodged with the imperial government in March of 1909 and relied strongly, but not exclusively, on the Royal Proclamation of 1763.[23] Getting the case to the Judicial Committee involved persuading the Imperial Privy Council to conclude that it had sufficient merit to be referred to the Committee for a decision. When the petition was received, almost the first thing the British government did was, in effect, to ask Ottawa: What is going on?

This imperial demand, coupled with the tension and even violence in the Upper Skeena that is the main subject of the present essay, meant that the reaction of the dominion government was uncharacteristically swift. In April of 1909, the minister of the interior retained a lawyer, T.R.E. McInnes, to provide a legal opinion on the sort of claims that were made in the petition, and that were motivating activism in the Skeena and elsewhere. In August McInnes advised the dominion government that the claims had merit and even came up with a clever legal manoeuver for getting around the provincial government's refusal to allow the question to go to court.[24] However, the Laurier administration hesitated to challenge BC so directly, and by the time it found the will to proceed and had amended the *Indian Act* to permit such a lawsuit, the dominion election of 1911 intervened and Laurier's Liberals were no longer in government.

The new Conservative administration in Ottawa had even less interest in antagonizing the Conservative government of BC, and the idea of a lawsuit was soon abandoned. Instead, Premier Richard McBride and dominion representative J.A.J. McKenna agreed in 1912 – the year of

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23 See Foster & Berger, "From Humble Prayers to Legal Demands", *supra* note 7. The Royal Proclamation of 1763 provided that Aboriginal land could be purchased only by the Crown, and then only in a public meeting of the tribe or nation at which consent to the purchase was given.

24 See Hamar Foster, "A Romance of the Lost: The Role of Tom MacInnes in the History of the British Columbia Indian Land Question" in G Blaine Baker & Jim Phillips, eds, *Essays in the History of Canadian Law, Vol VIII* (Toronto: Osgoode Society, University of Toronto Press, 1999) at 171-212 [Foster, "A Romance of the Lost"]. When acting as a lawyer, MacInnes used his family name, T.R.E. McInnes. He published his poetry as Tom MacInnes.

Emily Carr's first visit to the Skeena - to take the matter of Aboriginal title in BC off the table. Instead, the McKenna-McBride Agreement provided for a new joint dominion-provincial reserve commission – the body that had been allotting Indian reserves since 1876 had been shut down in 1907 – to adjust the size of reserves in the province.[25] Ottawa agreed to this because Premier McBride insisted that there was nothing to talk about if the dominion continued to try to open up the title question for discussion. This royal commission, which did its work between 1912 and 1916, came to be referred to as the McKenna-McBride Commission. Setting aside the question of unextinguished Aboriginal title had two important results.

Figure 3: Nisga'a and Tsimshian representatives awaiting the arrival of the McKenna-McBride Commission (1913)[26]

The first was that the Nisga'a Land Committee filed the Nisga'a Petition of 1913 with the Imperial Privy Council, renewing the struggle to

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25 A single reserve commissioner had replaced the JIRC in 1878, and the refusal of the dominion government to recognize BC's claim to a reversionary interest in BC's Indian reserves led the province to terminate the allotment of reserves in 1907.

26 The author received this photograph personally from Reg Kelly, a son of Allied Tribes Chairman Peter Kelly, in 1995.

have the title question litigated. The second was the formation of the Allied Indian Tribes of British Columbia in 1916. The Allied Tribes represented a coming together, not only of many of the province's First Nations, but of pre-existing pan-tribal groups such as the Indian Rights Association and the Interior Tribes.[27] It was this body that, along with the Nisga'a and the non-Indigenous Friends of the Indians of British Columbia, stood at the forefront of the campaign for title. From 1916 until 1927 the Allied Tribes fought against the implementation of the McKenna-McBride Report's recommendations regarding Indian reserves, legislation providing for compulsory enfranchisement, and the continuing denial of Aboriginal title by the BC government.[28]

In the latter year, however, two events, one political and the other legislative, put an end to the Allied Tribes, the Nisga'a Petition and the campaign for title. Between March 22nd and April 11th, 1927, joint committees of the dominion Senate and House of Commons inquired into the claims of the Allied Tribes, dismissing them.[29] On March 31st royal assent was given to an amendment to the *Indian Act* that, effectively, made land claims activity a federal offence if undertaken without government consent.[30] When Arthur O'Meara, counsel to the Nisga'a and the Allied Tribes died a year later, the Indian Department was gathering evidence with a view to prosecuting him under this new law. From then until the mid-1950s, the campaign for title went underground.

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27 For details of the organizations active in the land campaign before the formation of the Allied Tribes, see Robert M Galois, "The Indian Rights Association, Native Protest Activity and the `Land Question' in British Columbia, 1908-1916" (1992) 8:2 Native Studies Rev 1 [Galois, "The Indian Rights Association"].

28 On the Allied Tribes see Darcy Anne Mitchell, *The Allied Indian Tribes of British Columbia: A Study in Pressure Group Behaviour* (MA thesis, UBC, 1973). This is an analysis of the organization from a political science perspective and, as such, is quite good. The author's characterization of the argument for title as "questionable," however, reflects much of the conventional thinking in the year that the Supreme Court of Canada decided the *Calder* case (*supra* note 8).

29 See *Journal of the House of Commons, 16:1,* vol 64 (1926-27) at 509-522, 527.

30 *Amendment to the Indian Act*, SC 1926-27, c 32, s 6 introduced the new section 149A of the Act. In the 1927 consolidation it became RSC 1927, c 98, s 141.

Figure 4: The Allied Tribes Executive. Peter Kelly is located in the centre of this photo. He is flanked by the Secretary of the Allied Tribes, Andy Paul, and the only woman on the Executive Committee, Jane Cook (Ga'axsta'las) (1922)[31]

THE UPPER SKEENA BEFORE 1927

There were clashes between fur traders and the Indigenous peoples of what became BC, including the Upper Skeena, long before Emily Carr's visit to Kitwancool in 1928 and, indeed, long before confederation.[32] These incidents were unpleasant and stressful, but were broadly consistent

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31 The author received this photograph personally from Reg Kelly, a son of Allied Tribes Chairman Peter Kelly, in 1995.

32 For details see Hamar Foster, "'The Queen's Law Is Better Than Yours': International Homicide in Early British Columbia" in Jim Phillips, Tina Loo & Susan Lewthwaite, eds, *Essays in the History of Canadian Law, Vol. V: Crime and Criminal Justice* (Toronto: The Osgoode Society, University of Toronto Press, 1994) 41 at 49-60 [Foster, "The Queen's Law"]. See also Chief Factor & Archibald McDonald, *Peace River. A Canoe Voyage from Hudson's Bay to the Pacific by the late Sir George Simpson ... in 1828/Journal of the late Chief factor, Archibald McDonald ... who accompanied him*, ed by Malcolm McLeod (Ottawa: 1872, Coles Canadiana Collection reprint, 1970) at 27 and Rev AG Morice, *The History of the Northern Interior of British Columbia* (Smithers: Interior Stationary reprint, 1978) at 147, 254-55.

with inter-tribal norms of vengeance and retaliation in situations where compensation was not to be had. Father Adrien-Gabriel Morice, an Oblate priest who lived and worked in the northern interior of BC for a quarter of a century, found this reprehensible. "Instead of lifting the lower race up to the standard of Christianized Europeans," he complained, the men of the HBC:

> [I]n too many cases, stooped to the level of the savages ... Gambling, Indian fashion dancing, face-painting, potlatching or heathen feasting, rendering murder for murder, the lax observance of the Lord's Day, disregard of the sanctity of the marriage tie ... were not only countenanced, but actually practised by the Company's officers and servants.[33]

Morice thus confirms that in some respects the HBC was conforming to Indigenous law and culture rather than imposing English law. Of course, the examples of vengeance killing referred to above also reflect the fact that, during this period, the traders were a tiny and insecure minority in the country. They were therefore very much concerned with signalling that they could not be trifled with. The need to do this lessened somewhat when the mainland colony of BC was established in 1858.

As Robert Galois has shown, the non-Indigenous presence in the Upper Skeena increased substantially with the Omineca Gold Rush in 1870, generating tensions and at least four "dramatic confrontations."[34] In 1872, careless miners set a fire that destroyed the village of Kitsegukla, so the villagers closed the Skeena to freight traffic. This incident was ultimately resolved by means of a settlement that was broadly consistent with Gitxsan dispute resolution practices. A meeting of the parties with the new province's lieutenant governor and attorney general aboard a naval vessel near the mouth of the Skeena led to an agreement providing for payment to the chiefs and an undertaking that the Kitsegukla people would be peaceful and advise the government of any future disputes. Copies of the written agreement were given to the chiefs, and a celebration

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33 Morice, *supra* note 32 at 115.

34 Robert Galois, "The History of the Upper Skeena Region, 1850 to 1927," (1993-1994) 9:2 *Native Studies Rev*113 at 131 [Galois, "The History of the Upper Skeena"]. The descriptions of the events that follow are taken, unless otherwise indicated, from pages 131-139 of this essay. These events are also documented in Neil J Sterritt et al, *Tribal Boundaries in the Nass Watershed* (Vancouver: UBC Press, 1998).

followed that they saw as a potlach, that is, a legal settlement of the dispute.

The second confrontation was really a series of incidents arising out of packers using Gitxsan trails to supply the Cassiar mining district. Galois traces the threats, thefts and the denial of access to the "strong probability that the pack trains ... infringed on [Gitxsan] customary law" because the packers did not get permission or offer to pay to use the trails. A provincial constable was sent to the region and one man from Kispiox went to jail for a month, but the transgressions continued.

The third confrontation was the most serious up to that point: the murder, according to English law, of trader Amos Card Youmans by Haatq, a Gitxsan man, in 1884.[35] According to Galois, by then the relations the Gitxsan, the Tsimshian and other First Nations had with the white inhabitants of the region had deteriorated. The troubles at Metlakatla (which led to missionary William Duncan and his followers decamping to Alaska), the early attempts to delineate Indian reserves, and the development of mining at Lorne Creek in the Upper Skeena all contributed to rising tensions.[36] Overarching all this were increasing concerns about settler encroachment on hunting and fishing rights and access to land and resources generally.

The Youmans case was a classic example of the clash of legal systems. One of Youmans' employees, a young Gitxsan man named Billy Owen, had drowned while in his employ. It was an accident, and according to Gitxsan law Youmans had to report this to Owen's family and offer compensation. When he did neither, this aroused suspicions of foul play and Haatq, the young man's father, went to Youmans' store and stabbed him to death. The details of the case may be found elsewhere.[37] Suffice it to say that policemen and a magistrate were sent to the Skeena and, with the help of a young Nisga'a man, they succeeded in arresting Haatq and having him sent to Victoria for trial. This resulted in threats that were

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35 See Foster, "The Queen's Law", *supra* note 32 at 41-48, 85-87.

36 On the "troubles" at Metlakatla, see, *inter alia*, Jean Usher, *William Duncan of Metlakatla: A Victorian Missionary in British Columbia* (Ottawa: National Museums of Canada, 1974) and Peter Murray, *The Devil and Mr. Duncan* (Victoria: Sono Nis Press, 1985).

37 See "The Queen's Law", *supra* note 32 at 41-48, and Galois, "History of the Upper Skeena," *supra* note 34.

sufficient to induce the white people at Hazelton to leave the settlement to go to the mines at Lorne Creek. But the miners were also afraid, and wrote to the government urging that Haatq be hanged at the Forks of the Skeena, to make an example.[38]

Haatq was tried, convicted of murder and sentenced to death. The sentence was commuted to ten years' imprisonment, and three years later he died in jail. The bitterness occasioned by this incident long outlived him, and the fourth confrontation soon followed.

This was the so-called "Skeena War" of 1888.[39] The triggering event was a rivalry between Kamalmuk (known to non-Indigenous history as "Kitwancool Jim") and a shaman from Kitsegukla over the chiefly name of Hanamuxw. Unfortunately, a measles epidemic intervened, taking the life of Kitwancool Jim's son, and this was attributed to the shaman's evil powers. Like the Youmans case, what happened next reflected the difference between Gitxsan and English law. Although Kamalmuk appears to have been reluctant, his wife prevailed upon him to carry out his obligations under Gitxsan law and kill the shaman, which he did.[40]

The provincial government sent special constables to the region to find and arrest Kamalmuk, but when they did he was shot and killed in ambiguous circumstances. The result was escalating fear and tension in both the Indigenous and non-Indigenous communities, and the despatch of HMS *Caroline* with militia and police to the Skeena. Although no real "war" ensued, the disturbance took place in the context of growing apprehension about settler incursions into Gitxsan, Tsimshian and Wet'suwet'en territory, resistance to land surveyors seeking to allot

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38 British Columbia, Legislative Assembly "Return to an Order of the Legislative Assembly for all correspondence relating to the recent Indian troubles on the North-West Coast" *Sessional Papers* (1885) at 281-82. This letter also raised the spectre of the Tsilhqot'in War twenty years earlier by noting that one of their number was "one of the survivors of the Bute Inlet massacre, so he well knows the risk." The letter then asks, "is it right to desert these men – miners and traders – the pioneers of British Columbia, in their hour of need?"

39 The military aspects of which are described in Ken Campbell, "The Skeena War" (1989) 69:4 The Beaver 34.

40 For a somewhat romanticized version of these events see Marius Barbeau, *The Downfall of Temlaham* (Edmonton: Macmillan, 1928; reprint Hurtig Publishers, 1970).

reserves, and opposition to the appointment of the first Indian agents.[41] Even the *Toronto Mail* regarded the killing of Kamalmuk as simply a triggering event, opining that the underlying cause was the ongoing dispute over land.[42] Galois concludes that by the summer of 1888 the situation on the Northwest Coast was one of "widespread Indian discontent."[43]

In 1889 the dominion government established the Babine Agency, with an Indian agent at Hazelton. Although there continued to be protests in the years between 1889 and 1897, the 1890s were comparatively peaceful, partly because Indian Reserve Commissioner Peter O'Reilly assured the First Nations of the region that they "would not be confined to [their] reserves."[44] Still, O'Reilly was not well received at Kispiox and Kitwanga, and in 1898 the chiefs of Kitwancool wrote the new Indian reserve commissioner, A.W. Vowell, to say they did not want him to visit them. He came anyway, and was faced with demands for compensation for past incursions and a tombstone for Kamalmuk.[45]

Galois identifies a couple of economic developments at the end of the nineteenth century that helped to change the nature of Indigenous/non-Indigenous relations in the region in the new century. The first was the Klondike gold rush: the need for a land route to the Yukon led to the building of the Dominion Telegraph line and the quest for a railway route. The second, related development was the growth of agriculture, especially in the Bulkley Valley, and its attendant speculation in land, "particularly as the prospect of railway construction became more imminent."[46] The pressure all this put on Gitxsan and Wet'suwet'en land was considerable.

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41 What made all this more complicated, of course, were divisions among and within these First Nations themselves over the extent to which Christianity should be adopted and the new regime of Indian agents and reserves accommodated. The tension between Kamalmuk and his wife as to whether Gitxsan law (as she interpreted it) should apply, and require him to kill the shaman, is a good example of the latter.

42 *Toronto Mail*, quoted in Patricia Roy, "Law and Order in British Columbia in the 1880s: Images and Realities" in RC MacLeod, ed, *Swords and Ploughshares: War and Agriculture in Western Canada* (Edmonton: University of Alberta Press, 1993) at 68.

43 Galois, "The History of the Upper Skeena", *supra* note 34 at 138.

44 *Ibid* at 139.

45 *Ibid* at 143.

46 *Ibid* at 142.

Tension increased to the point that in 1906 there was conflict over native fishing weirs at Babine Lake and, near Hazleton, the murder of two white men resulted in the famous manhunt for Simon Peter Gunanoot.[47] To make matters worse, two special constables who had been sworn in to assist in the search for Gunanoot had gone to Kispiox, where they "debauch[ed] young Indian girls after plying them with liquor" and got into an undignified dispute with the local missionary.[48]

These incidents, and the land speculation associated with the railway, so affected relations that by 1908 some officials at Hazelton were afraid that an "Indian uprising" was imminent. Such fears proved unfounded, but the Gitxsan were offended by the defensive precautions that were taken, particularly the digging of rifle pits around the town's perimeter. As a result, "not a scrap of reliable information" about Gunanoot came from the Indigenous community after that, and Gunanoot remained at large until he voluntarily surrendered himself thirteen years later.[49] In the meantime he had become a symbol of Gitxsan resistance.

At about the same time, the provincial government's policy of encouraging settler pre-emptions in the region and of pressing for the reduction in size of existing reserves was fanning the flames. In 1905, for example, the minister of agriculture forwarded a resolution of the Central Farmers Institute to the Indian Department, asking Ottawa to purchase all reserves or portions thereof that were not being used by the bands and "throw them open for settlement."[50] Further, in 1907 an intense disagreement between the two governments about the effect of a sale of

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47 On the Babine fishing weirs and the "Barricade" treaties, see Douglas Harris, *Fish, Law, and Colonialism: The Legal Capture of Salmon in British Columbia* (Toronto: University of Toronto Press, 2001). On Gunanoot, see David Ricardo Williams, *Simon Peter Gunanoot: Trapline Outlaw* (Victoria: Sono Nis Press, 1982).

48 Williams, *supra* note 47 at 74-75. The missionary was WH Pierce, a so-called "half-breed" whom one of the constables saw as interfering in the matter. Pierce's role in an alarm about a possible uprising at the village of Glen Vowell is described in a letter from the government agent at Hazelton to the attorney general: F.W. Valleau to Bowser (4 November 1908) British Columbia Archives (GR 429, Box 15, File 5) [Valleau to Bowser].

49 Williams, *supra* note 47 at 79. In 1919 Gunanoot was ably defended at trial by the legendary Stuart Henderson, and was acquitted.

50 Robert G Taylor, Minister of Agriculture, quoted in Edwin Peter May, *The Nishga Land Claim, 1873-1973* (MA Thesis, Simon Fraser University, 1979) at 47.

reserve land near Prince Rupert connected with the building of the Grand Trunk Pacific Railway resulted in the province passing an order in council that threw down the gauntlet.[51]

Re-stating in legal form the province's long-standing policy, this order provided that the Indians' interest in their reserves was a right of use and occupation only; that too much land had been reserved; that the dominion had no proprietary right to the reserves, even as trustee for the Indians; and that the dominion could not even lease any portion of a reserve when the band requested this. Whenever a band surrendered its rights to a reserve or a portion thereof, "the entire beneficial interest ... immediately becomes vested in the Province, freed from incumbrances of any kind."[52] In short, the government regarded the existing reserves as too large, and maintained that reducing them should result in no financial benefit to the bands whatsoever. Ottawa's response was to advise the province that it could no longer participate in such transactions.

The impasse this created led the province to terminate the reserve allocation process in 1907.[53] Since 1898 the official responsible for allotting reserves had been A.W. Vowell, who was also the dominion Indian superintendent. He felt one way around BC's decision was to have Indians purchase land directly. When the province advised him that their policy was not to permit such sales, he replied that there was nothing in the statute book to justify such a policy. The province fixed this oversight by amending the *Land Act* to make Aboriginal purchases of land subject to the same restriction that had been imposed upon Aboriginal pre-emptions in 1866: government permission.[54]

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51 For details see Hamar Foster, "Roadblocks and Legal History, Part I: Do Forgotten Cases Make Good Law?" (1996) 54:3 The Advocate 354 at 360-61 and Frank Leonard, *A Thousand Blunders: The Grand Trunk Pacific Railway and Northern British Columbia* (Vancouver: UBC Press, 1996), ch 2.

52 Order in Council 125/1907 (BC).

53 Robert E Cail, *Land, Man and the Law: The Disposal of Crown lands in British Columbia, 1871-1913* (Vancouver: UBC Press, 1974) states at 227 that R.G. Tatlow, the chief commissioner of lands and works, made this decision in 1908. However, Cail relies on a 1908 letter from Vowell to the deputy superintendent general of Indian affairs, and it seems likely that Vowell was referring to a decision made the previous year. Tatlow left the lands and works portfolio in 1907.

54 *Land Act Amendment Act,* SBC 1907, c 25, s 9.

The shut down of the reserve commission was especially significant in the Nass and Skeena regions, where very few reserves had been allocated. Although (as will become clear below) many Nisga'a, Gitxsan and Wet'suwet'en people opposed the reserve system, the end of the reserve commission left them singularly vulnerable to settler pre-emptions. They were also increasingly aware of, and beginning to involve themselves in, the land claims activity in the south of the province, and increasingly dissatisfied with the local Indian agent.[55] At Kitwanga they would not allow him to subdivide their reserve and the people at Glen Vowell warned the missionary there that a "rising" was in the offing and advised him and his family to leave.[56] At Kispiox, a man who had been arrested for threatening to shoot a white man escaped from jail and remained at large, and near Moricetown some Wet'suwet'en were arrested and fined, also for threatening white settlers.[57]

These events were partly responsible for the rumours about an impending attack on Hazleton.[58] They also prompted a police investigation that came to focus on the activities of Chief Joe Capilano (Kayapálanexw) of the Squamish.

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55 For the mainly Salish land claims activity in the south, see below and the text accompanying *supra* note 23.

56 The missionary was a Mr. Thorglessen of the Salvation Army: Valleau to Bowser, *supra* note 48.

57 *Ibid;* see also Galois, "The History of the Upper Skeena," *supra* note 34 at 145.

58 See *supra* note 49 and accompanying text.

Figure 5: Joe Capilano (1906)[59]

Capilano, who was a major source of the stories in Pauline Johnson's *Legends of Vancouver*, had been active in the land campaign for a number of years and was part of the three man delegation that went to see King Edward VII in London in 1906.[60] Capilano, Charlie Tsulpi'multw from Cowichan, Basil David of the Bonaparte tribe near Ashcroft and their translator, Simon Pierre of Katzie, were the bearers of a petition that specifically raised the matter of Indian title. "In other parts of Canada," their petition read in part, "the Indian title has been extinguished reserving sufficient land for the use of the Indians, but in British Columbia the Indian title has never been extinguished, nor has sufficient land been allotted to our people for their maintenance."[61] That was it in a

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59 "Photograph #2849" online: *North Vancouver Museum and Archives* <nvma.ca/collections/archives/> [perma.cc/8J3G-QAMX].

60 For a fascinating account of this visit that seeks to understand how the Salish delegation interpreted their experience, see Keith Thor Carlson, "Rethinking Dialogue and History: The King's Promise and the 1906 Aboriginal Delegation to London" (2005) 16:2 Native Studies Rev 1.

61 See "Indians' Petition to King Edward: Full Text of Appeal Which Will Be Laid at Foot of the Throne", *Victoria Daily Colonist* (6 July 1906) at 8.

nutshell, and it is interesting that the petition also stated – somewhat disingenuously – that the petitioners "are but poor ignorant Indians, and know nothing of the white man's law."[62]

The decision to go to London had been preceded by meetings in Nanaimo, Quamichan and Vancouver. The Cowichan – whose traditional territory had been drastically affected by the massive Esquimalt and Nanaimo Railway land grant twenty years earlier – had also presented an address to King Edward's nephew, the Duke of Connaught, when he came to fish the Cowichan River. This was followed by a series of potlatches at which the idea to go to England was again vetted, and the delegation also visited Kamloops and North Vancouver for tribal gatherings before it departed.[63] That same year the Lillooet, the Nlaka'pamux, the Shuswap, the Okanagan and others began to meet together to discuss strategy.[64] Soon these groups would coalesce into a relatively loose organization known as the Interior Tribes of British Columbia.[65]

In 1908 Capilano went to Ottawa with a delegation of twenty-five representatives that, this time, included three Gitxsan chiefs from Kuldo, Kisgaga'as and Kispiox.[66] They presented two petitions, one on behalf of the Coast Salish and the other for the Tsimshian (which included the Nisga'a and the Gitxsan).[67] On June 11th they met with Prime Minister Laurier, who promised to send the petitions to the king and, according to newspaper reports, told the chiefs that the land question "would be settled as soon as possible, and their rights protected."[68] When the delegation returned it was met by a crowd of "several hundred Indians" and its members reported optimistically on their experience in Ottawa.[69]

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62 *Ibid.*

63 Daniel Marshall, *Those Who Fell from the Sky: A History of the Cowichan Peoples* (Duncan: Cultural and Education Centre, Cowichan Tribes, 1999) at 146-50.

64 Joanne Drake-Terry, *The Same As Yesterday: The Lillooet Chronicle the Theft of their Land and Resources* (Lillooet: Lillooet Tribal Council, 1989) at 231.

65 *Ibid.*

66 Galois, "The Indian Rights Association", *supra* note 27 at 8.

67 *Ibid.*

68 *Ibid.*

69 *Ibid* at 8, n 8. After their arrival the delegation attended a procession and "impromptu celebration" at the reserve in North Vancouver. See also Sterritt et al, *supra* note 34 at 99, 139.

Capilano then journeyed to the northwest coast, both to report on what Laurier had said and to become better informed about the situation in the Nass and the Skeena. It was a propitious time. The fishery overseer in the region, C.P. Hickman, had reported that there was a great deal of unrest on the Nass and told the attorney general that the dominion government should send a commission of inquiry to the region to deal with the discontent over Aboriginal title and the reserves. Hickman added, rather pointedly, that the Indians who were "supposed to be good and the bad ones, are equally bitter regarding the land question."[70]

There was also the matter of the scare at Hazelton. So far as BC Provincial Police Superintendent Frederick S. Hussey was concerned, the main cause of the trouble was "certain promises alleged to have been made by Premier Laurier to Joe Capilano and a deputation of Indians, who waited on the Premier at Ottawa some months ago, which promises it is claimed have not been carried out." [71] Capilano, he told the attorney general, was "a dangerous man ... very likely to cause some serious trouble in the Naas and Skeena districts as well as in other unsettled portions of this Province ..."[72] He therefore recommended Capilano's early arrest and prosecution.[73]

Hussey does not specify what the charge or charges would be, but at the time the *Criminal Code* made it a crime to incite or "stir up" any three or more Indians or "half-breeds" to riotous or disorderly behaviour. It was even enough simply to incite them "to make any request or demand of government in a disorderly manner."[74] This provision, which dates back to a statute passed in 1853 in what was then the Province of Canada, was not

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70 Hickman to Bowser (7 October 1908), British Columbia Archives (GR 429, Box 15, File 5). By "good" and "bad," he probably meant those who had accepted Christianity and those who had not. But it was more complicated than this: for example, some Christian Nisga'a still potlatched and the missionary on the Nass clearly regarded some Christians as among the "evil-disposed": Daniel Raunet, *Without Surrender, Without Consent: A History of the Nishga Land Claims* (Vancouver: Douglas & McIntyre, 1984) at 124.

71 Hussey to Bowser (3 Nov 1908), British Columbia Archives (GR 429, Box 15, File 5).

72 *Ibid.*

73 *Ibid.*

74 *Criminal Code*, RSC 1906, s109, creating an indictable offence punishable by up to two years in prison. Section 110 made inciting an Indian to commit an indictable offence punishable by five years in prison.

removed from the *Criminal Code* until 1954.[75] It reveals a tension in Aboriginal-settler relations that was often glossed over in the history of "Indian administration" in Canada.[76]

Figure 6: "Indian Agitator" at Hartley Bay (Tsimshian), home of the Gitga'at First Nation (1913)[77]

The Indian Department agreed with Hickman that a commission should be sent to the region, but in the months before its arrival there

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75 See Hamar Foster, "If Your Life Is a Leaf: Arthur Eugene O'Meara's Campaign for Aboriginal Justice," in Constance Backhouse & W Wesley Pue, eds, *The Promise and Perils of Law: Lawyers in Canadian History* (Toronto: Irwin Law, 2009) 225 at 235-36.

76 See e.g. TRL MacInnes, "The History and Policies of Indian Administration in Canada" in CT Loram & TF McIlwraith, eds, *The North American Indian Today* (Toronto: University of Toronto Press, 1943). MacInnes, who was the son of the man who provided Ottawa with a legal opinion on Aboriginal title in 1909 (*supra* note 24) makes no mention of this law.

77 McKenna-McBride Commission collection (BC Archives), "Labelled item G-01899 and photo #14-07119", online: *BC Archives* <search-bcarchives.royalbcmuseum.bc.ca > [perma.cc/XF8M-4GEL]**.** As is usually the case with photos of Indigenous people in the past, this individual is not identified by name.

were other incidents. By June of 1909 it seems clear that word of the Cowichan Petition, which had been filed in March, and of its reliance on the Royal Proclamation of 1763, had reached the Upper Skeena. That month, three Kitwancool men were arrested and fined for denying white people access to the Kitwancool Valley, and at about the same time the Nisga'a approached the Tsimshian at Port Simpson to make common cause with them, and began raising funds to hire a lawyer. They also asked Indian Superintendent Vowell to prohibit any more settlement in their territories until a court ruling on title could be secured.[78] Relations were, in short, increasingly strained, and the Indian agent requested that a detachment of the North-West Mounted Police be sent.

A.E. Green, a missionary who was also an Indian Department official, told his superiors that the campaign for title was becoming "widespread" among BC's Indians, and advised that, to maintain their confidence, he had agreed to become treasurer of the newly formed Indian Rights Association. This news was not well received: Green was reprimanded and told that a lawyer had already been retained by the dominion "to look thoroughly into the whole land question."[79] Green was ordered to disassociate himself from the IRA.[80] Yet another official reported that the trouble over the land question was greater in the northwest than anywhere else in the province; so when the promised commission arrived, it was none too soon.[81]

The Stewart-Vowell Commission (named for the two Indian Department officials who were appointed to visit the region) held meetings with both the Gitxsan and the Wet'suwet'en. The latter complained of conflict with settlers over hunting and fishing, and produced twenty-nine specific claims for land, all associated with some

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78 George Edgar Shankel, *The Development of Indian Policy in British Columbia* (PhD dissertation, University of Washington, 1945) at 194, quoting the *Daily Colonist* of 25 June 1909 to the effect that the "Indians on the Naas" had raised $500 for a legal opinion.

79 May, *The Nishga Land Claim*, *supra* note 50 at 69-70. The lawyer was McInnes: see text accompanying Foster, "A Romance of the Lost" *supra* note 24.

80 *Ibid.* In the Rev. CM Tate's diary the last entry to specifically mention Green attending an IRA meeting is dated 27 Dec. 1910. Rev CM Tate's Diary (27 Dec 2010), Victoria, British Columbia Archives, (Add MSS 303, Box 3, File 1).

81 Galois, "The History of the Upper Skeena", *supra* note 34 at 146.

individual's or family's "place." Some of the people had been displaced, mainly by the agents of railway land speculators who had bought up scrip issued to Boer War veterans, and such incidents continue to be recounted today.[82] James Yami, for example, spoke of settlers coming and setting fire to Wet'suwet'en houses, telling the owners, "You get away from here, I bought this land and if I catch you here again I will have you jailed."[83] Yami then told the commissioners he was glad they had come. "If we were educated people," he said, "we would make more complaints. We always give way to the law-less white rather than offend him."[84] Years later, when the Gitxsan and the Wet'suwet'en brought their land claims to court in the *Delgamuukw* case, government lawyers would argue at trial that such attitudes constituted an abandonment of the Aboriginal title claim, that it was a form of legally significant acquiescence.[85] Resistance, on the other hand, was regarded as illegal and ill-informed obstinacy, prompted by "agitators" such as Capilano.

The Gitxsan's presentation to the Stewart-Vowell Commission was rather different. In lieu of specifics, they stressed the Royal Proclamation of 1763 as a source of protection for their culture and land, and became angry when they realized that the Commission had come not to settle their claims but only to inquire into them. This discontent quickly spread. Shots were fired at a survey party at Kitwanga, and people there and at Kitwancool wrote to condemn the Indian agent and his role in all this. At Kispiox, notices put up in June warning whites not to cross the river had caused alarm, and in November the people there tried to halt construction of a road. A warning visit from police had little effect, and when further threats were made against the construction foreman, the police raided the village.

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82 Tyler McCreary, *Shared Histories: Witsuwit'en-Settler Relations in Smithers, British Columbia, 1913-1973* (Smithers, British Columbia: Creekstone Press, 2018) at 18, citing Robert England, "Disbanded and Discharged Soldiers in Canada Prior to 1914," (1946) 27, No. 1 *Canadian Historical Review* 16. I am indebted to Richard Overstall for this reference. For accounts of some of these incidents, see Sheila Peters, *Canyon Creek: A Script* (Smithers: Creekstone Press, 1998).

83 Galois, "The History of the Upper Skeena", *supra* note 34 at 146.

84 *Ibid* at 147-148, where all 29 of the Wet'suwet'en claims are listed.

85 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193. The trial decision is at 79 DLR (4th) 185 (BCSC), [1991] 3 WWR 97.

Seven arrests were made, and an eighth sometime later.[86] All but one of the accused were convicted on charges ranging from assault to intimidation and incitement, the latter based on the *Criminal Code* provision described earlier.[87] The penalties ranged from fines to imprisonment, the most severe being ninety days for Stephen Morgan of Kitwanga, "the worst agitator on the Skeena."[88] As a result, by 1910 the Gitxsan strategy had changed – for the time being – from active resistance to what BC Land Surveyor A.H. Green called "passive obstruction."[89]

In his excellent research report and notes for the *Delgamuukw* trial, Robert Galois reproduces a petition that the "Indians of the Upper Skeena" sent to Prime Minister Laurier in 1910, politely but firmly making their claims. [90] It is signed by chiefs from five Gitxsan villages, including Kitwancool, where surveyor Green was already meeting resistance and even threats to his proposed activities. At about the same time the Rev. John McDougall visited the region as a representative of the Indian Department. He held a number of meetings with both the Gitxsan and the Wet'suwet'en and submitted a written report to the government.[91] In it he recommended that Ottawa and BC begin the "extinguishment of the Indian title to the lands in British Columbia."[92] This of course was not

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86 Galois, "The History of the Upper Skeena", *supra* note 34 at 148-149.

87 See text accompanying *Criminal Code*, *supra* note 74.

88 Galois, "The History of the Upper Skeena", *supra* note 34 at 149.

89 *Ibid* at 148-49. On Morgan's jail sentence the *Omineca Herald* had this to say: "Evidence was submitted to show that [Morgan] was the real thing as a trouble-maker. He drew ninety days on the woodpile," quoted in Williams, *supra* note 47 at 81.

90 *Ibid* at 150-51.

91 *Ibid.*

92 *Ibid.* This same year, 1910, the deputy minister of justice in Ottawa was advising Laurier that BC Premier McBride's Indian land policy and his refusal to countenance a court case were ill-advised. E.L. Newcombe, KC, told Laurier that it "has been held distinctly by the Judicial Committee of the Privy Council with regard to the Indian title in Ontario and Manitoba, that the Indians have an interest other than that of the Province within the meaning of Section 109 of the British North America Act – an interest which may be [vindicated] in competition with the beneficial interest of the Province. If this rule applies as we contend in British Columbia, *it would seem to follow that those portions of the Province which have not been ceded or surrendered cannot be open for settlement until competent arrangements are made to secure the rights of the Indians*": Newcombe to Laurier (16 June 1910), Library and Archives Canada (MG26-G (R10811-2-3-E) (Reel C892) 172168 at 172171) [emphasis added].

done, and in 1912 Premier McBride and JAJ McKenna agreed to take the whole question of Aboriginal title off the table and create yet another commission whose mandate was restricted to adjusting the reserves.[93]

In the meantime, obstruction continued in the Kitwancool Valley and notices from the chiefs of Kitwanga and Kitwancool were put up on a number of trails. The message was simple and to the point. In part it read: "We ... have [one] thing to say, We do not wish any whiteman to take our land away. This land belongs to our forefathers and King George 3 tell this land belong to Indian."[94] And of course white men who spoke not a word of any language other than their own would regard such broken English as simply more evidence that land claims were nonsense.

Between 1912 – when the McKenna-McBride agreement was signed and Emily Carr was dissuaded from visiting Kitwancool – and 1927, tensions continued and further incidents occurred.[95] In 1913 the police arrested three men for halting the work of a survey crew in the Kitwancool Valley; the Gitxsan and the Wet'suwet'en made (again, rather contrasting) submissions to the McKenna-McBride Commission; attempts were made by the Nisga'a and their lawyer, Arthur E. O'Meara, to seek Gitxsan support for the Nisga'a Petition, which he filed with the Imperial Privy Council in 1913; and the Gitxsan – except for the people of Kitwancool – appear not to have wavered in their support of this petition.[96] Although the Kitwancool attended the meetings in 1916 that resulted in the formation of the Allied Indian Tribes of British Columbia and did occasionally involve themselves with Allied Tribes initiatives, this involvement was not consistent.

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93 See text accompanying *supra* note 23.

94 Reproduced in Galois, "The History of the Upper Skeena", *supra* note 34 at 152. The reference to "George 3" is to the Royal Proclamation of 1763. Smithers lawyer Richard Overstall recalls an elder from Gitwangak who, on important occasions in the 1980s, would wear a vest with the words "King George's Man" hand-embroidered on the back.

95 *Ibid* at 153-63.

96 *Ibid*. The Gitanyow (Kitwancool) withdrew their support when it appeared that the Nisga'a were claiming land they regarded as theirs: Sterritt et al, *supra* note 34 at 7. This book documents the Gitanyow case, and was originally prepared as part of the negotiations between the Gitxsan and the Nisga'a in the years leading up to the Nisga'a Treaty of 2000. Robert Galois & Richard Overstall are two of the five co-authors.

Throughout these years, settlement proceeded apace, as did construction of the Grand Trunk Pacific Railway, resulting in increased pressure on Gitxsan and Wet'suwet'en land. In 1919-1920 concerns about beaver trapping led the "northern Indians" to hire Stuart Henderson, the defender of Gunanoot, to make their case to the government, and his submission made a "clear link between beaver conservation and the Indian system of owning hunting territories."[97] In 1922, Peter Kelly, the chair of the Allied Tribes, and Ambrose Reid, a member of the executive, met with the Gitxsan to discuss their objections to the McKenna-McBride Report; and although they tried to soften the Gitxsan position, they told W.E. Ditchburn, the chief inspector of Indian agencies for BC, that the Gitxsan claims "should not be lightly regarded as they are in earnest and may cause a great deal of trouble if not properly [addressed]. All the people from the upper Skeena seem to be the same."[98]

The Kitwancool were particularly adamant, and by 1923 were disassociating themselves from the Allied Tribes.[99] On a number of occasions between 1917 and 1927 settlers, fire rangers and surveyors were "ordered out of the valley."[100] As well, both government officials and police found themselves rebuffed when they tried to tell the people at Kitwancool that, in effect, resistance was futile.[101] Still, they managed to keep out the surveyors.

THE POLICE AND THE 1927 PROSECUTIONS

On the 20th of October, 1922, Ditchburn replied to a letter from Albert Williams, president of the Kitwancool Indians, who had asked for

97 *Ibid* at 161.

98 *Ibid* at 159.

99 *Ibid* at 86, 105-108, 191.

100 *Ibid* at 162.

101 *Ibid* at 163.

information about the Land Question.[102] This was only one of many letters and petitions that Williams and other people from Kitwancool had sent to officialdom in the 1920s, most of which "received no substantive answers, although a quantity of official correspondence was generated."[103] The timing is important, because the Allied Tribes had met with Charles Stuart, the dominion minister charged with resolving the BC Indian Land Question, in July, and Ditchburn told Williams that Stuart had accepted their statement of principles as "a basis to work from."[104] In my view, Ditchburn was never as optimistic about finally concluding the province's unfinished business regarding Indian lands as he was in 1922: he thought an agreement with the Allied tribes about both Aboriginal title and implementation of the revised McKenna-McBride Report on Indian reserves was now a real possibility.

However, the August meeting that Peter Kelly and Ambrose Reid had with the Gitxsan, and especially the Kitwancool, had not gone well.[105] In his letter, Ditchburn expressed surprise at this, and told Williams he had

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[102] Ditchburn to Williams (22 Oct 1922), Library and Archives Canada (RG10, Vol 11046, File 33/general) [Ditchburn to Williams]. James Teit, an amateur but accomplished anthropologist and very important advocate for land claims who had worked with Ditchburn, died ten days after this letter was written. This was an ill omen: Teit was an important and sympathetic actor in the Land Question, and his death was a serious loss. There is now an excellent and important book about him: see Wendy Wickwire, *At the Bridge: James Teit and an Anthropology of Belonging* (Vancouver: UBC Press 2019).

[103] Galois, "The History of the Upper Skeena", *supra* note 34 at 163. See also Sterritt et al, *supra* note 34 for this correspondence.

[104] *Ibid*, Ditchburn to Williams, *supra* note 102. The Allied tribes' statement of principles is in House of Commons, "Special Committees of the Senate and House of Commons meeting in joint session to inquire into the claims of the Allied Indian Tribes of British Columbia, as set forth in their petition submitted to Parliament in June 1926", *Proceedings, Reports and the Evidence* (Ottawa: Printer to the King's Most Excellent Majesty, 1927) at Appendix A [House of Commons].

[105] See text accompanying *supra* note 98. Kelly and Reid had been retained by the Indian Department to gather information relevant to the ongoing revisions (by Ditchburn for the dominion and Major JW Clark for the province) of the McKenna-McBride Commission's report on Indian reserves, which had been submitted in 1916 but not made public until a few years later. Ottawa and BC wrangled over implementation of the report from 1916 to 1923, and BC did not formally transfer title to the province's Indian reserves to the dominion until 1938 – sixty-seven years after the Terms of Union made this obligatory.

been advised that the Kitwancool gave Kelly and Reid "a very poor hearing."[106] It would, he wrote, "almost lead one to think that the Kitwancools were not desirous of having any real settlement of this question."[107] He was pleased, however, that "practically all other tribes ... are very glad to know that their long standing complaint is now within a measureable distance of settlement."[108] But this was not to be. Although the province and the dominion agreed to implement an amended version of the McKenna-McBride Commission Report on reserves, the Allied Tribes withheld their consent. It was therefore dispensed with. Three years later, in April of 1927, the Senate and House of Commons committees dismissed their claim to Aboriginal title, as well.[109]

Shortly thereafter, in June of 1927, the Indian agent at Hazelton advised the RCMP that a dominion government survey party working in the region was scheduled to survey reserves in the Kitwancool Valley that summer. He therefore requested that the police send a patrol to Kitwancool before the surveyors arrived. The senior RCMP officer in the district, Inspector S.T. Wood, was reluctant to do so without the approval of his superiors, because the Kitwancool knew of this proposed survey and he felt that a patrol "would only provoke matters in view of the past history of this band."[110] However, he added, he would be prepared to provide the surveyors with protection should they "demand" it.[111]

According to a detailed police report sent by Sgt. H.E. Taylor of the Prince George Detachment, the events leading up to the prosecution of

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106 Ditchburn to Williams, *supra* note 102. Sterritt et al, *supra* note 34 at 191, go further and assert that the Gitanyow (Kitwancool) did not even meet with Kelly and Reid.

107 *Ibid.*

108 *Ibid.*

109 See text accompanying *supra* note 29.

110 Wood to the Officer Commanding, Vancouver (23 June 1927), Library and Archives Canada (RG10, Vol. 11047, File 33-1). At the end of this letter Wood notes that the lawyer for the Nisga'a, Arthur E. O'Meara, was recently in the Nass and that $500 was presented to him at a recent meeting of the Allied Tribes in Vancouver to enable him to pursue the campaign to have the JCPC hear the Nisga'a case. Steps were therefore being taken to prosecute O'Meara under the new law making such fundraising illegal (see text accompanying *supra* note 30). Wood then states that, if the Vancouver meeting was "covered," he would appreciate a copy of any report of it.

111 *Ibid.*

several of the people living at Kitwancool were as follows.[112] Taylor ordered a constable, K.H. Turnbull, to take the train to Kitwanga on August 17th and get a job with the survey party. He was also to advise the surveyor, one V. Schjelderup, to proceed into the Kitwancool Valley without uniformed police. In other words, Turnbull was in plain clothes and was not to identify himself to the Kitwancool as a police officer.[113]

In a letter, Taylor told Schjelderup to send word to him at Kitwanga if they met with any obstruction. Taylor explained what constituted an assault under the *Criminal Code* and told him he was to avoid provoking an assault and not to resist "by force unless absolutely necessary."[114] Schjelderup was also not to accept any invitation to attend meetings in the village and to "refuse to acknowledge the authority of the Indians in any way."[115] Previous meetings, Taylor said, had only led to "futile argument" and had not settled the matter of the surveyors' right to work "unhindered."[116]

When Sgt. Taylor arrived at Kitwanga, most of the people who lived there and in Kitwancool were down at the canneries on the coast but, due to a poor fishing season, they were expected back any day. He reported that, without revealing his identity, he got in touch with Albert Williams, "the main agitator," who was willing to talk about Aboriginal title but not about the impending survey.[117] Taylor felt that Williams was waiting for the people to return from the canneries, which they did on the 19th and 20th. On the 19th, Schjelderup received a note from Kitwancool Chief Alexander Smith, telling him not to go to Kitwancool "until the trouble had been settled."[118] The note, which contained no threats, was ignored.

On the 20th the survey party, which was made up of Schjelderup, his assistant, Robert Russell, Constable Turnbull ("incognito"), and David Wells, "a Kitwanga Indian ... who had accompanied two previous survey

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112 Taylor, "Report regarding Kitwancool Indians", *supra* note 4.

113 *Ibid.*

114 *Ibid.*

115 *Ibid.*

116 *Ibid.*

117 *Ibid.*

118 *Ibid.*

parties some time ago," proceeded by automobile to Kitwancool.[119] Around midnight, Russell came back and reported to Taylor that they had camped about a mile and a half south of the village and that a messenger had delivered a notice signed by Peter Williams, Albert's son, advising them of a meeting at 7:30 p.m. on Sunday the 21st.[120] It ended: "Unless you come you better not carry out your work."[121] Schjelderup declined to go but said he would be happy to talk with them at his camp. When the messenger returned, it was with a note signed by Albert Williams indicating that this was their second warning, and that if the surveyors did not come to the meeting, "we will be in force to stop you to-morrow ... [Y]ou are ... in our jurisdiction."[122]

Schjelderup repeated what he had said before, adding that he was "quite willing to recommend anything the Indians asked for, regarding any particular pieces of land that they had worked on, and suggested that the matter could be easily settled if they allowed the survey to be made first, and discussed the matter afterwards."[123] The Kitwancool were not the first to be wary of such a suggestion, fearing that allowing reserves to be surveyed might undermine their assertion of title to the whole valley.[124]

Nothing further happened that day, and Taylor came up to the survey camp on the morning of the 22nd. Schjelderup and Turnbull told him that earlier that morning Samuel Douse, Richard Douse, Walter Derrick, Albert Williams and Peter Williams had come to the camp, and an argument had ensued. One of them had picked up the surveyor's transit and set off towards the village, but Schjelderup took it away from him. Then another picked up one of the survey party's axes and smashed it against a rock before throwing it into the creek. There was also another unsuccessful attempt to seize the transit.

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119 *Ibid.* There is some ambiguity in the report as to whether the survey party left for Kitwancool on the 20th or early on the 21st.

120 *Ibid.* The exact wording of this portion is interesting. It was: "Meeting will be held at Kitwancool to-night although today is Sunday, but we thought the matter must be dealtwith at once."

121 *Ibid.*

122 *Ibid.*

123 *Ibid.*

124 This phenomenon was remarked upon as early as the 1860s and was noticed in 1945 by the first scholar to investigate the land question: See Shankel, *supra* note 78 at 79.

Throughout, Taylor reported, the five men tried to provoke an assault by "hustling, jeering, *etc.*"[125] In his opinion, they had been instructed not to assault the surveyors but to do everything they could to cause the surveyors to start a fight. "It is obvious," he concluded, that this was "the result of careful advice and coaching on the part of some white advisers..."[126] So, like the surveyors, the Kitwancool may also have been getting advice.

The men had then left, but one of them kept coming back to keep an eye on the camp. Taylor decided to get warrants for the arrest of all five, and to return with a uniformed patrol. The only reasons he gave were the "circumstances," which he had concluded earlier did not amount to assault, and standing orders that patrols in the Kitwancool Valley should consist of not less than three men (so they were one short). Before leaving on the 22nd to report to Inspector Wood at Telkwa, Taylor discovered – it is unclear how – that Albert Williams had sent the following telegram to the Governor General in Ottawa:

> WE THE NATIVES OF KITWANCOOL YOUR POOR CHILDREN WISH TO SET FORTH OUR GRIEVANCE BEFORE YOU. THE LAND SURVEYOR V. SCHJELDERUP PREPARE THEMSELVES TO FORCE US TO ABANDON OUR MOTHER LAND OF KITWANCOOL AND GO INTO SMALL RESERVE BY THE USE OF ARMED MEN OR MOUNTED POLICE. WE FEAR THAT OUR MOTHER LAND BE OUR GRAVE BY THE FORCE. HOW CAN YOUR POOR CHILDREN BE FORCED LIKE THIS WHILE WE WISH THAT OUR MOTHER LAND OF KITWANCOOL BE USED FOR PUBLIC WEALTH.[127]

Taylor reports that he had another conversation with Albert Williams, but does not say how that came about. Williams had said "again and again" that the whole valley was theirs, and they would not ask the surveyor for reserves because they "would be asking for something that was already theirs."[128] He also refused to countenance the possibility that the governor general would not reply to his telegram, and said that if he did reply and

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125 Taylor, "Report regarding Kitwancool Indians", *supra* note 4.

126 *Ibid.*

127 *Ibid.* The capitalization is in the report and probably reproduces the style of the original telegram.

128 *Ibid.*

said the survey should proceed, he did not think the people of Kitwancool would allow it.

On August 23rd Sgt. Taylor laid informations before Magistrate S.H. Hoskins at Smithers against all five men under what was then s. 501(d) of the *Criminal Code*. This section made it an offence to wrongfully compel another person to abstain from doing anything he has a lawful right to do, by hiding any tools, clothes or other property owned or used by such other person or hindering him in the use thereof.[129] The magistrate also issued arrest warrants. On the morning of the 24th Taylor left Telkwa with Constables M.T. Berger and R.E. Horsefield, "all of us wearing red serges," and went by train to Kitwanga.[130] Russell met them with his car, and on the way to the camp they passed a truck he had sent on earlier. Albert Williams was on it: he had hitched a ride back to Kitwancool to report that he had not received an answer to his telegram. Nothing untoward had happened at the camp in the interim.

When they arrived at the camp Taylor showed the warrants to Williams, who was wearing a revolver, and advised him to tell the others to submit without trouble. When Williams suggested returning to the village first, Taylor decided to arrest him and asked for the revolver. Williams said he would turn it over when they got to the village, and Taylor tried to take it from him. He resisted and Taylor threw him to the ground, at which point Williams is reported as saying, "Alright, I'll give it to you."[131] Constable Turnbull, who was also part of the patrol, found it to be loaded in all six chambers.

Taylor warned Williams that if the others "started anything they could all get all the trouble they wanted."[132] Williams said he would tell them to

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129 Sub-section 501(d) of the *Criminal Code* as it existed in 1927. It was based on an English statute and, although general in terms, was usually used in labour disputes. The revised *Criminal Code* that was enacted in 1953-54 replaced section 501, which is reproduced in the 1955 edition of Martin's *Criminal Code* after the new section at 599.

130 Constable Berger, who was stationed at Hazelton at the time, was the father of Thomas Berger, QC, who has been representing First Nations in court and otherwise since the early 1960s (email exchange with Tom Berger, March 2018). Constable Berger appears to have played a minor role in the arrests, and the police documents do not include any report or even any comments by him.

131 Taylor, "Report regarding Kitwancool Indians", *supra* note 4.

132 *Ibid.*

come quietly, and once at the village the police arrested Richard Douse and Walter Derrick. Peter Williams was further up the valley, so Turnbull and Horsefield went with the car to arrest him. Samuel Douse was in Kitwanga, where he was arrested. No further resistance was had and, according to Taylor, Chief Smith "seemed somewhat relieved to get rid of these agitators."[133]

Something of particular interest then occurred. Isabella Douse, "the Kitwancool chieftainess" whom Taylor described as showing them "due respect," invited the police into her house.[134] Using Peter Williams as interpreter, she asked the police to treat the prisoners properly, to feed them well, and to send them back in good condition. Taylor reported that she told them that:

> [T]he Kitwancool Valley had been given to them by Almighty God, and was the property of their grandfathers, and that the whole valley belonged to them. She said she was wearing poor clothes because all her money had been given to the cause of keeping the Kitwancool Valley for the public wealth in the hands of the Indians.[135]

Taylor replied that the police never hurt anyone "unless they invited trouble."[136] He also told her that interfering with the survey was "just like slapping the government in the face," and that the survey would be completed "even if it resulted in arresting every Indian in the Kitwancool Valley."[137]

The RCMP and their prisoners were back in Smithers by the afternoon of the 24th, and all five were lodged in the cells of the BC Provincial Police.[138] Taylor let inspector Wood know that defence counsel

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133 *Ibid.*

134 *Ibid.*

135 *Ibid.*

136 *Ibid.*

137 *Ibid.*

138 There was a provincial police force in British Columbia until the province contracted with the RCMP to take over in 1950. Even before then, however, the RCMP had jurisdiction over federal "Indian" lands.

had been retained, and suggested the prosecution do the same.[139] Wood therefore telegrammed Vancouver, advising that this be done. As he put it, "[o]wing to the importance of this case the result of the trial will materially affect the future attitude of Indians of the whole district."[140]

Taylor's lengthy report also included his reflections, and those of Inspector Wood, on the situation. Taylor repeated his charge that the actions of the prisoners were the result of "careful coaching by some persons possessing more intelligence than they themselves possessed."[141] They "appear to repeat by rote," he said, "certain set phrases regarding their right to the land in the valley, and have not the ability to present an intelligent argument."[142] Albert Williams "seems puffed up with importance" but is "unintelligent and illiterate."[143] Their behaviour "all through reminded one of precocious children who had never been properly disciplined."[144] Taylor, like so many of his peers, was clearly equating literacy in the English language with intelligence, and his reference to the men being children in need of discipline speaks worlds about the gap between the legal narratives animating each side in this dispute. The sergeant recommended that a two-man patrol should remain at Kitwancool until the survey was completed, and concluded as follows:

> I am informed that a large number of the younger Kitwancool Indians would be glad to see the land question settled definitely, and would have no use for the agitators. A large number of them stay at Kitwanga in order to avoid any trouble. On the 22nd inst. the council sent down to Kitwanga after the trouble started, for reinforcements, but none of the other Indians would go up to help them.[145]

Apart from lack of support, there were of course other, equally plausible reasons for staying in Kitwanga.

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139 Many prosecutions in those days were conducted by a police officer, and often the accused would not have a lawyer. This could, obviously, be problematic: see Alfred Watts, QC, *Magistrate-Judge: The Story of the Provincial Court of British Columbia* (Victoria: Provincial Court of British Columbia, 1986) at 30.

140 Telegram from Wood to the Officer Commanding at Vancouver, quoted in Taylor, "Report regarding Kitwancool Indians", *supra* note 4.

141 *Ibid.*

142 *Ibid.*

143 *Ibid.*

144 *Ibid.*

145 *Ibid.*

For his part, Inspector Wood had issues with the Indian Department, whose policy he felt had placed the RCMP in an "untenable" position. He said the Indian agent had visited Kitwancool only twice in seven years, and the Indian Department constable had never visited. It was well known, he charged, that "these Indians have been brewing liquor, making drunken brawls, potlatching, *etc*. with complete immunity in their village ... and we are under orders not to patrol the valley."[146] He also claimed that they got only five of the seven agitators, because he regarded Isabella Douse and another man just as culpable – which makes Emily Carr's impressions of Mrs. Douse, which are described below, even more striking. Wood was also concerned that good counsel be retained to prosecute because he worried that the accused would elect a jury trial and "the whole Indian lands question will be rehashed."[147]

He closed by urging patrols in the Kitwancool Valley "whenever we see fit."[148] It would be better, he said, to close the detachment in the Skeena than to continue "under present conditions."[149] Accusing certain unnamed "white residents and half breeds at Kitwanga and other outsiders" of being in sympathy with the "agitators," he stated that, were it not for a manpower shortage, he would recommend that a summer detachment be established at Kitwanga.[150] Displaying no knowledge whatsoever of the political and cultural context that shaped places like Kitwanga and Kitwancool, Wood, like Taylor, believed that Albert Williams and his council had "usurped" the authority of Chief Smith,

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146 Insp. ST Wood to the Officer Commanding, "E" Division, 25 August 1927, contained in Taylor, "Report regarding Kitwancool Indians", *supra* note 4. This is one of the rare references to potlatching, but it was an ongoing issue. Although not as determined to retain the potlatch as the "incorrigible Kwakiutl" were, the Gitxsan did resist, and on one occasion in 1890 the Kitwanga Council told the magistrate at Hazelton that the potlatch law was "as weak as a baby", Kitwanga Council to Fitzstubbs, quoted in Douglas Cole & Ira Chaikin, *An Iron Hand Upon the People: The Law Against the Potlatch on the Northwest Coast* (Vancouver: Douglas & McIntyre, 1990) at 39. But of course, this was said a year after Chief Justice Begbie had declared the law too vague to be enforced. It was amended after Begbie's death to meet his objections.

147 Taylor, "Report regarding Kitwancool Indians", *supra* note 4.

148 *Ibid.*

149 *Ibid.*

150 *Ibid.*

who "took no part in the disturbance ... and ... seems to be relieved that most of them have been removed."[151]

The trials were held in Smithers on September 1st and 2nd and all of the accused entered not guilty pleas. Significantly, it would appear that the Crown elected to proceed by way of summary conviction, thus eliminating the possibility of the accused electing a jury trial, as Inspector Wood had feared.[152] The evidence led by the prosecution was broadly similar to that contained in the police report.[153]

Albert Williams was charged and convicted of an offence under s. 501(d) of the *Criminal Code*. He testified that he had wanted everything to be peaceful, but admitted on cross-examination that he had received a suspended sentence on a similar charge in 1913. He was sentenced to three months with hard labour at the Oakalla Prison Farm for trying to prevent the police from stopping Richard Douse from taking the transit. He was also charged with resisting arrest, but defence counsel successfully argued that when he refused to surrender his revolver he was already under arrest, and the magistrate rather strangely agreed that this raised a reasonable doubt.[154] The prosecution then charged Williams with obstructing a police officer, to which charge he pleaded guilty and was sentenced to four months with hard labour at Oakalla, to run concurrently with the previous sentence.

Richard Douse (Isabella Douse's husband) was charged with an offence under s. 501(d) of the *Criminal Code* for trying to make off with the transit. He testified in his defence that he firmly believed that all of the valley belonged to the Indians and that he just wanted to stop the survey

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151 *Ibid.*

152 Offences under section 501 could be prosecuted summarily or by indictment. Obstructing a police officer – one of the two charges upon which Albert Williams was convicted – was an indictable offence but was within the sole jurisdiction of the magistrate, meaning that an accused could not elect a jury trial.

153 The following information on the trials is from the RCMP Crime Report, Prince George, 2 Sept. 1927, Library and Archives Canada (GR10, Vol. 11047, File 33-1) [*The Crime Report*].

154 Strangely, because whether he was already under arrest was a question of law, and the reasonable doubt principle applies only to questions of fact. There was also evidence that it was common for people in the Upper Skeena to carry firearms for protection against wild animals.

until "they could take up the matter with Ottawa."[155] He was convicted, but his sentence was suspended owing to his age and to the fact that "the court considered he was merely a tool of the more advanced agitators."[156]

Samuel Douse was charged with an offence under s. 501(d) of the *Criminal Code* for striking one of the axes against a rock and throwing it into the creek. The prosecution was also allowed to lead evidence that he was "very insolent to Constable Turnbull, jeered and laughed, and did all he could to provoke the survey party into committing an assault."[157] He stated in his defence that he firmly believed that all the land in the Kitwancool valley belonged to the Indians and that, when he threw away the axe he did so "because he thought Turnbull might use it on the Indians."[158] He was convicted and sentenced to two months with hard labour at Oakalla.

Walter Derrick was charged under s. 501(d) of the *Criminal Code* for helping Richard Douse try to take the transit. He also testified that he firmly thought all the land in the valley belonged to the Indians. He was convicted and sentenced to ten weeks with hard labour at Oakalla.

Peter Williams was also charged under s. 501(d) of the *Criminal Code* because he was alleged to have tried to bar Constable Turnbull from preventing Samuel Douse from taking the transit.[159] The surveyor also told the court that Peter tried to provoke an assault and told Turnbull that "he was mistaken if he thought the government owned the Kitwancool Valley, as it belonged to the Indians to use as they thought fit."[160] Peter testified in his defence that he firmly believed that the Kitwancool Valley belonged to the Indians. "It was given them by God and was meant to be used by them for the public good."[161] His only desire, he said, was to prevent trouble.

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155 *The Crime Report*, *supra* note 153.

156 *Ibid.*

157 *Ibid.*

158 *Ibid.*

159 This is confusing. It was Richard Douse, not Samuel, who tried to take the transit. Samuel threw the axe in the creek.

160 *Ibid*; *The Crime Report*, *supra* note 153.

161 *Ibid.*

Nonetheless, he too was convicted and sentenced to three months with hard labour at Oakalla.[162]

Five months after the four men who received prison terms were sent to Oakalla to serve their sentences, Constable T.E.E. Greenfield filed a report on the patrol to Kitwancool that he and Constable H.M. Childerstone had just completed on hired saddle horses.[163] When they arrived they left their horses at a barn and walked through the village on foot. They found that several families were out on their trap lines and that a funeral was being held for an infant son of Walter Douse.

Constable Greenfield's report is composed largely of negative comments about the land question and Kitwancool politics. When they passed Samuel Douse's home he came out to speak with them. He had a copy of the report of the parliamentary committees that had examined and rejected the claims of the Allied Tribes a year earlier.[164] When he asked to know who had sent for the police, Greenfield replied that no one had, they were there on business. Douse then told Greenfield that the police were not wanted in Kitwancool. The constable reported that he had replied to Douse, "forcibly," as follows: "The Mounted Police did not take orders from him and ... the Mounted police were going to make patrols to Kitwancool whenever they deemed it necessary."[165] Greenfield refused to discuss the Land Question with Douse and walked away.

He soon met Albert Williams and a woman he believed to be Mrs. Richard Douse, whom he describes as a "chieftainess [who] supports the malcontent faction."[166] Williams told Greenfield he was not wanted in Kitwancool and he received the same response that Samuel Douse had. He then told Greenfield that the government was trying to steal all their land

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162 *The Daily Colonist* carried a report on the trials ("Five Indians in B.C. sentenced") on Sept. 4th 1927, noting that two of the police were acting undercover. It contains at least one error, but the amount of detail suggests the paper either had a reporter present or had access to the RCMP report.

163 Greenfield to the Officer Commanding, "E" Division (4 February 1928, reporting on the patrol conducted February 3rd), Library and Archives Canada (RG10, Vol. 11047, File 33-1). The previous patrol to Kitwancool had been on Jan. 19th, which suggests that since the trials patrols may have been conducted every two weeks or so.

164 See text accompanying *supra* notes 29 and 104.

165 Greenfield to the Officer Commanding, *supra* note 163.

166 *Ibid.*

and they were going to start charging the police $50 a trip to come to their village. In the course of this exchange Richard Douse passed by, asking who had sent for the police. Greenfield ignored him.

The report then goes on to state that "apparently" a meeting had been held in Kitwancool since the last patrol there on January 19th, and that the village was divided into two factions. One was composed of Albert Williams, Samuel Douse, and Richard Douse and his wife, and they wanted to keep the Land Question open. The other faction was made up of the chief, Alexander Smith, and "includes the majority of the Indians of Kitwancool." Greenfield does not say what they wanted, only that they did not support Williams and Douse.[167] He goes on to repeat some of what he had reported earlier and notes – in contrast to Inspector Wood's earlier complaint – that the village was "well behaved with respect to Intoxicants."[168] His concluding paragraph is revealing. "With regard to the possession of Government reports," he states, presumably referring to the copy of the 1927 committee report that Samuel Douse had:

> These Indians are not sufficiently intelligent to understand the language used and more often than not get the most absurd ideas from these reports. Only a very few can read English at all and these, particularly when it suits them, read into the reports any translation that will serve their own ends, thus creating in the minds of the unlearned a wrong impression, which is harmful to any transactions.[169]

As was customary, a copy of this report was forwarded to the local Indian agent.

In December of 1929 the Kitwancool Land Committee sent a letter to the provincial government containing a number of grievances – including the 1927 prosecutions – but which focussed on ongoing land and forestry concerns. Signed by Albert Williams and Richard Douse, with directions to reply to Peter Williams, secretary, it lamented that "the Good Queen

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167 There are some omissions in Greenfield's report – he does not mention Peter Williams or Walter Derrick, for example – and some ambiguities that suggest he was not as familiar with Kitwancool and its people as the officers who made the arrests in 1927.

168 See Taylor, "Report regarding Kitwancool Indians", *supra* note 4. As it seems unlikely that Wood's and Greenfield's assessments could both be accurate, Greenfield's may well be a rather crude attempt to show how effective the prosecutions and jail terms had been.

169 Greenfield to the Officer Commanding, *supra* note 163.

Victoria" was no longer alive. More to the point, the letter invoked the laws of the authors' ancestors, which were "very similar" to English laws regarding ancestral lands.[170] Decades later the twelve chiefs of the Kitwancool houses continued to march to a different drum: they refrained from joining the other Gitxsan houses in the *Delgamuukw* litigation in the 1980s, and in the 1990s challenged the Nisga'a treaty as wrongly including Gitanyow (Kitwancool) land.[171]

EMILY CARR AND HER VISIT TO KITWANCOOL

Such was the world that Emily Carr entered in the summer of 1928. From the point of view of the authorities, it was the world described by the editors of the Victoria *Daily Colonist* in 1910: one in which any rights that First Nations may have had before contact were extinguished, "ipso facto," by the mere assertion of British sovereignty – a view mirrored in the police reports on the arrests at Kitwancool seventeen years later. Yet in the same year that the editorial was published, lawyers for both the Nisga'a and the dominion government had already concluded that the *Daily Colonist* had got the law wrong and were looking for ways to get the question into the courts for a decision.[172] Although Ottawa backed off after signing the McKenna-McBride Agreement in 1912, the Nisga'a and the Allied Tribes continued this quest until 1927, when the enactment of s. 149A of the *Indian Act* and the decision of the parliamentary committees effectively put an end to it.[173]

One of the puzzling things about Carr is that, although she painted the forests and First Nation villages of BC, and wrote about her

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170 The Kitwancool Land Committee to the Provincial Government (2 December 1929), Library and Archives Canada (GR 10, Vol. 11047, File 33-1).

171 Sterritt et al, *supra* note 34. In 1959 Chief Wee-kha (Ernest Smith) explained that the first name of the village was Git-an-yow, meaning "village of many people" or "big village." After a series of wars that severely reduced the population, they changed the name to Kitwancool, meaning "narrow valley." See *Histories, Territories and Laws of the Kitwancool*, *infra* note 222 at 17.

172 See e.g. the opinions that TRE McInnes (text accompanying Foster, "A Romance of the Lost", *supra* note 24) and EL Newcombe, KC (Newcombe to Laurier, *supra* note 92) provided to the dominion government in 1909 and 1910, respectively.

173 See text accompanying *supra* notes 29 and 30.

Indigenous friends and their communities, she seems never to have mentioned this campaign for Indian title – even though it was at its height in these years and periodically erupted in the newspaper headlines. As Douglas Cole has put it, she "was not a very politically or socially conscious person," so it is not surprising to find her "virtually silent about the relations between the Canadian government and its Aboriginal peoples."[174]

One omission, however, is especially puzzling. The real names of "Jimmie" and "Louisa," the couple with whom Carr stayed on a number of occasions and who took her to some of the locales described in *Klee Wyck* – such as Tanoo, Skeedans and Cumshewa – were William and Clara Russ.[175] William was the brother in law of Peter Kelly, chair of the Allied Tribes throughout its twelve year existence. Yet Carr never mentions Peter Kelly.[176]

As Gerta Moray points out, it is not known if Carr ever met Kelly.[177] She suggests that part of the explanation for why the artist was "not at all alert" to First Nations activism is that she was more comfortable in the company of women (most of the activists were men) and her "most prolonged and personal" contacts with individuals were with people like Sophie Frank (to whom *Klee Wyck* is dedicated) in the Squamish community of Ustlawn/North Vancouver Mission.[178] Moray suggests further that Carr's lack of awareness may have been because these contacts were in the south, where most missionaries were Roman Catholics who

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174 Douglas Cole, "The Invented Indian/The Imagined Emily", [2000] BC Studies, no. 125 & 126, 147 at 147-48. Cole does note, however, that few of her pre-1927 letters have survived and her journals start after that date.

175 These are the titles of three of the stories in Carr, *Klee Wyck*, *supra* note 15 and there is a photograph of Clara and Emily in Moray, *Unsettling Encounters*, *supra* note 14 at 3. They are sitting on a beach in Haida Gwaii in 1912. The photo was taken by Clara's husband, William.

176 Peter Kelly had married William's sister, Gertrude. Their father was Amos Russ (Gedanst), who was one of the first Haida to convert to Christianity and who addressed the McKenna-McBride Commission when it visited Skidegate in 1913. See Hamar Foster & Megan Harvey, "Amos Russ" in the *Dictionary of Canadian Biography* (Toronto: University of Toronto, 2018-2019) online: <biographi.ca> [perma.cc/7L9B-7QKT].

177 Moray, *Unsettling Encounters*, *supra* note 14 at 294-95.

178 *Ibid.*

did not tend to encourage Native rights organizations.[179] However, given that the twentieth century campaign for title began in these southern, Salish communities (e.g., the 1906 and 1909 petitions) and that both Chief Capilano and Andy Paull, who was the secretary of the Allied Tribes, were Squamish, this seems unconvincing.

Figure 7: Peter Kelly and his family at Nanaimo (1926)[180]

More persuasive is Moray's view, with which Cole agrees, that Carr was more focussed on "the visual symbols of traditional cultures" and "dismayed by their apparent disappearance."[181] This has led some scholars to criticize her for buying into the prevailing myth of the "vanishing Indian" and the sort of "salvage" anthropology associated with Franz Boas and Marius Barbeau (whom Carr knew). But, as Cole has argued, "[t]he 'vanishing Indian' was, of course, a construction, a 'cultural myth,' but that does not mean it was a falsehood."[182] In the nineteen-twenties the Indigenous population of the province reached its nadir, and even many

179 *Ibid* at 295.

180 The author received this photo from the late Reg Kelly in 1995.

181 Moray, *Unsettling Encounters*, *supra* note 14 at 295.

182 Cole, *supra* note 174 at 149.

Indigenous people were afraid that they were doomed to extinction.[183] Carr had grown up in the 1880s and 1890s in Victoria, "where Indigenous people were a ubiquitous presence" so "her sense of the 'vanishing Indian' was not imagined."[184] Carr "saw the deserted villages – they were no myth – and she was witness to the deserted and rotting poles. She regretted their demise, whether to the forces of nature or to museum collectors."[185] Her dear friend, Sophie, had twenty-one children, all of whom had died by the time Sophie was in her early fifties.[186]

Carr may have had little interest in the law and politics of Indian title, but she had even less time for missionaries and residential schools. In her story in *Klee Wyck* entitled "Friends," for example, Carr refuses a missionary's request to use her influence with her friend, Louisa (Clara Russ), to send her boys to residential school.[187] When asked why, she tells the missionary that in Louisa's house there was "an adopted child, a lazy, detestable boy, the product of an Indian Industrial School, ashamed of his Indian heritage."[188] That's why, later, when Louisa asks Carr if her boys were Emily's, would she send them away to school, Carr's answer is NO (in capital letters in the text).[189] This passage was omitted from the 1951 edition, which was intended for use in schools, along with over 2000 other words, including "almost every derogatory adjective or descriptor" about missionaries and residential schools.[190] There was a concern that such passages "might offend any members of the teaching profession."[191]

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183 *Ibid* at 150. As Cole points out, in 1901, when Carr was thirty, Aboriginal people were 16% of the population. By 1911 they were only 5%. I would add that in the early 1880s, when Carr was just becoming a teenager, Aboriginal people were 50% of the population; by 1921 that had dropped to 4.3%: Galois, "The Indian Rights Association", *supra* note 27 at 2, citing the Census of Canada.

184 Cole, *supra* note 174 at 150-51.

185 *Ibid*.

186 Carr, *supra* note 15 at 56. For a similar case, see Alan Morley, *Roar of the Breakers: a biography of Peter Kelly* (Toronto: Ryerson Press, 1967) at 138.

187 Carr, *supra* note 15 at 114.

188 *Ibid*.

189 *Ibid*.

190 *Ibid* at 10 (from the introduction to the 2003 edition by Kathryn Bridge).

191 *Ibid* at 9-10.

Like all but the most perceptive of people, Carr did not foresee the future; and she certainly put her art and, later, her writing, first. But Cole is surely correct when he responds to critics by arguing that the stories in *Klee Wyck* are not about "essentialized" Aboriginal people. The people she meets "live in Carr's present, not in an ahistorical past."[192]

Readers of *Klee Wyck* can decide for themselves whether Carr's stories can be used, as one critic has charged, "to point out the diffusion of Native culture into Canadian culture in order to deny Native peoples' claims for Aboriginal title."[193] That seems quite a stretch to me. What is clear, however, is that her story, "Kitwancool," provides a fascinating and instructive counterpoint to the police reports set out above. Also noteworthy is what Carr told a friend shortly after her visit: that the people had threatened the surveyors with axes.[194] There was nothing in the police reports or in the evidence at the trials about this, only that Samuel Douse had taken one of the surveyors' axes and smashed it against a rock before throwing it into the creek. But Carr's version must have been what was circulating in the region at the time. It was, apparently, also what a Mounted Police officer had told her when she returned from Kitwancool to Kitwanga.[195]

Emily Carr's "Kitwancool" begins with her journey. She had heard of the totem poles at Kitwancool, and regretted that she had been dissuaded from going there in 1912. She got the same advice in 1928, but ignored it and hitched a ride with Aleck, whom she was told was the chief's son. She purchased supplies to last for two days. Aleck's wagon had "four wheels and a long pole. He tied the lumber [he had loaded] to the pole and a sack of oats to the lumber; I was to sit on the oats."[196] The road was terrible, she said, and a "sturdy old man trudged behind the wagon."[197] He "carried

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192 Cole, *supra* note 174 at 153, 155.

193 Judith Mastai, "Hysterical Histories: Emily Carr and the Canadian West" in M Catherine de Zegher, ed, *Inside the Visible: An Elliptical Traverse of 20th Century Art in, of, and from the Feminine* (Cambridge: MIT Press, 1996) at 34, quoted in Cole, *supra* note 174 at 158.

194 Moray, *Unsettling Encounters*, *supra* note 14.

195 Carr, *supra* note 15 at 150.

196 *Ibid* at 138.

197 *Ibid* at 140.

a gun and walked most of the way."[198] One of them, she wrote, seemed to be a hero: "The other men questioned him all the way, though generally Indians do not talk as they travel."[199] There were so many holes in the road that "the men fell off so often that they were always changing places, like birds on a roost in cold weather."[200] The mosquitoes were as bad as the road.

After seven hours they reached Kitwancool. Carr wanted to walk rather than risk crossing a dangerous looking ravine, and Aleck warned against it, saying the village dogs would attack and kill her little griffon dog, Ginger Pop. When they arrived, the "village people made a fuss over the hero-man, clustering about him and jabbering."[201]

Carr was pretty much ignored at first. "They paid no more attention to me than to the oat-sack."[202] She was surprised to learn that the old man who had trudged behind the wagon "was Chief Douse – Aleck's father."[203] Carr goes on:

> Mrs. Douse was more important than Mr. Douse; she was a chieftainess in her own right, and had great dignity. Neither of them spoke to me that night. Aleck showed me where to put my bed on the veranda and I hung the fly over it. I ate a dry scrap of food and turned into my blankets. I had no netting, and the mosquitoes tormented me.
> My heart said into the thick dark, "Why did I come?
> And the dark answered, "You know."[204]

198 *Ibid* at 141.

199 *Ibid*.

200 *Ibid*.

201 *Ibid* at 142.

202 *Ibid*.

203 *Ibid* at 143.

204 *Ibid* at 144.

Figure 8: Mrs. Douse, Chieftainess of Kitwancool (1928)[205]

The next morning, Isabella Douse's demeanour was cold. She wanted to know why Carr had come. She could not speak English, so the hero, who was her son-in-law, offered to translate. Carr said she had come to make pictures of their totem poles, and Douse again asked why. Carr replied:

> Because they are beautiful. They are getting old now, and your people make very few new ones. The young people do not value the poles as the old ones did. By and by there will be no more poles. I want to make pictures of them, so that your young people as well as the white people will see how fine your totem poles used to be.
> Mrs. Douse listened when the young man told her this. Her eyes raked my face to see if I was talking 'straight'... 'Go along,' she said through the interpreter, `and I shall see.' She was neither friendly nor angry. Perhaps I was going to be turned out of this place that had been so difficult to get into.[206]

When Carr and Ginger Pop left to see the poles in the old village, little Ginger Pop routed the allegedly dangerous village dogs, their tails "flat, their tongues lolled, and they yelped."[207] The Douses "all rushed out of

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205 Emily Carr, "Mrs. Douse, Chieftainess of Kitwancool" (1928), online: *Vancouver Art Gallery* <museevirtuel.ca> [perma.cc/4L7Z-6EB2].

206 Carr, *supra* note 15 at 144.

207 *Ibid* at 145.

their house to see what the noise was about, and we laughed together so hard that the strain, which before had been between us, broke."[208]

Carr was entranced by the poles:

> They were carved elaborately and with great sincerity. Several times the figure of a woman that held a child was represented. The babies had faces like wise little old men. The mother expressed all womanhood – the big wooden hands holding the child were so full of tenderness they had to be distorted enormously in order to contain it all. Womanhood was strong in Kitwancool. Perhaps, after all, Mrs. Douse might let me stay.[209]

208 *Ibid.*

209 *Ibid.*

Figure 9: (Left) Totem Mother, Kitwancool (1928); (Right) Base of Kitwancool Pole (1928-1929)[210]

Carr was so taken by the poles that she did not notice that a storm was approaching. She got soaked. When she was able to return to the new village, she found all her things in a corner of the Douses' home. "My mother-in-law says you may live in her house," said the hero. "Here is a rocking-chair for you."[211]

Carr goes on to describe the living arrangements in the big room of the house, which included two married daughters, their husbands and children, Aleck and an orphan girl, Lizzie, "who always took a long lick at the top of the jam-tin as she passed it."[212] As for Mr. and Mrs. Douse, they "came and went continually, but they ate and slept in a shanty at the back of the new house" that had cedar walls, an earthen floor and a fire on the ground with a smoke hole in the roof:[213]

> The place was full of themselves – they had breathed themselves into it as a bird, with its head under its wing, breathes itself into its own cosiness. The Douses were glad for their children to have the big fine house and be modern but this was the right sort of place for themselves.[214]

She also described the daily routine, finishing with:

> There was no rush, no scolding, no roughness in this house-hold. When anyone was sleepy he slept; when they were hungry they ate; if they were sorry they cried, and if they were glad they sang. They enjoyed Ginger Pop's fiery temper, the tilt of his nose and particularly the way he kept the house free of Indian dogs. It was Ginger who bridged the gap between their language and mine with laughter. Ginger's snore was the only sound in that room at night. Indians sleep quietly.[215]

When Carr awoke on the first morning she slept in the Douse household, she went to the creek to wash. Lizzie seems to have reported this, and later Mrs. Douse came to Carr with Lizzie and the hero, and gave her a basin

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210 Emily Carr, "Totem Mother, Kitwancool" (1928), online: Vancouver Art Gallery <museevirtuel.ca> [perma.cc/AWN9-P5TT]; Emily Carr, "Base of Kitwancool Pole" (1928-1929), online: Vancouver Art Gallery <museevirtuel.ca> [perma.cc/C7PL-SS27].

211 Carr, *supra* note 15 at 146.

212 *Ibid* at 148.

213 *Ibid* at 147.

214 *Ibid.*

215 *Ibid.*

with water. "My mother-in-law says the river is too cold for you to wash in," said the hero.[216] "Everyone watched my washing next morning. The washing of my ears interested them most."[217]

For two days Carr worked in the old part of the village, after which Aleck was to take her back to Kitwanga. But it started to rain, and it rained for three days, making the road impassible. She had brought food for only two days, so she had to live on hard tack and raisins. The Indians would have shared their food with her, she said, but she did not tell them she was out of food. "The thought of Lizzie's tongue licking the jam-tin stopped me."[218]

The sun eventually came out, but they had to wait for all the puddles to drain before they could leave. Although Carr had shown Mrs. Douse her paintings – and thought her "stolidly indifferent" – she asked to see them again. So Carr unpacked them and showed her all the canvases and sketchbooks. "She went through them all."[219]

> The two best poles in the village belonged to Mrs. Douse. She argued and discussed with her husband. I told Aleck to ask if his mother would like to have me give her pictures of her poles. If so, I would send them through the Hudson's Bay store at Kitwangak ... Mrs. Douse's neck loosened. Her head nodded violently and I saw her smile for the first time.[220]

When Carr got back to Kitwanga, the Mounted Police came to see her. The officer asked how she had been treated, and Carr replied, "Splendidly."

> Learned their lesson, eh?" said the man. "We have had no end of trouble with those people – chased missionaries out and drove surveyors off with axes – simply won't have whites in their village. I would never have advised anyone going in – particularly a woman. No, I would certainly have said, 'Keep out.'"
> "Then I am glad I did not ask for your advice," I said, "perhaps it is because I am a woman that they were so good to me."
> "One of the men who went in the wagon with you was straight from jail, a fierce, troublesome customer."

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216 *Ibid* at 148.

217 *Ibid*.

218 *Ibid* at 149.

219 *Ibid* at 150.

220 *Ibid*.

> Now I knew who the hero was.[221]

SOME REFLECTIONS

The contrasting versions of the village and people of Kitwancool contained in the police reports, on the one hand, and the story in *Klee Wyck*, on the other, reflect the parlous state of the Land Question by the latter half of the nineteen-twenties. And each version must be approached with caution. The police reports were written to assure superiors that the writers were doing a good job and to put them in the best light possible. They are ambiguous in places and the patent errors and omissions they contain are probably out-numbered by ones not so easily detected. For her part, Carr's "Kitwancool" is a story, written as a work of art, a "word sketch," and completed years after her visit to the village. It too contains ambiguities and, perhaps, errors we cannot see.

One could say so much about the issues raised by these texts. I will confine myself to the following.

First of all, both texts are unclear when it comes to the legal and political structure of Kitwancool, referring to different people and chiefs. Carr probably was not that interested, but the police should have been. Their reports make more than one unsatisfying but self-serving mention of "factions" and do not set out the difference between the chief and the president. According to the *Histories, Territories and Laws of Kitwancool*, in the early years of the twentieth century the various village chiefs gave the title of "president" to a person to indicate he was to protect the laws, especially those relating to land and resources.[222] Albert Williams was the second president, and when this publication was produced in the late 1950s his son, Peter Williams, was president. This, at least, is the Gitanyow explanation of the situation, and it needs to be borne in mind when assessing the RCMP's contention that Albert Williams had "usurped" the authority of the village chief.

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221 *Ibid.*

222 This publication is in British Columbia Provincial Museum, *Anthropology in British Columbia, Memoir No. 4* (Victoria: Royal British Columbia Museum, 1959). It was edited by Wilson Duff, and two of the contributing chiefs and elders, Peter Williams and Walter Derrick, figure in the police reports from 1927.

Connected with this omission are the references to factions that are designed to make the men who were imprisoned and one or two others appear to be a small minority. The implication is that Chief Alexander Smith and most of the other people of Kitwancool opposed land claims. Although there were no doubt disagreements about strategy, such opposition is highly unlikely. It is much more likely that the situation was similar to what C.P. Hickman reported on the Nass in 1908: that the Indians "supposed to be good and the bad ones, are equally bitter regarding the land question."[223] Good and bad, of course, in the opinion of the civil and religious authorities. Given the subsequent history of the Gitanyow, it strains credulity to think that only a tiny minority approved of the actions that ended up being judged in a Smithers courtroom. Indigenous leaders all over the province were apprehensive about allowing reserve surveys because they were rightly concerned that, as Albert Williams said, to ask the surveyor for reserves "would be asking for something that was already theirs."[224] It is also striking how firmly the convicted men, and Isabella Douse, invoked God in asserting their honest belief that the Kitwancool Valley was theirs.[225]

No doubt there were problems at Kitwancool and it is clear that some of the "agitators" could be difficult. Having said that, it is also noteworthy how minor the infractions were and how artfully the charges were laid. Basically, the men tried to make off with a transit and blunted an axe before throwing it in the creek. The police clearly received some sort of legal advice, probably from the magistrate or by telegram from "E" Division headquarters in Vancouver, respecting s. 501 of the *Criminal Code*, an antique provision used hitherto mainly in labour disputes. Equally clearly, there were few other options: Sgt. Taylor, when he decided to apply for arrest warrants, reported his reason simply as the

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223 See *supra* note 70 and accompanying text.

224 See the text accompanying *supra* note 128.

225 In this connection it is worth noting that, more than sixty years later, a court acquitted an Indigenous defendant of mischief (obstructing a road) because his honest belief that his First Nation owned the land entitled him to the "colour of right" defence: *R v Gary Potts*, [1990] OJ No 2567, 12 WCB (2d) 128. Gary Potts led the Temagami First Nation's effort to settle their land claim in a case that went all the way to the Supreme Court of Canada. He died in June of 2020, as this article was being prepared for publication: obituary, *The Globe and Mail* (11 July 2020).

"circumstances" – which he had concluded earlier did not amount to assault. Even the nefarious "incitement" provision used against Stephen Morgan for the incidents at Kispiox in 1909 was not invoked.[226] By the time Emily Carr had returned to Kitwanga from Kitwancool, however, the police were describing the men as driving "surveyors off with axes."[227] It is true, of course, that Albert Williams was armed with a loaded revolver; but he was not charged, nor could he have been, with anything more serious than resisting arrest (of which he was acquitted) and obstruction. Guns were common in the remote parts of the province, and gun laws were different then.

Also of interest are the clues to how much official surveillance was going on. At least two of the constables involved were in what the newspapers called "mufti," meaning that someone who usually wore a uniform was in civilian clothes. The telegram that Albert Williams sent to Ottawa seems to have been easily obtained, with no suggestion of a warrant. When Inspector Wood received news that, at an Allied Tribes meeting in Vancouver $500 may have been raised to further the Nisga'a claim, he inquired whether this meeting had been "covered."[228] If it was, he wanted a copy of the report for a contemplated prosecution of the lawyer for the Nisga'a, Arthur O'Meara, under the new amendment to the *Indian Act*.[229]

A truly central figure in all this is Isabella Douse. In both the police accounts and in "Kitwancool," she comes across as a person of strength and dignity. In Carr's story she is hospitable but appropriately reserved until she is able to ascertain whether Carr was talking "straight." Carr's description of the Douse household – especially the part Isabella and Richard lived in – and its daily routine perfectly captures how impressed the artist was with how they lived. Yet although Sgt. Taylor allowed that Isabella Douse showed the RCMP "due respect," his remarks about her husband and his associates "slapping the government in the face" and his willingness to arrest "every Indian in the Kitwancool Valley" suggest this was not reciprocated.[230] The contempt that some of the police clearly felt

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226 See text accompanying *supra* notes 74 and 88.

227 Carr, *supra* note 15 at 150.

228 See *supra* note 110.

229 See *supra* note 30.

230 See the text accompanying Taylor, "Report regarding Kitwancool Indians", *supra* notes

for people who could not speak or read English, inferring from this that they were therefore unintelligent, obviously included Mrs. Douse.

There were two recurring themes in the Land Question during these years. One was that outside "agitators" were behind the campaign for title and that the campaign would collapse without them. This is repeated again and again, in newspaper editorials, in parliamentary debates, and in official correspondence. The usual suspects in the nineteenth century were missionaries and "half-breeds." The former were gradually replaced by lawyers in the twentieth century. It seems that their firm belief in the hopelessness of the case for Aboriginal title made some authorities deeply resent the fact that people such as the Kitwancool could get legal and strategic advice – just as the authorities themselves did. The police reports in this case are no exception: they reveal that the officers believed that the activists in Kitwancool were not capable of doing what they did without such advice. That they did have advisors clearly rankled.

Samuel Douse's possession of the 1927 report dismissing the claims of the Allied Tribes is especially suggestive. Constable Greenfield seemed to think that Douse was relying on it, wrongly, to support the Kitwancool position on Indian title in some way, and perhaps he was. The report is lengthy, the language quite dense in places and it may be that Douse was unable to read it. On the other hand, it may be that Douse was aware that the report had dismissed the claims of the Allied Tribes, whose adoption of the third narrative described at the outset of this essay had led the Kitwancool to break with that organization. It is unclear. But what is clear is that, if Douse was in the grip of the first narrative, Greenfield and the other police officers seem to have been firmly in the grip of the second. And both sides were relying on their own nation's perspective and, to some extent, on what Sgt. Taylor referred to as "careful coaching" by others.[231]

The second theme is related. Sgt. Taylor reported that Isabella Douse said she had given all her money to the cause of keeping the Kitwancool Valley "for the public wealth in the hands of the Indians."[232] Again,

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4 and 137.

[231] See text accompanying Taylor, "Report regarding Kitwancool Indians", *supra* note 126.

[232] See text accompanying Taylor, "Report regarding Kitwancool Indians", *supra* note 135.

because of the belief that there was no legal case for Aboriginal title, many non-Indigenous people believed that lawyers were getting rich and their unsophisticated clients were getting fleeced for no good reason. By 1927 it may well have seemed that this was true: implementation of the McKenna-McBride report, the rejection of the Allied Tribes' case and the prohibition of fund-raising for claims against government seemed to confirm that this was all a waste.

When Arthur O'Meara died in April of 1928, depriving the authorities of the satisfaction of prosecuting him, he certainly must have felt that he had failed, that the previous twenty years had amounted to nothing. Yet, after years of being accused by politicians and others of getting rich on the backs of the Nisga'a and the Allied Tribes, O'Meara left his family nothing but two life insurance policies: he had no savings, no real estate, no stock portfolio. But, beginning with the decision of the Supreme Court of Canada in the Calder case in 1973, the arguments he advanced between 1908 and 1928 were all conceded to be the law.[233]

This of course is hindsight. As writer and poet Marilyn Bowering has written of a fictional character not unlike O'Meara: "Of course he was right. History shows that ... But the present offered no such comfort to a man on the way down, who could not ask the future to support him."[234] We also cannot condemn people solely because they did not have the political and legal knowledge we have now. This is especially so when one considers that, forty years after the prosecutions at Smithers, the vast majority of British Columbians continued to think that Aboriginal title was not a legal right. The vast majority of lawyers thought this way, too, right up to 1973. Why? An important factor, I think, is that the legal research done between 1906 and 1927 by lawyers Clark, O'Meara, McInnes and Newcombe, as well as that done by James Teit and by Peter Kelly and Andy Paull of the Allied Tribes, was buried in archives until it was reinvented by Tom Berger and his clients in the 1960s. It certainly formed no part of any Canadian lawyer's legal education during this period.

Equally, we cannot condemn Emily Carr for not being an Aboriginal rights activist. "To expect Carr to have been a crusading social and political reformer," wrote Douglas Cole, "is to ask her to have assumed a

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233 See Hamar Foster, *supra* note 75 at 225-41.

234 Marilyn Bowering, *To All Appearances a Lady* (Toronto: Penguin Canada, 2007) at 30.

role to which she was intellectually and temperamentally unsuited..."[235] Critics who do expect this "are imagining an Emily that could never have existed."[236]

So, who was the "hero" in Carr's story? Every nation has its myths, and if Carr or the Gitanyow have romanticized the story of Isabella Douse and the men who resisted the land surveyors, so be it – they are entitled. But I don't think they have.[237] I agree with Cole that the "subtlety of her subversion of authority in her 'Kitwancool' story" is perfect, and could be missed by someone "unfamiliar with the long history of that village's resistance."[238] He then quotes Gerta Moray to similar effect:

> At a moment when government and settler interests lay in minimizing native claims and grievances, the acquisition of such a vivid and positive testimony to Native culture could hardly be seen as expedient. In addition, Carr clearly sought to change her audience's preconceptions about Native peoples. Both her lectures and her images did, in many respects, contradict the ideas about native culture propagated by other agencies of White society – agencies that sought to regulate Native affairs.[239]

To answer my question, I think the hero was Peter Williams. In the police reports he is described as interpreting for Isabella Douse, and in Carr's story the hero – who is Isabella's son-in-law – is also the interpreter. Williams went on to succeed his father as president, worked in land claims all his life and in 1984 the University of Victoria awarded him an honorary degree. He was 83 at the time. When Neil Sterritt, the lead author of *Tribal Boundaries*, received his honorary degree from UVic thirty-three years later, he referred to Peter Williams as one of his role models.[240]

But the last word should go to *Klee Wyck*. In the story, "Greenville," Carr wrote about the poles in an abandoned Nisga'a village. Drawing on

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235 Cole, *supra* note 174 at 161.

236 *Ibid*.

237 Unless referring to their reserve after 1927 as the "Oakalla Prison Reserve" counts: see Sterritt et al, *supra* note 34 at 86.

238 Cole, *supra* note 174 at 161.

239 *Ibid*, quoting from the PhD dissertation which became *Unsettling Encounters*, *supra* note 14.

240 Creekstone Press News, "UVic Honorary Degree for Neil J Sterritt" online: *Creekstone Press* <creekstonepress.com> [perma.cc/Y7WH-9GD2].

her own experience as an artist she describes at some length what a carver did. Beginning with the bare poles, she says, the carver:

> [W]anted some way of showing people things that were in his mind, things about the creatures and about himself and their relation to each other. He cut forms to fit the thoughts that the birds and animals and fish suggested to him, and to these he added something of himself. When they were all linked together they made very strong talk for the people. He grafted this new language on the cedar trunks ... and the cedar and the creatures and the man all talked together through the totem poles to the people.[241]

Carr sees the result as a language that links together the forest and the animals and the supernatural beings portrayed in the wood with the people themselves. After criticizing missionaries for condemning the carving of poles as "foolish and heathenish" – a passage no doubt omitted from the 1951 edition of *Klee Wyck* – she describes what she thought the effect was when missionaries moved people to a new village, leaving the poles behind.[242] When that happened, she wrote:

> [T]here was no one to listen to their talk any more. By and by they would rot and topple to the earth, unless white men came and carried them away to museums. There they would be labelled as exhibits, dumb before the crowds who gaped and laughed and said, "This is the distorted foolishness of an uncivilized people." And the poor poles could not talk back because the white man did not understand their language.[243]

All in all, a fitting epitaph for the events at Kitwancool in 1927.

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241 Carr, *supra* note 15 at 86. This of course is Carr's interpretation of the carver's art, influenced no doubt by her own cultural heritage.

242 *Ibid.*

243 *Ibid.*