

X

British Columbia: Legal Institutions in the Far West, from Contact to 1871

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I. Those Who Came and Stayed

IN 1892 J.A. LEES AND WJ. CLUTTERBUCK published a book entitled *B.C. 1887: A Ramble in British Columbia*. They had gone to this “little known country” to scout it out as a potential destination for Britain’s increasingly redundant public school and university graduates. By the 1880s, the Canadian Pacific Railway had rendered the province much more accessible, and there were “still plenty of spots worth taking up” in the Columbia and Kootenay valleys. However, the authors warned their readers that anyone wanting land there had “no time to lose.”¹

The same sort of pitch was made all over the British Empire during the nineteenth century. This particular one came at a critical point in B.C.’s history, because the railway had ended the isolation of the “West beyond the West” and prepared the way for the population explosion of the next two decades and the prosperity that accompanied it.² By then, the boom and bust cycle of the province’s resource-based economy was well-established, and everything, including the legal system, was under pressure. Nonetheless, it was a shock when the bubble burst again just before the First World War, and the fragile recovery of the twenties was followed by the even deeper shock of the Great Depression. The good times did not really return until the remarkable spurt of growth that took place in the decades following World War II. As old as European colonisation itself, and deceptively similar to natural fluctuations in salmon and other stocks, this cycle and its perceived demands were a prime determinant of legal development.

Another travelogue writer, W.A. Baillie-Grohman, was more abrupt about the province’s history. It was brief, he wrote in 1900: “Gold made it and gold unmade it.”³ He could have said something similar in the 1850s about the decline of the fur trade, or even today, when “fall down” in the forest industry means much more than what happens to trees. But the threats to so-called ‘renewable’ resources were harder

¹ If they had at least £2000: see J.A. Lees and WJ. Clutterbuck, *B.C. 1887. A Ramble in British Columbia* (London: Longmans, Green, and Co., 1892) at 2-3, 385-86.

² Jean Barman, *The West beyond the West. A History of British Columbia* (Toronto: University of Toronto Press, 1991) chapter 7.

³ W.A. Baillie-Grohman, *Fifteen Years’ Sport and Life in the Hunting Grounds of Western North America and British Columbia* (London: H. Cox, 1900) at 316.

to see than the obviously finite nature of gold, so the legislature was slower to respond: laws about extracting gold came well before laws about preserving fish.

In the 1840s the coastal forests and salmon seemed virtually "inexhaustible" to senior Hudson's Bay Company officials.⁴ A century later the only change in this attitude was a marked decline in sophistication of expression. "Explore, exploit, export!", the Canadian Confederation Centennial Committee of British Columbia proclaimed in 1967. "Those three words," they exulted, "might well form a new corporation symbol [for] British Columbia in the mid-sixties."⁵ Many British Columbians agreed, but were less enthusiastic about its implications; for example, the Sekani of the Upper Peace River and Parsnip River valleys. Soon after the centennial celebration, the W.A.C. Bennett Dam was built on lands they had occupied for centuries, and the people were moved off to make room for Williston Lake, a human creation that is the largest and possibly the ugliest body of fresh water in the province. Once the corridor of Alexander Mackenzie's and Simon Fraser's first penetration of "New Caledonia," its shores were strewn with decayed wood, its shallows pincushioned with protruding snags.⁶ There is less talk of exploitation today, and of course much less to exploit.⁷

Relationships among human beings, as well as the relationship between human beings and their environment, have been the other great preoccupation of law and legal institutions. In British Columbia the natural resources of the province, from the fur trade era through the mining, agriculture, fishing and lumbering that came later, required extensive outlays of capital and labour for their development. The law has not only regulated their exploitation through statutes respecting credit, bankruptcy, employment and the like; it has also mediated the exploiting parties' disputes and often taken sides. For labour, the signposts ranged from the miner's strikes at Fort Rupert (1850) and Wellington (1877), to the relief camp workers' march on Vancouver in 1934 and Operation Solidarity in 1983.⁸ For business and commercial interests, they began with the struggle over the Hudson's Bay Company trade monopoly prior to 1858, and included railway land grants, tree farm licences, government-subsidised industries and twentieth century "company towns" that controlled the lives of employees almost as much as the reviled "worshipful corporation of peltmongers" did.⁹

⁴ James Douglas to Capt. Shepherd of H.M.S. *Inconstant* dated 28 May 1849 at Fort Nisqually, in British Columbia Archives and Records Services, Victoria [hereinafter BCARS] GR 332, vol. I at 11; George Simpson to the Governor & Committee of the Hudson's Bay Company [hereinafter HBC], dated at Honolulu, 1 March 1842, in Glyndwr Williams, ed., *London Correspondence Inward from Sir George Simpson 1841-1842* (London: Hudson Bay Records Series, 1973, vol. XXIX) at 109.

⁵ Herbert L. McDonald, *British Columbia: A Challenge in Abundance* (Vancouver: Canadian Confederation Centennial Committee of B.C., 1966) at 41.

⁶ Hugh Brody, *Maps and Dreams: Indians and the British Columbia Frontier* (Vancouver: Douglas & McIntyre, 1981) at 134-5.

⁷ See, for example, M. Patricia Marchak, "For Whom the Tree Falls: Restructuring of the Global Forest Industry" (1991) 90 B.C. Studies 3.

⁸ Information about all the incidents in the text may be found in any standard history (e.g., Barman, *supra* note 2).

⁹ This is how the *Morning Herald* referred to the HBC (9 February 1849). To the *Morning Chron-*

Cutting across these relationships, the tension between newcomers and those who came before was also never far from the surface, and strategies of reaction and response developed that remain with us today. The Aboriginal wars and migrations that ceased as recently as the colonial era, and the waves of European, Asian and other immigrants that quickly followed, marked the stages of significant aspects of the province's legal history.¹⁰ Denial of the franchise to Natives and Asians, banning the potlatch, the Anti-Chinese riot in Vancouver in 1887, the *Komagata Maru* incident in 1914, the Chinese head tax, and the forced removal of the Japanese and seizure of their property during World War II, were all examples.¹¹ Notwithstanding the repeal or repudiation of these measures, one need only look at the print and broadcast journalism of the 1980s and 1990s to see, in opinion pieces about immigration from non-European parts of the world, the same sense of displacement that British Columbia's Aboriginal peoples felt more than one hundred years earlier.

To varying degrees, laws about crime, the work-place, the constitution, property, contracts, and the family have shaped and been shaped by tensions involved in developing these resources and attempting to accommodate successive generations of investors and workers. Land posed an especially acute problem in British Columbia's "sea of mountains," and the colonists' hunger for it was not to be denied. Lees and Clutterbuck were still planning their expedition when this implacable reality was confirmed in February of 1887. Premier William Smithe met with a delegation of Nisga'a and Tsimshian chiefs in Victoria, and told them that the province's Natives were not legally entitled to a treaty. All their traditional lands, he said, were the Queen's.¹² The authors of *B.C. 1887* were as culture-bound as anyone, and thought that Natives could not really be regarded as owning much good land. But even they remarked on the negative results of British Columbia's unusual policy:

[M]any places there are which *have* been owned and lived on by Indians in a perfectly regular manner, and we believe that the Government has paid very little attention to facts of this kind, but treating all the land as Crown land, has in many instances sold such plots to white settlers. They have given the Indians, it is true, certain reserves, but these often inadequate in amount, and selected without much regard to the feelings of the allottees as to position or quality.¹³

icle they were "a sort of corporate Nimrod" (22 August 1848).

¹⁰ Intermecine conflict lasted into the 1860s, and some boundaries, for example that between the Euclataw and the Comox on Vancouver Island, are relatively recent: Wilson Duff, *The Indian History of British Columbia, vol. 1: The Impact of the White Man* (Victoria: Anthropology in B.C., Memoir No.5, 1965) at 24, 44.

¹¹ All these are described in standard histories such as Barman, *supra* note 2 and Margaret A. Ormsby, *British Columbia: A History* (Vancouver: Macmillan, 1958). See also W.P. Ward, *White Canada Forever* (Montreal: McGill-Queen's University Press, 1978) and Patricia E. Roy, *A White Man's Province: British Columbia Politicians and Chinese and Japanese Immigrants 1858-1914* (Vancouver: University of British Columbia Press, 1989).

¹² B.C. Sessional Papers, "Report of Conferences between the Provincial Government and Indian Delegates from Fort Simpson and Nass River" 3 and 8 February 1887 (50 Victoria) 252 at 255-6.

¹³ *Supra* note 1 at 200 (emphasis in original). Lord Dufferin made a similar complaint when he visited B.C. as governor general in 1876, as did Keith, *Responsible Government in the Dominions*, 2nd ed., vol. I (Oxford: Oxford University Press, 1928) at 786. The latter described the amount of land set aside by the colonial authorities in B.C. as "decidedly inadequate," noting that "some difficulty has been experienced in inducing the province to conform to the standard of generosity of the Dominion."

In fact, the “land question” as a well-defined issue was already over a decade old in 1887, and its roots went back to the 1850s, when the fur trade “frontier” first began to give way to settlement and exploitation of other resources.¹⁴ As Nisga’a chief James Gosnell once put it, his ancestors had been slow to understand the threat that the newcomers posed. “They thought these people were there for a visit and [would] then go. They didn’t, you know.”¹⁵ Once established, the “visitors” were much quicker to appreciate the threat, or what they perceived as the threat, posed by subsequent, non-European migrations.

Geography has also played an important role in British Columbia’s legal history. First, its size and terrain made the imposition of a uniform legal system difficult, especially with regard to Aboriginal inhabitants, and encouraged local variations in what was seen as legal and just.¹⁶ Secondly, its location at the end of the colonisation trail not only enabled the province to pursue a deviant Aboriginal policy, but isolated it from the centres of imperial and federal authority, giving rise to certain anomalies. Thus, in order to make handing Britain’s first Pacific colony over to the Hudson’s Bay Company more acceptable, the Colonial Office inflicted a bizarre and antiquated constitution on Vancouver Island. The mainland colony’s first governor, James Douglas, was given extraordinary legislative authority because of the threat of American annexation and the delays that long-distance decision making would involve. Equally impressive was the position of the colony’s first legally trained judge, Matthew Baillie Begbie. He presided over the British Columbia Supreme Court for thirty-five years, but did not experience having one of his decisions challenged on appeal until twenty-one of those years had passed.¹⁷ Theoretically, his rulings in civil cases could be reviewed by the Judicial Committee of the Privy Council in London, but that expensive and impractical remedy was never invoked during the colonial period.¹⁸ Insofar as cases that reached his court were concerned, from 1858 until 1870 Begbie was the law.¹⁹

British Columbia’s often rocky relations with distant London and Ottawa also played a critical role in its development, and this influenced important portions of its legal inheritances. Unlike the rest of western Canada, it was a self-governing colony with an established superior court of “imperial descent” when it confederated; it was not simply carved out of existing federal territory.²⁰ A great deal of energy was therefore devoted to defining the proper relationship between province and

¹⁴ See *Papers Connected with the Indian Land Question* (Victoria: Queen’s Printer, 1875) [hereinafter *Papers*].

¹⁵ Quoted in Daniel Raunet, *Without Surrender, Without Consent* (Vancouver: Douglas & McIntyre, 1984) at 17–18.

¹⁶ See Tina Loo, “The Grouse Creek ‘War’ ” (1990) 70 *The Beaver* 24.

¹⁷ David Williams, Q.C., “... ‘The Man for a New Country’ Sir Matthew Baillie Begbie” (Sidney: Gray’s, 1977) at 225.

¹⁸ The authority for such appeals was *An Act to Provide for the Government of British Columbia* 21 & 22 Victoria, 1858, c. 99, s. 5 (U.K.). There was a similar clause in the statute providing *For the Administration of Justice in Vancouver’s Island* 12 & 13 Victoria 1849, c. 48, s. 3.

¹⁹ A second supreme court judge was appointed in 1870, and a third in 1871.

²⁰ This characterisation of the supreme court is in Justice Henry Pering Pellew Crease to Alpheus Todd, 4 February 1882, *BCARS*, Add. MSS 54, folder 14/76.

dominion, and between government and the courts.²¹ British Columbia's position on Aboriginal title was a special sore point, but the province might not have been so intransigent if the issue had not become a pawn in other disputes, notably over the railway. These disagreements often left the locals feeling hard done by, and the dominion, put upon—especially when dealing with the likes of B.C.'s second premier, Amor De Cosmos.²² Even the secretary of state for the colonies, exasperated by the province's behaviour during the railway negotiations, was moved to call it "the spoilt child of Confederation."²³ Justice Henry Pering Pellew Crease, reluctantly accepting that his views about the division of powers were not shared in Ottawa, was more philosophical. British Columbians, he ruefully observed in 1882, could not expect "larger communities to read the *British North America Act* by the light of a B.C. candle."²⁴

British Columbia often found itself cast in the role of the needy and dissatisfied in-law, but its isolation did not prevent overseas influences from playing a crucial part in its developing legal system. Vancouver Island's land laws were based upon the ideas of Edward Gibbon Wakefield, the British social theorist whose views about how a colony should be structured also influenced the establishment of colonies in Australia and New Zealand, not to mention Lord Durham's Report on the Canadas. And Joseph Despard Pemberton, Vancouver Island's first real surveyor, used his knowledge of developments in nearly a dozen other colonies to establish the Island's "tripartite" division of local real estate into town lots, suburban lots and country lands.²⁵ The colony was also the first "Canadian" jurisdiction to import the Torrens system of title registration, modelled on shipping registries and therefore basing ownership upon a certificate of title rather than a detailed and time-consuming search of conveyancing documents. The Douglas "treaties" were copies of Aboriginal land deeds from New Zealand.²⁶ Examples from as far away as South Africa were consulted in developing the colony's Aboriginal policy, and the first gold mining regulations were based upon the Australian and New Zealand models, modified to

²¹ On the latter issue see Hamar Foster, "The Struggle for the Supreme Court: Law and Politics in British Columbia, 1871-1885" in L. Knafla, ed., *Law and Justice in a New Land: Essays in Western Canadian Legal History* (Calgary: Carswells, 1986) [hereinafter *Law and Justice*] at 167.

²² The self-named "Lover of the Universe." Some of his successors were also interesting: see Peter Murray, *From Amor to Zalm. A Primer on B.C. Politics and its Wacky Premiers* (Victoria: Orca Book Publishers, 1989), and Gordon Hilliker, "Fighting Joe Martin Comes to British Columbia" (1987) 45 *The Advocate* 671.

²³ Quoted in Ormsby, *supra* note 11 at 283.

²⁴ Crease to E. Douglas Armour of the Canada Law Times, 25 March 1882, *BCARS*, Add. MSS 54, folder 14/76.

²⁵ See Richard Somerset Mackie, "*Colonial Land, Indian Labour and Company Capital: The Economy of Vancouver Island, 1849-1858*" (M.A. thesis, University of Victoria (history), 1984) at 231. On the Wakefield system see W.K. Hastings, "The Wakefield Colonisation Plan and Constitutional Development in South Australia, Canada and New Zealand" (1990) 11 *The Journal of Legal History* 279, and the text accompanying note 87 *infra*.

²⁶ Williams, *supra* note 17 at 156-7. On land policy generally see Robert Cail, *Land, Man and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913* (Vancouver: University of British Columbia Press, 1974), and on the New Zealand connection to the treaties, see Hamar Foster, "The Saanichton Bay Marina Case: Imperial Law, Colonial History and Competing Theories of Aboriginal Title" (1989) 23 *University of British Columbia Law Review* 629.

reflect California experiences and local circumstances.²⁷ Laws from all over the empire played a part in shaping British Columbia's racial legislation, and the province's supreme court examined international treaties, principles of federalism, and even judicial precedents from California when the validity of this legislation was challenged.²⁸ No doubt other examples of this sort of legal eclecticism could be found, because isolation was a reason to look, not only inwards for protection, but outwards for assistance.²⁹

The result of these influences has been a jurisdiction that, in theory, reflected rather closely the principle contained in the first English Law Ordinance.³⁰ English law as it existed at reception applied, except where local circumstances rendered it inappropriate or where it was justifiably modified by local laws that often found inspiration elsewhere.³¹ This was the usual imperial rule, but of course it had its exceptions and different groups interpreted it in different ways. Apart from the issue of how Aboriginal law was to be accommodated, if at all, the main question for the colonists was whether this principle should protect an imported *status quo* or become an instrument of change. Fidelity to the rules of English law or British justice could be invoked by both the advocates and the opponents of innovation, on either side of any number of issues.³² Among the most important were those generated by the

²⁷ See, e.g., Barry Gough, "Keeping British Columbia British": The Law-and-Order Question on a Gold Mining Frontier" 38 *Huntingdon Library Quarterly* 269. Many of the relevant colonial despatches are in the Irish University Press series of *British Parliamentary Papers, Colonies: Canada* [hereinafter *BPP*].

²⁸ See John P.S. McLaren, "The Early British Columbia Supreme Court and the 'Chinese Question': Echoes of the Rule of Law" (1991) 20 *Manitoba Law Journal* 107, also published in Dale Gibson and W. Wesley Pue, eds., *Glimpses of Canadian Legal History* (Winnipeg: Legal Research Institute, 1991) 111 [hereinafter *Glimpses*], and "The Early B.C. Judges and the 'Chinese Question': The California and Oregon Connections" in John McLaren, Hamar Foster and Chet Orloff, eds., *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West* (Regina: Canadian Plains Research Centre, 1992) at 237.

²⁹ For example, James Douglas regretted the imperial government's failure to extend the Reciprocity Treaty of 1854 to Vancouver Island; but B.C. opposed free trade in the elections of 1891 and 1911, and was distinctly divided in 1988: see Mackie, *supra* note 25 at 291, and Randall White, *Fur Trade to Free Trade* (Toronto: Dundurn Press, 1988) at 90.

³⁰ The 1867 version of this ordinance is considered in *Reynolds v. Vaughan* (1872), 1 B.C.R., Part I at 3.

³¹ This principle was proclaimed in force on the mainland when the colony was established. On Vancouver Island, there was no such ordinance until after proclamation until after merger with the mainland in 1866. However, a 27 January 1861 report in a California newspaper noted that Judge Cameron invoked the principle to rule that pre-1849 English bankruptcy laws applied in the colony: "Bancroft Scraps" at 124, Bancroft Library, University of California at Berkeley [hereinafter *Bancroft Library*]. Of course, in at least one sense the principle is clearly a fiction: it was mainly Scots who opened up the west, and it remained unclear why British sovereignty required English law. For a discussion of this question in the New Zealand context, see N.J. Jamieson, "English Law But British Justice" (1980) 4 *Otago Law Review* 488.

³² On this point generally see Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983). Both supporters and opponents of Aboriginal title have appealed to legal tradition to support their arguments, especially when B.C.'s Natives "discovered" the Royal Proclamation of 1763. Over half of the 2,000 words in the 1913 Nisga'a petition to the imperial authorities in London was made up of excerpts from the Proclamation: see Paul Tennant, *Aboriginal People and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1990) at 71, 90.

pressure exerted by immigration on land and resources, including human resources, and by the process of sorting out proper spheres of local and federal authority. What all this replaced is more difficult to ascertain, because it belonged to an oral culture. And many of the newcomers did not see that as “law.”

II. The Pre-Contact Era

The Native peoples who preceded Europeans in “British Columbia” had been there for centuries when the Spanish, British and Americans began arriving in the 1770s and 1780s. European anthropology has determined that the “Indians” probably came to North America by way of the Bering land bridge from Siberia, and that the “pronounced Asiatic tinge” to the coastal cultures was due to continuing if intermittent contacts with the other peoples across the north Pacific rim.³³ Probably about forty percent of Canada’s Aboriginal population lived in B.C. when the fur trade reached west of the Rockies. They comprised ten major ethnic language groups made up of thirty-four different dialects.³⁴ The total population has been estimated as being in excess of 80,000 persons at contact; that of the northwest coast cultural area as a whole may have been as high as 200,000. This would put it among the most densely populated non-agricultural areas of the world, and some parts of the coast had a larger population than they do today. Within a century, these numbers had declined by as much as eighty percent.³⁵

The linguistic and cultural diversity of pre-contact British Columbia renders generalisations about Aboriginal law hazardous. Residential schools and the devastating effects of European diseases, especially upon the very old who transmitted the knowledge, and the very young who received it, have made detailed retrieval even of particular traditions difficult.³⁶ So too has the concept of private knowledge, whereby certain matters may not be revealed to anyone outside the relevant grouping. However, a rather crude distinction can be drawn between the interior and the coast. The Athapaskan tribes in the north (e.g., the Sekani, Beaver and Slave) and the Kootenay in the southeast were as egalitarian and “semi-leaderless” as any in

³³ Duff, *supra* note 10 at 7. Another theory is that the first settlers came by sea. The traditional view, as put for example by a witness in an injunction proceeding involving clear-cut logging on Lyell Island, is that “[s]ince the beginning of time—I have been told this through our oral stories—since the beginning of time the Haidas have been on the Queen Charlotte Islands. That was our place given to us. We were put on the islands as the caretakers of this land ...” (*Western Forest Products Limited v. Dempsey Collinson et al.*, No. C854988, Transcript of Proceedings, Supreme Court of B.C., 6 November 1985 at 41).

³⁴ Duff, *supra* note 10 at 15, 39. The numbers of course depend upon which classification scheme is adopted, and the Indians “had no terms for [the] major subdivisions”

³⁵ *Ibid.* at 40, and Robert T. Boyd, “Demographic History, 1774-1874” in Wayne Suttles, ed., *Northwest Coast*, vol. VII, *Handbook of North American Indians* (Washington: Smithsonian Institution, 1990) at 135. The cultural area stretches, conservatively, from the Alaska Panhandle to Oregon.

³⁶ See, for example, Ernie Crey, “The Children of Tomorrow’s Great Potlatch” (1991) 89 B.C. Studies 150 at 152. Crey asserts that “the bridge between generations which would have permitted the transfer of cultural knowledge from one generation to the next was virtually destroyed” by four generations of residential schools. However, not all such schools should be included in this indictment: see J.R. Miller, “Owen Glendower, Hotspur, and Canadian Indian Policy” in Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991) at 323.

Canada: there were no tribal or sub-tribal chiefs and, except for the Kootenay, even the leaders of independent migratory bands had "little or no real authority." But the closer a tribe lived to the ocean, the more its socio-political organisation was affected by the distinctly undemocratic customs of the coastal Indians which, unlike their languages, had much in common.³⁷ On the coast, the main political unit was the village, and rank was a universal and important fact of life. The Tsimshian, Haida and other nations may have been hunters and gatherers, but unlike most foraging societies, they were organised along strictly hierarchical lines.³⁸ Although a certain amount of controversy continues in the literature about how rigid the categories were, most researchers agree that much depended upon whether one was a noble, a commoner, or a slave.³⁹

In Europe, law was generally concerned with at least two social phenomena: resource allocation and dispute resolution. So it was with Aboriginal societies, although with them the spiritual permeated the temporal to a much greater degree. In addition to elaborate and complex rules governing kinship, adoption and other common legal institutions, the coastal Indians, as Governor Douglas himself told the Colonial Office, had "distinct ideas of property in land."⁴⁰ The first European to set foot on the soil of what is now British Columbia had also noted this. Referring to the inhabitants of Nootka Sound, Captain James Cook wrote that he had never met a people "who had such high notions of everything the Country produced being their exclusive property."⁴¹ Nearly two hundred years later, most anthropologists agree. Except for areas so remote and inhospitable that they remain unused even today, every part of British Columbia was "within the owned and recognised territory of one or other of the Indian tribes," and boundaries were delineated by physical landmarks.⁴² The law of trespass varied from place to place, but permission was normally required to go on another tribe's lands, and death could be the penalty for omitting to obtain such permission.⁴³

While larger territories were regarded as belonging, in a general sense, to all who shared a particular language (e.g., the Gitksan, Kwakwaka'wakw, Nisga'a),⁴⁴ major

³⁷ Diamond Jenness, *The Indians of Canada*, 7th ed., (Ottawa: University of Toronto Press, 1977) at 351, 359, 362, 365, 380, 384 and 391. The spread of coastal cultures into the interior was accelerated by the fur trade: see Olive Patricia Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: McClelland & Stewart, 1992) at 212.

³⁸ Bruce Alden Cox, *Native People, Native Lands* (Ottawa: Carleton University Press, 1987) at xiii.

³⁹ Philip Drucker, *Cultures of the North Pacific Coast* (New York: Harper & Row, 1965) at 47. The different anthropological views, and differences among the tribes, are canvassed in Wayne Suttles "Private Knowledge, Morality and Social Classes among the Coast Salish" in Suttles, *Coast Salish Essays* (Seattle: University of Washington Press, 1987) at 3–25.

⁴⁰ Douglas to Newcastle, 25 March 1861, reproduced in *Papers*, *supra* note 14 at 19. Of course, rules that seemed elaborate and complex to Europeans were hardly so to the people living under them.

⁴¹ Quoted in Gilbert Malcolm Sproat, *The Nootka. Scenes and Studies of Savage Life*, 2d ed., (Victoria: Sono Nis Press, 1987) at 59. This book was originally published in London in 1868.

⁴² Duff, *supra* note 10 at 8.

⁴³ See, for example, *Histories, Territories and Laws of the Kitwancool* (Victoria: Anthropology in B.C., Memoir No. 4, 1989 reprint) at 36.

resource sites within these territories tended to belong to chiefs and their households, which they administered on behalf of smaller groups.⁴⁵ Hereditary title to tangibles, e.g., fishing grounds and clam beaches, and to intangibles such as crests and names, was acquired in public winter feasts that came to be known in the post-contact period as “potlatches,” a term borrowed from the Chinook trade jargon. Much like the feudalism of the early English common law, which permitted neither *inter vivos* alienation nor wills of land, this was a system not of abstract ownership or rights but of hereditary claims.⁴⁶ Yet the effect of the potlatch procedure, by which individuals gave gifts even of land, could, according to one anthropologist, “be compared to that of notarising a document or registering a deed.”⁴⁷ Because of the pagan and allegedly immoral nature of some of these gatherings, the Dominion parliament laid “an iron hand” upon the potlatch in the 1880s and prohibited them.⁴⁸

Dispute resolution in Aboriginal British Columbia also had something in common with early English law, before trial by jury gradually replaced older, tribal institutions. The local kin-group was key, and if problems developed between such groups retaliation was likely to follow. This was not simply because of some “savage thirst for vengeance” but because that was how social control was maintained. As European fur traders quickly discovered, to fail to respond forcefully to aggression would be to invite more aggression, especially when resources were scarce.⁴⁹ In fact, a principle of liability obtained in North America that was similar to early European law: individual responsibility attached to the actual wrong-doer, and collective responsibility fell upon “all members of his or her kin group, whether that kin group was a household, an extended family, or a clan.” If the wrong-doer was a member of a different nation entirely, retribution could be exacted against any and all members of that nation.⁵⁰

This also appears to have been the situation on the B.C. coast, but it was modified by the distinctive rank-ordering of those societies. The kin of the victim would either ask the offending group to produce voluntarily the person who was most nearly the victim’s equal in status, in order that they could kill him, or they would simply attack,

⁴⁴ Duff, *supra* note 10 at 12, 15.

⁴⁵ For contrasting views of this arrangement see Drucker, *supra* note 39 at 49, and Rolf Knight, *Indians at Work: An Informal History of Native Indian Labour in British Columbia 1850-1930* (Vancouver: New Star Books, 1978) at 208. Like the medieval prerequisite in English common law of seisin, i.e., actual “sitting” and occupying the land, pre-contact proofs of possession centred also on usage, be it for hunting, berry-picking or transit.

⁴⁶ In England, wills of land could not be made at law until 1540, and then only partially. Moreover, prior to the regular intervention of the king’s courts, feudal law was a law of hereditary expectations, not rights: see S.F.C. Milsom, *Historical Foundations of the Common Law*, 2d ed., (London: Butterworths, 1981) chapters 6 and 7.

⁴⁷ Drucker, *supra* note 39 at 56.

⁴⁸ Gilbert Malcolm Sproat to the superintendent-general of Indian Affairs, 27 October 1879, quoted in Douglas Cole and Ira Chaikin, *An Iron Hand Upon the People. The Law Against the Potlatch on the Northwest Coast* (Vancouver: Douglas & McIntyre, 1990).

⁴⁹ Drucker, *supra* note 39 at 72.

⁵⁰ John Phillip Reid, “Principles of Vengeance: Fur Trappers, Indians, and Retaliation for Homicide in the Transboundary North American West” (1993) 24 *Western Historical Quarterly* 21 at 24.

risking a much bloodier encounter and possibly a prolonged feud. If the victim was of high rank, self-sacrifice was expected and admired.

The volunteer to be slain was expected to don the ritual finery of his group and come out performing the dance associated with his highest crest until the injured group shot him down. The purpose of this heroic gesture was to prevent further bloodshed and to equalise the losses of both groups so that they could negotiate a peaceful settlement.⁵¹

After this, or sometimes even in lieu of this, some kind of recompense was made to the victim's group.⁵² Except among the Nuu-Chah-Nulth and the Kwakwaka'wakw, feud-indemnities were paid everywhere on the coast. But this practice varied as to whether payment could be arranged without actual blood vengeance, and only in the most southern region were there any set standards for evaluating the worth of a life or a less serious injury.⁵³ As a result, negotiations could be difficult. Demands had to be high enough to reflect the esteem in which the dead man was held, and offers had to be low enough to show that the offenders were not afraid, yet not so low as to make them appear poorly off.⁵⁴ This naturally raises the question of whether the Northwest coast had to endure uncomfortably high levels of feuding and violence.

The answer is an unavoidably relative one. Dr. John Sebastian Helmcken, one of Vancouver Island's earliest European pioneers, thought that colonists were too quick to condemn. Looking around at the Europe of the 1890s, and then back at the Aboriginal raids of the fur trade, he declared that it was the Christians who were the more violent.⁵⁵ Moreover, the complex relationships characteristic of tribal society allowed rules of self-help and vengeance to operate "without constantly disturbing social life."⁵⁶ As in European society, people belonged to different groups for different purposes. Conflicting allegiances, created usually "through marriage rules that lead to the dispersal of the vengeance group through several local communities," existed in and among all tribes, including those few who did not have feud-indemnities.⁵⁷ As for conflict within local groups, as opposed to between them, there was always the option of simply leaving, of going to live with another group to whom one was connected. Of course, everything was done to ensure that tensions did not

⁵¹ Drucker, *supra* note 39 at 73.

⁵² Accepting compensation made it possible to take into account circumstances such as accident, provocation, etc. Reid, *supra* note 50 at 8–9.

⁵³ For an early medieval pre-feudal model, see the Anglo-Saxon tariff set forth, for example, in the Kentish Laws of Aethelberht (A.D. 601–04).

⁵⁴ Drucker, *supra* note 39 at 73–74.

⁵⁵ "I see the war canoe become the 'ironclad ship of war,' the Indian warriors represented by disciplined sailors and soldiers ... These like the Indians are defenders of their country, ready at the same time to invade another's territory. Instead of small tribes I see large nations — instead of small parties I see legions of soldiers. Instead of a few heads and slaves being taken, I learn of thousands upon thousands slaughtered! What hypocrites we are." From Dorothy Blakey Smith, ed., *The Reminiscences of Doctor John Sebastian Helmcken* (Vancouver: University of British Columbia Press, 1975) [hereinafter *Helmcken*] at 330.

⁵⁶ Max Gluckman, *Politics, Law and Ritual in Tribal Society* (Oxford: Basil Blackwell, 1965) at 111.

⁵⁷ Stuart Michael Piddocke, "Wergild Among the Northwest Coast Indians" (M.A. thesis, University of British Columbia, 1959) at 35, 194–95.

reach a point which threatened the common good, and this was especially true of the hunting bands of the interior plateau. As Drucker pointed out, speaking of the coastal cultures, on those rare occasions when blood was shed within the group,

usually nothing was done about it. The group would not take vengeance on itself, nor demand wergild of itself, and there was no higher authority. Acts considered serious crimes might be punished by the group, however. There are a few accounts of persons accused of witchcraft being put to death ... usually by being tied to a stake on the tide flats at low tide and drowned

Among groups having unilateral clan organisation, clan incest was considered the blackest of crimes, and offenders were put to death by their own people to wipe away the disgrace of misdeed.⁵⁸

III. The Fur Trade

The maritime fur trade began almost immediately after Cook came ashore at Nootka Sound in 1778, and continued even after the North West Company established land-based trade in the northern interior in 1805 and 1806.⁵⁹ The North Westers merged with the Hudson's Bay Company in 1821, and this union was sanctioned by an imperial statute which provided for criminal and civil jurisdiction over the 'Indian country' and authorised the Crown to grant an exclusive licence to trade there. The former provision proved barren, but the latter was invoked in favour of the new, expanded Hudson's Bay Company, which proceeded to exploit the potentially rich fur harvest of New Caledonia much more efficiently than the North West Company had done.⁶⁰ They accomplished this primarily by creating an agricultural infrastructure in the Columbia valley to reduce provisioning costs, and a "fur desert" further south to keep out rival American traders. They also sought, and eventually obtained in 1839, a lease of the Alaska Panhandle from the Russians, thus completing their zone of protection. Then, two years after Great Britain ceded Oregon to the United States in 1846, the British government announced its intention to grant the HBC the fee in Vancouver Island, provided they promoted colonisation.

The British press was generally hostile to this idea. The Hudson's Bay Company, wrote *The Times* of London in 1848, were

fur traders and monopolists, and in neither capacity can they give hearty encouragement to the pursuits of civilised or colonial life. They want beavers and sables to multiply, hunting grounds to be preserved, and hunters and trappers to thrive. Their function is to perpetuate what it should be the aim of a colony to destroy.⁶¹

There will always be a debate about the extent to which the fur trade adversely affected Aboriginal society; but if its effect is compared to that of colonisation and settlement, *The Times's* assessment seems accurate. Certainly the trade had very little impact upon Aboriginal law. Aboriginal lands were left alone, Aboriginal ideas of

⁵⁸ Drucker, *supra* note 39 at 74.

⁵⁹ At McLeod Lake, Stuart Lake (Fort St. James) and Fraser Lake.

⁶⁰ 1 & 2 George IV, 1821, c. 66 (U.K.). The original licence was granted in 1821, and a copy of the 1838 renewal is reproduced in the *Report from the Select Committee on the Hudson's Bay Company*, 1857 [hereinafter *Report*], at 414–416.

⁶¹ *The Times*, 21 August 1848.

how trade should be conducted were modified, but not abrogated; and Aboriginal customs regarding homicide, not contemporary European ones, tended to govern behaviour.⁶² Even the imperial statutes of 1803 and 1821, which provided for trial back east in Canada for crimes committed in the "Indian Territories," and which appeared on their face to subject Natives to British or Canadian law, did not in fact do so.⁶³ The Natives' own laws continued to govern their relations *inter se* and generally with the traders: marriages were contracted *à la façon du pays*,⁶⁴ and blood rendered for blood or some equivalent when required.⁶⁵

There was one situation in which it might be argued that traders resisted Aboriginal law. If the offender was of a different nation, retaliation against any member of that nation was permitted, even required. Because Natives tended to see all European traders as part of one distinct people, they could retaliate against any of them, however unconnected to the original wrong and even if the original wrong was unintentional. Some attacks upon traders that appeared to have been unprovoked and treacherous were therefore quite justified under Aboriginal law; subsequent chroniclers simply could not see a pattern that, to the Native perpetrators, was so plain as to require no explanation. Certainly many traders understood this, but they were unwilling to put themselves on the receiving end. Hard pressed to understand why someone innocent in the eyes of European law and morality should be killed to avenge a death, they could regard such an act only as a fresh injury, requiring a response.

Because critics were quick to accuse fur traders of sinking to the "barbarous" standards of the Natives, it was important for the HBC to maintain that they retaliated only against guilty individuals, not against tribes or nations.⁶⁶ Such statements reflected European ideas of justice and were intended for public consumption in England.⁶⁷ But, however opposed they were to submitting themselves to this aspect

⁶² See Reid, *supra* note 50 at 14 and the debate about the importance of non-economic considerations in the fur trade summarised by Robin Fisher and Kenneth Coates, *Out of the Background: Readings on Canadian Native History* (Mississauga: Copp Clark Pitman, 1988) at 7–9.

⁶³ 43 George III, 1803, c. 138 (U.K.); 1 & 2 George IV 1821, c. 66 (U.K.). These are discussed in Hamar Foster, "Long-Distance Justice: The Criminal Jurisdiction of Canadian Courts West of the Canadas, 1763–1859" (1990) 34 *American Journal of Legal History* 1; and "Forgotten Arguments: Aboriginal Title and Sovereignty in *Canada Jurisdiction Act Cases*" (1992) 21 *Manitoba Law Journal* 343.

⁶⁴ See Jennifer S.H. Brown, *Strangers in Blood: Fur Trade Company Families in Indian Country* (Vancouver: University of British Columbia Press, 1980); Sylvia Van Kirk, "Many Tender Ties": *Women in Fur-Trade Society, 1670–1870* (Winnipeg: Watson & Dwyer, 1980); and Constance Backhouse, *Petticoats & Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: University of Toronto Press, 1991) at 9–28.

⁶⁵ In what is now Oregon, men of John Jacob Astor's American Fur Company tried and hanged Natives in a quasi-European manner. But this was exceptional, and seemed to reflect an American obsession with legal form rather than any significant departure from the custom of the country: Ross Cox, *Adventures on the Columbia River*, vol. I (London: 1831) at 203–206 and 291–299.

⁶⁶ Douglas assured the secretary of the HBC in 1851 that "we have invariably acted on the principle that it is inexpedient and unjust to hold *tribes* responsible for the acts of *individuals* ...": Douglas to Archibald Barclay, 16 April 1851, in Hartweil Bowsfield, ed., *Fort Victoria Letters 1846–1851* (Winnipeg: Hudson Bay Record Service, XXXII, 1979) [hereinafter *Fort Victoria Letters*] at 176, (emphasis in original).

of Aboriginal law, on occasion the Company did exact retribution against groups for the acts of individuals, arguing internally that this was necessary in the circumstances.⁶⁸ And, as the post journals and other sources amply reveal, the physical chastisement of Natives who offended the clerks and chief traders was a regular feature of life in New Caledonia.⁶⁹

That traders relied on their fists should not surprise: the Company's officers treated their own men just as roughly. In theory, the same HBC rules and regulations that applied east of the Rockies applied west of them, and this was supposed to mean that summary beatings were not permitted. But in practice most transgressions were handled through blows or "poundings," and perhaps even flogging and confinement in irons.⁷⁰ More formal sanctions included docking a man's wages or dismissing him and shipping him home, sometimes in hearings before senior officers that loosely approximated a trial.⁷¹ In cases involving "combinations," i.e., group disobedience that senior officers tended to refer to as "mutiny," offenders might be subjected to both types of sanction.⁷² But even these offences were not sent out of the "Indian Territories". Although the imperial statutes of 1803 and 1821 made elaborate provision for long-distance justice, the Company would consider sending a case to Canada only if it involved a homicide, and then only in the rarest of circumstances.⁷³ West of the Rockies this occurred only once, when the son of the

⁶⁷ See, for example, Sir George Simpson's testimony before the Select Committee in 1857 (*Report*, *supra* note 60), especially questions 1060-61. Some of these issues are examined in Hamar Foster, "'The Queen's Law is Better than Yours': International Homicide in Early British Columbia" in Jim Phillips, *et al.*, eds. *Essays in the History of Canadian Criminal Law*, vol. V, *Crime and Criminal Justice* (Toronto: University of Toronto Press 1994) 41-111.

⁶⁸ For example, the closing of Fort St. John in 1823 after some HBC employees there were killed: see Shepard Krech III, "The Beaver Indians and the Hostilities at Fort St. John's" (1983) 20 *Arctic Anthropology* at 35-45. Other examples may be found in HBC records and contemporary accounts such as Francis Ermatinger's journal, which recounts a punitive expedition against the Clallums in June of 1828: *Bancroft Library*, fm. F1060. See also A.G. Morice, *The History of the Northern Interior of British Columbia* (Smithers: Interior Stationery, 1978 reprint) and W.S. Wallace, ed., *John McLean's Notes of a Twenty-Five Year's Service in the Hudson's Bay Territory* (Toronto: Champlain Society, 1932). Both are relatively hostile accounts of the HBC record, one by an Oblate priest, the other by a disgruntled employee.

⁶⁹ See, for example, the Fort Langley post journal for 1827-30, a copy of which is in the *Bancroft Library*, P-C22 (entries for 4 April, 11 August and 6 September 1828).

⁷⁰ The Fort Langley post journal (*ibid.*) contains a number of examples: see 30 July 1827 and 7 May 1830. On one occasion the officer in charge said he was "quite at a loss" as to what he should do with a man who got drunk and smuggled an Indian woman into the fort, because there were no irons available. Had there been, the man "would have felt the weight of them, for three months to come" Instead, he lost half his wages and his liquor allotment: see, 2 and 3 January 1828.

⁷¹ Simpson appears to have applied Scots law in a case of assault that he heard at McLeod's Fort during his second journey to New Caledonia and the Columbia in 1828. The verdict was "not proven": see Malcolm McLeod, ed., *Peace River. A Canoe Voyage from Hudson's Bay to Pacific, by the late Sir George Simpson in 1828 (Journal of the late Chief Factor, Archibald McDonald, etc.)* (Toronto: Coles, c.1970; original published in Ottawa by J. Durie, 1872) at 21-22. For another example see G.P.V. Akkrigg and Helen B. Akkrigg, *British Columbia Chronicle/1778-1846: Adventures by Sea and Land* (Vancouver: Discovery Press, 1975) at 223-25.

⁷² For example, the incident described in Hamar Foster, "Mutiny on the Beaver: Law and Authority in the Fur Trade Navy, 1835-1840" in *Glimpses (supra* note 28) at 15-46 and the coal-miners' strike at Fort Rupert in 1850.

man in charge of all the Company's Pacific operations was killed by his own men; even then, reasons were found for letting the matter drop.⁷⁴

In the 1830s the Company's maritime employees attempted to invoke the protection of English law on the northwest coast, but complaints about "club law" persisted in what is now British Columbia. The attitude of the governor and committee in London to such "on the spot" corporal punishment was one of official disapproval, especially as the region's reputation made it difficult to recruit men to go there. But between the lines one could discern a somewhat contradictory acknowledgment that the sort of men who would agree to work in such a place might require harsh discipline.⁷⁵ As one historian of the Company has put it, eighteenth-century fur trade punishment must be seen against the floggings and keelhaulings common in the army and navy and the sort of physical penalties imposed in British public schools.⁷⁶ The point is that, west of the Rockies, these punishments were being administered well into the 1850s. Even after the introduction of colonial government and British legal institutions, some Company officers continued to act as if the old sort of summary justice was still legal.⁷⁷

Given that many critics faulted the Company for the way they treated their employees and Natives, it is worth noting that the workplace did not suddenly become a place of enlightened humanitarianism during the colonial period. Nor did Native people notice an improvement when the hangman and "commodore justice" became a regular feature of coastal law enforcement, replacing the rough enforcers of the fur trade.⁷⁸ Instead of criticising naval bombardment of villages as a tool of law enforcement, colonists generally clamoured for more.⁷⁹ No one remembered that retaliation against groups was supposed to be confined to "barbarous" law codes; instead, what was condemned when infrequently practised by HBC raiding parties was both tolerated and even advocated when done on a much larger scale by British

⁷³ The only attempts to try "Indian Territories" cases for offences less than homicide occurred during the conflict between Lord Selkirk and the North West Company over the Red River colony in 1811-1819. See the Dale Gibson essay, "Company Justice", *infra*.

⁷⁴ See Hamar Foster, "Killing Mr. John: Land and Jurisdiction at Fort Stikine, 1842-1846" in *Law for the Elephant*, *supra* note 28 at 147.

⁷⁵ For details, see the essays cited in notes 72 and 74 *supra*.

⁷⁶ E.E. Rich, *The History of the Hudson's Bay Company*, vol. I (London: Hudson Bay Record Series, 1958, XXII) at 607-8.

⁷⁷ On HBC discipline generally, but especially east of the Rockies, see Michael Payne, *The Most Respectable Place in the Territory. Everyday Life in Hudson's Bay Company Service: York Factory, 1788 to 1870* (Ottawa: Minister of Supply & Services Canada, 1989) at 27-49.

⁷⁸ Such as Jean Baptiste Boucher (d.1850), the notorious "Waccan," who was used by the Company to maintain their authority over the Indians in New Caledonia: see Morice, *supra* note 68 at 257.

⁷⁹ The worst example of this occurred during the Chilcotin "uprising" of 1864. Governor Seymour informed the secretary of state for the colonies that he might "find [him]self compelled to follow in the footsteps of the Governor of Colorado ... and invite every white man to shoot each Indian he may meet. Such a proclamation would not be badly received here ..." Cardwell replied that he did not understand what Seymour meant, and that he was to do no such thing: Seymour to Cardwell, 4 October 1864, Public Record Office, Kew [hereinafter *PRO*], 60/19 at 298; Cardwell to Seymour, 1 December 1864, CO 398/2 at 271.

gunboats.⁸⁰ *The Times* had been right: true colonists were bent on destruction, so Natives and fur traders who longed for the old ways had better watch out. It would be newcomers, not those who had been there for millennia, who would lay down the law in British Columbia.

IV. The Colonial Years, 1849-71

A. Vancouver Island, 1849-1858

The letters patent concerning Vancouver Island in 1849 granted the fee in the Island to the Hudson's Bay Company, subject to the crown's right to re-purchase upon expiration of the Company's trading licence in 1859.⁸¹ Vancouver Island was therefore a proprietary colony, an unusual arrangement in the era of so-called "Manchester economics," i.e., the view that free trade was the key to prosperity and that crown-granted monopolies were inherently bad. According to the legal categories of the day, it was also a colony acquired by settlement rather than conquest, which meant that, unless the imperial parliament provided otherwise, it was entitled to representative institutions.⁸² That body did not so provide, because the grant to the Hudson's Bay Company was already unpopular enough.⁸³ Instead, parliament legislated only with respect to the administration of justice.⁸⁴ The result was that the Island's constitution was the type that "it was usual to grant the settlers in new colonies in the earlier days of our colonial history."⁸⁵ Executive and, in a sense, judicial authority was vested in an unsalaried governor appointed by the crown, but legislative authority was to be shared with a representative assembly elected by the colonists. It was, in other words, the essentially unworkable constitution - an appointed governor and council at perpetual loggerheads with an elected assembly

⁸⁰ In December of 1865 the steam corvette *Clio* totally destroyed a Kwakwakwa'wakw village, its winter food supplies and over one hundred canoes in an attempt to force the inhabitants to surrender three men suspected of killing a Newity Indian. The legislature demanded further details, "not with the design of condemning the action of Her Majesty's ship, but in order to have such Indian affairs brought under the cognizance of regular authorities." But the Navy and Governor Kennedy stonewalled: see Barry Gough, *Gunboat Frontier: British Maritime Authority and Northwest Coast Indians, 1846-1890* (Vancouver: University of British Columbia Press, 1984) at 82-84.

⁸¹ The letters patent are reproduced in the *Revised Statutes of British Columbia* [hereinafter RSBC] 1979, vol. 7 at 15-19. The tenure was free and common socage, the rent seven shillings *per annum*.

⁸² The most recent contribution to the discussion of the artificial nature of these categories is Mark Walters, "British Imperial Law and Aboriginal Rights" (1992) 17 *Queen's Law Journal* 350.

⁸³ Certainly no one was willing to confer on the Company the sort of legislative and judicial authority that Charles II had given them over Rupert's Land. Even the option of appointing Douglas governor and fourteen Company men as justices of the "Indian Territories" under the 1803 law was rejected: Douglas was seen as too much of a Company man and serious cases would have to be sent to Canada for trial: Pelly to Earl Grey, 13 September 1848, *PRO*, C.O. 305, No.1 at 137-38, and the opinion of HBC solicitors Crowder and Maynard at 127-30.

⁸⁴ 12 & 13 Victoria, 1849, c. 48 (U.K.) repealed the relevant portions of the 1803 and 1821 laws and authorised the crown (and, once an assembly was summoned, the colonial legislature) to make laws and provide for a judiciary.

⁸⁵ In the days, that is, before the American Revolution taught the Colonial Office to prefer direct control by the crown: memorandum to Sir John Pelly, 31 July 1848, *PRO*, C.O. 305, No.1 at 110-112.

- that had been replaced elsewhere by the crown colony system. To compound the problem, all the land was owned, subject to Aboriginal title, by a private company. This was an anachronism which, as Sir James Stephen put it, could be maintained only so long as the colonists were "too few and feeble to shake it off."⁸⁶

The condition of the Company's grant was that they promote settlement and use ninety per cent of all revenues for that purpose; if they failed to perform, the crown could revoke the grant after only five years. But Wakefield's theories decreed that, in order to secure an adequate supply of landless labourers, land must not be sold too cheaply; so the British government fixed the price at one pound sterling per acre, even though across the straits in U.S. territory land was going for free.⁸⁷ The result was predictable.⁸⁸

For the first few years there were no settlers other than Company employees, retired Company employees, and persons formerly associated with the Company. The California gold rush and free land in nearby American territory saw to that. Dissenting from the general opinion that the fur traders were getting a windfall, the *Dublin World* had foreseen this disadvantage when it commented on the grant during the parliamentary debate in 1848:

The enterprising colonist ... must undertake a voyage half as long again as to Australia to reach a territory as yet untried.... Is land so scarce in Canada, Nova Scotia, the trackless leagues of fertile South Africa, and the endless plains of New Holland, New Zealand, Ceylon and fifty other places more or less within the hail of the haunts of men, that people should wander to the remoteness of Vancouver? In Heaven's name, what sane man would go there, and for what would he go?⁸⁹

Arriving on Vancouver Island in March of 1850 with no salary and no place to live, the man appointed by the Crown to be the colony's first governor must have asked himself the same question. Richard Blanshard found himself in charge of a colony where everyone was connected to the Company and where real power continued to lay with the Company's Chief Factor, James Douglas. Not surprisingly, less than a year later he tendered his resignation. That it was so readily accepted indicated that the Colonial Office had come to recognise both the impossibility of Blanshard's position and the inevitability of Douglas.

Yet Blanshard's term of office remains an important part of British Columbia's legal history. When he arrived in the colony in 1850, he was the only legally trained person west of the Rockies,⁹⁰ and he soon put this skill to use by drafting and

⁸⁶ Quoted in Paul Knaplund, "James Stephen on Granting Vancouver Island to the Hudson's Bay Company" (1945) 9 *British Columbia Historical Quarterly* [hereinafter *BCHQ*] 259 at 269.

⁸⁷ Mackie, *supra* note 25 at 233, 235. Wakefield's system is discussed in Hastings, *supra* note 25.

⁸⁸ Another problem that may be attributed to Wakefield's theories was that, for a while, purchasers of quantities of land in excess of the twenty acre minimum had to bring five single men or three married couples with them to work the land: see "H.B. Co's Prospectus of Colony on Vancouver's Island" Hudson's Bay Company Archives, Winnipeg [hereinafter *HBCA*], A. 37/42, at 13-14d, and Mackie *supra* note 25 at 231, 232-3. At one point Douglas suggested that Natives be counted as qualifying under this requirement.

⁸⁹ *World* (Dublin), 26 August 1848.

⁹⁰ Bringing £51 8s. 6d. worth of law books with him: see enclosure in A. Colville to Sir John Parkington, 24 November 1852, *BPP*, vol. 20 at 323, and W. Kaye Lamb, "The Governorship of Richard

proclaiming the colony's first law: an "Act regulating the importation of Spirituous Liquors," designed as much to raise revenue as to control the liquor traffic.⁹¹ Blanshard challenged Douglas's authority over ship's registers, summoning the latter before him in what one trader described as "the first time that English law was felt here."⁹² He also complained to Earl Grey, the secretary of state for the colonies, about the way Douglas inflated the expenses associated with the Company's role in making land-purchase treaties with local Natives.⁹³ During his tenure a lock-up of sorts was established in the lower floor of the fort's bastion, the first of a series of inadequate gaols about which complaints continued to be heard long after the colonial period. Blanshard also acted as coroner and presided over settlement of a number of relatively minor disputes.⁹⁴

Perhaps more noteworthy is the fact that Blanshard appointed the colony's first magistrate, Dr. John Sebastian Helmcken, and sent him to Fort Rupert at the north end of the Island to contend with a miners' strike and friction with the local Native peoples. He also resigned after only a few months. Blanshard claimed that Helmcken's position as a Company employee had compromised him, and this was true; but he also quit because he found that he could do little about the continuing turmoil at Fort Rupert, nor could he allay the colonists' other fears.⁹⁵ Feeling threatened both by Natives and by fractious labour relations, many of them had become increasingly concerned about what lay ahead.⁹⁶

Blanshard" (1950) 14 *British Columbia History Quarterly* 1.

⁹¹ 13 May 1850, *BCARS*, GR 771.

⁹² Roderick Finlayson, "History of Vancouver Island and the Northwest Coast" copy in the *Bancroft Library*, P-C 15, at 99-100. The incident is also described in *Helmcken*, *supra* note 55 at 135-136 and *Report*, *supra* note 60 at questions 5210-30 (testimony of Richard Blanshard).

⁹³ Douglas had paid in blankets, entered onto the Company's books at the usual 300% HBC mark-up charged to purchasers unconnected to the Company. This of course gave an inflated impression of the amount the Company was spending on colonisation, although Douglas claimed such prices were standard in California. Because Blanshard had also been required to pay this mark-up at the Company store, he no doubt took pleasure in exposing the practice: Blanshard to Grey, 12 February 1851, *BCARS*, GR 332, vol. I at 175; see also Margaret A. Ormsby, *Fort Victoria Letters*, *supra* note 66 at lxxxiii.

⁹⁴ *Helmcken*, *supra* note 55 at 136. B.C. also used a few of the smaller Gulf Islands as leper colonies and, later, as a penal colony for Doukhobors.

⁹⁵ As he put it in a letter to Douglas, requesting permission to return to Fort Victoria: "As far as I could, it has been my endeavour to check or remedy complaints; these have now grown beyond remedy and probably abandoning [Fort Rupert] shortly will be the cure. I was sent here on account of the miners. They have disappeared; so please allow me to do the same ..." *ibid.* at 316.

⁹⁶ These worries were not confined to inexperienced miners and settlers. Douglas was always anxious to preserve good relations between the Native peoples and the vastly outnumbered colonists, and was equally concerned about disciplining the labourers and miners imported by the Company to work the farms and mines. So concerned that, when Blanshard left for Fort Rupert to assess the situation there, Douglas asked to be made a magistrate during the governor's absence. Blanshard reluctantly complied, advising Douglas that this was only temporary and warning him not to abuse his authority: Blanshard to Douglas, 2 July 1851; Douglas to Blanshard, 3 July 1851; and Blanshard to Douglas, 3 July 1851: *BCARS*, GR 332, vol. I at 212-14. Contrary to what has hitherto been believed, Helmcken was therefore not Blanshard's sole judicial appointment. In his letter to Blanshard, Douglas seems to acknowledge that he had said that he "no longer dared to speak to any of [his] own men" and that he lived in "daily fear of seeing the establishment burnt down" and blood shed.

Not long afterwards, Blanshard declined to adjudicate a suit for damages brought by one of the miners against the Company for their behaviour at Fort Rupert, and tried to persuade Earl Grey to send out a salaried chief justice. The governor and committee in London professed an inability to understand this refusal to act, and the Colonial Office treated Blanshard's request for a judge just as they had treated his earlier request for a garrison of troops.⁹⁷ They sent neither. Instead, they censured him for his handling of another Fort Rupert crisis, the killing of some deserters by local Natives. His refusal of an offer of blankets and furs as compensation, and his determination "to put into force the white man's law in what still remained a red man's country," was fine;⁹⁸ but his ready resort to "commodore" justice at Fort Rupert, where on two occasions the navy burned villages and destroyed property, was seen as a waste of resources in a case where the victims had strayed too far from the safety of the settlements.

Dr. Helmcken reflected upon the broader issue years later, readily conceding that the Natives had "their own traditional unwritten code of laws." He described what happened at Fort Rupert as a "miserable affair" and said that, as a rule, the Natives

... were orderly; peace reigned in their villages. To friends and friendly tribes, friendly; to enemies no mercy. Yet among these people we walked and roamed and certainly, after having become accustomed to them felt less fear of molestation than I had often experienced when traversing the slums of London ... Indeed, these Indians were peaceable and better conducted than the inhabitants of mining or frontier towns.⁹⁹

On Blanshard's departure in 1851 Douglas reluctantly assumed the governorship. He was already the senior officer of the Company's board of management west of the Rockies, as well as agent of the Company's corporate associate, the Puget's Sound Agricultural Company. Perhaps no British official has ever been in such an egregious position of conflicting interests, as even Company men acknowledged.¹⁰⁰ Moreover, the tasks he faced were enormously difficult: among other things, he had to keep peace with the Natives, prepare the colony for settlement, and organise and administer a legal system without lawyers. In such circumstances it is surprising not that he made a number of legal and policy mistakes but that he did not make more.¹⁰¹ At least two aspects of this record deserve comment.

⁹⁷ To protect settlers against Indians: see Blanshard to Grey, 18 September 1850 and 10 June 1851; Andrew Muir to Blanshard, 29 April 1851; and Pelly to Grey, 24 October 1851: *BCARS*, GR 332, vol. I at 151, 194-97.

⁹⁸ Lamb, *supra* note 90 at 16.

⁹⁹ Helmcken, *supra* note 55 at 326.

¹⁰⁰ As Peter Skene Ogden put it in a letter to Simpson dated 1 May 1851: "We are taught that a man cannot serve two masters but [the HBC] are of a different opinion—vide Douglas' new appointment ... [and] if there be not a clashing of interests in the management of these different interests—I wonder": quoted in Lamb, *supra* note 90 at 36.

¹⁰¹ His autocratic fur trade attitudes were controversial even after he severed his connection with the HBC in 1858, and he also had to face a certain amount of less principled criticism. As one colonist put it, "he has been all his life among the North American Indians and has got one of them for a wife so how can it be expected that he can know anything at all about Governing one of Englands last Colony's in North America?" Annie Deans, writing to relatives in England in February of 1854, quoted in G. Hollis Slater, "Rev. Robert John Staines: Pioneer Priest, Pedagogue and Political Agitator"

(i) Workers, Courts and Civil Litigation

When English law replaced Aboriginal and fur trade law, the commissioned officers of the Hudson's Bay Company lost whatever judicial authority they may once have had. Even those who held appointments as justices of the peace for the "Indian Territories" had jurisdiction only on the mainland, which is why Douglas asked to be made a magistrate during Blanshard's visit to Fort Rupert.¹⁰² Blanshard was able to do little to fill this vacuum. The following excerpt from his testimony before the parliamentary investigation into the Hudson's Bay Company revealed that finances were a large part of the problem:

Q. How was justice administered: was there a recorder, or anybody to administer justice?

A. I did it all myself; I had no means of paying a recorder a salary; there were no colonial funds.

Q. I suppose you were not cognizant of the law: you were not brought up on the law, were you?

A. I had been called to the bar.

Q. And in that capacity you administered justice there?

A. Yes.

Q. So that you were Governor and justice. Had you constables?

A. Yes. When I wanted a constable, I swore one in.¹⁰³

By the time Douglas presided over his first council meeting as governor, he was firmly of the view that something more was required: not to control crime, which was negligible, but to "regulate the relations of employer and Servant" and to punish offences "such as insolent language, neglect of duty, and absence without leave ..." ¹⁰⁴ Two years earlier, Archibald Barclay, secretary of the Hudson's Bay Company, had instructed him that the aim of every "sound" system of colonisation should be

... not to reorganise Society on a new basis, which is simply absurd, but to transfer to the new country whatever is most valuable and most approved in the institutions of the old, so that Society may, as far as possible, consist of the same Classes, united together by the same ties, and having the same relative duties to perform in one country as in the other.

The system of land disposal devised by the Company, said Barclay, was designed to prevent "the ingress of squatters, paupers and land Speculators." It was, in short, a "principle of Selection, without the invidiousness of...direct application."¹⁰⁵ It ap-

(1950) 14 *British Columbia History Quarterly* 187 at 223. Not only was Amelia Douglas half-Cree, but Douglas's own mother was apparently a "Creole" with whom his father had lived while in British Guiana. This is why he is sometimes referred to in fur trade records as a "Scotch West Indian."

¹⁰² See *supra* note 96.

¹⁰³ *Report, supra* note 60, at questions 5206-09.

¹⁰⁴ See James E. Hendrickson, ed., *Journals of the Colonial Legislatures of Vancouver Island and British Columbia, 1851-1871*, vol. I (Victoria: Provincial Archives of British Columbia, 1980) [hereinafter *Journals*], minutes of council for 28 April 1852.

¹⁰⁵ Barclay to Douglas, December 1849, quoted in William J. Burrill, "Class Conflict and Colonialism: The Coal Miners of Vancouver Island During the Hudson's Bay Company Era, 1848-1862"

parently was not having the desired effect, so Douglas wanted a law with fines or imprisonment as penalties.

But no such law was enacted. If the summary beatings of the fur trader were no longer acceptable, the English statute book contained something that would do just as well. In England, justices of the peace had jurisdiction over disputes between employers and employees, and could fine or imprison workers who, for example, quit work before completing the job.¹⁰⁶ Douglas therefore put forward the names of four men as magistrates or justices of the peace, who could charge for their services and hold both petty and quarter sessions.¹⁰⁷ All but one were bailiffs or managers of the Puget's Sound Agricultural Company (the fourth managed a farm unconnected to the Company), and they were therefore in charge of virtually all the labourers in the colony who were not directly subject to Company discipline.

Douglas evidently never enacted his law because he discovered that he did not need it. The diary of Robert Melrose, one of the farm workers who came to the colony just two months before the justices were appointed, confirmed this. His daily jottings painted a rather dismal picture of rain, excessive drinking and accidental drownings, and of how the law was used to discipline the workers.¹⁰⁸ On a number of occasions he noted that someone had "stricken work," and then a few entries later that same person was reported to have been "tried" and "imprisoned." Others "escaped" or "absconded" across the border or, less successfully, to nearby Sooke, where they were soon captured and jailed. Given Melrose's account of how much liquor was consumed, it is hardly surprising that he also recorded his opposition to a new law requiring a licence fee for grog shops. It was "Justice vanished, larceny," he wrote, and signed a petition demanding removal of the supreme court judge that Douglas had appointed in 1854.¹⁰⁹ The licence fee paid the judge's salary, and it had apparently reduced the number of ale houses, albeit temporarily, to one.

In short, the neophyte governor took Barclay's advice and looked to something that was "most valuable and most approved in the institutions of the old" country: the pre-existing and employer-oriented law of master and servant. Only Kanaka

(M.A. thesis, University of Victoria, 1987) at 71.

¹⁰⁶ The source of this jurisdiction was 5 Elizabeth I, 1562, c. 4 (U.K.), amended by a number of eighteenth century statutes. Whether the English laws applied in Canada had raised doubts in that colony, so the legislature there enacted its own statute in 1847: see 10 & 11 Victoria, 1847, c. 23 (P.C.), prompted by *Shea v. Choat* (1846), 2 Upper Canada Queen's Bench 211; and Paul Craven, "The Law of Master and Servant in Mid-Nineteenth Century Ontario" in David Flaherty, ed., *Essays in the History of Canadian Law*, vol. I (Toronto: University of Toronto Press, 1981) 175.

¹⁰⁷ *Journals*, *supra* note 104, vol. I, minutes of council, 29 March and 7 April 1853. Douglas also managed to persuade the council to approve a heavy duty upon wholesale and retail liquor licences, and the minutes do not do justice to the wrangling and cajoling that occurred: see *Helmcken*, *supra* note 55 at 296.

¹⁰⁸ "The Diary of Robert Melrose" (1943) 7 *British Columbia History Quarterly* 119, 199, and 283. The meaning of some of the entries is not entirely clear, but at least one leaves little room for doubt: on 5 June 1856 some of the men were fined £5 for "shooting into [Justice] Mckenzie's house."

¹⁰⁹ *Ibid.* entry for 5 July 1855, referring to the law described *supra* note 107. In a note to the entry for 1 January 1854 Melrose added that "it would almost take a line of packet ships, running regular between here, and San Francisco, to supply this Island with grog, so great a thirst prevails amongst its inhabitants."

(Hawaiian) employees and Natives, who during this period were transformed from traders into labourers, remained subject to the old fur trader way of doing things.¹¹⁰ And if contemporary accounts are to be believed, discriminatory treatment survived introduction of convict labour and the chain gang in 1859.¹¹¹ The competence of Natives to testify against Europeans was unclear until after merger with the mainland in 1866, and their right to pre-empt land, as white men could, was taken away after Douglas retired.¹¹² There were also demands that Natives be subjected to special, summary forms of trial and corporal punishment. These, however, were successfully resisted.¹¹³

Douglas did not find all of the problems with Vancouver Island's amateur justice system as easy to solve. When *Webster v. Muir*, a commercial lawsuit involving substantial damages, came to be decided, he concluded that the "whole case" had been mismanaged by his new appointees, whose forensic abilities appear to have been restricted to labour law.¹¹⁴ Their jurisdiction was therefore limited to claims for £100 or less, and the council resolved that a higher court of common pleas should be established for larger cases. There was still no legally trained person in the colony, so Douglas recommended David Cameron as chief justice of the new court, at a salary of £100 *per annum* secured by imposing a licence fee on public houses.¹¹⁵ Cameron, who was Douglas's brother-in-law, performed the duties of this office for more than a decade, establishing a small claims division modelled on the English county court legislation of 1846,¹¹⁶ and drafting rules for his own court, re-named the Supreme Court of Civil Justice, with Colonial Office approval.¹¹⁷

¹¹⁰ Douglas dealt with a Kanaka who had attempted to steal from the storehouse when on watch by having him tied to a tree and given three dozen lashes: see William John Macdonald, "Sketches of British Columbia" *Bancroft Library*, *supra* note 32 P-C 4.

¹¹¹ See D.W. Higgins, *The Passing of a Race* (Toronto: William Briggs, 1905) at 72-73. Certainly one prominent citizen was offended by the first execution in Victoria, the hanging of Allache, a young Tsimshian, for killing a black man who had insulted his wife. The accused did not speak English, nor the court Tsimshian, so the trial had to be conducted through an interpreter using the Chinook jargon. There was no defence lawyer, and the day before a white man who had a lawyer got four years for stabbing a drunk to death in the street. See Alfred Waddington, "Judicial Murder," dated 27 August 1860, *BCARS, NWp, 970.51, W118*.

¹¹² In 1864 the colony's supreme court acquitted Indians in two high profile cases because the judge would not accept the evidence of the Native witnesses against them. In January of 1865 the legislative council on the mainland passed the *Native Evidence Ordinance* in response, and in 1867 it was re-enacted to reflect the merger of the two colonies. See Douglas to Grey, 16 December 1851, *PRO, C.O. 305, No.3* at 75-78; *Fort Victoria Letters*, *supra* note 66 at 247-49; Gough, *supra* note 80 at 121. On pre-emption, see the *Land Ordinance* of 31 March 1866.

¹¹³ Tina Loo, "Law and Authority in British Columbia, 1821-1871" (Ph.D. dissertation (History), University of British Columbia, 1990) at 283-84. Begbie's suggestion that separate tribunals be established for Native offenders was also still-born, but he did urge all justices of the peace to permit chiefs to exercise their traditional authority over drunken or disorderly members of their tribe, and to intervene only in cases of "excessive severity" (Williams, *supra* note 17 at 107).

¹¹⁴ *Journals*, *supra* note 104, vol. I, minutes of Council, 20 September 1853.

¹¹⁵ See *supra* notes 107 and 109, and accompanying text.

¹¹⁶ The English legislation is 9 & 10 Victoria, 1846, c. 95 (U.K.), and Douglas reported Cameron's explanation of his measure to the assembly: see Archives of B.C., Memoir No. IV, *House of Assembly Correspondence Book, August 12th, 1856, to July 6th, 1859* (Victoria: King's Printer, 1918) [hereinafter *Correspondence Book*] at 27-28. On small claims, see His Honour Judge Edward

Notwithstanding these accomplishments, Cameron was probably the most controversial judicial appointment in British Columbia's history, and he was dogged by criticism until his retirement in 1865. Colonists unhappy with the Company complained of his alleged partiality and incompetence, dredging up his unhappy past as a failed merchant in both Scotland and Demarara; they also alleged that he had treated one colonist, the Rev. Robert Staines, particularly badly.¹¹⁸ The details of these complaints are too complex to unravel here,¹¹⁹ but when examined they show how relatively trivial incidents can become a constitutional grievance in a tiny colony of contending interests and personalities. Supporters and opponents of Cameron divided along what was becoming a colonial fault line. Those who had fur trade careers prior to 1849, either as officers or servants, tended to side with what came to be called the "Family Company Compact"; those who arrived later, full of expectations not met, tended to oppose it.¹²⁰

When lawyers began to arrive in 1858, they too found Cameron wanting. This, more than anything else, probably forced him out. Although Douglas stood by him to the end, in 1864 his successor as governor of Vancouver Island was of the opinion that the chief justice displayed "a want of moral weight and legal knowledge."¹²¹ By then Cameron's judicial style, and especially his penchant for opposing legislation he disapproved of as incompatible with English law, had involved him in even more public disputes. On one occasion, his pronouncement that several laws passed by the assembly were invalid prompted that body to suggest to Douglas that he suspend the chief justice.¹²² On another, Cameron refused to pay a tax authorised by a law that he had opposed in council, much to the irritation of those charged with collecting

O'Donnell, "The History of Small Claims in British Columbia and Vancouver Island, 1849-1871" [unpublished manuscript available from the author].

¹¹⁷ See Jesse F. Gouge, "Civil Procedure in the Superior Courts: The British Columbia Illustration, 1849-1880" (1979) 18 *University of British Columbia Law Review* 338 at 353-359.

¹¹⁸ Cameron was a man who had probably been asked to perform beyond his abilities, and Staines—according to James Cooper, one of his supporters—had "mistaken his vocation, inasmuch as he would have made a very good parish lawyer instead of parish priest": "Maritime Affairs on the North West Coast and (other) Affairs of the Hudson's Bay Company in Early Times" [hereinafter *Maritime Affairs*] *Bancroft Library*, *supra* note 32 P-C6 at 7. Staines drowned on his way to England, carrying petitions to the Colonial Office, including one seeking Cameron's removal: see Slater, *supra* note 101 and Sydney Petit, "The Trials and Tribulations of Edward Edwards Langford" (1953) 17 *British Columbia History Quarterly* 5.

¹¹⁹ See Slater, *supra* note 101, Cooper's *Maritime Affairs*, *supra* note 118, and the latter's testimony before the Select Committee in 1857 (*Report*, *supra* note 60, question 3612). There is also a detailed account in Loo, *supra* note 113 at 82-97.

¹²⁰ See Loo, *ibid.* at 90ff., for a break-down of the factions. There were of course exceptions. Dr. Helmcken and colonial surveyor J.D. Pemberton arrived after 1849 but, loyal employees both, they supported the Company. Commenting on colonists who invoked the rights of British subjects against the HBC, Pemberton concluded that, "[a]s in the old fable, it doesn't require much penetration to detect the ass beneath this pseudo-British Lion's skin" (quoted in Loo, *supra* note 113 at 93-94).

¹²¹ Governor Kennedy to Newcastle, 12 May 1864, quoted in David M.L. Farr, "The Organisation of the Judicial System of the Colonies of Vancouver Island and British Columbia" (B.A. essay, University of British Columbia, 1944 at 29). An abridged version of this standard work of reference may be found in (1967-68) 3 *University of British Columbia Law Review* 1.

¹²² *Journals*, *supra* note 104, vol. II, minutes of the second house of assembly, second session, 11 and 15 July 1861. See also the *Victoria Colonist*, 12 July 1861.

it. His opinion in the case, to the effect that real property could not be sold to satisfy delinquent taxes, was eventually disavowed by the law officers in England.¹²³ Indeed, his zeal for importing English legal rules by judicial fiat suggested that he might have been the one who persuaded Douglas that the colony had no need of a home-grown labour law.

However that may be, many of Cameron's harshest critics, notably Staines, E.E. Langford, and George Hunter Cary, were hardly moderate, disinterested men themselves. Like Staines, Langford complained to the Colonial Office about Cameron, prompting Douglas to come to his judge's defence.¹²⁴ Cary, who did a stint as attorney-general in both colonies and was, by his own admission, "hated by one half of Victoria and feared by the other," kept his attacks local.¹²⁵ In 1863 he announced before Cameron that he would advise all his clients "to cut their throats before coming into this court of justice." He had said something similar about Begbie's court a few months earlier and even had a few minor scrapes with the law himself, before descending into illness and returning to England.¹²⁶ Perhaps most revealing of all was the testimony of James Cooper before the parliamentary committee that investigated the HBC in 1857. Eager to give an example of Cameron's judicial incompetence, Cooper pointed to the fact that, "before he can decide upon a case, he has to refer to his books even in the most common case." Incredulous, the committee's chair volunteered that "most judges are in the habit of referring to books before they decide cases, are they not?" "I dare say they are," responded a flustered Cooper, but "he has never been educated as a lawyer; that is the grand thing."¹²⁷

It is unfortunate for Cameron's place in history that his critics made more noise than he did, but this has been the traditional fate of judges.¹²⁸ Even his accomplish-

¹²³ *Journals*, *supra* note 104, vol. I, minutes of council, 29 November 1860; minutes of executive council, 28 December 1864. The law in question imposed a tax for road repairs, and the chairman of the road commissioners for the Esquimalt District was Kenneth McKenzie, one of the J.P.'s who had opposed Cameron's appointment as judge. In his letter to Attorney General Cary dated 10 November 1863 (i.e., before the opinion of the law officers had been received), McKenzie complained that Cameron and two other "defaulters" under the Act had failed to come forward when summoned to explain why they had refused to pay. "Please state candidly," McKenzie asked Cary, "if our power as Commissioners be set at naught by such contempt thus rendering the Act useless ..." (*BCARS*, GR 673, Box 3).

¹²⁴ See sources in *supra* note 118, and the entry on Cameron in the *Dictionary of Canadian Biography*, vol. X (1972). The despatches, etc. which deal with Langford's attack on Cameron and his response are in *BPP*, vol. 24 at 398-448.

¹²⁵ Cary's remarks are reported in an odd little pamphlet entitled "Addresses and Memorials ... upon the occasion of the retirement of Sir James Douglas, KCB...1864" a copy of which is in the *Bancroft Library*, *supra* note 32.

¹²⁶ Cary's insult to Cameron is reported in the *Alta California*, 16 November 1863, under the heading "An Attorney-General's Advice to Clients" ("Bancroft Scraps" at 162, *Bancroft Library*, *supra* note 31.) Cary subsequently went insane, and doctors in England diagnosed him as having "paralysis of the brain" (*Helmcken*, *supra* note 55 at 177).

¹²⁷ *Report*, *supra* note 60, questions 3578-3579. In marked contrast to Cooper was George Pearkes, who became the colony's crown solicitor in 1858, and proposed a scheme for a judicial system on the mainland. "It matters not however brilliant a presiding judge may be," he advised Douglas, "he will find a constant reference to legal books and the statutes absolutely necessary to the just administration of the law" (*BPP*, vol. 23 at 287, enclosure in Douglas to Lytton, 26 October 1858).

¹²⁸ As Begbie put it some years later: "The position of a judge is a very helpless one, especially

ments were somewhat overshadowed by mistakes, not all of them his. This was most graphically demonstrated when the Colonial Office concluded that the Supreme Court, and probably all the laws passed until an assembly was established in 1856, had been invalidly constituted.¹²⁹ The reason was embedded in an ancient rule of colonial common law.

Early in his governorship Blanshard had advised the Colonial Office that he was delaying appointment of an executive council because it would be composed of Company men who would be “completely under the control of their officers.” Although Earl Grey warned him not to delay too long, Blanshard waited until immediately before departing the colony in August 1851, when he was urged to appoint a council by disenchanted colonists who were apprehensive about being left solely to the good graces of the Company.¹³⁰ But he never summoned an elected assembly. Nor did Douglas. Both governors felt that there were too few qualified electors, and they relied upon a clause in their commission that seemed to permit them to legislate without one.¹³¹ However, the crown could confer legislative power only upon a body elected “wholly, or in part” by the colonists, because common law required settled colonies to have a representative assembly.¹³² When the Colonial Office realised that no such body had been constituted, and that a parliamentary investigation of the Hudson’s Bay Company’s record throughout British North America was imminent, they arranged for passage of an imperial order-in-council establishing the court, rather than ask parliament to authorise further gubernatorial legislation.¹³³ As Earl Grey told his successor, it was almost never a good idea to involve parliament in a colonial matter, if one could avoid it.¹³⁴

Labouchere therefore instructed Douglas to summon a legislative assembly, ushering in the first representative government in Western Canada. As in England,

in British Columbia. He cannot state his opinions except in judgments from the Bench.... He cannot write leading articles in newspapers...” (*Sewell v. British Columbia Towing Co.* (1882), 1 B.C.R., Part I, 153 at 165).

¹²⁹ There appear to have been only ten such laws: *Correspondence Book*, *supra* note 116 at 25.

¹³⁰ Blanshard to Grey, 8 April 1850 and annotation thereon by Undersecretary Herman Merivale, *PRO*, C.O. 305, No.2 at 27-28. See also Willard E. Ireland, “The Appointment of Governor Blanshard” (1944) 8 *British Columbia History Quarterly* 213.

¹³¹ In Blanshard’s commission, this clause granted the governor, with the advice of his council, “full power and authority to make and enact all such Laws and Ordinances as may from time to time be required for the Peace, Order and good Government” of the colony: *Journals*, *supra* note 104, vol. I, Appendix B.

¹³² This, as lawyers say, is ‘trite’ law, and it was conveyed to the governor in Labouchere to Douglas, 28 February 1856, which despatch is quoted in James E. Hendrickson’s introduction to the *Journals*, *supra* note 104, at xxix.

¹³³ The vice-admiralty court Douglas established in January 1854 to inquire into the wreck of the brig *William* was also illegal, because only lords of the admiralty could constitute such a court: see Lionel H. Laing, “An Unauthorized Admiralty Court in British Columbia” (1935) 26 *Washington Historical Quarterly* 10.

¹³⁴ Grey told Labouchere that “a bill for the government of a colony is never discussed in Parliament without danger,” and condemned the “incredible ignorance & rashness which prevail upon this subject in the House of Commons ...” (quoted by Hendrickson, *supra* note 105 at xxx).

the franchise was property based: Douglas's commission confined electors to those owning twenty acres or more, and he and his council decided that candidates had to own freehold land worth at least £300. Because only adult British males could buy land in the first place, this made for an electorate composed of "sturdy yeomen" and a legislature of country gentry.¹³⁵ Although in this, as in the magistracy, Wakefield's and Barclay's view that colonisation should reflect the British class system had been realised, Douglas was concerned that "properly qualified" representatives would be hard to find. "I fear," he told Labouchere, "that our early attempts at legislation will make a sorry figure; though at all events, they will have the effect you contemplate, of removing all doubts as to the validity of our local enactments."¹³⁶ He suggested that the franchise, excluding as it did the many owners of town lots, which were of course much less than twenty acres, ought to be extended, hastening to explain that this would be purely a matter of expediency. In principle, Douglas assured Labouchere, "I am utterly averse to universal suffrage, or making population the basis of representation."¹³⁷

Liquor licensing laws, coal royalties, lumber duties and land sales were the only sources of colonial revenue, and only the first was directly controlled by the new assembly.¹³⁸ Ten per cent of the other revenues could be retained by the Company, and there was also the matter of their exclusive licence to trade. Although the Island fur trade was small compared to that of the mainland, for a few years the Company was really the only commercial outlet, charging their usual mark-up to the slowly increasing number of non-employees. Moreover, they continued to enjoy their monopoly on the adjacent mainland, forbidding Island entrepreneurs from engaging in trade and especially from exploiting the rich Fraser River fishery. At the parliamentary inquiry into the HBC in 1857, Cooper complained that they had effectively prevented him from obtaining cranberries and potatoes for resale in San Francisco, implying that this was illegal because their monopoly extended only to furs.¹³⁹ But the Company's licence referred simply to "trade with the Indians," so this argument did not persuade. And as long as the only effective way of getting hold of such commodities in commercial quantities was by trading them from the Natives, the Company's legal monopoly was secure.¹⁴⁰

¹³⁵ Mackie, *supra* note 26 at 231, 236-38.

¹³⁶ *BPP*, vol. 21 at 393 (Douglas to Labouchere, 7 June 1856).

¹³⁷ *Ibid.* at 392 (Douglas to Labouchere, 22 May 1856). Douglas was also aware of his own limitations, remarking that he undertook the task of summoning an assembly with "diffidence." He knew very little about legislating, he said, and could get no "legal advice or intelligent assistance of any kind."

¹³⁸ *Correspondence Book*, *supra* note 116 at 16.

¹³⁹ *Maritime Affairs*, *supra* note 118 at 7.

¹⁴⁰ *Report*, *supra* note 60 at question 3739ff. After Cooper had shown its potential and then been excluded, the Company moved into the cranberry business. However, some of their other attempts at diversification were less successful. For example, they sold off their coal mining venture at Nanaimo in 1861: H. Keith Ralston, "Miners and Managers: The Organization of Coal Production on Vancouver Island by the Hudson's Bay Company, 1848-1862" in E. Blanche Norcross, ed., *The Company on the Coast* (Nanaimo: Nanaimo Historical Society, 1983) at 55. See also Mackie, *supra* note 25 and Burrill, *supra* note 105.

If the new assembly's means were limited, so was the jurisdiction of Cameron's re-constituted supreme court. It was, unlike the supreme court that would be established in 1858 on the mainland, a court of civil justice only. Douglas had reported that there was no need to confer criminal jurisdiction, and in fact this was withheld until 1860.¹⁴¹ Until then, the English practice of issuing special commissions for serious crime sufficed, and even afterwards this remained the primary way to try serious cases. As for policing, prior to the gold rush it was looked after by a small group of retired servants who had been granted 20 acre rural lots in return for "volunteering." Made up almost exclusively of Kanakas, "half-white" Canadians, Iroquois, and even a few Blacks, they came to be known as the "Victoria Voltigeurs."¹⁴² All of this was further proof, if such was needed, that it was not serious crime that preoccupied the colony's legal system but the demands of labour and commerce.¹⁴³

(ii) The "Land Question"

To the few independent settlers on the Island prior to 1858 land had as much to do with the Company's charter right as with Aboriginal title. They accused the HBC of keeping the best acreage for themselves, forcing other purchasers to pay for land farther out, away from the fort and its protection. Hence, Blanshard's request for troops.¹⁴⁴ Even when the influence of the California gold fields ceased to be felt, the high price of land, long delays involved in getting title deeds from England once a purchase was made, and the requirement that large purchasers bring out other colonists, continued to dampen sales. The situation had obviously improved somewhat by 1855, when the Company was legally obligated to show that they had met the conditions of their grant or face revocation, because Douglas reported that there were sixty-six land owners.¹⁴⁵ By 1858 there were approximately 180, "almost all of them active or former members of the Hudson's Bay Company," and an analysis of who they were revealed as Wakefieldian a result as could be hoped for.¹⁴⁶

¹⁴¹ Farr, *supra* note 121 at 18, 21.

¹⁴² This force was expanded in 1856 when the colony felt threatened by the large numbers of northern Natives at the fort: see B.A. McKelvie and Willard E. Ireland, "The Victoria Voltigeurs" (1956), 20 *British Columbia History Quarterly* 221.

¹⁴³ Certainly there was no need for much statutory intervention. Of the 124 pieces of legislation passed in the colony between 1859 and merger with the mainland in 1866, perhaps two (dealing with speedy trials in summary matters and the exclusively colonial "problem" of selling liquor to Natives) related to criminal law and procedure properly so called: see the Table of Laws in the *Consolidated Statutes*, 1871.

¹⁴⁴ By June of 1851 the HBC listed nine land sales in a report to the Colonial Office, but seven were to employees; of the remaining two, one was to an American who may not have completed his purchase and the other was to Captain Walter Colquhoun Grant, a colonist who resigned as HBC surveyor and left the colony in 1850: *BCARS*, GR 332 at 177. By June 1852 the number of sales had increased to eleven: *BPP*, vol. 20 at 322.

¹⁴⁵ There were forty-three owners of rural land in excess of twenty acres, and a further thirty-two owners of town lots: *HBCA*, B.226/2/1, at 38-39. The total was only sixty-six because nine people owned both types of lot. See also, "The Census of Vancouver Island, 1855" (1940) 4 *British Columbia History Quarterly* 51.

¹⁴⁶ Mackie, *supra* note 25 at 233, 235.

Nonetheless, a petition complaining about the problem had been sent “home” in 1853 and further complaints were made to the Select Committee of parliament that investigated the HBC in 1857. For this and other reasons, the Committee recommended that the Company’s connection with the colony be terminated “as soon as it can conveniently be done.”¹⁴⁷ This was, in theory, easily accomplished: the original grant had provided for such an eventuality, and when the HBC’s exclusive licence to trade in the “Indian Territories” expired in 1859, the crown exercised its right to require a re-conveyance of the fee. However, negotiations concerning the amount of compensation due the Company were protracted and the transfer was not completed until 1867.

But this is to anticipate. In order to sell any land at all during its tenure as the “true and absolute lords and proprietors” of Vancouver Island, the Company first had to extinguish Aboriginal title. Their grant had noted that colonisation would “induce greatly to ... the protection and welfare of the native Indians,” and internal Colonial Office memoranda revealed that extinguishment was expected.¹⁴⁸ By the 1860s most colonists were either unaware of this requirement or came to believe that it could be safely ignored; but such a view, which was official governmental policy from then until 1990, is extremely difficult to reconcile with imperial law and practice. More importantly, it is difficult to reconcile with what happened on Vancouver Island between 1850 and 1854. In those years James Douglas made fourteen “treaties” with the Coast Salish and Kwakwaka’wakw peoples of the Island.¹⁴⁹

The Douglas “treaties” were almost identical to the land conveyances developed by the New Zealand Company, which recognised the pre-existing title of the Native peoples and provided for its transfer to “the white people forever.”¹⁵⁰ Each preserved the grantors’ villages and cultivations, as well as their rights to hunt on unoccupied land and to fish “as formerly.”¹⁵¹ The first few were entered into before the conveyancing forms had been sent out, so Douglas had the Natives make their marks on blank sheets of paper. The text was added later. But this hardly mattered. Neither party could speak the language of the other, and such communication as took place was probably in the Chinook trade jargon, an exceptionally poor instrument for explaining the notion of land as a commodity. Thus in the oral tradition of the Tsartlip,

¹⁴⁷ Report, *supra* note 60 at iv.

¹⁴⁸ Letters Patent, *supra* note 81, and essay marked “ ‘Confidential,’ PRO, C.O. 305, No.1 at 324-328.

¹⁴⁹ Douglas ceased making such agreements in 1854, partly due to financial constraints, partly because he seems to have decided that a different approach was needed; and when the mainland was colonised a few years later, he and his successors made no treaties at all. For a discussion of various opinions about Douglas’s motives, see Hamar Foster “Letting Go the Bone: The Idea of Indian Title in British Columbia, 1849-1927” in Hamar Foster and John McLaren, eds. *Essays in the History of Canadian Law*, vol. VI: *British Columbia and the Yukon* (Toronto: University of Toronto Press, 1995).

¹⁵⁰ See the sources cited *supra* note 26, and Wilson Duff, “The Fort Victoria Treaties” (1969) B.C. Studies 3, and Dennis Madill, *British Columbia Indian Treaties in Historical Perspective* (Ottawa: Research Branch, Corporate Policy, Indian and Northern Affairs, 1981).

¹⁵¹ This phrase has recently been litigated. See *Saanichton Marina Ltd. v. Louis Claxton, et al.* (1989), 57 D.L.R. (4th) 161 (B.C.C.A.), which is commented upon in the article cited *supra*. note 26

Tsawout and other Salish bands who signed the treaties, each document was simply a bond of peace and friendship that conveyed no title.

Colonial and provincial governments from the mid-1860s agreed, but for a different reason: they said that there was no title to convey. Joseph Trutch, who became chief commissioner for lands and works on the mainland and then B.C.'s first lieutenant-governor, maintained that the treaties were merely necessary gestures. As years went by, British Columbians simply forgot them or, if newcomers, never learned of their existence. Nor would they have known that in 1860 Judge Begbie had reminded Douglas that Aboriginal title on the mainland was "by no means extinguished" and that "[s]eparate provision must be made for it, and soon ...",¹⁵² or that, in 1861, the House of Assembly on Vancouver Island had complained that many colonists had bought land "in districts to which the Indian title has not yet been extinguished," deterring prospective purchasers because they "could not rely on having peaceable possession." The House therefore petitioned the secretary of state for the colonies for funds to remove this "most serious obstacle,"¹⁵³ and Douglas advised the Duke of Newcastle that Natives would regard occupation by white settlers without the "full consent" of their own proprietors as "national wrongs." That was why, he said, he had hitherto purchased "the native rights in the land, in every case, prior to the settlement of any district."¹⁵⁴ But when Newcastle replied that funds for this important task were a colonial responsibility, Douglas interpreted this as a refusal of all assistance.¹⁵⁵ Although many people continued to press for extinguishment of Native title, and although as late as 1864 the House of Assembly approved spending estimates of over nine thousand dollars for this purpose, nothing was done.¹⁵⁶ Douglas, it seemed, had changed his views about treaties.

The relatively peaceful process of settlement and of reserve allocation that followed cessation of treaty-making were no indication that B.C.'s Native peoples accepted the new policy.¹⁵⁷ The real explanation lay in tribal linguistic and cultural

¹⁵² Begbie to Douglas, 30 April 1860, *BCARS*, microfiche file 142c at 20. In the 1880s, Begbie took a different view: see *A.G. and I.B. Nash v. John Taii*, Begbie Bench Books, *BCARS*, vol. XIII, 28 October 1886 at 446, a case dealing with land at Metlakatla.

¹⁵³ Petition from House of Assembly, 6 February 1861, cited in *Regina v. White & Bob* (1964), 50 D.L.R. (2d) 613 at 662 (B.C.C.A.).

¹⁵⁴ Douglas to Newcastle, *supra* note 40.

¹⁵⁵ He may have misunderstood: see James Hendrickson, "The Aboriginal Land Policy of Governor James Douglas, 1849-1864" a paper delivered at a B.C. Studies Conference held at Simon Fraser University, 4-6 November 1988, at 16.

¹⁵⁶ Tennant, *supra* note 32 at 23.

¹⁵⁷ Peaceful only when compared to some other areas, e.g. the United States: see Robin Fisher, "Indian Warfare and Two Frontiers: A Comparison of British Columbia and Washington Territory during the Early Years of Settlement" (1981) 50 *Pacific Historical Review* 31. Many officials thought that there was a serious threat of an Indian war in the southern interior. See, e.g., Lord Dufferin to Lord Carnarvon, 27 July 1877, in C.W. Kiewiet and F.H. Underhill, eds., *Dufferin-Carnarvon Correspondence, 1874-1878* (Toronto, 1955). Although some missionaries were quite adamant in their support of Aboriginal title, in 1913 a Haida elder said to the McKenna-McBride Commission: "[W]e have seen and know that the government has come in and sold our lands. What can we do? We have kept the teachings of the missionaries. Don't do any harm to others. Love one another....but the Boers and the English fought over their land troubles. We have not fought, because we have kept what the missionaries taught us [T]he government have called [the North Island] Langara[T]f I took a piece of

diversity, and the difficulties involved in travelling and sending messages in the colony. These factors militated strongly against concerted action. It lay as well in the devastating smallpox epidemic of 1862, which probably killed one-third of the Aboriginal population and left them with no energy and few resources for pursuing other matters. Important too was increasing acculturation: many were becoming aware of the “resistless agency” they were up against, and Christian Natives were urged to turn the other cheek and cast up their eyes to heaven.¹⁵⁸

The provincial legislature demanded information about the land question again in 1875, when British Columbia was well into its decades’ long quarrel with Ottawa about Aboriginal reserve policy. Periodic pressure was brought to bear upon the province from then until 1927, when the Dominion parliament made raising money to prosecute Aboriginal claims an offence.¹⁵⁹ The issue finally reached the courts in the latter part of the twentieth century, the provincial government arguing that Aboriginal title had been implicitly extinguished by colonial land legislation that mentioned neither title nor extinguishment. The trial judge in *Delgamuukw et al. v. The Queen*, the first Aboriginal title case to be tried since the courts disinterred the concept in the 1970s, accepted this position, but he has since been reversed by the British Columbia Court of Appeal.¹⁶⁰ As a result, an issue that for years warranted barely a footnote in British Columbia’s legal history now demands much more than a chapter.¹⁶¹

B. The Mainland and Merger, 1858-71

(i) More Constitutional Confusion

When the discovery of gold in the Fraser River brought thousands of Americans and other newcomers through Victoria in 1858 on their way to the goldfields, the Colonial Office moved quickly to establish a new and quite separate colony on the mainland, one which the Queen decided to call ‘British’ Columbia.¹⁶² Concerned

land and claimed it without any title to it, I would naturally call it another name and that is the case with North Island where our totem poles are the same to us as the white man’s preemption stakes are to them.” (Read into the record in the Lyell Injunction application, *supra* note 33 at 53.)

¹⁵⁸ The phrase in quotation marks is from a charge to a grand jury: see the *Victoria Colonist*, 16 March 1880.

¹⁵⁹ Primarily to stop the agitation of non-Native lawyers such as A.E. O’Meara. See S.C. 1927, c. 32, s. 6.; R.S.C. 1927, c. 98, s. 141.

¹⁶⁰ (1991), 79 D.L.R. (4th) 185 (B.C.S.C.), reversed in part by *Delgamuukw v. British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.). Interestingly, clause 18 of Governor Douglas’ Instructions stated that he was “not to make ... any law, of an extraordinary nature and importance, whereby Our Prerogative, or the rights and property of Our subjects residing in Our said Colony ... may be prejudiced” (*B.P.P.*, vol. 21 at 24). From the outset, Natives were repeatedly said to be British subjects.

¹⁶¹ See, e.g., Tennant, *supra* note 32. In 1990 the Social Credit government reversed the century old policy of refusing to negotiate land claims. A year later the New Democratic government went even further, recognising the concept of Aboriginal title for the purposes of negotiating settlements. Then, in 1993, the provincial legislature passed Bill 22, the *British Columbia Treaty Commission Act*.

¹⁶² Because “New Caledonia,” its fur trade name, was—and is—a French Colony in the South Pacific.

that annexation by the United States was a distinct possibility, and determined to avoid the tensions between governor and assembly that hobbled the divided government on Vancouver Island, the secretary of state for the colonies moved through parliament a bill designed to “get rid of certain legal obstacles which interpose to prevent the Crown from constituting a Government suited to the exigencies of so peculiar a case.”¹⁶³ *An Act to Provide for the Government of British Columbia* created what was, in effect, a crown colony with a vengeance: it authorised the crown to appoint a governor with powers both to administer justice and to establish all laws and institutions “necessary for the Peace, Order and good Government” of the colony.¹⁶⁴ Lord Lytton advised Douglas that, provided he sever all connection with the Hudson’s Bay Company, he could be this one-man legislature; but he warned him that to exercise such extraordinary powers in any but the most serious circumstances would be to abuse them.¹⁶⁵

After some haggling over salary, Douglas accepted these terms. He left the Company that had employed him for thirty-seven years and, until a new constitution was enacted immediately prior to his retirement, he governed single-handedly, without even an executive council.¹⁶⁶ Thus from 1858 to 1864 there were two colonies, each with a different form of government and separate legal system but the same governor.

During this period, Douglas acted decisively to put a new legal and administrative régime in place, even before he had authority to do so. The murder trial of William King at Fort Hope in September 1858 was the most striking example, because the accused was tried by commissioners appointed by Douglas rather than sent to Canada, as the imperial statutes of 1803 and 1821 required.¹⁶⁷ Douglas’s appointment as governor was not proclaimed in the new colony until November, but by then he had not only issued decrees respecting sale of liquor to Natives and land fraud, he had also forbidden unlicensed trading vessels on the Fraser River.¹⁶⁸ Lytton advised Douglas that even his position as chief factor of the HBC could not justify the latter: the Company’s monopoly extended only to trade with the Natives, and could not be invoked against persons who intended only to supply the miners.¹⁶⁹

The “opinion of lawyers,” wrote Lytton, was that British colonists did indeed carry the law of England with them, and that acts done in accord with that law would

¹⁶³ *BPP*, vol. 22 at 61 (Confidential despatch, Lytton to Douglas, 16 July 1858). The obstacle was the common law principle, referred to in the text accompanying note 132 *supra*, that entitled settled colonies to representative institutions.

¹⁶⁴ 21 & 22 Victoria, 1858, c. 99, s. 2 (U.K.).

¹⁶⁵ *BPP*, vol. 22 at 80 (Lytton to Douglas, 2 September 1858).

¹⁶⁶ There is a record of a council being appointed, consisting of Colonel Richard Clement Moody of the Royal Engineers and Judge Begbie: see *BCARS*, GR 444, vol. 18, File 1. But there is no record of any formal meetings.

¹⁶⁷ *BPP*, vol. 23 at 4 (Douglas to Lytton, 12 October 1858). King was convicted only of manslaughter and then escaped.

¹⁶⁸ Proclamations dated 6 and 15 September 1858. In December of 1857 Douglas had also issued a proclamation declaring the gold on the mainland to belong to the Crown and fixing licence fees for miners: *BPP*, vol. 21 at 420–421.

¹⁶⁹ *BPP*, vol. 23 at 60 (Lytton to Douglas, 16 July 1858).

be “substantially” legal, even before a regular authority was constituted on the mainland. But he added that Douglas’s own authority to make and enforce the law “could only be created by the act of the Crown, and cannot commence until you receive their commission.”¹⁷⁰ Accordingly, among the proclamations Lytton sent to Douglas, dealing with such things as the applicability of English law and the revocation of the Company’s exclusive licence of trade in B.C., he included a sample indemnity proclamation. This was intended to protect the fledgling government from any untoward legal consequences that might otherwise have flowed from Douglas’s premature assertions of authority.¹⁷¹ He also sent along a copy of the *British Columbia Act*, which set the new colony’s boundaries, provided for a local legislature as soon as her majesty deemed it “convenient”, repealed the jurisdiction of Canadian courts over what was now British Columbia and, as we have seen, made the governor for the time being a virtual dictator.¹⁷² These documents, together with those proclaiming Douglas’s appointment and that of the new judge, were read at a public ceremony in a crowded log house at Fort Langley on 19 November 1858. True to form, it rained. Further proclamations dealing with land, custom’s duties and the supreme court were issued over the ensuing six weeks, and extensive gold mining regulations followed in the new year.

Six years later, the council of Vancouver Island divided into separate executive and legislative branches, so that colony’s amazingly top-heavy governmental apparatus now had two councils, an elected assembly and a governor. Even more significant constitutional changes came that same year on the mainland. Her majesty had evidently decided that it had become expedient to constitute a legislative council, and so ordered. However, although one third of the council was to be members elected by the population and then nominated to the council by the governor, it was not technically a representative body; rather it was a crown council in which some of the appointed members had also been selected by the electorate.¹⁷³ Douglas of course did not have to live with this arrangement, nor probably did he want to. His benevolent fur trader despotism was increasingly out of step with what the majority of the settler population regarded as their birthright, so he retired. Arthur Edward Kennedy replaced him in Victoria and Frederick Seymour in New Westminster, the grandly named capital of the mainland. Neither man was especially popular.

The legal status of the new legislative council seems to have ‘eluded’ Governor Seymour and Attorney-General Henry Crease for some time. Indeed, their ample but erroneous interpretation of gubernatorial authority managed to irritate the Colonial Office even more than Blanshard and Douglas had done.¹⁷⁴ The mainland also got a formal Executive Council, and when Vancouver Island and British Columbia united in 1866, the latter colony absorbed its insular counterpart. Although

¹⁷⁰ See *supra* note 31, above and *BPP*, vol. 22 at 79 (Lytton to Douglas, 2 September 1858)

¹⁷¹ *Ibid.* It should, Lytton advised, be adapted “to suit the exigencies of the case.”

¹⁷² *Supra* note 164.

¹⁷³ This was the model followed in a number of other Crown colonies at the time. The *Colonial Laws Validity Act*, 28 & 29 Victoria, 1865, c. 63 (U.K.) subsequently defined a representative legislature as one in which one half the members were elected.

¹⁷⁴ See Hendrickson, *supra* note 132 at xlv.

Victoria became the capital, the Island's unusual form of representative government came to an end and the Legislative Council of British Columbia was enlarged to accommodate its expanded boundaries. However, the system of government for the merged colony was unpopular with most colonists because it was neither representative nor responsible.

When Seymour died in 1868 Anthony Musgrave replaced him, and then shepherded the colony into Canada after a representative majority was finally established in the Legislative Council in 1870.¹⁷⁵ Ottawa, the Colonial Office and British Columbia agreed that "responsible government," the rallying cry of those settlers all over the empire who were committed to the transformation advocated by *The London Times* in 1848, would be implemented immediately after confederation. Responsible government, of course, took authority over such matters as crown lands and Aboriginal claims away from imperial officials and placed it firmly in the hands of the settler-dominated local assembly.

(ii) Gold Rush Professionals: Judges and Lawyers

The Colonial Office had known for some time that the amateur legal system of tiny Vancouver Island was inadequate, and it certainly would not do on a rapidly expanding gold mining frontier. Accordingly, Lytton sent out what Blanshard had pleaded for unsuccessfully in 1850: troops, a legally trained judge, and at least the beginnings of a salaried police force. Colonel Richard Clement Moody and a detachment of royal engineers came to build roads and survey lands; Chancery lawyer Matthew Baillie Begbie came to be the colony's judge and, for a time, its *de facto* attorney-general and legislative draughtsman; and Chartres Brew of the Royal Irish Constabulary came to establish a body of constables that became the B.C. Provincial Police, until replaced in 1950 by the Royal Canadian Mounted Police.¹⁷⁶ Before then, the provincial force was obliged to yield jurisdiction to the North West Mounted Police, the predecessor of the RCMP, only during railway construction in the 1880s and the Klondike gold rush in the '90s, and then only in the regions affected. They also had to share jurisdiction with U.S. Military Police during the building of the Alaska highway in the 1940s. Much earlier, attempts to use Black policemen at Victoria foundered upon the racism of the predominantly American population;¹⁷⁷ and experiments with Native constables, which enjoyed some initial successes, were largely abandoned.¹⁷⁸

¹⁷⁵ 33 & 34 Victoria, 1870, c. 66 (U.K.) and the Order Reconstituting Legislative Council, 9 August 1870.

¹⁷⁶ See generally Frederick John Hatch, "The British Columbia Police, 1858-1871" (M.A. thesis, University of British Columbia, 1955). The force was not modelled on the para-military Royal Irish Constabulary due to the expense this would entail, and did not wear uniforms. There was also a separate, uniformed force under Augustus F. Pemberton in Victoria.

¹⁷⁷ See F.W. Howay, "The Negro Immigration into Vancouver Island in 1858" (1939) 3 *British Columbia History Quarterly* 101; and Crawford Killian, *Go Do Some Great Thing: The Black Pioneers of British Columbia* (Vancouver: Douglas & McIntyre, 1978) at 47.

¹⁷⁸ See Hatch, *supra* note 176 at 90. However, William Duncan, the lay missionary and founder of Metlakatla, established a successful, uniformed Native police force there: see Peter Murray, *The Devil and Mr. Duncan* (Victoria: Sono Nis Press, 1985), and the photograph at 160. The other study of Duncan is Jean Usher, *William Duncan of Metlakatla: A Victorian Missionary in British Columbia*

The first lawyers arrived in 1858, so Douglas soon began to enjoy in both colonies the legal advice he had sought in vain on Vancouver Island only two years before. Whether or not it met with his expectations, by 1863 legislation regulated the legal profession, and by 1869 the Law Society of British Columbia, composed of thirteen members, was established. The first lawyer to advertise was black: Joshua Howard, about whom very little is known, placed a notice in the *Victoria Gazette* of 28 July 1858. He described himself as an attorney from Virginia, and offered "advice in law, to the poor *gratis*."¹⁷⁹ Another, Mifflin Wistar Gibbs, read law with D. Babington Ring in the 1860s, but returned to the U.S. without attempting to be admitted to practice. There he went on to become, among other things, the first black man to be elected a municipal judge in Little Rock, Arkansas.¹⁸⁰

Continuing with "first's," the first blueprint for the colony's legal system was drawn up by a Canadian, George Pearkes, who became crown solicitor for Vancouver Island. Douglas sent it to the Colonial Office, along with a request for at least twenty copies of "that useful work, 'Burn's Justice'."¹⁸¹ Although politely received, Pearkes's scheme, which called for two puisne judges as well as a chief justice, was too expensive for Westminster's limited revenues; like Brew's equally elaborate plans for a police force modelled on the Royal Irish Constabulary, it was quietly dropped.

Instead, Douglas got Begbie, whose court enjoyed the widest possible jurisdiction, thereby avoiding difficulties caused in Upper Canada by the lack of a court of equity.¹⁸² The new judge promptly made the Vancouver Island rules of court applicable to the mainland. Only one person in either colony, Crease, was a qualified British practitioner, so Begbie temporarily relaxed the admission rules in order to permit Americans and others who lacked the cachet of a British legal education to practice in the mainland colony.¹⁸³ By 1860, six lawyers had set up shop in Victoria, one in New Westminster and two at Yale.¹⁸⁴ Law reporting did not begin until the 1880s, and the first professional law schools were established in Vancouver and Victoria in 1914.¹⁸⁵

(Ottawa: National Museum of Man, 1974).

¹⁷⁹ Alfred Watts, Q.C., *History of the Legal Profession in British Columbia, 1869-1984* (Vancouver: Law Society of B.C., 1984) at 3-5, 49-50.

¹⁸⁰ Killian, *supra* note 177 at 144-145.

¹⁸¹ *BPP*, vol. 23 at 284 (Douglas to Lytton, 26 October 1858).

¹⁸² Order of Court, 24 December 1858; Proclamation 8 June 1859: *Consolidated Statutes* (B.C.), 1877, c. 51. On the Upper Canadian situation see Paul Romney's essay *infra* in this volume. That the same judge administered both law and equity did have its drawbacks, however: to those unschooled in the niceties of nineteenth century legal procedure as adapted to the colony, Begbie seemed to be able to appeal his decisions to himself: see Loo, *supra* note 16 at 26.

¹⁸³ In fact, only John George Barnston, the son of a fur trader who had been born at Red River and educated in Canada East, was admitted under this temporary exemption: Watts, *supra* note 179 at 48. It turned out that there was no need for American attorneys, so Begbie, who had a low opinion of Canadian legal education, insisted on English training. He admitted George Anthony Walkem, a future premier educated in Montreal, only when virtually ordered to do so: see *Dictionary of Canadian Biography*, vol. XIII (Toronto: University of Toronto press, 1994).

¹⁸⁴ "Bancroft Scraps" at 117ff., *Bancroft Library*, *supra* note 31.

¹⁸⁵ Watts, *supra* note 179, chapters 6 and 8. University law schools were not established in B.C.

The inferior courts of British Columbia, in keeping with those on the Island a few years earlier, got off to a rocky start. The temptations of a gold frontier were considerable; and no system, however well-intentioned or organised, was without flaws, especially one on a gold-mining frontier. A number of the men appointed by Douglas to dispense justice to the miners of Fraser's River had to be dismissed for incompetence or corruption.¹⁸⁶ Until well after Confederation even stipendiary magistrates who became county court judges were without legal training and some, according to their critics, were without "common sense" as well.¹⁸⁷ Overall, however, the system worked. Its success was due, not simply to the determination of Douglas and Begbie, but to the willingness of the mining population to submit to an authority that, for all its faults, promised and delivered orderly resolution of disputes.¹⁸⁸

Douglas's six years as governor were eventful and expensive ones. His efforts to facilitate the development of the new colony's mines, most notably his road-building, generated debts that revenues from the waning gold fields could not offset. However, although his autocratic style and powers to match had made him yesterday's man by the time he was eased out, his myth was re-furbished once people became acquainted with some of his successors. As the gold rush receded, legal institutions with which his name and Begbie's were permanently linked acquired a roseate glow, and historians on both sides of the border contrasted the "peaceful" Canadian frontier with the lynchings and vigilanteism associated with the western United States.¹⁸⁹ But before a confident assessment of British Columbia's colonial legal system can be made, at least two comments seem justified.

The first is that, to the extent it can be determined, the crime rate in British Columbia's towns and gold fields was probably in line with those elsewhere.¹⁹⁰ Twenty-two year old Lieutenant Charles Wilson, secretary to the British Boundary

until after World War II.

¹⁸⁶ The most notable incident came to be referred to as "Ned McGowan's War," after a former judge from California who came to B.C. to search for gold and hide from political enemies. McGowan became a powerful force among the miners, even managing to persuade the justice of the peace at Yale to arrest and imprison his counterpart at Hill's Bar. Things in the Fraser River mines improved considerably when both of these unfortunates quickly joined the list of officials that Douglas felt obliged to dismiss: see F.W. Howay, *The Early History of the Fraser River Mines* (Victoria: Archives of B.C. Memoir No.6, 1926) and W. Wymond Walkem, *Stories of Early British Columbia* (Vancouver: News-Advertiser, 1914).

¹⁸⁷ *British Columbian*, 15 November 1881.

¹⁸⁸ As veteran fur trader Alexander Caulfield Anderson put it: "The stringency of the laws ... coupled with the good sense of the miners ... had a great effect ... in deterring [the bad element among them].... As a body they are spoken of with great respect." "Anderson's History of the Northwest Coast" copy in *Bancroft Library*, *supra* note 31, P-C 2. See also David Ricardo Williams, Q.C., "Mining Camps and Frontier Communities in British Columbia" in *Law and Justice*, *supra* note 21 at 215-232.

¹⁸⁹ See sources cited in Hamar Foster, "Law Enforcement in Nineteenth-Century British Columbia: A Brief and Comparative Overview" (1984) B.C. Studies 3; and "Shooting the Elephant: Historians and the Problem of Frontier Lawlessness" in Richard Eales and David Sullivan, eds., *The Political Context of Law* (London: The Hambledon Press, 1987) at 135.

¹⁹⁰ Loo, *supra* note 113 at 270-274.

Commission that was sent out to survey the 49th parallel, left this impression of the streets of Victoria in 1858:

You are hardly safe without arms & even with them, when you have to walk along paths across which gentlemen with a brace of revolvers are settling their differences; the whiz of revolver bullets round you goes on all day & if anyone gets shot of course it's his own fault....¹⁹¹

Because he wrote to impress the folks at home, he probably exaggerated; nonetheless, evidence of a significant amount of crime, much less glamorous than Wilson's but more reliable, can be found in police records for the colonial era.

For example, a force of twenty-eight sergeants, officers and special constables policed the merely three or perhaps four thousand citizens of Victoria between January 1863 and April 1865.¹⁹² The pages of their "Sergeant's Daily Report Book" for this period contain a dreary litany of alcohol, greed and desperation, coupled with a recognition that there were limits to what police could do about it.¹⁹³ Bodies, many of them Native women, were found in the streets, in the harbour, on the reserve, in rooming houses. They were either suicides, deaths from "excessive drinking," or suspected murder victims. Breaking, entering and theft were the crimes of choice, with armed robbery, especially of single pedestrians at night, a close second.¹⁹⁴ A random sampling of other incidents included an insane husband with a gun; liquor being sold to Natives in the ravine behind Johnson Street; a Native woman giving birth on a sidewalk; a man found hanged from an oak tree on the edge of town; the arrest of an attempted suicide; intoxicated Haidas assaulting police and driving them from the Songhees Reserve with bottles and stones; someone shooting at a constable from a dark alley; a seven year old Native girl dying of starvation; a shooting on the reserve compromised by a payment of blankets; the suicide of a justice of the peace, with a verdict of "temporary insanity"; one constable accidentally shooting and killing another; and so on. Not a picture of lynch mobs and vigilantes, but sobering nonetheless.

The second observation supported by the evidence is that the police and other officials did their jobs, at least in the sense that they maintained an appearance of control sufficient to match the rhetoric of English law and order. Most recorded police activity was geographically, socially and perhaps even racially confined; it never seriously threatened to undermine the opinion makers' view of British Columbia as a place where the rule of law was secure.¹⁹⁵ This was especially so in the gold

¹⁹¹ George F. Stanley, ed., *Mapping the Frontier: Charles Wilson's Diary of the Survey of the 49th Parallel, 1858-1862, While Secretary of the British Boundary Commission* (Toronto: Macmillan, 1970) at 25.

¹⁹² Anderson, *supra* note 188 at 80; and "Victoria: Police Sergeant's Daily Report Book", vol. I (1863-1865), BCARS, GR 426.

¹⁹³ *Ibid.*, the entry for 25 February, 1863 that a number of very noisy Frenchmen in a house on Johnson Street were warned by the police several times "but took no notice of this."

¹⁹⁴ *Ibid.*, entries for 12-13, 20 June 1863.

¹⁹⁵ Loo, *supra* note 113 at 280ff., argues that colonists maintained their belief in the orderliness of their society by labelling the Natives as the colony's "criminal class," thus isolating themselves from responsibility in the same way that the governing classes in England did with respect to the "criminal classes."

fields of the Cariboo, where Judge Begbie and a small number of magistrates and constables quickly developed a reputation for presiding over the most orderly of the mid-century gold rushes. Although some observers were clearly shocked by life at the diggings, Americans who had experienced mining camps on both sides of the line pronounced in favour of the north.

One of the most "colourful" of these was Billy Ballou, a veteran of California, Idaho and Montana who claimed to have travelled a little with Mark Twain.¹⁹⁶ According to him, there were fewer rogues on Fraser's River than across the line, and Judge Begbie soon "cleared out" these few.¹⁹⁷ The substance, if not the flavour, of Ballou's remarks was typical of what American miners said of British Columbia.¹⁹⁸ It was not California, and even highly unpopular and contentious incidents did not permanently injure the overall repute of the justice system.¹⁹⁹ Indeed, the demands of the mob seem to have threatened to influence governmental policy only once, during the hysteria surrounding the Chilcotin "massacre" in 1864; but even then calmer heads eventually prevailed and retribution, extreme as it was, came at the hands of executioners acting pursuant to judicial authority rather than military or vigilante expediency.²⁰⁰

To emphasise violent crime and *causes célèbres*, however, is to risk distortion. Only recently have historians begun to turn their attention to more mundane, and statistically more significant, civil and commercial aspects of law.²⁰¹ These investigations confirm what one might expect: most "law" in colonial British Columbia was to be found, not in theft and assault but in bankruptcy and small debts. The

¹⁹⁶ Perhaps he did: there are references to "an old gold miner" named Ballou in *Roughing it in the Bush*. See *The Works of Mark Twain*, vol. 2 (Berkeley: University of California Press, 1972.)

¹⁹⁷ "Adventures of Wm. T. Ballou" *Bancroft Library*, *supra* note 31, P-B1 at 10.

¹⁹⁸ See, e.g., Begbie's account of the views of a famous "Old Californian" named Downie (after whom Downieville was named). He was surprised at how peaceful the mining town of Antler, B.C. was, compared to California: *BPP*, vol. 24 at 202-203 (quoted in Douglas to Newcastle, 24 October 1861). The flavour of Ballou's blustery reminiscences can be gathered from the following excerpts: "Talk about Indian fighting [in Idaho]....we had hand grenades ... and Lord bless your soul if we did not let them have it. We killed everything ... young ones, by George—shot them all. [Our Colonel] said 'Kill them all, little as well as big; nits make lice'.... Idaho ... beat anything I ever saw for murder ... I went out ... one morning [and] saw nine men hanging in the...butcher shop where he strung cattle up; nine men all labelled: Horsethief, Robber, Murderer, etc.It was done by the Vigilance Committee [The worst were the] Sydney Ducks [Australians]....There were not many of that class on Fraser River. They soon cleared them out there. Old Judge Begbie mighty soon made them understand who was boss." The researcher who transcribed these reminiscences at Seattle in 1878 added that Ballou "is noted as a spinner of great yarns. His sober tongue *may* have vibrated a little over the bounds of truth here" (*supra* note 197 at 6-10).

¹⁹⁹ E.g., *Cranford v. Wright* and the litigation connected with the so-called "Grouse Creek War", both described in Loo, *supra* notes 16 and 113 (chapters 4 and 5); Williams, *supra* note 17 at 75-79, 191-95; Sydney Petit, "The Tyrant Judge: Judge Begbie in Court" (1947) 11 *British Columbia Historical Quarterly* 273; and Patricia Johnson, "McCraith and the Law" (1948) 12 *ibid.* 127.

²⁰⁰ *Supra* note 79; and also Edward Sleigh Hewlett, "The Chilcotin Uprising of 1864" (1973) *B.C. Studies* 50; Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890* (Vancouver: University of British Columbia Press, 1977) at 107-09; and Tina Loo, "The Road from Bute Inlet: Crime and Colonial Identity in British Columbia" in Phillips *et al.*, eds., *supra* note 67 at 112-142. The incident remains a bitter memory among Chilcotin people to this day.

²⁰¹ Williams, *supra* note 188 and Loo, *supra* note 113.

colony's high-risk, credit-based economy was one in which people looked for predictability and order in their business, as well as in social relations. Courts that could somehow cope with the harsh realities of transiency, geography and the fluctuating pressures of a gold rush were therefore a pressing necessity.²⁰²

The court system that British Columbia brought into Confederation was in many ways a typically colonial one, with indistinct lines between different governmental functions. In particular, the judiciary resided at the heart of the daily business of government in a way that is not possible today. Magistrates had administrative and legislative as well as judicial duties. They sat on the Legislative Council, and in their districts were like Gilbert and Sullivan's Pooh-Bah, "Lord-High-Everything-Else," including assistant gold commissioner, government agent, and land commissioner. This was not true of the Supreme Court, but Begbie did engage in a sort of administrative work on assize. When his circuits brought him to distant population centres, he not only tried civil and criminal causes before petty juries but he also responded to grand jury complaints about insecure gaols, poor sanitation and the like, carrying the messages back to politicians in New Westminster and, after 1866, in Victoria. His judicial brethren routinely did the same.

Although prior to merger in 1866 the chief justice was a member of the Legislative Council on Vancouver Island, this had not been the case on the mainland, where Judge Begbie had ceased to be attorney-general in March of 1859. However, he continued for some time to be involved in drafting legislation, influencing legal institutions in equally important, if sometimes more subtle, ways. Begbie's treatment of juries, and his legislation dealing with them and with the office of sheriff, attracted criticism both in the colony and "at home."²⁰³ But for all the sound and fury generated by some of his actions, they did not quite become the focus of political discontent that similar developments had prompted in the Upper and Lower Canadas a few decades earlier.²⁰⁴ More depressing, both for judges and everyone else, was the confusion over the status of the two supreme courts when Vancouver Island was absorbed by British Columbia in 1866. Nothing was said about this issue in the Act of Union, so Chief Justice Needham, who had succeeded Cameron in 1865, lobbied somewhat crassly for pride of place.²⁰⁵ This jurisdictional confusion had to be resolved by legislation providing for fusion of the courts, but only after one or the other of the judges died or retired. Until then, the Supreme Court of Civil Justice on Vancouver Island continued to exist, and each judge had precedence in his own

²⁰² Thus a Nanaimo merchant who was "somewhat in debt, literally walked into a lion's den" when he decided to watch a trial. He was promptly arrested in the court room by *capias*: *British Columbian* (date uncertain): "Bancroft Scraps" at 103, *Bancroft Library, supra* note 31.

²⁰³ Loo, *supra* note 113 at 245-247.

²⁰⁴ For example, the disallowance of his Gaol Delivery Act, 1860, discussed in Hamar Foster, "The Kamloops Outlaws and Commissions of Assize in Nineteenth-Century British Columbia" in David Flaherty, ed., *Essays in the History of Canadian Law*, vol. II (Toronto: University of Toronto Press, 1983) at 318-19 and note 341. Not all of his attempts to adapt English law to colonial realities met with official approval, but that may say as much about deficiencies in the Colonial Office as in him. On the other hand, Begbie did have a few brushes with scandal: see Williams, *supra* note 17 at 183ff.

²⁰⁵ Williams, *supra* note 17 at 158-59.

territory. Needless to say, this caused no small amount of distress for litigants and their counsel.²⁰⁶

By the early 1860s stipendiary magistrates resided at Victoria, Nanaimo, Yale, Lytton, Kamloops, Lillooet, Williams Lake and Cariboo.²⁰⁷ These magistrates became county court judges in 1867 and federal appointees after 1871, although the first to have practised as a lawyer did not sit until 1884.²⁰⁸ The bulk of their judicial work, like that of the supreme court, flowed from the extensive network of credit required in a gold rush economy. Most of it therefore involved civil disputes, pursuant to the small debts jurisdiction established in late 1859. Whether presiding in the magistrate's (county) court or the mining (gold commissioner's) court, someone like Henry Maynard Ball at Lytton or Peter O'Reilly at Williams Lake spent much of his time hearing actions to recover debts of one kind or another. The most recent and complete study of these courts reveals that most of these actions ended up in the mining court: to avoid the higher costs associated with the supreme court, those litigants with claims that exceeded the monetary jurisdiction of the magistrate's court deliberately chose, in considerable numbers, to go before the gold commissioner, even if they had to stretch the claim's connection to mining in order to do so.²⁰⁹

County courts remained an integral part of the judicial system for almost one hundred and twenty-five years, until merged into the Supreme Court in 1990. After Confederation the province continued to appoint stipendiary magistrates, although the constitutional status of their courts was not finally settled until 1938.²¹⁰ Over time this led to the refining of small claims, family and juvenile jurisdictions, including establishment of a juvenile court at Vancouver in 1910, the second such in Canada.²¹¹ The first woman to be appointed to the bench in British Columbia, Helen Gregory MacGill, presided in the latter. In 1969 the magistrate's court became the Provincial Court of British Columbia, which was interpreted to mean that provincial judges, like federal ones, had to be legally trained. As a consequence, the five remaining lay judges, the last descendants of the administrator-magistrates of the gold rush era, were "duly exorcised."²¹²

However, British Columbia continued to appoint lay justices of the peace. As a separate office, these appear to have been a post-Confederation development; prior to that time the terms justice and magistrate were used interchangeably. In the

²⁰⁶ Loo, *supra* note 113 at 236.

²⁰⁷ *British Columbia and Victoria Directory 1863* (Victoria: Howard & Barnett) at 168.

²⁰⁸ F.W. Howay, *British Columbia From Earliest Times to the Present*, vol. II (Vancouver: S.J. Clarke, 1914) at 683

²⁰⁹ For details, see Loo, *supra* note 113 at 122-123. That the same official presided in both lower courts was probably also a factor.

²¹⁰ *Reference re: Adoption Act, Children's Protection Act, Deserted Wives' and Children's Maintenance Act*, [1938] S.C.R. 398.

²¹¹ Alfred Watts, Q.C., *Magistrate-Judge: The Story of the Provincial Court of British Columbia* (Vancouver: Law Society of B.C., 1986) at 15 [hereinafter *Magistrate-Judge*].

²¹² *Ibid.* at 65. See also Roderick Haig-Brown, "The Lay Mind in the Law" (1974) 9 *University of British Columbia Law Review* 1.

nineteenth century both JP's and magistrates were "gentlemen," but the latter's jurisdiction was wider, as successive federal criminal codes have acknowledged. The former administered summary, local justice as a public service, and only when they were not occupied with their regular business and leisure activities. No doubt many were the sort of "public-school and university young men" for whom Lees and Clutterbuck gathered their information to encourage immigration. In 1881, the Dominion constituted every "Indian agent" a justice of the peace, thereby conferring upon them jurisdiction to try summary offences, including after 1918 violations of the potlatch law.²¹³ Sitting alone or in pairs, the justices and the police magistrates in urban centres such as Victoria handled most of the criminal cases in the province.²¹⁴ By the late 1870s there were scores of JPs in virtually every corner of the province.²¹⁵

V. The New Province, 1871

British Columbia entered Confederation in 1871, and the terms of union were generous.²¹⁶ The ensuing decades, however, would prove that both interpreting and living up to mutual obligations were much more difficult than drafting them. The most notorious example involved the new province's obligation to provide reserve lands for Natives.

Unlike Alberta, Saskatchewan and Manitoba, British Columbia entered Confederation with its public lands vested in the crown in right of the colony. This meant that provision had to be made for transferring the underlying title to Aboriginal lands to Ottawa.²¹⁷ The clause that was eventually settled upon required the Dominion to pursue "a policy as liberal as that hitherto pursued by the British Columbia Government," and obliged the province to convey to the Dominion such tracts of land as had "hitherto been [their] practice" to reserve "for the use and benefit of the Indians."²¹⁸ According to Dr. Helmcken, one of the three delegates who travelled to Ottawa to negotiate the terms, this clause was "very fully discussed," and the Ottawa ministers thought that "in some respects" British Columbia's system was better than theirs.²¹⁹ This was not, however, what Ottawa would soon be saying; nor did it reflect the attitude displayed in the Legislative Council in Victoria during the debate on the

²¹³ S.C. 1881, c. 17, s. 12; S.C. 1918, c. 26, s. 7. Potlatch violations were reduced from indictable to summary offences, triable by Indian Agent, because the superior courts had proved reluctant to convict.

²¹⁴ See, e.g., *Regina v. Akerman* (1883), 1 B.C.R., Part I at 255.

²¹⁵ *Guide to the Province of British Columbia, 1877-8* (Victoria: 1877) at 77ff.

²¹⁶ So generous that at least one member of the delegation to Ottawa was pleasantly surprised: see "Helmcken's Diary of the Confederation Negotiations, 1870" (1940) 4 *British Columbia History Quarterly* 111 at 117. The actual dispatches between B.C. and the Colonial Office regarding terms for the union were bundled and sent back to London at the end of Anthony Musgrave's tenure as colonial governor, only to be destroyed at an unrecorded date, according to a note in Colonial Office reference materials in the Public Record Office, Kew (as reported to the author by DeLloyd J. Guth).

²¹⁷ Because s. 91(24) of the *British North America Act* made the Dominion responsible for "Indians, and the Lands Reserved for Indians."

²¹⁸ *Terms of Union, 1871*, clause 13.

²¹⁹ Perhaps because Helmcken himself thought so: *supra* note 216 at 127.

terms of union two months earlier, when the attorney-general squelched an attempt to discuss Aboriginal policy.²²⁰

In the years that followed, the Dominion quickly discovered what it should have already known: under British Columbia's hitherto "liberal" policy, approximately ten acres of reserve land had been allotted per family head. This was much less than in the treaties on the prairies, where available land was, admittedly, more plentiful and where there were no coastal fisheries. In addition, the colony had failed to secure a surrender of Aboriginal title prior to opening land to settlement and prohibited Natives from pre-empting land the way immigrant settlers could. For the next century these two issues, the failure of the colony to extinguish Aboriginal title, "the land question," and the size and location of reserves, "the reserves question," refused to go away.²²¹

After disallowing the new province's first attempt at consolidated land legislation because it ignored these two questions, Ottawa agreed in 1875 to shelve the title issue so the two governments could concentrate instead on resolving the problems of reserve allocation and size.²²² Although a reserve commission was established, Aboriginal protests eventually persuaded Prime Minister Laurier to amend the *Indian Act* to provide a means of litigating the much more fundamental issue of title.²²³ However, his government lost the 1911 election and the new Conservative administration agreed with their counterpart in British Columbia to put this issue aside yet again. The result was the McKenna-McBride agreement and a new reserve commission, the recommendations of which met with considerable Aboriginal resistance.

Renewed squabbling between Dominion and province delayed the transfer of title in Aboriginal reserves to the Dominion until 1938, a decade after parliament had put an end to agitation over the land question by making the raising of funds to prosecute Aboriginal claims against government illegal.²²⁴ By then, criminalisation of the potlatch, encroachments on reserves, legislative assaults on traditional forms of self-government, attempts at compulsory enfranchisement, problems with residen-

²²⁰ *Journals, supra* note 104, vol. V, Appendix A at 567-8. Henry Holbrook proposed a resolution asking that Aboriginal people should receive "protection" under the change of government, but Crease interrupted. Such talk was dangerous, he said, because "Indians do get information about what is going on." When Holbrook persisted, Crease again warned that "[t]hese are the words that do harm," and Amor De Cosmos ordered the reporter not to record them. Although John Robson praised Canada's Aboriginal policy and condemned B.C.'s as "a blot on the Government," the resolution was defeated, twenty votes to one. (I am grateful to Mr. Stuart Rush for drawing this to my attention.)

²²¹ A third issue, self-government, was also important: see Tennant, *supra* note 32, chapter 5.

²²² Hamar Foster, "How Not to Draft Legislation: Indian Land Claims, Government Intransigence, and How Premier Walkem Nearly Sold the Farm in 1874" (1988) 46 *The Advocate* 411. In 1881 Prime Minister Macdonald expressed his concern that "if the government raised the question of the Indian title [in B.C.], the Courts of this country and the Courts of England ... would maintain the right of the Indians and their title to the occupation of the soil until that right whatever it might amount to was extinguished" (*House of Commons Debates*, 11 March 1881, at 1348).

²²³ S.C. 1910, c. 28, s. 1; S.C. 1911, c. 14, s. 4.

²²⁴ See *supra* note 159, and order-in-council 1036 (B.C.). Note that the question of whether the reserves were actually transferred to the Dominion prior to 1938 is currently before the courts: see *B.C. (A.G.) v. Mount Currie Indian Band* (1991), 54 B.C.L.R. (2d) 156 (B.C.C.A.).

tial schools and a host of other more or less well-meaning but ill-advised initiatives had probably done far more harm to Aboriginal people and their cultures than any colonial official, with or without gunboats, ever did.

Increased population, as well as the movement of prospectors and homesteaders into previously unsettled areas, meant greater pressure not only upon Aboriginal people but upon the legal system itself. This in turn meant, on the criminal side, a need for more gaols, more police and more magistrates. By 1871 there were three main gaols and about twelve "lock-ups" in the new province, in which prisoners were confined together regardless of age, sex or the seriousness of the offence.²²⁵ The arrangement established at Confederation distinguished offenders at least in terms of the length of sentences imposed. It provided that "the local govt. could oblige the Dominion to build a penitentiary" for those sentenced to be confined for two years or more, which they did.²²⁶ In 1878 the British Columbia Penitentiary was completed at New Westminster, on a slope high above the Fraser River. A grey, solid, medieval fortress, it performed its dismal functions for over a century before being demolished and replaced. The first "juvenile reformatory" for boys was established at Victoria in 1890, the first "industrial school" for girls in 1914. The Women's Unit at Oakalla Prison Farm in Burnaby had to wait until 1942.²²⁷

Money to pay for criminal justice has always been a problem: people always want the authorities to "get tough" on crime but, whatever this may mean, they are less willing to have their representatives vote taxes necessary to do so. A remarkable example was an order-in-council passed in 1878. This regulation, not wholly dispensed with until 1960, provided that magistrates in an unorganised territory were not entitled to a fee unless the accused was convicted. The obvious problem this caused could be addressed in one of two ways: either the magistrate made it known that in the event of an acquittal he would appreciate being paid by counsel for the accused, or counsel would offer to do so at the outset. What unrepresented persons did can only be guessed at, but one lawyer who adopted the latter approach maintained that he rarely had to pay: the magistrate where he practised in the 1930s held "rather consistently to the view that the police would not lay an information unless the accused was guilty."²²⁸ Of course, in such cases the prosecutor was often the policeman who laid the charge.

One historian has discussed the period from 1871 to 1929 under the heading, "Reform and Its Limits," summarising these years as ones in which a largely male and working-class labour movement sought to improve the work-place, and Christians and middle-class women sought to reform almost everything else.²²⁹ Predictably, efforts to consolidate the power of trade unions, protect married women's property, ban alcohol, obtain the vote for women, provide equal access to education

²²⁵ Diana Doherty and John W. Ekstedt, *Conflict, Care and Control: The History of the Corrections Branch in British Columbia* (Vancouver: 1991) at 21-22 [hereinafter *Corrections*].

²²⁶ *Helmcken's Diary*, *supra* note 216 at 356.

²²⁷ *Corrections*, *supra* note 225, at xii-xiii.

²²⁸ Watts, *supra* note 211 at 79-80.

²²⁹ Barman, *supra* note 2, chapter 10, referring in part to the social gospel and "maternal feminist" movements.

and accomplish a number of other objectives, met with mixed results. Differences of race, class and religion cut across a number of these issues, helping to forge unusual alliances that make a confident assessment of who really benefited somewhat elusive.²³⁰ But there were successes. The increasing demand for better protection against the injury and damage that are an inevitable by-product of industrial society, coupled with the desire of employers to limit a liability that was showing signs of expanding, led in 1902 to the first worker's compensation legislation in Canada.²³¹ The province was somewhat slower off the mark with respect to women's suffrage (1916), but enacted, along with the Dominion government, the first old age pension law in 1927.²³²

When in 1903 electoral tickets based upon party rather than personal loyalty emerged, this brought a measure of stability to a political process that had been increasingly characterised by shifting coalitions and short-lived administrations.²³³ But it also represented a new polarisation. Instead of the old divisions between fur traders and independent settlers, Island and mainland, or British gentlemen and Canadian-American upstarts, the twentieth century would see the underlying contest between capital and labour come to dominate the rhetoric, if not always the reality, of the province's political life.²³⁴ At first, copies of the two federal parties, Liberal and Conservative, took the field for themselves. But when the Co-operative Commonwealth Federation (C.C.F.) won a plurality of votes in the provincial election of 1941, the two older parties formed a coalition to oppose "socialism" that survived until the early 1950s. Then a new coalition, Social Credit, took its place, and for the next forty years the Liberal and Conservative parties were increasingly marginalised as forces in provincial politics.²³⁵ For most of this period the courts played the subsidiary and limited sort of role usually associated with parliamentary democracy.

During the province's critical first decade, however, shifting allegiances undisciplined by party affiliation were the rule, and the status of the formerly colonial courts became contentious. Before Confederation, Begbie had sought to ensure that the magistracy would be English country gentlemen, believing this would be conducive to good order and would impress both the Natives and the Americans. After 1871, pressure mounted to remove such cultivated but legally untrained individuals. A

²³⁰ See, e.g., Barman, *supra* note 2 at 207-08 and Ross Lambertson and Alan Grove, "Pawns of the Powerful: The Politics of Litigation in the *Union Colliery Case*" (1994) 103 B.C. Studies 3.

²³¹ *Workmen's Compensation Act*, 2 Edward VII, c. 74 (B.C.).

²³² Barman, *supra* note 2 at 225. For an assessment of the record of the different provinces in legislation relating to women, see Backhouse, *supra* note 64.

²³³ The longest-serving of the five premiers between 1898 and 1903 was coal baron James Dunsmuir, who lasted two years: Barman *supra* note 2 at 177. In 1991, B.C. had three premiers in one year.

²³⁴ It was not always the reality because, as Barman, *ibid.*, points out at 223, many people of working class backgrounds did not come to B.C. to remain working class: "They sought to rise in status, possibly becoming employers themselves."

²³⁵ This second coalition collapsed in 1991 when a resurgent Liberal Party split the vote, leading to the election of B.C.'s second New Democratic Party government (the first was in 1972-75). Social Credit was reduced to seven members, five of whom subsequently defected to the B.C. Reform Party.

series of legislative attempts to achieve this goal and to reform the county courts failed, partly because Ottawa did not want to pay the salaries of judges who would now be Dominion appointees, and partly because the legislation trenched upon federal jurisdiction. Frustrated by this opposition, Premier George Anthony Walkem turned his attention to the province's supreme court judges, some of whom had become increasingly nervous about the extent to which local government intended to control the courts, tending to side with Ottawa on the county court issue.²³⁶

Since 1870, Begbie had been joined on the bench by Crease and John Hamilton Gray, a father of Confederation from the Maritimes. Two more justices, John Foster McCreight, the province's first premier, and Alexander Rocke Robertson, were added in 1880. When the Walkem government proposed their reforms, the supreme court judges reacted with concern, especially to the proposal that their long-standing authority to make rules of court might be taken away. When it became clear that these reforms also included "districting" the judges, i.e., ordering them to leave Victoria and reside in such enclaves of gentility as Richfield, a gold rush assize "town" that the judges looked on as somewhat akin to Siberia, they took action.²³⁷ But the spectacle of all five of them "huddled together" in Victoria, while the mainland made do with lay judges, ensured that the public would be slow to sympathize.²³⁸

Crease and Begbie lobbied their Ottawa contacts to oppose the changes, and Crease even wrote anonymous letters to newspapers and unsigned articles for bar journals, criticising the Walkem government in the most intemperate terms. Gray, when ordered to re-locate to New Westminster, refused to obey. Maintaining that the Supreme Court was a dominion rather than a provincial court, the judges delivered their lengthy reasons for so holding in *Sewell v. British Columbia Towing Co.*, the "Thrasher" case, only to be curtly reversed a year later by the Supreme Court of Canada.²³⁹ Not, however, before Crease had managed to distinguish himself by describing Walkem's legislation as "communistic" and by calling the franchise or suffrage that produced the Walkem government one of "universal suffering." He also contributed an anonymous skit to the *Victoria Daily Colonist*, ridiculing the librarian of the House of Commons for daring to write a letter to the *Canada Law Journal* supporting the province's legal position.²⁴⁰

The controversy was eventually defused when Prime Minister Macdonald appointed Premier Walkem to the B.C. Supreme Court, and Justice McCreight agreed to go to New Westminster instead of Gray. In the ensuing election the government lost badly, and Premier William Smithe's new administration smoothed things over

²³⁶ See *supra* note 21.

²³⁷ The judges and government had already collided in the trial of the infamous McLean gang over the issue of whether commissions of assize were necessary to try cases on circuit. The judges probably got the best of that exchange: see *supra* note 204.

²³⁸ *British Columbian*, 15 November 1882.

²³⁹ *Supra* note 128.

²⁴⁰ Crease to Z.A.Lash, 18 January 1879, BCARS Add. MSS 54, folder 13/72; Add MSS 55, folder 25/15. It was said that Crease came to be known among the bar as old "Necessity," because necessity knows no law.

by removing the objectionable provisions of the new laws. As the new premier had told Crease a few years earlier, the administration of justice required

the strictest principles of conservatism I have no sympathy with the iconoclastic tendency of the age. Instead of endeavouring to pull down that which has been the growth of centuries, I would pertinaciously act upon the old precept, "Prove all things, holding fast to that which is good."²⁴¹

The courts went through other structural changes as well. The possibility of creating a court of appeal was raised during the Confederation negotiations in 1870 but rejected by the Dominion government for the same reason it was reluctant about professional county court judges: Ottawa would have to pay the salaries.²⁴² Until 1909, civil appeals were therefore heard by way of application to the "Full Court," i.e., to the trial justices sitting as a court of review. Thus in the "Thrasher" case, which involved a negligence suit arising out of the sinking of a collier, Chief Justice Begbie's decision on the merits was reviewed by the full bench, including Begbie himself.²⁴³ For historical reasons this procedure was not available to criminal defendants: serious cases were not usually commenced in a central court but were heard from start to finish by commissioners, who were nearly always judges, sitting by virtue of a commission of oyer and terminer or general gaol delivery. Jury verdicts in this sort of case were reviewed by way of prerogative writs, such as *habeas corpus*, or by the trial judge reserving a point of law for consideration by the court, a highly discretionary remedy. The situation was partially reformed in 1885, when the legislature provided for a divisional court, primarily to review procedural matters in civil causes.²⁴⁴ But this too was composed of supreme court judges, and comprehensive reform did not come until 1909, when a completely separate court of appeal was established for both civil and criminal causes, amid renewed protests about expense.²⁴⁵

The practicing profession also had its controversies and landmarks. The first Aboriginal person to be called to the bar of British Columbia was Alfred Scow, in 1962, subsequently a provincial court judge. The first woman, Mabel Penery French, preceded him by fifty years, but only after unsuccessful *mandamus* proceedings and

²⁴¹ Smithe to Crease, 14 August 1878, *BCARS*, Add. MSS 54, folder 12/66. The end result was legally trained county court judges sitting locally, with supreme court judges going on spring and fall circuits.

²⁴² *Helmcken's Diary*, *supra* note 216 at 353.

²⁴³ This conformed to the English practice at *nisi prius*, whereby litigants disappointed by a jury verdict in the countryside could apply to the central court in which the action had been originally filed, to prevent ("arrest") the verdict from becoming the judgment of the court. In the "Thrasher" case Begbie and Crease upheld Begbie's judgment at trial, but Gray dissented. The Supreme Court of Canada agreed with Gray: see (1884) 9 S.C.R. 527.

²⁴⁴ Williams, *supra* note 17 at 225.

²⁴⁵ Creation of this court resolved an embarrassing and long-standing feud between Chief Justice Gordon Hunter and Justice Archer Martin, which older members of the bar regarded with a mixture of frustration and amusement. Because there were now two superior courts, these judicial combatants could be separated and a measure of peace restored: see David Verchere, *A Progression of Judges: A History of the Supreme Court of British Columbia* (Vancouver: University of British Columbia Press, 1988), chapters 11 and 12; Hon. H.B. Robertson, "When Judges Disagree ..." (1957) 15 *The Advocate* 181; and David R. Williams, Q.C., "Judges at War: Mr. Justice Martin vs. Chief Justice Hunter" (1982) 16 *The Law Society Gazette* 295.

a special statute.²⁴⁶ In the late 1940s, the *Legal Professions Act* was amended to permit an appeal for a law student whom the benchers had refused to admit because he was an avowed Marxist; but the court was as unsympathetic as the Law Society.²⁴⁷ Although it was and remains easier to keep people out of the profession than to remove them once in, this too could be done. Indeed, the first member to article a student was in 1866 the first to be struck from the rolls. The reason was “numerous contempts.”²⁴⁸

Yet the bench appeared to have been much more tolerant of “contempts” than it has since become, perhaps because judges in 1995 are less inclined to vexatious outbursts than their predecessors and they expect a similar courtesy in return. Whatever the explanation, during such celebrated contests as *Cranford v. Wright* (1863), *Regina v. The McLeans and Hare* (1880) and the “Thrasher” case (1882), some remarkable things were said. None attracted a citation for contempt, possibly because, prior to 1875, the judiciary rather than the profession controlled admissions and discipline, and this was power enough. Indeed, in *Cranford Begbie* would not allow one of the lawyers to sit at the counsel table because he was trained in Lower Canada (Quebec), not in England. At the close of the case two other lawyers were so angry at the judge that they directed the registrar to strike their names from the roll of barristers entitled to practice in his court.²⁴⁹

A rather different scenario unfolded before Begbie at Richfield a few months later, when some of George Hunter Cary’s fellow barristers moved to have him struck from the rolls for accepting contingent fees.²⁵⁰ Rejecting Cary’s arguments that such arrangements benefited the poor, Begbie said that he looked upon “barratry” with “the utmost abhorrence” and regarded lawyers who engaged in it as “the scum and refuse of the profession.” This was an interesting observation, given that Cary was attorney-general of Vancouver Island at the time! Nonetheless, Begbie doubted whether he could punish Cary, and discharged the rule (i.e., the motion to strike), noting that Cary had expressed “repentance and contrition” for his acts. Cary promptly denied that he had done any such thing, and threatened to sue the other lawyers. He added that he would take such proceedings in a court where “I can get justice,” which is more or less what he would say two months later to Chief Justice Cameron, burning his bridges in the only other superior court to which he could conceivably have been referring.²⁵¹ Begbie therefore reversed his decision to discharge the rule and told Cary:

²⁴⁶ Watts, *supra* note 179 at 58, 132-4, and Christine Mullins “Mabel Penery French” (1986) 44 *The Advocate* 676.

²⁴⁷ *Re: Martin* (1949), 2 D.L.R. 559.

²⁴⁸ Watts, *supra* note 179 at 118, referring to George Edgar Dennes, who was a bankrupt who “repeatedly failed to appear before the Court for examination.” On ethics and credentials in the legal profession generally see the work of W. Wesley Pue, e.g., his essay in *Glimpses*, *supra* note 28 at 237, and his essay in this book.

²⁴⁹ Johnson, *supra* note 199 at 144-5. The first lawyer was Walkem, the others were McCreight and D.B. Ring.

²⁵⁰ Including one in a case involving a defendant named, perhaps aptly, the “Dead Broke Co.” (This report is from an unidentified newspaper in the “Bancroft Scraps” at 248ff, *Bancroft Library*, *supra* note 31.)

Your threats against these gentlemen are as idle as the wind. Be advised by some better counsel than yourself; you are unfit to be your own advisor in this matter. Let me once more entreat you to consider before you adopt a course which must bring obloquy and disgrace upon yourself²⁵²

He then ordered Cary to appear at a subsequent date to show cause why he should not be struck from the rolls.

Such incidents, especially when tainted by personal antagonism, should not be over-emphasised; for the most part, the work of the courts proceeded without undue rancour; and justice, in the sense that disputes were settled and disorder addressed, was seen to be done. But they were noticed by the press, both within British Columbia and beyond, as worthy of comment. And they illustrated how intimately the courts were involved in the stresses and strains of working out arrangements whereby conflicting views of the new order were to be imposed on what colonists saw as the vacuum that preceded them.

VI. Conclusions

To devote so much space, in a history of the structure of British Columbia's legal system, to the years prior to its overland connection with Canada in 1887 may appear disproportionate. But the institutions, except perhaps in the area of administrative law, were largely formed by then, and the patterns of conflict and accommodation settled. It has been mainly technology and priorities that have changed. Immigration, access to resources, Aboriginal title, the place of Native people in the justice system, British Columbia's role in Confederation, urban crime, relations between employers and employees, and a host of other issues facing the legal institutions of today were all familiar to Douglas and Begbie, although of course not in their present form. In one respect the law of the late-twentieth century has come full circle: after over a hundred years of relatively low-profile dispute resolution, the courts are resuming the important role in the political and constitutional life of the province that they played in the early years. This time it is the Charter, Aboriginal rights and constitutional reform, not the principle of compatibility with English law or the status of provincial judges, that is merging political issues with legal ones. But the underlying cause is the same: the pressure of different voices, asserting the right to a say in government, especially in the allocation of resources and the resolution of disputes.

Concentrating on the early years also emphasises how recent the province's legal beginnings really are. There are people alive in British Columbia today, five hundred years after Columbus, for whom the history touched upon in this essay is tangibly present: Earl Maquinna George, for example, hereditary chief of Ahousat and descendant of the Maquinna who greeted the first maritime fur traders in the eighteenth century. As one of the plaintiffs in the Meares Island case, he sought to have some of that history reviewed in the courts and form the basis of a land claim settlement.²⁵³ Or Gabriel Bartleman, a Tsartlip elder whose Kwakwaka'wakw

²⁵¹ *Supra* note 126 and cited texts. Cary may well have been already showing signs of the illness there described.

²⁵² *Ibid.*

²⁵³ *MacMillan Bloedel Limited v. Mullin et al; Martin et al. v. Regina in Right of British Columbia et al.* (1985), 61 B.C.L.R. 145 (B.C.C.A.).

grandmother came down from the central coast to visit Fort Victoria. His grandfather, Peter Bartleman, was among the first batch of men brought out to work for the Puget's Sound Agricultural Company in 1853, and he has worked hard to remind British Columbians of their obligations under the "Douglas Treaties." There are many other elderly men and women, from both the Native and the non-Native communities, with similar memories and family histories: people whose grandparents told them about the miner's strike in 1877 and the banning of the potlatch in 1885, or whose parents spoke of the Klondike gold rush in '98 or the visits of the McKenna-McBride Reserve Commission in 1913.

What is astonishing is that, in such a short time, so much of what the first colonists found has been transformed or, as *The Times* (London) had it over a century ago, destroyed.²⁵⁴ Much has been gained, but the land, the ocean, and the Native peoples have paid a heavy price. So too did the many men and women who came to this Pacific "El Dorado," only to suffer disappointment, despair and defeat, traces of whom may be found in the records of every decade. One pioneer who came to Vancouver Island in the early 1850s, and who made his living in a variety of ways, mused afterwards about the casualties of his generation. Apart from the Victorian cadences in the prose, C.A. Bayley's recollections are not unlike those recorded on other gold frontiers:

What ... a sad experience only to make them wiser in this life befell hundreds of young men who left ... all the comforts of civilised life, in pursuit of Fortune. Many a heart saddened by the experience of a miner's life broke down on the way and monuments to [their dashed?] hopes line the road marking the fall of those who succumbed to the dire misfortune of disappointment. Murders by Indians and white desperadoes were a frequent occurrence, some brought to light, others veiled in darkness as black as the deed consummated.... Many inscriptions left by them written on trees ... they will never see again. Men of fine education, who indulged in their college training not for display, left their mark of despair engraved upon a living monument that remains to be read by those who in after years passed as a successful miner from that far off region of gold.²⁵⁵

Although those who were moved to set down their opinions found law enforcement in British Columbia better than that in California, one thing was a constant: it was failure, not murder, that took most lives. Whether in San Francisco or Victoria, Downieville or Barkerville, men died "in bitterness, their heads turned to the wall."²⁵⁶ The "public school and university young men" for whom Lees and Clutterbuck wrote in the 1890s fared better than most of Bayley's "men of fine education" in the 1860s; but twentieth century statistics on crime, suicide and other social indicators suggest that British Columbia has more in common with California than many care to admit.

Scholars will continue to differ about the extent to which the law and its institutions were instruments of this transformative process, as opposed to merely a reflection of it. Dr. Helmcken, the colony's first magistrate, had no such theoretical

²⁵⁴ *Supra* note 61 and accompanying text. According to Helmcken (*supra* note 55 at 331), writing in 1890, "forests have disappeared, civilised off the face of the land ... the earth has been subdued and robbed ruthlessly, made the slave of man and treated as such."

²⁵⁵ C.A. Bayley, "Early Life on Vancouver Island" copy in the Bancroft Library, *supra* note 31, P-C 3 at 47. Cf., Kevin Starr, *Americans and the California Dream, 1850-1915* (Oxford: Oxford University Press, 1973), chapter 2.

²⁵⁶ Starr, *ibid.* at 70.

concerns. As he put it, he did not think there were any special laws in the early days, “those used in England were supposed to rule—when applicable.” But he was impressed by the rapidity of the changes. Looking about himself in 1892—the same year that Lees and Clutterbuck published their book—he reflected that, only fifty years earlier, an American senator had described the coast between Juan De Fuca Straits and Sitka as a “vacant waste ... the derelict of nations.” What, the old doctor wondered, “may take place in the next half or whole century?”²⁵⁷ Part of the answer is that the contest for control over what some people still call a “vast emptiness” has been renewed.²⁵⁸ And today, competing visions of justice remain at the heart of reminiscences about legal inheritances.

²⁵⁷ *Helmcken*, *supra* note 55 at 168 and 176. The senator was Thomas Hart Benton, speaking on the “Oregon Question.”

²⁵⁸ Chief Justice Allan McEachern, the trial judge in *Delgamuukw*, *supra* note 160 at 12.