

Retitling, Cultural Appropriation, and Aboriginal Title

by Michel-Antoine Xhignesse

Capilano University

michelxhignesse@capilanou.ca

This is a penultimate draft. Please cite the final version: Xhignesse, Michel-Antoine (2021). Retitling, Cultural Appropriation, and Aboriginal Title. *British Journal of Aesthetics* 61 (3) :317-333.

Abstract: In 2018, the Art Gallery of Ontario retitled a painting by Emily Carr which contained an offensive word. Controversy ensued, with some arguing that unsanctioned changes to a work's title infringe upon artists' moral and free speech rights. Others argued that such a change serves to whitewash legacies of racism and cultural genocide. In this paper, I show that these concerns are unfounded. The first concern is not supported by law or the history of our titling practices; and the second concern misses the mark by ignoring the gallery's substantial efforts to avoid just such an outcome. Picking up on a suggestion from Loretta Todd, I argue that we can use Aboriginal Title as a model for thinking about the harms perpetuated by cultural appropriation, and the practices we should adopt to mitigate them.

Retitling, Cultural Appropriation, and Aboriginal Title

1. Introduction

In 2018, the Art Gallery of Ontario (AGO) retitled a painting by Emily Carr: formerly known as *The Indian Church* (1929), it is now called *Church at Yuquot Village*.¹ The move sparked controversy nationwide: some worried that changing a work's artist-given title changes its associated work, and that such unsanctioned changes to a work infringe upon artists' moral rights; others worried that the change papered over Canada's shameful history of Indigenous-Crown (and -settler) relations, including the state's legacy of cultural genocide.²

These criticisms echo concerns which were raised three years earlier in response to the Rijksmuseum's Adjustment of Colonial Terminology project, whose goal was to eliminate the use of that term and other offensive designations (including the words 'Bushman,' 'Eskimo,' 'Hottentot,' 'Mohammedan,' and 'Negro') in the titles and descriptions of works in the museum's collections (Rijksmuseum, 2020). Predictably, many critics' complaints were simply cries of 'political correctness' run amok. The more substantive concerns, however, concerned artists' moral rights, censorship, and historical revisionism, just as in Carr's case. The art historian Julian Spalding, for instance, argued that 'it's absolutely wrong to remove words like 'negro' and even [redacted] from historical texts. On one level, it's dishonest, because it rewrites history. On an artistic level, it's censorship' (Glanfield, 2015). Similarly, the art critic Josh Spero worried that altering offensive titles and descriptions amounts to pretending these shameful periods in our history never happened—although, unlike Spalding, he also conceded that not all titles are created equal: 'The other side is that the artists often made paintings without naming them and they just acquired the name later... So the

¹ Since the former title is offensive in Canada, I have avoided its use except this once. As a Canadian, I have also eschewed further uses of the offensive term, save in three instances where it is directly quoted or names a specific piece of extant legislation. Note also that the term is not universally considered offensive: in the United States, for example, it is the generally preferred term for referring to Indigenous people and peoples.

² Readers will find good summaries of the controversy see Goodyear (2018) and Loos (2018).

titles don't always have any integral relevance to the work and often tell us more about ourselves than about the artwork' (Burgess, 2015). We can see, then, that the same kinds of concerns motivated criticism of the museums in both 2015 and 2018; these are live concerns, and they need to be addressed.

I will argue that these complaints are misguided. First, retitling does not necessarily impact a work's identity-conditions, as the history of our titling practices makes clear. No artist's moral rights are infringed upon when we substitute one perfectly accurate descriptive title for another, nor is anyone's speech being censored. Second, and more importantly, efforts to remove racially-charged language from museum collections are not attempts to whitewash colonial legacies. Instead, I will argue that retitling works is part and parcel of a reconciliatory approach to addressing the harms of cultural appropriation which models itself on the ideals embodied in the collection of legal rights known as 'Aboriginal Title'.³

2. The church at Yuquot village

Before we can assess Carr's painting and the impact of changing its title, we need to understand the ways in which it is culturally appropriative. And to do so, we need to know a little more about Carr herself, and her artistic process.

From 1899-1910, Emily Carr regularly visited Indigenous reserves on sketching and painting trips.⁴ After some further training in France, she returned to Indigenous subjects in 1912-13, spending some time in Kwakiutl, Gitskan, and Haida villages, applying the colour and brushwork she had mastered in France to the task of documenting Indigenous life and cultural patrimony. This documentary interest was not widely shared by her Victorian contemporaries, however, and her

³ 'Aboriginal Title' is the name given to a common law doctrine concerning the land rights of Indigenous peoples. I shall explain the term in more detail in §5.

⁴ The following brief history of Carr's involvement with Indigenous subjects is drawn from Harper (1977, pp. 290-4) and Reid (1988, pp. 156-61).

work was not well-received by Vancouver's white establishment, causing her to give up on painting for a time. Carr only seriously took up painting—and her Indigenous subjects—again in 1927, and by 1932 she had abandoned Indigenous content for more fashionable landscapes featuring forests and skies. For most of her career, however, Carr was intimately associated with Indigenous art in the public's mind, as evidenced by a 1928 profile in the *Toronto Star* titled 'Some Ladies Prefer Indians' (Brwester, 1928). And yet, despite the prominent place Indigenous imagery, life, and style occupied in her artistic identity, Carr had little contact with Canada's First Nations outside her painting and sketching trips, the last of which was in 1928 (DeSoto, 2008, p. 86).

Church at Yuquot Village (1929) is a Post-Impressionist painting of a church among trees. Think Gauguin crossed with Van Gogh: the white, steepled pioneer church is centred, resting on a wave of greenery and nestled in a mass of impasto, dark green pines. The church and its accompanying cemetery are well-defined, while the surrounding trees are gestural and oppressive; on the left flank, the composition is anchored by a cropped rocky outcropping which draws our gaze back to the church. The painting is one of Carr's most-reproduced (DeSoto, 2008, p. 123), and widely regarded as a transitional work bridging her earlier interest in documenting Indigenous life with her later interest and success as a landscape painter. Lawren Harris, the Group of Seven painter, purchased the painting from Carr and entered it in several exhibitions. After one such, he wrote to Carr to say that 'Your church was the best thing there, a swell canvas. I do not think you will do any better' (Jensen, 2015, p. 99). Yet Harris was also instrumental in encouraging Carr to shift away from documenting Indigenous life: 'Put aside the Indian motifs,' he said, 'strike out for yourself, Emily, inventing, creating, clothing ideas born of this West, ideas that you feel deeply rooted in your heart' (DeSoto, 2008, p. 81).⁵

⁵ Note that the 'West' here probably refers to British Columbia, rather than to Europe and its environs. On Harris's influence over Carr's late shift, see Reid (1988, p. 161).

There is nothing wrong with the picture itself, or its pictorial content (a church and graveyard nestled amidst aggressive vegetation), which apart from the church itself is imaginary. By all accounts, it should be an entirely innocuous picture. It is just a painting of a church in the wilderness, after all, and it is hard to see how such a painting harms anyone. There are two potential issues here, however: first and foremost, there is the problem of the painting's now-offensive title, and second, there is the worry that the painting is culturally appropriative, or part of a body of work which is so. It is this second concern, I think, which lurks behind some of the allegations of 'whitewashing' in response to the AGO's retitling efforts. I will deal with the title in more detail in §3 and §4, but for now I think it worthwhile to explain why we should worry that Carr's work is culturally appropriative, even if it is not offensive (title aside).

First, we can observe that the painting fits into a pattern of appropriation which came to characterize Carr's career, and even her artistic identity.⁶ For example, Carr engaged in extensive content appropriation (specifically: style and motif appropriation),⁷ such as when she re-created Indigenous pottery and rugs, signed them 'Klee Wyck', and sold them as tourist baubles, or when she used Indigenous motifs on the cover of her National Gallery exhibition's brochure and in her painting (Stewart, 2005, p. 70).

Carr even went so far as to appropriate an Indigenous identity for herself: recall that those tourist baubles were signed 'Klee Wyck', a name which she signed to her National Gallery exhibition brochure and elsewhere (North Vancouver even boasts a Klee Wyck park!). The name is an anglicized version of a Chinook translation of the Aht nickname yelled at her by a Wynook woman in Ucluelet who chased her out of her house for 'stealing souls' with her sketches (Stewart, 2005, p. 60-1). Carr adopted the nickname as a pseudonym, even going so far as to title her 1941 Governor

⁶ For a detailed accounting of Carr's appropriations, see Stewart (2005).

⁷ James Young offers a taxonomy of cultural appropriations in his (2008, p. 5-7).

General's Award-winning memoir *Klee Wyck*. The nickname apparently means 'Laughing One', but being chased out of someone's house is no laughing matter.

One might also worry that Carr's work, including *Church at Yuquot Village*, was characterized by subject appropriation, which occurs when an artist uses another culture as their subject matter. Given her documentary interest in Indigenous culture and the fact that she was so intimately associated with that work in the public's mind, there is no doubt that Carr engaged in subject appropriation. The more important question is whether this 'appropriation' was also morally objectionable—did she, for instance, *misrepresent* her subjects, or use her work to speak on their behalf? I do not think there is much of a case for the former; as for the latter, it seems Carr was content to let her images speak for themselves, although they surely worked to introduce Canadians to Indigenous cultural expression.

Finally, there is perhaps an additional case to be made that Carr's work commits what James Young calls the 'consent offense' (Young, 2008, p. 149), since it involves a white tourist documenting her travels through Indigenous communities without first obtaining the consent of those peoples for representing their cultural patrimony. The case is bolstered by the 'Klee Wyck' incident, which suggests that not everyone was on board with Carr's documentary project.

But these were not the AGO's concerns; from its perspective, the problem with Carr's painting lies squarely with its title.

3. Moral rights

Artists are often said to have—and are generally recognized by law as having—moral rights over their works and their distribution. Since our case is Canadian, I will focus on moral rights in the Canadian Copyright Act, although I think that the lessons here are more generally applicable as well. According to the Canadian Copyright Act, an author's moral rights are infringed upon when 'the

work or performance is, to the prejudice of its author's or performer's honour or reputation, (a) distorted, mutilated, or otherwise modified; or (b) used in association with a product, service, cause or institution' (Section 28.2 (1)). In other words, someone violates an artist's moral rights when they alter an artwork in a way that reflects poorly on the artist, or when they use the artwork in connection with something which would reflect poorly on the artist and their reputation. The harm which moral rights aim to prevent is thus primarily to an artist's reputation.⁸

The operative question, then, is just what constitutes 'prejudice to the author's or performer's honour or reputation'. There is not a great deal of Canadian case law on the subject of moral rights in general, but it is worth mentioning two cases which pertain to prejudice to reputation in particular: *Snow v Eaton Centre, Ltd* (1982), and *Joubert v. G racimo* (1916).⁹ Let us begin with *Snow*: in 1979, Toronto's Eaton Centre commissioned a sculpture of geese in flight from Michael Snow. In 1981, the Eaton Centre decided to decorate those geese with red ribbons for the Christmas season, and Snow sued the Eaton Centre in the Ontario High Court of Justice for violating the integrity of his work. The judge ultimately sided with Snow, and established a test for determining prejudice to an author's honour or reputation: the author's own subjective, reasonably-derived judgement of that fact (*Snow v. The Eaton Centre Ltd. et al.*, 1982). At first, such judgements were supposed to be backed by expert testimony, although subsequent amendments to the Copyright Act have exempted paintings, sculptures, and engravings from requiring actual evidence of prejudice, so that any modification is sufficient to cause prejudice to the author (Section 28.2 (2)). This is not to say that any modification *necessarily* causes prejudice to the author; it simply means that if an author thinks their reputation has been harmed, any modification of their work suffices to legitimate that claim.

⁸ The extent to which 'honour' and 'reputation' are distinct concepts is not clear, nor are the bounds of 'honour' proper. I shall treat them interchangeably here, but I don't think anything much hangs on that.

⁹ My thanks to an anonymous referee who encouraged me to consider these cases.

Joubert and its outcome are a little more complicated, and in some ways appear more directly relevant to the issue of Carr's painting. Joubert was a French author who sued G racimo (a Montr al theatre-owner) for (1) putting on fourteen of his plays without his consent, (2) failing to attribute those plays to their proper author (Joubert), and (3) changing the titles of three of those plays without the author's consent. At the time, however, only the first offense was covered by the *UK Dramatic Copyright Act* (1833), which still held sway in Canada, and so all three offenses were bundled together and treated as the offense of 'unauthorized representation' (Adeney, 2001, p. 217-18).¹⁰ As far as unauthorized representation is concerned, the court characterized the suppression of attribution and the changing of titles (together) as constituting an 'intolerable fraud', and ruled that 'an author has a right to have his work credited, to have his texts respected, and also to the material benefits which might result from the prestige of his name or the fame of his works.'¹¹ This at least establishes that title change *can* violate an author's moral rights, when it is coupled with an effort to pass the work off as someone else's. But does it necessarily cause prejudice to an author?

Judge Pelletier, who authored the lone (partial) dissent in this case, did not think so:

'...it's said that this constitutes pillage and robbery. It does not seem so bad to me as it's been made out to be. [...] What difference does it make to [the author] that we give [one of his short plays] a Canadian name, which the Canadian public will understand, rather than a Parisian or faubourien name which doesn't speak to [the audience]?'¹²

(*Jurisprudence: Canada*, 1919, p. 23, my translation.)

His point being, of course, that some changes of title are not necessarily to a work's detriment but rather to its benefit, since they may render it more accessible to new audiences. If Pelletier is right—and I think he is, for reasons which I will explore in the following section—then at least *some* title

¹⁰ The case in question is *Joubert c. G racimo*, (1916).

¹¹ See (*Jurisprudence: Canada*, 1919, p. 20, my translation.) The original reads: 'Un auteur a droit au cr dit de son travail, au respect de ses textes, et aussi au b n fice mat riel qui peut lui r sulter du prestige de son nom ou de la vogue de ses  uvres.'

¹² The original reads: 'on dit que c'est du pillage et du brigandage. Cela ne me para t pas si grave qu'on nous le repr sente. [...] Alors quelle diff rence cela lui fait-il qu'on lui donne un nom canadien, que le public canadien va comprendre, plut t qu'un nom parisien ou faubourien qui ne lui dit rien?' 'Faubourien' is a name for a denizen of Paris's suburbs.

changes will prove acceptable to artists, since they do nothing to impugn their honour or harm their reputation—quite the opposite.

Let us return, now, to *Church at Yuquot Village*. I think that everyone will agree that the AGO's use of the painting, which it owns, is not in itself to the detriment of Carr's honour or reputation; after all, the whole point of an art gallery is to show artworks! So we can safely discard clause (b) of section 28.2 (1) of the Canadian Copyright Act. The question, then, is whether the title change distorts, mutilates, or 'otherwise modifies' Carr's painting, per clause (a). Following the test laid out in *Snow*, it seems we should refer the question back to Carr herself, and ask whether she thinks the alteration harms her honour or reputation. And while Carr clearly cannot answer the question, since she is long dead, presumably her estate could do so, if it were so inclined. Absent any such guidance, however, it is worth remembering two basic facts: (1) all of the evidence indicates that Carr was very fond of Indigenous peoples and subjects, and that she had their best interests at heart, and (2) the original title refers to Indigenous peoples with a term which, in Canada, is now widely considered a racial slur. It is unlikely that Carr intended *to employ a racial slur* in her title; rather, she most likely intended it as a neutral descriptor. Thus, far from impugning her honour or reputation, the new title does a *better* job of communicating Carr's attitude to her subject matter for contemporary audiences. Indeed, I take it that something like this intuition is what drove some to characterize the AGO's actions as 'whitewashing', since of course it is also true that Carr's contemporaries were quite racist towards Indigenous peoples, and Carr's own artistic career featured many acts of cultural appropriation, some quite offensive. I shall return to this criticism in §6; for now, however, I wish to consider the issue of whether the painting was in fact 'distorted, mutilated, or otherwise modified' in the first place. The artist's subjective, reasonably-derived judgement of whether their honour or reputation were impugned, after all, only enters into it if the work has been altered (or tainted by association, which we have already ruled out).

4. Titles of artworks

So: does retitling an artwork alter its artistic content and, thus, change it in some artistically relevant way?

The answer rather depends on what we think a title *is*. One intuitive view of titles treats them purely as labels affixed to artworks to facilitate their identification; on this view, titles are the names of artworks.¹³ Like names, titles are thus supposed to uniquely identify their referents in context and, at least on the Millian and Kripkean models, they lack semantic weight, which is just to say that their descriptive content (if any) does not reflect on their associated object. So, for instance, ‘Michel’ ultimately comes from a Hebrew phrase meaning ‘Who is like God?’, but it would be inappropriate to think that this reflects any properties of mine; my name carries no semantic weight. My name is not an essential part of me; it is a referential label.

According to this *unreflective* model, a change of titles is no more than a change of labels, and about as controversial (provided, of course, that the new label is a suitable one). So long as it leaves the referring function intact, a change of titles is thus completely unremarkable. So, for example, there is nothing to write home about if Budapest’s Museum of Fine Arts decides to retitling Sofonisba Anguissola’s *Madonna and Child* (1598) as *Mary and Jesus*; they would simply be substituting one label for an equally viable other, just as it would be perfectly unremarkable if I changed my name from ‘Michel’ to ‘Michael’.¹⁴ And indeed, retitling is fairly commonplace in the artworld, although it usually takes place out of the public eye. In 2015, for example, *The Times* reported that the Tate’s catalogue included a painting by John Simpson originally titled *Head of a Black* (1827); in 1995 and

¹³ This is the default view in linguistics, where onomastics—the branch of linguistics concerned with proper names—classifies titles and the names of cultural entities as ‘chrematonyms’, in contrast to bionyms and toponyms.

¹⁴ In fairness, doing so might actually make life in an Anglophone milieu a little easier; but the point is just that the name change would not be associated with any corresponding changes in *me*. It is a surface-level change to the label used to identify me, not a change to me or my parts. Likewise, a change of title might draw our attention to other features of a work, but this need not reflect a change *in the work itself*.

2001, it was exhibited (without fanfare) as *Head of a Negro*; in 2005 as *Male Head Study [The Captive Slave]*; and it is now simply listed as *Head of a Man* (Burgess, 2015).

It is worth observing that, for most of human history, titles have unambiguously been merely descriptive referential aids (Xhignesse, 2019). In fact, Western visual art was not titled until the mid-eighteenth century, and these titles were generally given by cataloguers rather than artists. By the nineteenth century, artists had begun supplying their own titles, and these were no longer always strictly descriptive of the work's content (Xhignesse, 2019, p. 441-2). Descriptive titles, like proper names, are not parts of their bearers. They are ways of referring to the object—ways of ordering the world so as to pick out some of its concrete parts. For such works, the substitution of one appropriate description for another leaves the work unchanged. It is rather like musical transposition, which shifts pitches up or down by a regular interval to allow us to play a particular piece on an instrument with a different range or in a different key.

There is another view of titles, however, which commands just as much intuitive plausibility.¹⁵ According to this view, titles are bearers of semantic weight—that is to say, their meaning reflects on, and is reflected by, their associated works. Call it the *reflective* model of naming.¹⁶ Consider Jaime Black's *REDress Project*, which involves a series of public installations of red dresses on coat hangers, left to hang on trees, in buildings, and by roadsides throughout Canada and the United States as a visual reminder of the epidemic of missing and murdered Indigenous women in these countries. The title that groups these installations together is itself a pun pointing us to the Canadian government's ongoing efforts at reconciliation, a key plank of which was a (bungled) national inquiry into missing and murdered Indigenous women. An identical series of public

¹⁵ Perhaps more, since I suspect this is the default folk view, whereas the unreflective view seems to be the default only among those with training in linguistics or the philosophy of language.

¹⁶ The reflective model comes from Levinson (2005). Note, however, that the mere possession of descriptive content or a focusing function is not, in itself, an indication of semantic weight. To be semantically weighty, this descriptive content or focusing function would need to be reflected in the work's own identity-conditions.

installations entitled *Dresses I Want* would have been a very different project, one entirely devoid of the original's political and social significance. Likewise, it matters that Daphne Odjig's *Time Revisited* (1982) is called as it is, and not something like *Cubist Faces* or *Together In Thought*, just as it matters that Whistler's *Symphony in White, No. 1* (1861-2) was not titled *My Mistress* or *White Woman Standing On A Wolf Pelt*. The titles of these works opens up a dimension of significance—of *artistic content*—which would go undetected under those other titles, if it was even there at all. These titles seem inextricably bound to their works' identity conditions; they are essential parts of their respective works, and a change of essential parts would entail a change of artistic content (and, thus, of work). Nor does it take a great leap of the imagination to pinpoint what these changes to work-identity would be.

These *reflective* titles are essential to their associated work's artistic content, such that a change in title results in a change of work. This is especially true of works with an important conceptual component which is indicated by the title, rather than by their vehicular medium. Reflective titles, like their associated artistic vehicle, act as special props for our aesthetic imagination. And there is nothing surprising in the fact that switching one prop for another can result in very different imaginings—even when what is substituted would have been a perfectly appropriate *description* of the work. So, for example, 'circular black squiggles on a white background with red bits' is a perfectly accurate *description* of Lee Krasner's *Night Creatures* (1965), but it would be the title of a different drawing entirely.

The lesson here is that we need a more nuanced approach, since clearly not all titles are created equal. Some are integral to their associated work's identity, while others are not, and the difference is plain to see. So-armed, we are now in a position to respond to the charge that retitling Carr's painting alters it in some fashion. In particular, the worry was that retitling Carr's painting changes it without her consent, thus violating her moral right to the work's integrity. The worry is especially acute considering that Carr titled the painting herself; unlike most of the works which

museums and galleries quietly retitle when it suits them, this painting's title was deliberately bestowed by its artist. The crucial question, then, is whether the title is reflective or unreflective; if the former, then changing it alters the work, and if the latter, then substituting a cognate description leaves the work and its artistic content unaltered.

It should be clear by now that the painting's original title carried no semantic weight: it was merely descriptive, like most of Carr's other titles, e.g. *Breton Church* (1906), *Arbutus Tree* (1922) *Skidegate* (1928), *Big Raven* (1931), and *Totem and Forest* (1931). Those few of her titles which *are* reflective are obviously so, e.g. *Vanquished* (1931), *Strangled by Growth* (1931), and *Scorned As Timber, Beloved of the Sky* (1935). The painting's original title was a convenient way of labeling it and tying it back to a place Carr visited in her travels. It is a painting of the church in an Indigenous village, so that is what she called it; nothing much hangs on the title. Indeed, leaving the original title unaltered might risk *misrepresenting* the work's artistic content to present-day audiences by introducing an inappropriate racist subtext. By retitling it *Church at Yuquot Village*, the AGO merely substituted one (appropriate) description for another—it changed a label, nothing more, and the proof is in the fact that it is excessively difficult to imagine just how this action may have altered the painting and its artistic content. The painting itself remains untouched, its integrity intact; consequently, no moral rights were violated.

Nor is any speech of Carr's being censored. There is no evidence that Carr intended anything special (or especially derogatory) with her use of the term. On the contrary, this just *was* the term used to refer neutrally to Indigenous peoples in Canada in the 1920s.¹⁷ By all accounts Carr's interest in Indigenous communities was genuine, and she bore them no particular animus; the evidence thus indicates that Carr's intended use of the term was in keeping with that spirit.

¹⁷ This is not to deny that there were plenty of slurring uses of the term, too.

5. Aboriginal Title as negative model

Having dealt with the first argument against the AGO's decision to retitle *Church at Yuquot Village*, the question remains whether doing so also works to erase or obscure Canada's colonial past, and its dismal treatment of Indigenous people. I do not think so; in fact, I think that the AGO's conduct in this matter exemplifies the goals and best practices mandated by genuine efforts at reconciliation. In particular, I think that the impulse to retitle the painting points to a productive way of thinking about and engaging with culturally-appropriated works, whether they be instances of content, subject, or work appropriation, offensive or not.

Thirty years ago, Loretta Todd suggested that we should look to Aboriginal Title as a model for thinking about cultural appropriation (Todd, 1990). This is not a suggestion which has garnered much attention from ethicists or philosophers of art, but I think that it offers us a powerful lens for thinking about reconciliation and sanitizing offensive titles. And, as we shall see, it is a suggestion which is already being taken up by the global artworld. Todd argued that there are two ways of thinking about Aboriginal Title which can be helpful for thinking about cultural appropriation. The first of these is negative, the second positive. Before tackling these two ways of thinking about cultural appropriation, however, it is worth taking a moment to clarify just what Aboriginal Title *is*.

'Aboriginal Title' (sometimes 'Indigenous Title') is the legal name given to the inherent Indigenous right to land and to administer that land according to their customs ('customary tenure').¹⁸ Although the particular rights encompassed by Aboriginal Title differ from one jurisdiction to another, in general we can say that Aboriginal Title names Indigenous peoples' inalienable right to the use and ownership (either individual or collective) of their traditional territories, subject, of course, to certain conditions. It also outlines the State's duties towards Indigenous peoples with respect to the extinguishment of use and ownership rights over the land.

¹⁸ For a detailed explanation of the history and meaning of Aboriginal Title in Canada, see McNeil (1997). In other jurisdictions which recognize it, this right goes by related names.

Now, to understand Todd's point we first need to understand that cultural appropriation, as far as she is concerned, is conceptually related to the colonial appropriation of Indigenous land. This is not just because both are non-consensual acts of appropriation, but because claims to cultural patrimony are also often—like land claims—*economic* claims. Consider land claims. As Winona LaDuke has observed, the theft of Indigenous land—especially resource-rich land—places Indigenous peoples in an economically dependent situation, in which they are unable to reap the economic benefits of resource extraction on their ancestral lands (LaDuke, 1994, p. 131). Settler economies are thus developed at the expense of Indigenous economies. The theft of land pushed and pushes Indigenous peoples to the under-developed geographic peripheries of society, forcing them to depend on subsistence lifestyles for their well-being. These harms are compounded when the environmental consequences of resource extraction projects foreclose on the possibility of maintaining smaller-scale local subsistence economies. Land rights claims are thus not merely claims over some historical patrimony; they represent live *economic* claims as well.

Todd's negative suggestion is that the long history of government abuse of Aboriginal Title shows us exactly what we ought *not* to do with Indigenous cultural subjects. This negative model is predicated on the premise that, once a colonial power has taken away an Indigenous group's land, all that is left to take is its *cultural* patrimony. As Todd puts it, 'Having taken our land, attention is then turned to the imagination, the interior realm of our territories and powers' (Todd, 1990, p. 31). This is especially important for Indigenous peoples because, as heather ahtone observes,

the willful learning of using our customary cultural practices, making beautiful objects using clay or hide and adorning them with the symbols of each distinct cultural group remains an important act of cultural sovereignty. [...] The arts have been part of who we are, as much as how we have remained culturally distinct peoples.
(ahtone, 2019, p. 4)

These thoughts are echoed by John Lavelle, who adds that appropriating Indigenous identities and status (as Carr did, for example) is the ‘final phase of genocide’: ‘First whites took the land and all that was physical,’ he says; ‘Now they're going after what is intangible’ (Torgovnic, 1997, p. 152).

In the British colonial context, this process began with the system of ‘residential’ or ‘day’ schools, compulsory boarding schools (attendance at which was enforced by the police) whose explicit purpose was the forcible assimilation of Indigenous populations by means of the elimination of Indigenous languages, religions, history, and cultural expression.¹⁹ In its final report, the Truth and Reconciliation Commission of Canada characterized this process as cultural genocide, ‘the destruction of those structures and practices that allow [a] group [of people] to continue as a group’ (Truth and Reconciliation Commission of Canada, 2015, p. 1). But although the last Canadian residential school closed in 1997, and although the horrors of these institutions are increasingly-well understood by the general public, itself increasingly sympathetic to Indigenous land claims, the appropriation of Indigenous cultural expression and identity continues unabated to this day.

Thinking of cultural appropriation in the terms set by Aboriginal Title also usefully puts an emphasis on *naming*. As Todd puts it, ‘In court, the issue of Aboriginal Title versus colonial ownership often comes down to naming. The colonizers named the land Canada, British Columbia, Vancouver and, in naming the land, justified the theft’ (Todd, 1990, p. 27). Naming a thing is a way of delimiting its boundaries, asserting ownership over it, and packaging it for wider consumption, since we typically think it is only those who stand in certain causal or proveniential relations to a thing who can name it. This is just as true of the appropriation of Indigenous cultural expression where, Todd reminds us, ‘the issue begins with origins and who has the right to name whom’ (Todd, 1990, p. 27).

¹⁹ Note also that child abuse and deaths were endemic in these institutions, along with other horrors which are only now coming to light.

Where artifacts (and persons) are concerned, naming is one of the illocutionary acts by which we declare that a thing is finished and ready for use. But we are also more careful of appropriating named artifacts—the name, or title, functions as a sign indicating that someone else owns the object or holds the copyright to the work, or the trademark to the name. Unfortunately, a great deal of Indigenous cultural expression is untitled, since it consists of artifacts taken out of their everyday context and put on display, and thus does not enjoy the same presumptions against appropriation.

Consider so-called ‘totem poles’ (in fact, they are no more totems than menhirs are). When they are displayed, such as in Vancouver’s Stanley Park, these iconic artifacts are typically given a descriptive title on the accompanying object label to facilitate tourist comprehension, even though they are (important, but) *everyday* cultural objects in their communities of origin. Removing them from those communities and putting them on display under a title—especially a misrepresentative one like ‘totem!’—erases their particular function and history and divorces them from their communities of origin. Not only should they be untitled, but their display in museums and as tourist attractions radically misrepresents their nature. The Coast Salish, for instance, seldom carved standalone poles; theirs were typically *house posts* which supported the building’s main beams. Other pole types include house frontal poles, which often framed an entrance into the house, mortuary poles, which served as tomb and headstone both, commemorative poles, which were carved to honour the dead, and shame poles, which testified to someone’s or some group’s dishonourable conduct (Huang, 2009). In many cases these artifacts are displayed in museums and galleries, and reproduced as tourist kitsch, not just without the consent of their originating communities but against the strenuous objections of those communities, and amid demands for repatriation. It is exactly this kind of object (and concept) appropriation which we are enjoined to avoid when we take Aboriginal Title as a negative model for thinking about cultural appropriation.

6. Aboriginal Title as positive model

Aboriginal Title can also offer us a *positive* model for thinking about cultural appropriation, a model which shows us how we *should* go about incorporating Indigenous cultural expression. Recall that Aboriginal Title represents a legal obligation on the part of the government to obtain consent from the Indigenous peoples over whom it holds power, and a mandate for shared governance and the equitable distribution of the benefits which accrue to development and land use. In particular, ‘Aboriginal Title’ marks the term under which Indigenous peoples negotiate with the Crown; it delimits a framework for respectful collaboration (Todd, 1990, 33). In so doing, the legitimacy of Indigenous claims to ownership and control of their territory are acknowledged. Much the same could be said in the cultural arena, too.

To be sure, Aboriginal Title has often proven a hollow protection for Indigenous land rights, which are routinely trammled by the Crown despite its legal duty to consult and accommodate Indigenous peoples on and for the use of lands to which they hold title. Federal and provincial governments in Canada have a very poor history of consultation with Indigenous peoples, which has resulted in a number of protests and lawsuits. These include, for instance, the development of a nine-hole golf course on Kanien’kehá:ka (Mohawk) land in Oka in 1959 and its attempted extension to 18 holes in 1989-90, which resulted in the infamous Oka Crisis, a 78-day armed confrontation which resulted in two deaths and which saw one child stabbed in the chest by a soldier’s bayonet.²⁰ Other notable incidents include Ontario Hydro’s development of the Mattagami Complex dams in the 1960s and their expansion and redevelopment in 1990,²¹ a 2018 Federal Court of Appeal ruling that the government did not adequately discharge its duty to consult in the matter of the TransMountain Pipeline expansion, and, in early 2020, a country-wide rail blockade precipitated by

²⁰ Waneek Horn-Miller survived, and later competed in the Olympics on Canada’s water polo team. For a detailed summary of this history and the Crown’s many broken promises, see Westra (1999).

²¹ For an excellent overview of this particular case and analysis of the moral underpinning of sustainable development, see Cragg and Schwartz (1996).

Coastal GasLink's attempt to construct a pipeline through unceded Wet'suwet'en land over the objections of their hereditary chiefs.

Taken seriously, Aboriginal Title requires the Crown to seek informed consent from Indigenous peoples prior to using their land; and just as in medical or sexual contexts, 'consent', taken seriously, should amount to a veto. Aboriginal Title thus requires the government to obtain consent from the relevant parties, and mandates a certain reciprocity in Crown-Indigenous relations. In pointing to the importance of obtaining consent from, and fostering a reciprocal relationship with, Indigenous peoples, Aboriginal Title can thus act as a model for avoiding some of the harms of *cultural* appropriation. Nor is the connection between cultural and land appropriation far-fetched: the same structural problems which characterize land appropriation are often echoed in offensive cultural appropriations. The most prominent of these structural problems concerns obtaining consent and involving Indigenous peoples in good-faith consultation in an effort to offset or minimize anticipated harms, and to ensure the fair distribution of benefits. Generally speaking, artists should be free to appropriate whatever artistic elements and subjects they like. But where sensitive cultural expression is concerned, obtaining consent goes a long way towards preventing profound offense. Likewise, ensuring that the work contributes to the well-being of the people in question, so that the benefits (including profits) are not merely externalized, goes even further.

Consider the many controversies over the literary works of Joseph Boyden, such as his widely-acclaimed novella *Wenjack* (2016), a fictionalized first-person account of the story of Chanie Wenjack. Wenjack was a twelve-year-old Ojibwe boy who ran away from his abusive residential school in October 1966, but who died of exposure as he tried to make his way home—six hundred kilometres away—on foot. Boyden has variously claimed Mi'kmaq, Métis, Nipmuc, and Ojibway

ancestry despite being unable to produce evidence of any such ancestors.²² He has also caused considerable offense by speaking publicly on behalf of Indigenous peoples, accepting awards, prizes, and speaking fees intended for Indigenous people, and—crucially—for appropriating and loosely fictionalizing Indigenous stories throughout his literary career.

The problem is not with the stories themselves, which are engaging and of high literary merit; *Wenjack*, for instance, is spare, lovely, and absolutely spellbinding, and it tells an important (true) story of which more Canadians should be aware. Rather, the problem is that the work's origins are tainted by Boyden's voice appropriation and the fact that he has made no effort to mitigate its harms or offense; on the contrary, he has used Indigenous cultural content, and his pretended Indigenous identity, to enrich himself at the expense of the communities from which he draws his subjects. Boyden's process resembles that of land appropriation in important and troubling respects: like the Crown so often does, he treats appropriation as a *fait accompli* and, without consultation, arrogates for himself the role of speaking for Indigenous peoples and their interests as *he* sees them.

Compare Boyden's case to that of David Carpenter, who collaborated with Joseph Auguste (Augie) Merasty to write the absolutely harrowing but widely acclaimed Burt Award-winning *The Education of Augie Merasty: A residential school memoir* (2015). Merasty was an Indigenous fisherman and trapper whose struggles with alcoholism left him homeless late in life, and whose last years were beset by cancer and dementia. Merasty wrote to Carpenter in 2001, asking for help telling his story in the form of a book. Over the next eight years, Carpenter compiled Merasty's recollections, resulting in the 2015 publication of the memoir. In a detailed preface, Carpenter explains that his role was purely editorial; at no point does he insert himself, or his creative imagination, into Merasty's story.

²² There is, however, evidence that Boyden's uncle, an artist, pretended to be Indigenous for the sake of his career. Note also that I do not mean to imply that the possession of an Indigenous ancestor is sufficient to ground claims of Indigenous identity.

Like *Wenjack*, *The Education of Angie Merasty* is spare and spellbinding, and deeply unsettling. It has not garnered the same attention as *Wenjack*, since it was not authored by a celebrity author; but nor has it been subject to the same intense—and thoroughly justified—criticism. *Wenjack* is the result of a creative process that finds someone else's stories and appropriates them for profit. *The Education of Angie Merasty*, by contrast, is predicated on an act of collaboration, and it is a story told for the public good, to make one Indigenous man's testimony to the Truth and Reconciliation Commission available for all to see and learn from. Boyden has been all too happy to accept prizes and accolades for his appropriative work; by contrast, when CODE awarded *The Education of Angie Merasty* a *Burt Award for First Nations, Inuit and Métis Young Adult Literature*, the prize was awarded to Merasty, not Carpenter. The donation component of the award further enabled 2500 copies to be sent to schools, libraries, and Friendship Centres across Canada, in this way helping to distribute the benefits of the collaboration back to its originating communities.

Where cultural appropriation is concerned, the example of Aboriginal Title represents a moral obligation on the appropriator's part to begin negotiations from a position of trust (by, e.g., acknowledging past harm and bad faith), to obtain consent for the use of Indigenous cultural expression, to repatriate or share appropriated artifacts, and not to profit at the expense of Indigenous communities. As Todd puts it, 'When negotiations over land resources are undertaken, there is room for sharing once Aboriginal Title is acknowledged and established' (Todd, 1990, 31). Likewise, a conversation about the appropriation of cultural expression needs to begin with the recognition of the appropriated culture's interests; once these are established, there can be room for sharing.

But what does this look like in action? Consider the University of British Columbia's Museum of Anthropology (MOA), which is renowned for its collection of First Nations cultural

artifacts.²³ The MOA (indeed, the entire university's main campus) is located on the unceded lands of the x^wməθk^wəy'əmə (Musqueam) people. This is an injustice which follows directly from the Crown's historically lackadaisical attitude towards Aboriginal Title, and towards the project of securing land-use treaties with Indigenous nations. As a repository of Indigenous cultural artifacts located on ancestral, unceded land, the MOA has taken several steps to offset the harms and offense it might otherwise occasion.

One of these mitigation strategies is a policy of free admission to all Indigenous visitors, to ensure their ready access to their own cultural patrimony. More importantly, however, the MOA is unique among anthropological museums in that it has actually sought consent from the relevant peoples to house and display their artifacts in its collection. In fact, the MOA has developed a borrowing agreement which allows originating communities to retake possession of their artifacts for the benefit of their communities, and offers funding to help Indigenous communities to either send people to study its collections, or to bring those collections home to Indigenous communities. The MOA's approach to reconciliation begins with the recognition of the importance of its collection to originating communities, and with the recognition that the just acquisition of a minority culture's patrimony can only be conducted under conditions of mutual trust and benefit. In these ways, it lives up to the positive ideals expressed by Aboriginal Title.

Let us return, finally, to Carr's painting. It is important to note that the move to retitle it was made in consultation with Wanda Nanibush, the AGO's Anishinaabe curator of Indigenous art, and with the Nuu-chah-nulth First Nations, on whose territory the church stood. In an effort to acknowledge the loaded history behind the painting's original title, and to point to the role that language played in Canada's colonial heritage, an informational panel now accompanies the painting,

²³ The observations which follow are based on information from the MOA's website, <<https://moa.ubc.ca/#menu-about>>. Its borrowing conditions can be found at <https://moa.ubc.ca/wp-content/uploads/2019/06/Guide-Borrowing-by-Originating-Communities_2019_final.pdf>, and its commitments to Indigenous access and engagement are detailed at <<https://moa.ubc.ca/indigenous-access-and-engagement/>>.

detailing the church's history and the gallery's reasons for changing the painting's title. In addition to these efforts, the AGO has now devoted nearly one third of its gallery space to the work of Indigenous artists, and has worked diligently to translate the accompanying wall texts into Anishinaabemowin. Far from erasing Canada's racist—and recent—colonial history, the AGO has in fact taken significant steps to highlight and address it as part of its retitling efforts.

7. Conclusion

We have seen that efforts to retitle works with offensive titles, such as the painting now known as Emily Carr's *Church at Yuquot Village*, have met with some resistance. In particular, public resistance has crystallized around two issues: first, that unsanctioned alterations to a work's title infringe upon an artist's moral rights by changing the artwork, and second, that altering offensive titles whitewashes history and unjustly exculpates the artists who generated these works and titles.

In response to the first concern, I have argued, first, that the AGO's retitling in no way would have grounded a reasonable assessment on Carr's part that her reputation had been harmed (quite the opposite!) and, second, that our titling practices and their history do not support the charge that, in this case, retitling altered the work in any way. Its title is merely a descriptive label, and labels can be swapped for new labels, provided they remain appropriate. Although retitling a work with a reflective title would indeed alter the work and so possibly infringe upon an artist's moral rights, retitling works with descriptive titles, such as Carr's painting, does not.

In response to the second concern, I have tried to show that retitling efforts—at least those of the Art Gallery of Ontario and the Rijksmuseum—have been undertaken in good faith and with appropriate consultation, and form part of broader efforts at reconciliation. Such efforts are consistent with the negative and positive lessons Loretta Todd suggests we can draw from

Aboriginal Title, and offer a useful model for thinking about the harms of appropriation and the path we ought to take to mitigate those harms.

References

- Adeney, E. (2001). 'Moral Rights: A Brief Excursion into Canadian History'. *Intellectual Property Journal* 15, 205-240.
- ahtone, h. (2019). 'Considering Indigenous Aesthetics: a non-Western paradigm'. *The American Society for Aesthetics Newsletter*, 39 (3), pp. 3-5.
- Brewster, M.B. (1928). Some Ladies Prefer Indians. *Toronto Star Weekly* (January 21, 1928).
- Burgess, K. (2015). The art of being politically correct. *The Times* (December 14, 2015).
- Cragg, W. and Schwartz, M. (1996). 'Sustainability and historical injustice: lessons from the Moose River Basin', *Journal of Canadian Studies* 31 (1), pp. 60-81.
- DeSoto, L. (2008). *Extraordinary Canadians: Emily Carr* Toronto: Penguin Canada.
- Goodyear, S. (2018). 'Why the Art Gallery of Ontario removed 'Indian' from the name of this Emily Carr painting'. *CBC Radio: As it Happens*, [online] Available at: <https://www.cbc.ca/radio/asithappens/as-it-happens-tuesday-edition-1.4672905/why-the-art-gallery-of-ontario-removed-indian-from-the-name-of-this-emily-carr-painting-1.4672934> [Accessed July 2020].
- Harper, J.R. (1977). *Painting in Canada: a history*, 2nd ed. Toronto: University of Toronto Press.
- Huang, A. (2009). Totem Poles. *Indigenous Foundations at UBC*, [online] Available at https://indigenousfoundations.arts.ubc.ca/totem_poles/ [Accessed July 2020].
- Jensen, P.M. (2015). *Artist Emily Carr and the spirit of the land: a Jungian portrait*. London: Routledge.
- Joubert c. G racimo, (1916) 35 D.L.R. 683.
- 'Jurisprudence: Canada', *Le droit d'auteur: organe officiel du bureau de l'union internationale pour la protection des  uvres litt raires et artistiques*, 32^{ me} ann e no. 2 (1919), pp. 16-23.
- LaDuke, W. (1994). 'Traditional ecological knowledge and environmental future'. *Colorado Journal of International Environmental Law and Policy* 5, pp. 127-148.
- Levinson, J. (1985). 'Titles'. *The Journal of Aesthetics and Art Criticism*. 44 (1), pp. 29-39.

- Loos, T. (2018). 'A Canadian Museum Promotes Indigenous Art. But Don't Call It "Indian"'. *The New York Times*, [online] Available at: <https://www.nytimes.com/2018/07/13/arts/design/art-gallery-of-ontario-indigenous-art.html> [Accessed July 2020].
- McNeil, K. (1997). 'The Meaning of Aboriginal Title', in Asch, M. (ed.), *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*. Vancouver: UBC Press, pp. 135-54.
- Reid, D.R. (1988). *A Concise History of Canadian Painting*, 2nd ed. Oxford: OUP.
- Rijksmuseum, (2020). *Terminology*. [online] Available at: <https://www.rijksmuseum.nl/en/research/terminology> [Accessed July 2020].
- Snow v. The Eaton Centre Ltd. et al.* (1982) 70 C.P.R. (2nd) 105.
- Stewart, J. (2005). 'Cultural Appropriations and Identificatory Practices in Emily Carr's 'Indian Stories''. *Frontiers: A Journal of Women Studies* 26 (2), pp. 59-72.
- Todd, L. (1990). 'Notes on Appropriation'. *Parallelogramme* 16 (1), pp. 24-33.
- Torgovnic, M. (1997). *Primitive Passions: Men, Women, and the Quest for Ecstasy*. New York: Alfred Knopf.
- Truth and Reconciliation Commission of Canada, (2015). *Final Report of the Truth and Reconciliation Commission of Canada: Summary: Honouring the Truth, Reconciling for the Future*, (Winnipeg: Truth and Reconciliation Commission of Canada).
- Westra, L. (1999). 'Environmental Racism and the First Nations of Canada: Terrorism at Oka'. *Journal of Social Philosophy* 30 (1), pp. 103-124
- Xhignesse, M.-A. (2019). 'Entitled Art: what makes titles names?'. *Australasian Journal of Philosophy* 97 (3), pp. 437-50.
- Young, J.O. (2008). *Cultural Appropriation and the Arts*. Oxford: Wiley-Blackwell.