THE UNIVERSITY OF CALGARY

The Common Law and the Justices of the Supreme Court of the North-West Territories, 1887-1907

by

Roderick Graham Martin

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE

DEGREE OF MASTER OF ARTS

DEPARTMENT OF HISTORY

CALGARY, ALBERTA

SEPTEMBER, 1997

© Roderick Graham Martin 1997

National Library of Canada
Acquisitions and Bibliographic Services
395 Wellington Street
Ottawa ON K1A 0N4
Canada

Bibliothèque nationale du Canada
Acquisitions et services bibliographiques
395, rue Wellington
Ottawa ON K1A 0N4
Canada

Your file Votre référence

Our file Notre référence

The author has granted a non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of this thesis in microform, paper or electronic formats.

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de cette thèse sous la forme de microfiche/film, de reproduction sur papier ou sur format électronique.

The author retains ownership of the copyright in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

L'auteur conserve la propriété du droit d'auteur qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

0-612-24601-9

Canada

ABSTRACT

This study of the common law and the Justices of the Supreme Court of the North-West Territories, 1887-1907, attempts to explain how the justices invoked, molded, followed and applied principles, doctrines and precedents from English and Canadian, statute, precedent and common law that fit the unique milieu of the North-West Territories.

The investigation begins with the Hudson's Bay Company Charter of 1670, the original vehicle that accommodated the migration of English law to Rupert's Land and Assiniboia. Company law was based on English law, and was also an administrative component of an economically based merchant company. In the late 1840's, the judicial activities of Adam Thom, the first recorder of Assiniboia, crystallized the grip of English law in the chartered territories. Then in the 1870's, the North-West Mounted Police and its judicial officials conveyed English and Canadian law to the Indian and North-West Territories. Subsequently, the first civilian stipendiary magistrates and judges were appointed, and the Supreme Court was established in 1887.

This thesis constitutes an analysis of the judicial proceedings of the Supreme Court of the North-West Territories, 1887-1907. It concludes that the first generation of justices were cognizant of, and proactive in, the developmental creation of common law precedents that

were germane to the North-West Territories. The justices' persistently invoked English and Canadian statute and common law precedents. When formulating their judicial decisions, they exercised judicial discretion, which meant that they actively molded, followed and applied principles, laws, doctrines, and precedents which would meet the particular or individual circumstances of cases. Their judicial decisions also emphasized the *rule of law*, and no evidence emerged of a judicial discretion that compromised that *rule of law* or the applicability of the common law. The evidence from several *en banc* proceedings, also reveals that individual justices often disagreed with the other members of the court, however, the concurring majority decision became the precedent common law of the North-West Territories at that time. Those doctrines endured, unless the decision was reversed by the Supreme Court of Canada or the Judicial Committee of the Privy Council in England.

Finally, it can be concluded that the members of the court were highly competent and gave diverse interpretations to the statutes, precedents and the common law. Indeed, their decisions both responded and contributed to the social, political, cultural and economic milieu of the North-West Territories.

ACKNOWLEDGMENTS

I would like to express my appreciation to the members of my committee, Dr. J. Chris Levy, Faculty of Law, Dr. Warren M. Elofson, Department of History, and foremost my supervisor, Dr. Louis A. Knafla, Department of History for their insightful contributions to this thesis. My special gratitude to you Louis, for your patience, guidance, advice, editing, draft proofing, and most importantly, the rigorous standard of academic achievement you demand. You provide an ongoing inspiration to me, and I hope that my scholarly career proves worthy of your excellent tutelage. My thanks to Don Sanders, University of Calgary Law Library, for his generous assistance in helping me research the Territorial Law Reports. Also, to Ms. Wendy Amero and Mrs. Olga Leskiw, Department of History support staff, for their administrative guidance and assistance. Finally, to my mentor and the love of my life, my wife Patti, whose love, patience, understanding and rigorous editing of my undergraduate papers throughout the years, set a standard of excellence which has enabled me attain this level of academic achievement. To all, this work would not have been possible without you and I am forever indebted.

TABLE OF CONTENTS

Page

Approval Page ii

Abstract. iii

Acknowledgments v

Table of Contents vi

Chapter One: Introduction 1

Chapter Two: The Common Law and the Hudson's Bay Charter 9

Chapter Three: The First Common Law Courts: Justices of the Peace, The North-West Mounted Police and Stipendiary Magistrates 30

Chapter Four: The Civil Law Courts. 57

Chapter Five: The Criminal Law Courts. 94

Chapter Six: Conclusion. 125

Table of Judges 136

Color Bar Graphs 137

Bibliography 141

CHAPTER 1:

INTRODUCTION

This analysis of the common law manifested through the first generation (1887-1907) of Justices of the Supreme Court of the North-West Territories (SCNWT) reveals that the Justices invoked, followed and applied principles, doctrines and precedents from English Statute and common law. The Justices also cited and followed (where applicable) the precedents and doctrines of the Supreme Court of Canada (SCC) and Provincial Supreme Courts. They occasionally referred to American and Australian Court decisions, as well as to scholarly papers and publications[1]. Throughout this formative period, the justices developed a body of common law that both responded and contributed to the social, political, cultural and economic milieu of the North-West Territories (NWT).

The proceedings of this Court *en banc* and on *assize* reveal the justices' strong belief in the supremacy of the *rule of law*.[2] No evidence emerged of a judicial discretion that compromised the *rule of law* or the applicability of the common law. There are, however, examples of discretionary

---

[1] The research conducted on The Territorial Law Reports, ed. N.D. Beck et al, Volumes 1 - 7 (Toronto: The Carswell Co., Limited, 1900-1912).

[2] Henry Campbell Black, Black's Law Dictionary, 6th Edition (St. Paul: West Publishing Co., 1990), 1332. The rule of law is "…[a] legal principle … sanctioned by the recognition of authorities and usually expressed in the form of a maxim or logical proposition … sometimes called 'the supremacy of law.'"

justice. Laws, rules, doctrines or precedents were cited and applied to meet particular or individual circumstances of litigating parties. Indeed, bylaws were sometimes invalidated or deemed *ultra vires*[3] when there were equally good precedents to uphold them. Nonetheless, it is also evident that the judicial practices of the justices overwhelmingly affirmed the supremacy and legitimacy of the English Imperial and Canadian Dominion Parliaments.

The Hudson's Bay Charter was the original *vehicle* that accommodated the migration of the common law into the chartered territories of Rupert's Land, the Indian Territories, and eventually the NWT. Hudson's Bay Company (HBC) officers were the first judicial officials to administer the colonial or private company law in Rupert's Land, 1670-1870. Company law was modeled on English law and was not " … repugnant to the laws of England".[4] In addition, the Governor and Company were empowered to " … assemble and make laws and ordinances for the good government of the Company and its colonies and forts, and for the advancement

---

[3] Ibid., 1522. "An act performed without any authority to act on subject."

[4] E.H. Oliver, ed. "The Constitutional Development of the Prairie Provinces". In The Canadian North-West, Its Early Development and Legislative Records. (Ottawa: Government Printing Bureau, 1914), p.22. Also, see J.E. Cote, "The Introduction of English Law into Alberta." In Alberta Law Review, Vol. 3. (Edmonton: University of Alberta Publishing Department, 1964), 262-292. Cote argued that HBC settlers introduced English common law into Western Canada.

of trade" in the territories.[5] They were also empowered " … to try civil and criminal cases and to employ an armed force for the protection of its (Company) trade and territories."[6] Where there was no governor and council, " … the chief factor of the district had authority to send the offender to England for trial."[7] Chief factors also dealt with misdemeanors and other petty offenses against Company law " … as a matter of internal corporate discipline."[8] The intent of the law was to regulate all aspects of fur trade life in the territories, however, its application and enforcement was virtually non-existent.

In 1870, the NWT were created when the HBC surrendered their territories to the British Crown and Dominion of Canada.[9] The only legal authority in the NWT at that time was Governor Adams G. Archibald and " … the Justices of the

---

[5] Oliver, 22.

[6] Ibid., 22. From this private judicial system, the General Quarterly Court evolved in Assiniboia with Adam Thom at the helm. Professor Hamar Foster has suggested, that between 1821 and 1859, there was no territorial judiciary. Chief factors and traders occasionally took depositions and performed marriage ceremonies. See "Long Distance Justice: The Criminal Jurisdiction of the Canadian Courts West of the Canadas, 1763-1859." In The American Journal of Legal History. (Philadelphia: Temple University School of Law, 1990), 26-7.

[7] Roy St. George Stubbs. Four Recorders of Rupert's Land: A Brief Survey of the Hudson's Bay Company Courts of Rupert's Land. (Winnipeg: Peguis Publishers, 1967), 1.

[8] Foster, 24.

[9] The actual date of surrender is 19 November 1869. The British North America Act, 1867 and the Rupert's Land Act, 1868 made possible the surrender of the Hudson's Bay Company territories. A reprint of the "Deed of Surrender" along with the above noted authorities are contained

Peace, if any there were [sic], under the Hudson's Bay Company's Régime who were continued in power by the Act of 1869."[10] In response to this state of affairs and the Cypress Hills massacre in June of 1873,[11] the Dominion government under Prime Minister Sir John A. Macdonald formalized the creation of the North-West Mounted Police (NWMP).[12]

In 1873, the NWMP were created to enforce and administer secular Territorial laws and Ordinances. The police were a formative influence on the development of the common law in the new Canadian Territories. Commissioned officers by virtue of their rank in the force were *ex officio* common law JP's, and were authorized to adjudicate minor criminal and civil matters. The Commissioner of the

---

in Oliver's "The Constitutional Development of the Prairie Provinces," 955-60.

[10] See the letter from Lieutenant Governor Archibald to Secretary of State for the Provinces, Dec. 6, 1870 in Oliver, 985-6. The letter indicates that there were no JP's in the Territories. It would not be until 1873 when twenty-one JP's were sworn in as judicial officials. The evidence for this conclusion is premised at the beginning of chapter 3 of this thesis.

[11] See S.W. Horrall. "The March West." In Men in Scarlet. (Calgary: Historical Society of Alberta/McClelland And Stewart West, 1974), 17-8. The creation of the NWMP came about in response to the Cypress Hills Massacre in early June of 1873. A party of wolf hunters from Fort Benton Montana shot and killed about thirty Assiniboine Indians on Canadian territory in the Cypress Hills.

[12] Ibid., 18. Privy Council Order 1134 was passed on August 30, 1873 which actually brought the NWMP into existence. The Canadian Parliament had passed "An Act respecting the Administration of Justice, and for establishment of a Police Force in the North West Territories" in May of 1873. Also, see _____. Opening Up The West, Being the Official Reports To Parliament of the Activities of the Royal North-West Mounted Police Force from 1874-1881, by Commissioners of the Royal North-West Mounted Police. (Toronto: Coles Publishing Company, 1973), ii-ix.

Force was also a stipendiary magistrate (SM) who presided with two officer JP's. These officers regularly held court and adjudged violations of the Territorial Ordinances. In fact the NWMP courts were the first courts of record in the NWT.

In the analysis of the proceedings of SCNWT, the primary source materials for this study are the Territorial Law Reports, (TLR), volumes 1-7. These reports contain 614 decisions, and comprise 3471 pages of text which are for the reporting periods of June 1887 through May 1907. Of the 614 decisions analyzed, 521 are civil cases. These include the following subjects: procedural applications, company law and private law issues, actions for damages, negligence, breaches of contract, sale of goods, corporate, municipal taxation assessments, master and servant relations, real estate, mortgages and land titles, liens for wages, wrongful dismissal, libel, alimony, the Medical and Legal Professions Act, the Canada Evidence Act, and Admiralty Law. The 93 criminal cases included reference cases, writs of *certiorari*,[13] substantive law,[14] rules of law, rules of Court; and appeal cases in murder, theft of cattle, fraud, polygamy, perjury, seduction of a female under the age of

---

[13] See Black's Law Dictionary, writ of certiorari. "An order by the appellate court which is used by that court when it has discretion on whether or not to hear an appeal from a lower court," 1609.

twenty-one, assault, obstruction, midwifery, willfully causing fires, illegally selling liquor, discrimination, and conspiracy to defraud.

The importance of these reports has been stated by Professor Wilbur Bowker. He suggested that they represent the Court's proceedings, and " … cover the twenty years of the court's existence,"[15] however, it has been determined that they do not contain all the court's proceedings. There are cases heard by the SCNWT that were not reported in the TLR. Those cases appear in several periodicals and contain similar judicial proceedings.[16] Nevertheless, the TLR also appear to represent an excellent variety of substantive issues heard by the court. Additionally, this examination is not intended to be a statistical analysis of the proceedings of SCNWT, but a random sampling of issues heard by the court. The editors, who included N.D. Beck of Calgary and Edmonton, O.M. Biggar of Edmonton and T.D. Brown of Regina, reported the appeal cases and decisions heard by the Court *en banc* and on *assize*. The judgments were reported verbatim, and the editors took special care in summarizing the

---

[14] Ibid., "That part of the law which creates, defines, and regulates rights and duties of parties … ," 1429.

[15] Wilbur F. Bowker. A Consolidation of Fifty Years of Legal Writings, 1938-1988, ed. Marjorie Bowker. (Edmonton: The Faculty of Law, University of Alberta,1989), 724.

[16] The other periodicals are the Canadian Criminal Cases (CCC), in which a number of select NWT cases, 1898-1907 appear. Several of these cases, however, also appear in TLR. The Western Law Reporter (WLR) also

critical issues, disputed facts, and legal arguments.

Nicholas Du Bois Dominic Beck made the most substantive contribution to the onerous task of correlating and writing the reports. His name appears on virtually every report as editor. He was from Cobourg, Ontario, graduated from Osgoode Hall Law School in 1881, practiced law in Ontario, Manitoba and Calgary in the NWT, and was also editor of the Territories Law Reports, 1883-1907.[17] Beck was appointed to the Supreme Court of Alberta in 1907 and remained on the bench until 1928.[18] Oliver Mowat Biggar was from Toronto, practiced private and public sector law, helped to edit several volumes of the TLR, and gained notoriety as a member of the Military Service Council which implemented conscription, 1917-1918.[19] From 1918-1919, Biggar was the judge advocate general and chief lawyer for the Canadian military. Thomas Dowrick Brown was from Port Hope, Ontario, and was called to the NWT bar in 1906. He helped to edit several volumes of the TLR. Brown practiced law in Moosomin until 1907, and then founded the firm of Brown, Thompson and Mclean in Regina of which W.F.A. Turgeon, KC and Attorney-

---

reported cases heard by the court in 1905, 1906 and 1907. Several judicial note books were also consulted.

[17] Louis Knafla and Richard Klumpenhouwer. Lords of the Western Bench. (Calgary: The Legal Archives Society of Alberta, 1997), 17.

[18] The SCNWT continued to function until 1907, even though Alberta was admitted to confederation on 1 September 1905.

General of Saskatchewan, was a member.[20]

In summary, chapter one of this thesis outlines the evolutionary path of the English common law as it developed in Rupert's Land, Assiniboia and the NWT. Chapter two examines the influence of the HBC law on the development of the common law, and chapter three reviews the role of the NWMP on law enforcement and their formative influence on the development of the Territorial courts. In chapter four, the focus is on the rise of the SCNWT and the civil law with the intent of demonstrating how civil law proceedings dominated the court's activities. Chapter five explores the criminal law cases heard by the court, and reveals that although criminal appeals were fewer in number they exerted a significant impact on the judicial system. Chapter six summarizes the scant historiography of the law and legal institutions of the NWT. It also traces the path of the law, and the important contributions of selected individuals. The chapter concludes with a table which lists the first generation of Justices of the SCNWT, and a color 3-D bar chart which illustrates the ebb and flow of both the *en banc* and *assize*, civil and criminal proceedings that came before the SCNWT.

---

[19] Norman Hillmer. "Biggar, Oliver Mowat" in The Canadian Encyclopedia, volume 1. Edited by James H. Marsh. (Edmonton: The Hurtig Publishers Ltd., 1985), 171.

[20] Dr. C.W. Parker, ed., Who's Who and Why. Vol. 6-7. (Toronto: International Press Ltd., 1914), 794.

CHAPTER 2:

THE COMMON LAW AND THE HUDSON'S BAY CHARTER

The common law of England, which Sir Matthew Hale[1] called the *Leges non Scriptae* (unwritten law), had developed its authority from two sources. The common law was formulated not from

> … that Authority that Acts of Parliament are, but they (common laws) … have acquired their binding Power and the Force of Laws by a long and immemorial Usage, and by the Strength of Custom and Reception in this Kingdom.[2]

Another source was the written law, or what Hale called the *lex scripta*, comprising statutes or Acts of Parliament. The important sinew that connected the operation and functioning of the common law as both unwritten and written was the recognition that common law included both custom and statute and as a whole was supreme.[3] As Hale suggested, statutes were part of the common law, not supreme to it. He observed,

> … doubtless, many of those Things that now obtain as Common Law, had their Original [sic] by Parliamentary Acts or Constitutions, made in Writing by the King, Lords and Commons; … we find many of those Laws enacted with now obtain merely as Common Law, or the General Custom of the Realm … .[4]

---

[1] See the editor's introduction in Sir Matthew Hale, The History of the Common Law of England (Chicago: The University of Chicago Press, 1971), xi-xxxviii. Hale's book is described as the "first book with any pretense to be a comprehensive account of the growth of English law," xi.

[2] Ibid., 17.

[3] English law in its historical tradition, as opposed to the language of the lawyer, can see the "common law" by the 17th century as encompassing the customs and usages of the law of the land which included precedents, statutes and the decisions of the court.

[4] Supra, Hale, 4.

The corpus of the common law that migrated into Rupert's Land, the Indian Territories and the NWT came by way of a Royal Charter granted by King Charles II to his cousin Prince Rupert in 1670. On 2 May 1670, King Charles II granted exclusive rights and privileges for the lawful exploitation of an area collectively known as Rupert's Land which was located west of the Canadas. The grantees of this Imperial proclamation included the Governor and Company of adventurers trading into Hudson's Bay.[5] The authority for the granting of the Proclamation was founded on the old English doctrine known as the Royal Prerogative of the Monarch,[6] which was included as part of the King's rights. This Prerogative was vested only in the English Monarch and was an exclusive and absolute right. The English jurist Sir William Blackstone commented that,

> … [b]y the word prerogative we usually understand the special pre-eminence, which the king hath over and above all other persons, and out of the ordinary course of common law …[7]

It may be concluded, then, that the granting of the Hudson's Bay Charter was within the Monarch's jurisdiction and his

---

[5] E.H. Oliver, ed. "The Constitutional Development of the Prairie Provinces", in The Canadian North-West, Its Early Development and Legislative Records. (Ottawa: Government Printing Bureau, 1914), p.20.

[6] See Sir William Blackstone, "Of The King's Duties" in Chitty's Blackstone, Volume 1, Book 1, Chapter VI, 176.

[7] Ibid., 180. Blackstone also tells us "… [t]he King of England is therefore not only the chief, but properly the sole, magistrate of the nation, all others acting by commission from, and in due subordination to him …", 187.

Royal Prerogative at this time.[8]

The granting of the Hudson's Bay Charter by the Monarch was ratified and affirmed by the Imperial Act of Parliament in 1690 (2 W.& M.c.23).[9] Thus, Charles II, by exercising his jurisdiction, also set in motion the principles for the eventual accretion and acceptance of the English common law into the chartered territories. This included common law precedents and procedures that were adapted to Rupert's Land, the NWT and the Indian Territories.

The Hudson's Bay Charter was the first statute arising from the Royal Prerogative relative to North America. It was also the first Imperial statute that would implant the English common law tradition in what is now Canada.

---

[8] The Charter was granted for trade purposes, however, the wording of the Charter appeared to grant to the HBC, ownership of Rupert's Land in "fee simple, conditional." The grantor (Charles II), conveyed (granted) to Prince Rupert and his heirs, the land forever. "[T]hey shall have perpetual succession, and that they and their successors … capable in law to have, purchase, receive, possess, enjoy and retain lands … ," 137. The HBC claimed and exercised dominion as proprietors of the soil, and claimed the exclusive right of trading in the territories embraced in the terms of the grant. For the complete text of the Charter, see Oliver, 135-153. Also, see Kirk N. Lambrecht. The Administration of Dominion Lands, 1870-1930. (Winnipeg: Hignell Printing Limited, 1991), 4. Lambrecht opined that the HBC possessed Rupert's Land in "fee simple." He states, "The Hudson's Bay Company (HBC) had owned Rupert's Land in fee simple under its charter of 1670 from Charles II." For an additional discussion on "fee simple," see J.H. Baker. An Introduction of English Legal History. (London: Butterworths, 1979), 224-5. "The fee simple was a right to land for ever." Also, see "fee simple, absolute (intestate) and (conditional)," in Black's Law Dictionary. An absolute or fee-simple estate is one in which the owner is entitled to the entire property, with unconditional power of disposition during one's life, and descending to one's heirs and legal representatives … ." Conditional "… transfer in which (the) grantor conveys fee simply on condition that something be done or not done … (a)t common law an estate in fee simple conditional was a fee limited or restrained to some particular heirs, exclusive of others," 615.

[9] Horace Harvey, "The Early Administration of Justice in the North-West," in

Subsequently, it was deemed applicable to the NWT, and more controversially, to the Indian Territories.[10] Indeed, it may also be argued that the purpose of the Charter, in common and statute law terms, was to give absolute jurisdiction and authority to the "Company of Adventurers", to exploit the chartered properties as they pleased " … for the finding [of] some trade for furs, minerals and other considerable commodities…".[11] Professor E.H. Oliver agreed with this theme of exploitation when he wrote, the enactment

> … smacks of the atmosphere of the Navigation Acts, the legislative statement of the principle that colonies and plantations justify their existence only when they yield profit to the mother country.[12]

Thus, on the one hand, the Charter was a use of the Royal Prerogrative to create a private Company law that can be seen in the context of seventeenth century absolutism. On the other hand, the Charter was also the vehicle that set in motion the grounds for the acceptance, adoption, adaptation, and the subsequent growth of a European law that was germane to Rupert's Land. That corpus of law would eventually migrate into the administration of justice in the Indian

---

The Alberta Law Quarterly, vol. 1, ed. C.A.Perkins, (Edmonton: Faculty of Law, University of Alberta, 1934), 1.

[10] Oliver, 22. Also see Hamar Foster's article "Law and Necessity in Western Rupert's Land and Beyond, 1670-1870." This paper was presented at the legal history conference, "Law for the Buffalo, Law for the Musk Ox, Law & Society in Canada's North-West Territories & Prairie Provinces, 1670-1990", April 2-5, 1997 at the University of Calgary.

[11] Oliver, "The Royal Charter Incorporating the Hudson's Bay Company", 135-53.

[12] Ibid., 20.

Territories and the NWT.

In the first, formative period of jurisprudence in Rupert's Land, 1670-1870, the responsibility for the administration of justice and law enforcement was vested to the Officers of the HBC.[13] That justice was private Company law and the law was enacted to preserve the Company's monopoly over the fur trade.[14] The law was, however, a form of common law founded on the Charter though it applied only to those employed by the Company. Those laws were the " … laws and ordinances for the good government of the Company and its colonies and forts, and for the advancement of trade."[15] Prosecutions for transgressions of Company law were the responsibility of the " … Governors and other officers, to try civil and criminal cases and to employ an armed force for the protection of its trade and territory."[16] There were, however, no Company armed forces and the laws proved inadequate. The jurisdictional boundaries were vague, and enforcement of Company law was

---

[13] Ibid., 22. Prof. Oliver sums up their authority. "The Governor and Company might assemble and make laws and ordinances for the good government of the Company and its colonies and forts, and for the advancement of trade. They might impose penalties and punishments, provided these were reasonable and not repugnant to the laws of England." Also, see D. Colwyn Williams, "The Dawn of Law on the Prairies" in The Saskatchewan Bar Review, Vol. 27, No. 4 (Law Society of Saskatchewan, 1962), 131.

[14] See Kathryn M. Bindon, "Hudson's Bay Company Law: Adam Thom and the Institution of Order in Rupert's Land 1839-54," in Essays in the History of Canadian Law, Volume 1, ed. David H. Flaherty, (Toronto: University of Toronto Press), 43.

[15] Oliver, "The Constitutional Development of the Prairie Provinces," 22.

difficult if not impossible due to the vast distances involved. Compounding these problems in the early nineteenth century were the ongoing disputes between the HBC and the North-West Company (NWC) regarding trading jurisdictions and territorial rights within Rupert's Land. The first recorded dispute was an incident between a Hudson's Bay trader and a NWC trader. This incident, however, made a formative contribution to the ommon law of the chartered territories.

The death of James King, an employee of the HBC was alleged to have been caused by Joseph Maurice Lamothe, an employee of the NWC.[17] The incident occurred in the summer of 1802, twenty miles west of Fort de l'Isle near Elk Point on the North Saskatchewan river. This area was outside Rupert's Land and was in the Indian Territories. Lamothe was apprehended and delivered to Lower Canada, but he was never prosecuted. Indecision on behalf of the prosecution and defense lawyers prevented the matter from proceeding. Arguments focused upon that Court's jurisdiction to try alleged offenses that had occurred in the Indian Territories and not in Rupert's Land. In the interim, however, Lamothe had fled to Upper Canada[18] to avoid prosecution. Aside from the legal arguments, the fact that he had been apprehended

---

[16] Ibid., 22.

[17] Arthur S. Morton, A History of The Canadian West to 1870-71 (London: Thomas Nelson & Sons Ltd., ___), 513-14.

[18] Ibid., 514.

and had been delivered to Lower Canada established a precedent.

Consequently, the Imperial Parliament of England enacted The Canada Jurisdiction Act of 1803.[19] In theory the Act was the legal authority that extended the jurisdiction of the courts of Lower and Upper Canada to " … the Indian Territories and other parts of America not within the limits of the Provinces of Upper and Lower Canada, or either of them."[20] On the other hand, perhaps the enactment was also meant to reinforce and make lawful the *unlawful precedent* already established by the prisoner's apprehension and delivery to Lower Canada. In any event, the enactment failed to control the deadly rivalry, competition, and disputes between the NWC and the HBC traders. In another incident, however, the 1803 Act was given force and effect.

The most serious incident was the June 1816 massacre at

---

[19] Quoted in Professor Oliver's book, The Canadian North-West "An Act for extending the jurisdiction of the Courts of Justice in the Provinces of Lower and Upper Canada", 1282-84.

[20] Ibid., 1282. See Larry A. Bakken, Justice in the Wilderness: A Study of Frontier Courts in Canada and the United States 1670-1870 (Littleton: Fred B. Rothman & Co., 1986), 48. Further evidence to substantiate the jurisdiction and the applicability of The Canada Jurisdiction Act (1803) to the North-West Territories, the Indian Territories and beyond is contained in the journal of Ross Cox entitled, The Columbia River. This account is also cited by Archer Martin and J.T. Huggard eds., in their article "The Rise of Law in Rupert's Land", The Western Law Times, Volume 1, No. 5 (Winnipeg: The Stovel Company, 1890-1), 93. The case involved murder and cannibalism that occurred in the Spring of 1817 near the headwaters of the Columbia river in British Columbia. The accused La Pierre was taken to Canada for trial along with one Indian witness. All the evidence was circumstantial and uncorroborated and the accused was acquitted. Professor D. Colwyn Williams also discusses the jurisdiction of the Act in his article "The Dawn of Law on the Prairies" in Saskatchewan Bar Review Vol. 27, No. 1 (The Law Society of Saskatchewan, 1962), 128. The importance of this case, however, is that an accused was delivered for trial from beyond the borders of Rupert's Land to Canada, which gave recognition and efficacy to the statute of 1803. It also established a common law precedent.

Seven Oaks.[21] Several of the accused parties were tried at York in Upper Canada. Nevertheless, no convictions were registered.[22] Although the accused were discharged, the substance of the Act authorized the lawful transportation of the accused to Upper Canada. This created a *lawful* precedent in common law, relative to the chartered territories. The common law also found impetus at the Red River colony.

The Red River colony had been founded in 1811, when Thomas Douglas, the Fifth Earl of Selkirk, arrived at Assiniboia with a group of Scottish settlers. The land had belonged to the HBC. However, it wasn't until Selkirk gained control of the HBC that the colony lands were settled by HBC traders. Miles Macdonell was the first governor of the Red River colony, followed by Robert Semple in 1815. The NWC had been trading in the Red River area, and the conflicts between the two Companies came to fruition in 1816 with the killing of Robert Semple and the massacre at Seven Oaks.

In March 1821, the two Companies merged and the HBC retained its exclusive name and jurisdiction without competition in Rupert's Land, the NWT or the Indian

---

[21] Roy St. George Stubbs, Four Recorders of Rupert's Land: A Brief Survey of the Hudson's Bay Company Courts of Rupert's Land (Winnipeg: Peguis Publishers, 1967), 3. In the spring of 1816, the HBC had destroyed a NWC post (Fort Gibraltar). The Seven Oaks incident occurred on 19 June 1816, near the HBC post of Fort Douglas in the Red River Colony. Robert Semple and twenty-five men had ventured out of Fort Douglas, and were intercepted by a party of Metis under the command of Cuthbert Grant of the NWC. Semple and twenty of his men were killed.

[22] Ibid., 3.

Territories.[23] To solidify the hold on the chartered territories and beyond, on July 2, 1821 the English Parliament passed "An Act for regulating the Fur Trade and establishing a Criminal and Civil Jurisdiction within certain parts of North America."[24] The Act, in addition to crystallizing the HBC monopoly and establishing courts of record, upheld and affirmed the private law of the HBC. The Act also made it apparent that Parliament continued to rely on the HBC to " … administer justice within its territory … ".[25] It was evident, however, that a formal judicial administration was required in the Territory.

When the HBC and the NWC amalgamated in 1821, the organization and settlement at Red River was led by Andrew Bulger. He was appointed " … Governor Locum Tenens of all

---

[23] Morton, 624.

[24] Ibid., 628. Several interpretations regarding the purpose of the Act exist. See Hamar Foster, "Sins Against the Great Spirit: The Law, the Hudson's Bay Company, and the Mackenzie River Murders, 1835-1839." In Criminal Justice History, Vol. X., ed. Louis A. Knafla, (Westport: Meckler Corporation, 1989), 23-73. Professor Foster argued that the object of the 1821 statute was to end the violent competition between the NWC and the HBC by legislating a monopoly, rather than by providing for more trials in Canada. He concluded that the statute was quite successful, 26. Also, see Kathryn M. Bindon's article "Hudson's Bay Company Law." Bindon also concluded that the amalgamation was intended to inhibit the confrontations between the two Companies, and it provided an exclusive trading monopoly for the HBC, 46. Roy St. George Stubbs, however, argued that the Act was a formal attempt at establishing Courts of Record. Some provisions of the Act included the requirement of a security (bond) for the execution of a criminal or civil legal process (forms & proceedings), the affirmation of the Canada Jurisdiction Act, the extension of the jurisdiction of the Court of Upper Canada to the Indian Territories in criminal and civil matters, the appointment of Justices of the Peace for the Indian Territories and the limitations of their jurisdiction in civil and criminal matters, 4-5.

[25] Bakken, 51. In the absence of any other judicial authority.

and every part of Ossiniboia [sic]… ".[26] A judicial system also developed through the

> …[r]esolutions passed at a General Court of the Hudson's Bay Company … May 29, 1822 … (where) anyone of the (two) Governors together with any two of the Council shall be competent to form a Council for the administration of justice.[27]

Four judicial districts were established, and each had its own magistrate.[28] Between 1822 and as late as 1835, there were four judicial districts, with a Petty Sessions Court held in the first district on the first Monday of every quarter, for the second district on the second Monday of every quarter, for the third district on the third Monday of every quarter, and for the fourth on the fourth Monday of every quarter.[29] The jurisdiction of these Courts was restricted to hearing minor cases, with serious cases and appeals heard by the Governor and Council.

By June of 1839, there were only three districts in Assiniboia, and each district had a magistrate who presided over a quarterly Court of Summary Jurisdiction that was

---

[26] His appointment took effect on March 27, 1822. See Oliver, 219. This evidence is from Dominion Archives, Bulger Corr., II, M. 150, p.76.

[27] Oliver, 219. Also see Kathryn M. Bindon's article "Hudson's Bay Company Law", 46-7.

[28] Stubbs, 4-5. In Kathryn M. Bindon's article, she tells us that a magistrate or any two constables could hear and decide petty offenses under 40' shillings. Serious cases of debt exceeding 40' shillings, and all appeal cases from JP's were referred to the General Quarterly Court, 48. This court, however, was not formerly and regularly established until 1839, 80-81.

[29] Minutes, 12 February 1835 in Oliver, 270.

convened on "three successive Mondays."[30] Magistrates exercised a form of discretionary justice based on their judicial discretion. Their common law jurisdiction extended to:

> … civil cases which did not exceed five pounds and all trespass and misdemeanor cases; difficult cases [were] moved to the next session of the colony's supreme tribunal the General Quarterly Courts consisting of the governor and council.[31]

The court system was adapted from the English model, and magistrates followed procedures based on English law. They established precedents, suspended judgments, found guilt or innocence, and levied fines or sentenced to gaol any accused convicted in their Court.[32] The jury trial was also adopted and adapted for both civil and criminal matters.[33] These Courts were also the first Courts of Record in the district.

English common and statute law exercised a formative influence on the Council at Assiniboia. The Council stated that the rules and regulations for the courts in each district would follow a procedure " … not repugnant to the

---

[30] Council minutes, 4 July 1839 in Oliver, 288. Court was convened on three successive Mondays, to be respectively appropriated to the three sections (districts), according to the existing order of precedence, beginning with the third Monday of January, of April, of July and of October.

[31] See Bakken's review, 54. It is evident that Bakken's account is based on Professor Oliver's book The Canadian North-West, 288.

[32] Ibid., 288-90

[33] Resolution number 14 of the Council minutes of the Governor and Councillors of Rupert's Land, subtitled "Supreme Court". See Oliver, The Canadian North-West, 290.

law[s] of England … "[34] If the laws in Assiniboia were not to be repugnant to the laws of England, it may also be concluded that in all legal matters the authority to establish the courts and a law truly relevant to Assiniboia evolved from the HBC Charter. Professor D. Colwyn Williams has supported this conclusion. He states that:

> … [t]he general authority and jurisdiction of this tribunal was not statutory but prerogatival, being wholly derived from the powers conferred upon the Hudson's Bay Company by the charter of King Charles II.[35]

By July of 1839, the Courts of Assiniboia were firmly established and they had incorporated English common and statute law into their jurisprudence. It was apparent, however, that crime was not a serious problem at that time.[36] On the other hand, if crime was not a serious problem, the Metis and half-breed population were thought of as problems. One individual who was assigned to deal with the problem also had a formative influence on and contributed to the development of the body of common law in Assiniboia. That individual was Adam Thom.

In Assiniboia, there was a large Metis and half-breed population, and there had previously been problems between the white and non-white populations. Thom, a Scottish lawyer

---

[34] Oliver, 288.

[35] Williams, The Dawn of Law on the Prairies, 131.

and an avowed monarchist who was also anti-French, was soon appointed the first Court Recorder of Rupert's Land. Thom had been attached to Lord Durham's staff in Lower Canada and in London, England. Roy St. George Stubbs has suggested that Thom made a substantial contribution to Lord Durham's Report on the state of the judiciary in Upper and Lower Canada.[37] In 1839, Thom was appointed the first Recorder of Rupert's Land by the Governor-in-Chief of the HBC, Sir George Simpson. Thom also represented an extension of the English government and HBC anti-French policy in Assiniboia. His appointment was meant " ... to put the French Canadians of the West in their place."[38] Shortly after his arrival in 1839, Thom proposed a local code formulated on his notion and interpretation of the law.

In his correspondence to Simpson on 29 May 1840, Thom suggested that it (the code) would,

> ... blend justice with mercy, temper law with equity and reconcile the peculiar circumstances of Rupert's Land with the fundamental principles of the Laws of England.[39]

Throughout his judicial tenure, the laws of Assiniboia were also consolidated and codified in 1841 and 1852. As a judge,

---

[36] Stubbs, 11. Sir George Simpson reported to the Select Committee in 1857 that there had only been nineteen major cases of serious crime in his thirty-seven years as Governor of Rupert's Land.

[37] Ibid., Four Recorders of Rupert's Land, 7. Stubbs even suggested that Thom may have been the author of The Durham Report. His evidence is contained in The Law Times (1890) Vol. 88, p.317.

[38] Supra, Stubbs, 8.

[39] Bindon, "Hudson's Bay Company Law", 56.

Thom was " … a strict legalist … (who) viewed things solely from the legal point of view … from the point of view of the law of the land, namely the Charter."[40] Thom's belief in royal sovereignty and the *rule of law* was entirely suited to his interpretation of the law. The evidence suggests as the sole legal sovereign in Assiniboia, he became somewhat of a judicial autocrat. Thom was also aware of the weaknesses of The Canada Jurisdiction Act of 1803 which, it will be remembered, required an accused to be delivered to Canada for trial in capital felony cases. The Act of July 1821, "An Act for regulating the Fur Trade and establishing a Criminal and Civil Jurisdiction with certain parts of North America,"[41] also extended the jurisdiction of the Courts of Upper Canada into Rupert's Land, Assiniboia and beyond for such trials. Most importantly, however, the weaknesses of the 1803 and 1821 Acts offer an explanation for Thom's actions in Assiniboia.

As justification for his judicial actions, Thom cited the occasion of an accused who could be charged with an offence and who could, subsequently, languish in gaol for

---

[40] Stubbs, Four Recorders of Rupert's Land, 16. Taken from a quote by Professor Arthur S. Morton contained therein.

[41] Morton, 628. See Professor Hamar Foster's article, "Long-Distance Justice: The Criminal Jurisdiction of Canadian Courts West of the Canadas, 1763-1859". On page 5, he suggests that this Act required the Hudson's Bay Company to ensure that those charged with offenses were tried, and those charged with capital offenses were delivered and tried in Upper Canada. Also see Horace Harvey's article, "The Early Administration of Justice in the North-West." Justice Harvey suggests that the 1821 Act did extend the jurisdiction of the 1803 Act, and it was applicable to the Territories granted to the Hudson's Bay Company, 4.

several years. He suggested that the jurisdiction of Canada,

> … even if valid in point of law, is utterly repugnant to justice and humanity … 'Any person or persons guilty' … **accused** - of any crime or offence' may without the intervention of a single magistrate or the guarantee of single affidavit, be dragged to Canada, from the farthest wilds of the North West 'by any person or persons whatever.'… After a period of coercion ranging from six to eighteen months, according to the locality of the crime, and the season of the year, the prisoner … is brought … within the cognisance of the law … if he is formally committed for trial, he must pass several months in gaol before steps can be taken for the summoning of witnesses … he must, under the most favourable circumstances, lie two years longer in the prisons … [42]

Convincing and practical, Thom's rationale had merit. He believed that any law repugnant to the law of England had no force or effect in Assiniboia. His judicial actions and decisions also made several important and controversial contributions to the corpus of law in Assiniboia.

Thom presided over numerous sessions of the Court. Professor Oliver has suggested that Thom, as the Recorder and Judge of the Court of Assiniboia, " … attended twenty-two sessions of the Court"[43] over 12 years. The evidence also suggests that Thom's judicial style on the bench was arbitrary, that he was prone to be quite vociferous, and that he penned long-winded judgments. Perhaps one of the most important judgments rendered by Thom was in the trial

---

[42] Stubbs, 14-5.

of James Calder in August of 1848, in which English common law of Assiniboia and Rupert's Land was deemed applicable to the NWT and the Indian Territories.

The accused, Calder, had been charged with murder and was brought to Red River from the Peace River District (Alberta). In his judgment, Thom defended the applicability and legality of the Royal Prerogative and the granting of the Hudson's Bay Charter. During the trial he found that his Court's authority was fixed solely in the Hudson's Bay Charter and that, in consequence, English statute and common law in the chartered territories was relevant and applicable. Most importantly, however, he found that the Peace River District was within his common law jurisdiction. This precedent decision remained in judicial obscurity until 1886. In the trial of Sinclair v. Mulligan,[44] a case of equity and constitutional law, the force and effect of Thom's judicial reasoning came to bear upon the decision of Mr. Justice Killam of the Manitoba Court of Queen's Bench.[45] In 1888, Adam Thom's and Justice Killam's decisions were also affirmed by the Manitoba Court of Appeal.[46] The

---

[43] Stubbs, 11. Quote taken from the Letters of Letitia Hargrave, edited by Margaret Macleod as contained in Stubbs, footnote no. 27, Re: Adam Thom, 44.

[44] See 3 Man. L.R. 481, (1886). Held: "The laws as to the transfer of property prior to the incorporation of this territory with Canada were the laws which existed in England at the date of the Charter of the Hudson's Bay Co., 2nd May, 1670, so far as such laws were applicable to the condition of the country," 481. Also see Horace Harvey comments on the case in "The Early Administration of Justice in the North-West", 4-5.

[45] 3 Man. L.R. 488.

evidence suggests then, that Thom, as the first Recorder of Rupert's Land, was the first judicial official to promulgate the principle that the laws in force in Rupert's Land were also applicable to the Indian Territories and, by extension, to the NWT. It can also be concluded that the granting of the Hudson's Bay Carter by Royal Prerogative and the imposition of statute law resulted in legal processes and outcomes that were not incongruent with the laws of England.

In 1868, the Imperial Parliament enacted The Rupert's Land Act. Among the provisions of that Act, where that:

> … it should be lawful for Her Majesty … to admit Rupert's Land and the North-Western Territory, or either of them, into the Union … And whereas for the Purpose of carrying into effect the Provisions of the said British North America Act, 1867, and of admitting Rupert's Land into the said Dominion as aforesaid … it is expedient that the said Lands, Territories … so far as the same have been lawfully granted to the said Company, should be surrendered to Her Majesty … [47]

The surrender of the lands by the HBC was to have relieved them of their former judicial responsibilities. It also made possible the acquisition of those lands by the Dominion of Canada. In addition, by the same Act, the Imperial Parliament gave to the Parliament of Canada the sole authority to make laws and constitute courts.[48] This

---

[46] See 5 Man. L.R. 17, (1888). Held: "The laws of England as they existed at the date of the charter of the Hudson's Bay Company, so far as applicable, formed the body of laws in force in this Territory up to the Assiniboia Ordinance of 11th, April, 1862," 17.

[47] Oliver, 937.

important judicial function was a recognition by the Imperial Parliament that the Territories had fully accepted English common and statute law. The statute also provided that magistrates and justices in the Territories would continue " … in full force and effect therein."[49] In 1869, the Parliament of Canada by (C.3 of 32 & 33, Victoria), proclaimed that " … all laws in force in Rupert's Land and the North-West Territory, and all Public officers and Functionaries should continue as such."[50] On 1 December 1870, the NWT became part of Canada and in 1871, Officers of the HBC were appointed JP's for those Territories.[51]

As had previously been the case, the chief factors and Officers of the HBC were still regarded as judicial officials, and were delegated to continue in that capacity. Essentially, however, they officiated at hearings for violations of Company rules. This also affirms the conclusion that HBC law was a form of private justice which was adjudged by common law judicial officials. If other non-Company cases arose, they were to be heard at a central location. "Cases of outrage were tried usually at Red River or Norway House. Murderers were to be sent to Canada for

---

[48] Ibid., 937.

[49] Harvey, 5.

[50] Ibid., 5. Also, see the reprinted proclamation admitting Rupert's Land and the North-West Territory into the " … Union and Dominion of Canada" in Oliver, 898-90.

[51] Oliver, 986, regarding HBC officers as JP's.

trial in accordance with George III, Act 43, Chap. 138."[52] It wasn't until 1873, however, by the authority of Chapter 35 of the Dominion Statutes, that provisions were made for courts and the appointment of additional judicial officials for the NWT, " … by Canadian authority."[53] The transfer of that authority was vested to the Lt. Governor of the NWT, who was also authorized

> … to appoint such and as many Justices of the Peace and Coroners for the North West Territories … and [they] shall have jurisdiction throughout the whole Territories or within any particular district or portion thereof … [54]

In reality, the Lt. Governor and Council were merely replacing the HBC officers in the enforcement and the administration of justice. The difference between the two entities, however, was that the Governor and Council did not enact protectionist legislation for the benefit of a monopoly. Instead, they would enact a multitude of statutory and regulatory ordinances which dealt with the maintenance of civil and criminal matters, the appointing of justices of the peace,[55] and bans on the importation and use of

---

[52] Oliver, 997.

[53] Ibid., contained in the minutes of the Governor and Council, March 10th, 1873. By authority of 34 Victoria, ch.16, the Lt. Governor of the North-West Territories was authorized to appoint Justices of the Peace. Also, see Horace Harvey's article, "The Early Administration of Justice in the North-West," 6.

[54] Oliver, from the minutes of the Council meeting at Government House, Fort Garry, 993-8.

[55] Ibid., 993-8. See the minutes of the Council meeting at Government House, Fort Garry, March 10, 1873. Twenty-one JPs were appointed, many of whom appeared to be current or former Hudson's Bay Company factors including, Richard Hardisty stationed at Fort Edmonton, William L. Hardisty at MacKenzie River, Horace

strychnine, rum and whiskey or other spirituous liquor[56] (wine for Sacramental purposes was exempt). There was even an ordinance specifying that twice a year a JP, a SM, and a judge residing in the Territory were required to submit " … a return shewing all trials and proceedings, civil and criminal, had before him during the preceding six months."[57] It is evident that the enabling statute entrenched a plethora of secular legislation which was meant to meet the growing legal and dispute resolution demands within the Territory.

Finally, the body of law that evolved from these statutes and ordinances did, in fact, foster and encourage the development of a substantive body of common law precedent in the NWT. Throughout the era of the SCNWT, 1887-1907, the common law that developed would both respond and contribute to the social, political, cultural and economic milieu of the NWT. By authority vested to them by the Governor General, however, it would be the Territorial Council of the NWT's that made the provision in the statute law for JP's and SM's to administer the first laws of the Territories.[58] These officials would be the "precursors of

---

Belanger at Cumberland, John Bunn at Rocky Mountain House, George McTavish at Rupert's House, Roderick McFarlane at Athabasca.

[56] Ibid., 995.

[57] Ibid., 1090.

[58] Minutes of the Territorial Council meeting, March 10, 1873 in Oliver, 993-998.

the bench and bar in the NWT."[59]

[59] See, C.C. McCaul. "Precursors of the Bench and Bar in the Western Provinces." In Canadian Bar Review, edited by Charles Morse, Vol. 3. (Toronto: The Carswell Company Ltd., 1925). 25-40.

CHAPTER 3:

The First Common Law Courts: Justices of the Peace, The North-West Mounted Police and Stipendiary Magistrates

When the NWT was created in 1870, Lieutenant Governor Adams G. Archibald was the only legal authority in the NWT.[1] Officers of the HBC, who were JP's with the Hudson's Bay Company Régime, were to have continued in power by the authority of the Rupert's Land Act of 1869. However, it wasn't until March of 1873 that twenty-one JP's were appointed for the NWT and any semblance of judicial authority (at least on paper) became evident.[2] The first JP's in 1873 were in fact HBC Officers who were already strategically positioned at Company posts throughout the NWT. They were authorized to deal with a number of matters which included the suppression of smallpox,[3] liquor violations,[4] the importing of poison, and an all

---

[1] Letter from Lieutenant Governor Archibald to the Secretary of State for the Provinces, Dec. 6, 1870 in Oliver's "Pioneer Legislation." At this time, Archibald did not know if there were any JP's in the NWT, 985-6.

[2] The Legislative records are unclear whether any JP's were active during the period between the inception of the NWT in 1870, and the appointment of twenty-one JP's on 10 March of 1873. If there were any, the most pressing issue was enforcement of the Smallpox Ordinance. See Oliver 977. Also, see the Legislative Records in Oliver, 997. The twenty-one officials were stationed at such diverse locations as Fort Edmonton (Richard Hardisty), Rocky Mountain House (John Bunn), Roderick McFarlane (Athabasca), George McTavish (Rupert's House) among others. All appear to be HBC officials.

[3] See the Ordinance passed by the Lieutenant Governor and Council of Rupert's Land and the North-Western Territories for the prevention of smallpox, Oct 22, 1870, in Oliver's "Pioneer Legislation," 977-78.

[4] According to the provisions of the Dominion Act regarding customs duties, and the prohibition of the importation of spirits into the NWT,

encompassing authority which included " … the vigorous assertion of the law in all cases of crime and disorder."[5] JP's were also authorized to take information's alleging offenses, issue warrants for arrests, summonses, subpoenas, recognizance's, and search warrants.[6]

The HBC officers, however, had no legal training or experience with the English common law or any Canadian criminal law.[7] In fact, the appointments were perhaps a precipitous attempt to establish a system of law and order in the NWT. The minutes of the Territorial Council meeting on 10 March 1873 reflected the situation.

> It shall be lawful for the Lieutenant Governor in Council whenever he shall think fit to appoint such and as many Justices of the Peace and also Coroners for the North West Territories … such Justices and Coroners shall have jurisdiction throughout the whole Territories or within any particular district or portion thereof to be defined and described in the Commission appointing such officer. And such officer shall thereupon be invested with

---

only Constables or Officers of the Law were authorized to seize and confiscate "spirits or strong waters &c. &c." The minutes of the Council meeting on September 8, 1873, however, indicate that there were no "such Officers," and the Council were desirous of amending the Act passed by the Council to empower " … any person to confiscate, spill on the ground, and destroy, any liquor brought into the Territories in contravention of the Law," Oliver, 1003.

[5] Minutes of the North West Council, March 8, 1873 in Oliver, 990-1. It becomes evident that there was little if any enforcement of the laws. See the minutes of the September 11, 1873 meeting where the Council indicate that they had no money at their disposal to enable them to help officials enforce any laws of the Dominion, 1006.

[6] Council minutes, September 13, 1873 in Oliver, 1008.

[7] See Oliver's "Pioneer Legislation". The following is quoted from the minutes of the Council meeting, March 10th, 1873: *"Resolved, - That the Council of the North-West Territories are of the opinion that the Criminal Laws now in force in the other portions of* ***the*** *Dominion of Canada should be extended to the North-West Territories."* Ibid., 997.

> Jurisdiction in the Territories or in any sub-division thereof as the case may be.[8]

The first JP's were also hampered by the absence of an effective enforcement body. The Acts and the judicial appointments were, perhaps, only "window dressings", meant to placate the settlers of the NWT regarding the issues of law and order. In May 1873, however, in response to the need for an enforcement body, and an effective judicial system in the Territories, the North-West Mounted Police (NWMP) were created by central Parliamentary authority.[9]

On 23 May 1873, "An Act Respecting the Administration of Justice, and for the establishment of a Police Force in the North West Territories,"[10] and for the appointment of SM's in the NWT was assented to by Parliament.[11] The following year the Commissioner of the Force was given " … the powers of a Stipendiary Magistrate while the Assistant Commissioner and Inspectors were *ex officio* Justices of the Peace … "[12] with jurisdiction throughout the NWT. Historical

---

[8] Ibid., 994.

[9] See Opening Up the West, "Being the Official Reports to Parliament of the Activities of the Royal North-West Mounted Police Force from 1874 - 1881, by The Commissioners of the RNWMP," (Ottawa: Maclean, Roger & Co. 1874-1881). Contained therein pursuant to 36 Vict., c.35 *ACT OF PARLIAMENT 1873*, "An Act respecting the Administration of Justice and for the establishment of a Police Force in the North-West Territories," iv. Also see *The North-West Territories Act, 1875* in Oliver's Pioneer Legislation, 1088-89.

[10] Ibid., ii.

[11] Ibid., ii.

references reveal a contradiction in facts regarding the initial appointment of SM's. Professor Bowker has suggested that the first SM's were James F. Macleod and Matthew Ryan, who were appointed on 15 November 1875 and assumed office on 1 January 1876.[13] The first Commissioner of the NWMP, George A. French, was appointed in 1873, and by virtue of his office had the powers of an *ex officio* SM in the NWT. There is evidence that he presided as a SM.[14] The second in command, Assistant Commissioner James Farquharson Macleod, however, became an active police and civilian jurist in the NWT.[15] Nonetheless, the "Administration of Justice Act"

---

[12] Bowker, 696. For further commentary see R.C. Macleod. "The benevolent despotism of the NWMP 1874-85." In The NWMP and Law Enforcement 1873-1905. (Toronto: University of Toronto Press, 1976),35. JP's were defined as " … judicial magistrates (of English origin) of inferior rank having (limited) jurisdiction … prescribed by statute in civil matters … and jurisdiction over minor criminal offenses, committing more serious crimes to higher courts" in Black's Law Dictionary, 864.

[13] Bowker, 696. These appointments are as civilian SM.

[14] See _____, A Chronicle of the Canadian West, North-West Mounted Police Reports for 1875 (Calgary: Historical Society of Alberta, ____), 11. Within this report, see the "Return of Magisterial Prosecutions, Punishments, Fines, Etc.," before the Commissioner of NWMP in his supplementary report. Commissioner French presided as a SM on one matter. A trader by the name of W.E. Jones from Winnipeg pled guilty to "Having intoxicating liquor in his possession in the N.W.T." He was fined $50.00, i/d one month imprisonment. The entry is undated, however, it forms part of Commissioner French's annual report. The proceedings would most likely have taken place sometime between 16 June 1875 and 28 November 1875 at Swan River, the site of the first NWMP headquarters.

[15] This conclusion was founded on the writer's research of James F. Macleod's NWMP and his judicial career. See professor R.C. Macleod's article in Frances G. Halpenny, ed. Dictionary of Canadian Biography, Vol. XII. (Toronto: University of Toronto Press, 1990), 672-5. Also, see Captain Ernest J. Chambers. The Royal North-West Mounted Police: A Corps History. (Montreal: The Mortimer Press, 1906), 5-160. See Sherrill MacLaren. Braehead, Three Founding Families in The Nineteenth Century Canada. (Toronto: McClelland and Stewart Limited, The Canadian Publishers, 1986), 264. See _____, "Colonel James Farquharson Macleod, C.M.G." In R.C.M.P. Quarterly, Vol. 1, no. 4. (Ottawa: Royal Canadian Mounted Police, 1944), 141-2. For his judicial career, see the

provided that a SM had superior jurisdiction to that of a JP, and commissioned officers were JP's. A SM had the power of two JP's, and had the authority to hear summary jurisdiction offenses like petty theft and assault. Capital criminal cases were tried in Manitoba.

It was the responsibility of the NWMP to ensure that the statute and common laws were enforced, applied and adjudged. Interestingly enough, the *Force*, which was a symbol of English Imperial authority, law and jurisprudence, was not a product of the localized and customary common law as represented by the magistrates courts, but were "agents of the central government," with authority over "criminal and civil law."[16] It could be argued, however, that the NWMP

---

judicial notebooks of Justice J.F. Macleod, file's, 74.1/252, 253, 254, 255, 256, 257 at the PAA. Also, see his judicial notebooks volumes one through seven for the years 1889, 1890, Feb.-June 1891, and the Supreme Court Sittings, 1890-94, file #M776, Glenbow Museum Archives. Also, see The Territories Law Reports, ed. N.D. Beck, Q.C., Volumes I,II. (Toronto: The Carswell Co., Limited, 1900), for the appeal cases presided over by Justice Macleod. Finally, see the writer's submission on James Farquharson Macleod in Louis Knafla and Richard Klumpenhouwer. Lords of the Western Bench: A Biographical History of the Supreme and District Courts of Alberta, 1876-1990. (Calgary: The Legal Archives Society of Alberta, 1997), 92-94. Macleod had a rigorous, active and interesting police and judicial career. He had been a practicing lawyer, a Lt. Colonel in the Militia, was appointed a Superintendent, Assistant Commissioner, and a JP in NWMP, 1874-76; a civilian SM, January 1876-July 1876; the Commissioner of the NWMP and a SM, July 1876-1880; He was then appointed a full-time civilian SM, 1880-1885; a Judge of the High Court of Justice with precedence, 1885-1887; a Justice of SCNWT, 1887-1894. He died in September, 1894.

[16] Gerald Friesen, The Canadian Prairies: A History (Toronto: University of Toronto Press, 1984), 167. Also, see R.C. Macleod, The North-West Mounted Police and Law Enforcement, 1873-1905 (Toronto: University of Toronto Press, 1976), 4-5. The British common law tradition regarding the creation of a police force was left to the local government. The NWMP were a creation of the federal government, yet the NWMP were imbued with certain judicial ingredients of the common law. For example, select NWMP officers were JP's and the Commissioner an *ex officio* SM.

were the vehicle that transferred the common law from Assiniboia to the NWT and the Indian territories.[17]

The idea of a Mounted Police force for the NWT had been codified in early 1873 by federal statute, 36 Vict., c. 35.[18] The NWMP were created by an Order in Council of 30 August 1873, a resolution which was hastily passed in response to the Cypress Hills massacre. The creation and deployment of the "Force" distinguished the Canadian government's formal effort to apply, enforce, and administer the law in the NWT as an objective of the National Policy. Indeed, it was the primary task of the Force to " ... effectively occupy the West for Canada until the growth of population established Canadian ownership beyond any doubt."[19] This "occupation" was intended to ensure the peaceful settlement and unquestionable proprietorship of the NWT. This occupation was also congruent with the NWMP common law authority.

As previously mentioned, the Commissioner of the NWMP, by virtue of his office, was an *ex officio* common law SM. Non-commissioned officers (NCO's), acting on the authority

---

[17] In 1874, the only SM in the NWT, by virtue of his office, was NWMP Commissioner French. Selected NWMP Officers were JP's. Other members acted as court officials, agents and clerks of the court. They also acted as prison guards, performed escort duties, and enforced the Territorial and Dominion laws.

[18] Opening Up the West, ii - ix. Also, see Thomas, 59.

[19] R.C. Macleod, "Canadianizing the West: The North-West Mounted Police as Agents of the National Policy, 1873-1905," in Essays on Western

of NWMP JP's and both the statute and common law, enforced common law writs and notices, acted as jailers, and delivered prisoners to NWMP guardhouses for trial before their Courts. In addition to their judicial duties, and in response to the frontier milieu, the NWMP also underwent a rapid metamorphosis.

The police assisted new settlers, made recommendations on settlement locations and planting crops, and reported on local weather conditions. They delivered the mail, fought prairie grass fires, and acted as health officers, census takers, and Indian agents. Many distributed treaty payments, enforced the provisions of the Indian Act (including the pass system), and gave dignitaries tours of the countryside.[20] They also conducted extended preventive patrols. These activities added to their reputation and status as icons. Nevertheless, their involvement with settlers, shoulder to shoulder, immersed them in some mundane administration and law enforcement duties, yet their reputation as unbiased arbiters and "gentlemen" remained ubiquitous.

The NWMP were also important symbols of the British Imperial upper-class tradition. The NWMP perceived

---

History, ed. Lewis H. Thomas (Edmonton: The University of Alberta Press, 1976), 103.

[20] Friesen and Macleod speak about the "European" role of the NWMP as agents of the "central government." However, the NWMP members, like the

themselves, and were considered by the settlers, as an elite body of men who were members of the Canadian "gentry".[21] As members of a British colonial police force in Canada, they also promoted Canadian values concerning law and order.[22] These values were consistent with the English law and order tradition which was propagated throughout the British Empire in the second half of the nineteenth century.

Although some officers were readily compromised in the heat of close community involvement, the NWMP were regarded to have dealt effectively with outlaws and First Nations. Their training and values, for the most part, appear to have allowed them to sustain respectable, even admirable behaviour. Chief Crowfoot (Blackfoot), in response to the threats to his peoples' health and welfare through the actions of the whiskey trader, said:

> … [i]f the Police had not come to the country, where would we all be now? Bad men and whiskey were killing us so fast that very few, indeed, none of us would have been left today. The Police have protected us as the feathers of the bird protect it from the frosts of winter … [23]

English village constables, were also an integral part of the local and customary life on the Prairie West.

[21] Gerald Friesen, The Canadian Prairies: A History, 168-9. Also, see R.C. Macleod's analysis, where he concludes that " … [p]olice officers considered themselves very much a part of the upper class of western Canada," 79, 81. Officers, as JP's were the gentry class in NWT. Also, see Sir William Blackstone's definitive assertion that a JP was a member of the gentry and " … distributed justice to his fellow-subjects" in The Sovereignty of the Law, 6-7.

[22] Macleod, 4, 8-10; Friesen, 163-70.

[23] Hugh A. Dempsey, Crowfoot: Chief of the Blackfeet (Norman: University of Oklahoma Press, 1972), 103.

The important contribution by the NWMP to the judicial system of the NWT, however, was providing a permanent common law court system, though their courts were only of summary jurisdiction.

In October, 1874, shortly after his arrival at Fort Macleod, Assistant Commissioner James F. Macleod in his capacity as a JP, presided in what was perhaps the first recorded trial in the NWT. Macleod oversaw the trial of Harry Taylor and William Bond "et al", who had been charged with unlawfully importing and possessing whiskey.[24] Albeit, the only record of the trial is a letter from Macleod to Commissioner French dated October 30, 1874, the events recounted from Macleod's letter state:

> I am happy to be enabled to inform you that … we have been able to carry on some police work as well, and have struck a first blow at the liquor traffic in this country … I gave Mr. Crozier (an Inspector in NWMP) written instructions to guide him; amongst others, to seize all robes and furs of any kind which he suspected had been traded for liquor, and in addition a sufficient amount of goods and chattels, to satisfy the fine which in each case might be imposed … Mr. Crozier executed his mission in a most satisfactory manner … He found the five in possession of two waggons, each of them containing cases of alcohol, and brought the whole party with their waggons, 16 horses, 5 Henry rifles, 5 revolvers and 116 buffalo robes, into camp. I confiscated the robes, and tried each of the prisoners, for having intoxicating liquors in their possession … All the inspectors sat with me to try the cases. I fined the two principals and Bond, who

---

[24] Contrary to Sec. 74, ss. 5 of the NWT Act, 1875, Oliver 1093-95.

was their interpreter and guide, $200 each, and the other two $50 each."[25]

Macleod and his police court also established several other firsts in the Territories.

Macleod, by seizing and confiscating the robes and other articles, exercised his judicial discretion when he interpreted the serious nature and intent of the NWT legislature regarding the prohibition of liquor in the Territories. This judicial interpretation of legislative intent was without precedent in the NWT. The Parliament of Canada had authorized the Lt. Governor and Council of the NWT, to enact laws for the peace, order and good government of the NWT, and the Ordinance prohibiting the sale of Liquor had been promulgated on the English common law doctrine regarding the supremacy of Parliament to enact laws.[26] Macleod also introduced another important common law precedent. Macleod, who presided with two NWMP inspectors including Crozier presided over the first judicial proceedings based on statute law in the NWT. Indeed, the

---

[25] Captain Ernest J. Chambers, The Royal North-West Mounted Police: A Corps History (Montreal: The Mortimer Press, 1906), 31. Also, see Sir Cecil E. Denny's, The Law Marches West, ed. W.B. Cameron, (Toronto: J.M. Dent and Sons (Canada) Ltd., 1972), 45. This excerpt is a reprint from Macleod's letter in the Commissioner's annual reports found in the book Opening Up the West, 60.

[26] See Oliver, Pioneer Legislation: "Whereas the giving, selling, or bartering to Indians of spirituous liquors is subversive of public order and dangerous to the public peace and the use or sale of such liquor in the North West Territories is detrimental not only to the Indian population by to the other residents therein," 995. Enacted 10 March 1873. Also, see L.A. Knafla's article in Calgary Herald, 14 October 1996, A14.

seizure and forfeiture of alcohol, wagons, horses, and buffalo robes constituted an action unique to the geographical and cultural context of the Territories. Besides the police court at Fort Macleod, there were other NWMP courts functioning in the Territories.

In 1875 at Fort Carlton (Sask), Inspector L.N.F. Crozier presided as a JP. At one trial, the accused Alexander Stewart and one Kelly had been charged with possession of intoxicating liquor. Both had pled not guilty and were found guilty after their respective trials. Stewart was fined $200, and Kelly fined $250 and $50 witness fees. On the other hand, many disputes were settled without resort to the Mounted Police courts. At Fort Walsh, Crozier reported that " ... many disputes were settled to the satisfaction of justice without going through the legal process."[27] Another member of the NWMP, Superintendent Herchmer, also acted as a JP.

Herchmer was stationed at Battleford and presided over the trial of two Indians from Frog Lake. It can be concluded, however, that Herchmer's role was somewhat offensive to the common law.[28] He writes, "I tried them at Fort Pitt, sentenced them, and brought them on to

---

[27] Bowker, 702.

[28] The legal basis for the totality of Herchmer's actions were tenuous. Although he had the statutory authority to do all the things he did, the

Battleford."[29] Herchmer apparently arrested the two, delivered them to the guardroom, tried them, and then escorted them to prison. Interestingly enough, this type of justice was still prevalent in 1880, four years after civilian SM's were active in the Territories. In addition, there were several other inconsistencies in the role of the NWMP.

The NWMP resonated with *judicial despotism*. During the first formative years of 1874-1878, NWMP members were authorized by statute to apprehend and arrest offenders for any violation of a Territorial Ordinance.[30] NWMP officers acting as JP's would summarily try the accused, find guilt or innocence and pass sentence. Non-commissioned officers (NCO's) acted as court prosecutors, and with constables were also gaol-keepers. In effect, the NWMP administered a form of justice which provided the law enforcement, prosecution, witnesses, gaol officials and, judges. Perhaps NWMP officers were even prone to a certain amount of bias when imposing sentence on an accused.[31] In that regard, then, the NWMP

---

multiple roles he combined would by this time be regarded as offensive to the "common law."

[29] Bowker, 703.

[30] Opening Up the West, "An Act respecting the Administration of Justice, and for the establishment of a Police Force in the North West Territories," Chap.35, Sec.19, ss. 1.

[31] See Opening Up the West, Commissioners reports (1878), 28-29, (1879), 36-40, (1880), 18-20. The evidence from these reports indicates that in many instances, convicted individuals were fined and/or in default sentenced to NWMP gaols with hard labor. Prisoners were given "fatigue

served as permanent system of law enforcement, provided judicial administration, and operated courts of competent criminal and civil jurisdiction which rendered a topical common law for the Territories.[32] In addition, certain NWMP officers, acting as JP's, were qualified lawyers.

Assistant Commissioner J.F. Macleod, Inspector L.N.F. Crozier,[33] and Superintendent W.M. Herchmer[34] were all former lawyers who had practiced in Ontario. They were the ablest civilian or police practitioners available who were qualified to sit as judicial officials (JP's) in the NWT. In 1876, however, Macleod left the NWMP after he was appointed a full-time, federal civilian SM for the NWT. Macleod was born in Scotland, educated in Upper Canada, had practiced law in Ontario, and had served as Assistant Commissioner of the NWMP. His judicial headquarters were situated at Fort Macleod.

After six months as a SM, however, he returned to the NWMP as the Commissioner of the Force, retaining his full-time judicial appointment as a SM. The evidence indicates that Macleod, as Commissioner of the NWMP, and as a police

---

duties" which included cleaning, working and building NWMP detachment quarters.

[32] Sentences to NWMP guardrooms became prevalent until the early twentieth century. This conclusion is based on the review of judicial notebooks and sentencing reports in the NWT.

[33] Frances G. Halpenny, ed., Dictionary of Canadian Biography, (Toronto: University of Toronto Press, 1990), volume XI, 672, and XII, 232.

SM presided over all manner of judicial proceedings. The 1878 commissioner's report reveals that for " … the southern district … Macleod with Inspector Crozier and a jury of six tried a man on 3 separate charges of stealing a horse. The accused was convicted and given 3 years hard labor."[35] The record does not indicate whether the sentence was concurrent or consecutive. Collateral with his authority as a SM, Macleod also presided over civil court matters, " … one at Fort Macleod, and the other at Fort Walsh. The cases were all 'matters of account.'"[36] Macleod, and several other NWMP officers acting in their capacity as JP's, also presided over thirteen other criminal cases.[37] In 1879, Macleod again presided at Fort Walsh and Fort Macleod on civil court proceedings. He noted on his report, " … claims for over $8000 have been entered and adjudicated upon."[38] In criminal court, Macleod appears to have tempered his judicial

---

[34] Herchmer studied law at Osgoode Hall, articled and practiced law in Kingston: Dictionary of Canadian Biography, Vol. XII, 427.

[35] Bowker, 701. See Opening Up the West, NWMP Commissioner's Reports, 1874-1881, ed. W.L. Higgitt (Toronto: Coles Publishing Company, 1973), 28-29. The accounts are also contained in the diary of William Parker Mounted Policeman, ed. Hugh A. Dempsey (Edmonton: Hurtig Publishers, 1973), 44-9. The convicted man was James Brook, alias "Slim Jim" who stole 30 horses belonging to J. Hughes, J. Bastion and J. Smith of Fort Macleod. Brook was tried and convicted at Fort Macleod and sentenced to Stony Mountain Prison in Manitoba. The excerpts from William Parker's diary recount the events in graphic detail. Parker also escorted the convict to Stony Mountain Penitentiary.

[36] Bowker, 702.

[37] Opening Up the West, 28-29. The 1878 Commissioner's report which shows the other cases involved were offenses regarding firearms, assaults, theft of horse and wagon, aiding the escape of a felon, intoxicating liquor and larceny. Also, see Bowker, 701.

decisions with mercy.

The Reports indicate, for example, " … case dismissed for want of evidence … charge withdrawn and prisoner released … prisoner cautioned and released … prisoner discharged; no proof of felonious intent."[39] This evidence suggests that Macleod followed the prescribed form of common law rules of evidence. He sometimes found that police evidence in the NWMP courts was not always credible, or was vague, faulty, or irrelevant. This also suggests that the police judiciary (JP's) or, in the case of police SM Macleod were not biased, and that proceedings were not as weighted against an accused as it might seem. This was remarkable considering there were few, if any practicing lawyers in the district who might represent or defend an accused. The police courts were not "Kangaroo Courts"[40] during this formative period.

A review of the Court calendars and archive materials[41] reveals that during the period 1874-1881, most charges were for importing or possessing or selling liquor, theft and

---

[38] Bowker, 702.

[39] See Opening Up the West, Being the Official Reports to Parliament on the Activities of the RNWMP, 1874-1881 (Toronto: Coles Publishing Company, 1973), 28-29 (1878), 36-39 (1879). Also, see Bowker, 701-2.

[40] See Black's Law Dictionary. Term descriptive of a sham legal proceeding in which a person's rights are totally disregarded and in which the result is a foregone conclusion because of the bias of the court or other tribunal, 868.

assault. A number of the accused individuals were acquitted. Of those convicted, most were fined and a few received prison sentences.[42] Even when the civilian SM's were presiding in the NWT, the NWMP courts continued to function as courts of first instance. On the other hand, there were only three SM's in the NWT's and their assize circuit encompassed present day Alberta and Saskatchewan.

The second civilian SM appointed on 1 January 1876 was Matthew Ryan Esq.[43] Ryan was originally from Newfoundland and studied law in Montreal. His judicial headquarters was located at Swan River, and after a short tenure as a SM, he was dismissed due to " … an unsatisfactory state of the administration of justice in the district presided over by Mr. Ryan."[44]

On 22 July 1876, the third civilian SM appointed in the Territories was Lieutenant Colonel Hugh Richardson.[45] Richardson was born in London, England, and came to Canada at the age of five. He was admitted to the Upper Canada bar in 1847, and practiced at Woodstock from 1852 to 1872,

---

[41] Opening Up the West, 1877-1881. A review of the recorded liquor cases reveals that there were 57 liquor related offenses that came before the courts.

[42] Bowker, 703. Those receiving prison sentences most likely served their sentences at NWMP guard-rooms, where prisoners were employed as menial-task labor at the barracks. Also, see the NWMP court proceedings and dispositions in Opening Up the West, 1877-1881.

[43] Pursuant the provisions of 36 Vict., c. 35 (1875).

[44] Bowker, 700.

serving as crown counsel from 1856 to 1862. These three magistrates were assigned jurisdictions, places of residence and were paid $3000 a year.[46] The judicial authority of these new SM's was more extensive and encompassing than those of a JP. SM's were to " … exercise functions within the North-West Territories, the magisterial, judicial and other functions appertaining to any Justice of the Peace, or any two Justices of the Peace under any laws or ordinances."[47] The appointees possessed *plenary* authority, which included all the authority and jurisdiction that was required for any given case throughout their jurisdiction. C.C. McCaul retells how Macleod viewed the extent of his jurisdiction.

> If I am driving over the prairies in any part of the Territories, and a couple of men should happen to meet me with a dispute to be settled, I can then and there convert my buckboard into a Bench, hear the evidence and give judgment.[48]

In addition to their expanded authority, the magistrates were the first civilian judicial officials independent of the NWMP. The judges exercised almost unlimited jurisdiction in criminal and civil cases when they

---

[45] See The Territories Law Reports, Vol. 1, ed. N.D. Beck (Toronto: The Carswell Co. Ltd., 1900).

[46] The literature does not indicate whether Macleod, as an *ex officio* SM was paid the extra $3000 in addition to his salary as Commissioner.

[47] Oliver, 1089.

[48] C.C. McCaul, "The Constitutional Status of the North-West Territories of Canada," in 2 The Canadian Law Times, (1894), vol.IV, 4.

presided with a judge of the Court of Queens Bench.[49] Otherwise, their summary authority (without jury intervention) extended to offenses where penalties did not exceed five years in gaol. Offenses with penalties in excess of five years but not punishable by death, could be heard either summarily (judge alone), if the accused agreed, or by a judge and jury if the accused requested. A jury panel was to be comprised of six persons, and in cases where the death penalty might be imposed a jury panel was not to exceed eight.[50] Since these courts had both local and Territorial jurisdiction, an interesting sentencing option was available for the presiding judge. Individuals could be sentenced into police custody and be available for hard labor if it was deemed impossible or inconvenient to deliver the prisoner(s) to gaol.[51] This sentencing procedure was one of the first precedents established by NWMP courts that was subsequently transposed to the superior courts.

After his NWMP career ended in 1880, Macleod continued to preside as a civilian SM with his own assize court. In a

---

[49] Ibid., 52. As such, they could be required to defer to the superior common law authority of the Court of Queen's Bench of Manitoba. In these matters they were required to appear as an associate with the Chief Justice or any Judge of the Court of Queen's Bench. Stipendiary magistrates with a Justice of the Manitoba Court would have " … power and authority to hold court under Section 59 (civil and criminal jurisdiction) … to hear any charge against any person for any offense alleged in the North-West Territories," Oliver, 1089.

[50] Ibid., 1089.

[51] Ibid., 1091.

most unusual case, Macleod (the senior magistrate), and Superintendent Crozier (JP) presided at a murder trial at Fort Macleod in October 1881. A jury of six men[52], five of whom were former Mounted Policemen, sat in judgment over the Blood Indian Starchild. The accused had been charged with the murder of NWMP Constable Marmaduke Graburn. Remarkably, the accused was eventually found not guilty for lack of evidence.[53] In his charge to the jury, Macleod reminded them that they " … were under oath to give [their] our verdict according to the evidence and if we had any reasonable doubt we should give the prisoner the benefit of it."[54].

The trial was the first murder trial for Macleod, as well as the first murder trial in the Territories since the arrival of the NWMP. It was also the first jury trial where a majority of the jurors were former members of the Mounted Police, and was perhaps the only murder trial where a former NWMP officer and a serving NWMP officer sat in judgment over an Indian charged with killing a member of the Force. Public sentiment for revenge was running high, and reportedly " …

---

[52] O. Hood Phillips, The First Book of English Law, 6th Ed. (London: Sweet & Maxwell, 1970,) 33. The trial by the *petite* jury in English criminal cases can be traced " … back to the thirteenth and early fourteenth centuries," and was part of the inherited English common law tradition in the NWT.

[53] Sir Cecil E. Denny, The Law Marches West, provides an account of the incident from his recollections, 141. For a first hand account of the trial proceedings, see juror E.H. Maunsell's recollections in John Jennings, "The Plains Indians and the Law" in Men in Scarlet, 60.

[t]he whole country was crying out for vengeance … ."[55] Macleod, however, set the tone for the trial and did not allow any anti-Indian sentiment by the public or the NWMP to influence or control the trial proceedings. Indeed, his charge to the jury iterated the most basic and fundamental common law tenet known in English criminal law: "Guilt must be proven beyond a reasonable doubt."[56] By citing this tenet, Macleod placed along with the other basic elements of a criminal procedure, a body of topical common law into the law books of the NWT.

While Macleod did not allow Starchild to be tried by a panel of "his" peers, he appears to have followed the *rule of law* and sanctioned only relevant and factual evidence, and disallowed any hearsay evidence. Macleod applied his knowledge of English criminal trial procedure to the proceedings, and through his actions, formulated precedent trial procedures for future generations of magistrates and judges in the NWT. Like his judicial colleague Hugh Richardson, every early case they presided over contributed to the formulation of precedents relating to the NWT. A minor exception, however, initiated by Hugh Richardson, was an abuse of his office of SM and of the independence of the

---

[54] John Jennings, "The Plains Indians and the Law" in Men in Scarlet, 60. This is a recount by a juror of the charge by Macleod.

[55] Ibid., 60.

[56] Ibid., 60.

judiciary.

Although he was appointed in July 1876, Richardson didn't commence his judicial duties at Battleford until the fall of 1877. He spent six years on his assize circuit which included Fort Battleford, Fort Pitt, Fort Edmonton, and Victoria and the evidence indicates he did an outstanding job.[57] His actions in one case regarding a NWMP sub-constable in March of 1878, however, bordered on a flagrant abuse of his judicial position. Richardson's daughter, Luders Richardson, who was under the age of twenty-one, had fallen in love with sub-constable Elliot. Richardson forbade the relationship and eventually the two eloped.[58] Outraged, Richardson initiated a judicial process which was clearly contrary to his position as a judge. He acted as a police investigator, prosecutor, and trial magistrate. He initiated proceedings by writing out, and then affirming on oath, several criminal charges against Elliot. He then personally delivered the charges to Superintendent James Walker who was in charge of the NWMP post at Battleford. Richardson ordered the arrest of Elliot, and his appearance before Walker as a

---

[57] Richardson performed a variety of tasks in addition to his judicial duties. He contributed to the writing of the Territorial Ordinances, undertook and completed a census of the Edmonton district in 1882, and advised individuals regarding selected matters outside the courtroom. In 1887, Richardson was appointed the senior Judge of SCNWT which speaks to his competence as a judge. See Bowker's article on Justice Richardson, 707-714.

JP. Three formal charges had been sworn.

The charges included felonious and fraudulent allurement, abduction, and possession of a female under the age of twenty-one against the will of her father.[59] Elliot was also charged under the NWMP Act for " … disgraceful, profane or grossly immoral conduct … ".[60] It was remarkable that Richardson charged Elliot under the NWMP Act which was administered and enforced by the senior officers of the Force. The incident suggests some collusion with Superintendent Walker. Consequently, Elliot and several other members, who were alleged to have assisted Elliot, deserted the NWMP and stole several NWMP horses and saddles, including Walker's. In September 1878, Elliot surrendered and was delivered to Battleford to stand trial. Richardson and W.J. Scott JP,

> … presided with a jury of six. Walker was the prosecutor (and also a witness) while Hayter Reed, the Indian agent at Battleford and also a lawyer, defended Elliot … [t]he Stipendiary Magistrate charged the jury at some length and very strongly against the prisoner, after which the jury retired. After about five minutes deliberation they returned a verdict of not guilty.[61]

---

[58] It is interesting to note that the courtship began in January-February of 1878, shortly after Richardson and his family settled at Battleford. See Bowker, 708-09.

[59] Contrary to Offenses Against the Person Act, 32-33 Vict., c. 20, s. 54, Bowker, 708-10. Bowker has reconstructed the events from evidence gleaned in the Saskatchewan Archives, R-85 I 10.

[60] Ibid., 709.

[61] Ibid., 710.

The disposition of the other charges of theft is unknown and this incident has also remained in judicial obscurity. However, questions can be raised regarding Richardson's impartiality in subsequent judicial proceedings. Nonetheless, he continued as a SM and was later appointed a member of the SCNWT with judicial precedence.

Another SM, Matthew Ryan, encountered difficulties during his judicial career. Ryan had been appointed SM in January of 1876 and left the judiciary in July 1881. He was somewhat of a loner and " … showed hostility to Macleod and Richardson."[62] He also quarreled with police officials at Swan River and was perceived by government officials as a trouble maker. He was subsequently investigated by a judicial commission and was granted a leave of absence. Consequently, he left the judiciary. In 1881, because of Matthew Ryan's departure, Richardson took over these duties in addition to his own until September 1883.

Like Macleod, Richardson presided over all manner of court trials.

> Civil sittings were separate from the criminal and involved actions in debt, account, replevin, partnerships and torts. The sittings were at Prince Alberta in January and May, at Regina in April, August and October, and at Fort Qu'Appelle in April and August, and at Edmonton in July. The lists were lengthy.[63]

---

[62] Bowker, 699.

[63] Ibid., 713.

In 1883, Richardson moved his headquarters to Regina, and he continued to travel the eastern part of his circuit alone. In the summer of 1885, Richardson presided over the most notorious and controversial trial ever conducted during the formative years of the NWT. Louis Riel[64] was tried for his part in the 1885 Rebellion by Richardson and a jury of six, who found him guilty of treason. Riel was subsequently hanged. There is cause for continued speculation on the outcome of the Riel trial because of Richardson's prior blemished record.[65] Numerous other members of the Riel rebellion were either tried by Richardson at Regina or Judge Charles B. Rouleau at Battleford.

Rouleau had been educated in Quebec, was a member of the Quebec bar, and had been a magistrate in Ottawa. In September 1883, he took over Richardson's assize circuit at Battleford. Rouleau presided as a SM in numerous trials including those of the Indians charged with the killings at Frog Lake in 1885.[66] The record indicates that Rouleau continued as SM and was an exemplary model of judicial impartiality.[67] As a judge of the SCNWT, however, Rouleau's

---

[64] See Regina v. Riel, (1885) 1 Terr. L.R. 20;

[65] Bowker, 718. Professor Bowker suggested that Richardson " … acted with dignity, spoke little and did not demonstrate hostility to Riel, though one can guess that he felt it … "; Professor Lewis H. Thomas described the Riel trial as "judicial murder."

[66] See vol. XII, Dictionary of Canadian Biography, 908. Also, see Bowker, 714, 718.

background at the Quebec bar may have sometimes obscured his judicial reasoning, and was most likely the cause for several appeals from his trial decisions.[68] In September of 1885, another SM, Jeremiah Travis was appointed and assigned the judicial district of Alberta with headquarters in Calgary.

Travis, who enjoyed considerable reputation, had a questionable legacy. He appears to have been somewhat of a religious, moral zealot. For example, he rigidly followed the *rule of law* when applied to the Territorial Liquor Ordinance. On 11 November 1885, shortly after his arrival in Calgary and in an apparent attempt to make an impression on the population, Travis sentenced hotel owner S.J. Clarke to gaol for six months with hard labor. Clarke had been convicted on charges of obstructing a peace officer and resisting a search warrant.[69] Travis also clashed with the editor of the Calgary Herald, Hugh Cayley, on 6 January 1886, over a negative editorial on the judge. Travis found him in contempt of court, and fined him $400 with costs of

---

[67] See Bowker at 718: "Some persons thought Rouleau was more lenient than Richardson …". Also, see *Regina v. Riel*, 1 Terr. L.R. 20, (number 1, 1885). There are reconstructed accounts in John G. Donkin's book Trooper in the Far North-West (Saskatoon: Western Producer Prairie Books, 1987), 139-144, and Captain Ernest J. Chambers, The Royal North-West Mounted Police: A Corp History (Montreal: The Mortimer Press, 1906), 92-95.

[68] From the author's review and analysis of Rouleau's decisions as a Justice of the SCNWT. There are several decisions reviewed in Chapter 5. Rouleau's judicial notebooks at the Provincial Archives of Alberta (PAA) in Edmonton do not contain any of Rouleau's judgments as a SM.

$100. Cayley refused to pay the fine and went to gaol in protest. He was released on 27 January 1886. Travis also interfered with the political process when he declared the Calgary municipal election of 1886 null and void. He fined the mayor $212 and each councilor $100.[70] Travis even went so far as to criticize his contemporary, SM Rouleau, accusing him of being a drunk. The accusations were proved false, and Travis soon left the bench in disgrace.[71] The evidence revealed that although he became notorious, Travis made no substantive contributions to the development of the common law in the Territories.

On 18 December 1885, SM's in the NWT were appointed Judges of the High Court of Justice.[72] The remaining judges of the High Court - Macleod, Richardson and Rouleau - were the precursors of the Justices of the SCNWT. Whereas Macleod was the judge with precedence in the former High Court of Justice, Hugh Richardson was appointed with " … rank and precedence before the other Judges of the said Court."[73] In addition, Edward Ludlow Wetmore and Thomas Horace McGuire were also appointed to the Supreme Court. These appointments

---

[69] Bowker, 715.

[70] See the Calgary Herald, 14 October 1996. Professor L.A. Knafla's article on Travis in "Reflections on the Past and the Present," A14.

[71] See Wilbur F. Bowker's account of the Travis incidents, 715-17. Also refer to the Calgary Herald and Professor L.A. Knafla's article.

[72] 1 Terr. L.R., vi.

[73] Ibid., vi.

would inaugurate a new era of jurisprudence for the NWT. Members of the SCNWT would actively invoke, follow and apply principles, doctrines and precedents from English statutes and common law, and soon they developed a body of common law germane to the social, political, cultural, and economic milieu of the NWT.

CHAPTER 4:

In 1886, the NWT Act was amended and the Lieutenant Governor in Council declared that the laws of the NWT were the laws of England as of 15 July 1870.[1] While the reception date of English law after 1870 had not been defined previously, this Act confirmed the existing statute law in the Territories and facilitated the continued application of English common law.[2]

Pursuant to sections 4, 5 and 6, the Act established a Supreme Court of five judges (without a Chief Justice).[3] The three stipendiary magistrates -- Macleod, Rouleau and Richardson -- were appointed to the Supreme Court as were two new appointees, Edward L. Wetmore and Thomas H. McGuire.[4] Wetmore, who was from New Brunswick, had been a

---

[1] The N.W.T. Act c. 50. See Oliver's published documents which contain the former North-West Territories Act, 1875 Chap. 49, "An Act to amend and consolidate the Laws respecting the North-West Territories," assented to 8th April, 1875, 1075.

[2] Professor Bowker suggested that it was of " ... such significance in Alberta's constitutional development that it was published with other Canadian and some Imperial statutes as late as the 1955 Revised Statutes of Alberta ... section 3 declared the laws of the Territories to be those of England as of 15 July, 1870 insofar as the same are applicable to the Territories." Bowker, 719.

[3] Ibid., 719.

[4] See 1 Terr. L.R. vi., "Judges of the Supreme Court of the North-West Territories." The jurisdiction of the Court was both original and appellate. Section 14 of the NWT Act conferred upon the court the powers of a superior court of civil and criminal jurisdiction. Section 5 of the Ordinances of the NWT (1886) was also congruent with the federal statute. "The jurisdiction of the SCNWT ... shall be exercised as nearly as may be as in the High Court of Justice in England," 7. The jurisdiction of the SCNWT then, was the same as the Courts of Common Law in England, which included the Court of Queen's Bench, Common Pleas, Exchequer, Chancery and Probate.

solicitor (not a barrister) there 1863-1881, Mayor of Fredericton 1881-1883, a Commissioner for consolidating the New Brunswick statutes, and an MLA 1883 - 1886.[5] McGuire was from Kingston, Ontario, where he practiced as a barrister. All five Justices presided *en banc* twice a year at Regina,[6] and each had his own *assize* district.[7] Pursuant to section 8 of the NWT Act, each justice presided as a judge " … of a Superior Court of civil and criminal jurisdiction … with jurisdiction throughout the Territories."[8] The five *assize* districts included eastern and western Assiniboia, Moosomin and Regina headquarters, southern and northern Alberta, Fort Macleod and Calgary headquarters, and Saskatchewan with Battleford as its headquarters.[9] All judicial matters that came before the justices *en banc* were appeals from the lower courts including the courts of revision[10], police magistrates and JP's, SM's, and reference or appeal cases from the justices on their *assize* circuits.

The Justices also presided over legal disputes or other

---

[5] Bowker, 722.

[6] See N.W.T. Act, s.15.

[7] Section 17, N.W.T. Act. On *assize* the justices also heard appeal from inferior courts.

[8] Section 8, N.W.T. Act.

[9] 1 Terr. L.R. xix. Also see Bowker 719.

[10] Courts of Revision decided municipal, school and county taxation assessments. Also, see 5 Terr. L.R. 192 in "Re: Canadian Pacific Railways and Town of Macleod", 5 Terr. L.R. 459 in "Re: P. Heiminch v.

legal matters in chambers. These hearings were usually procedural issues or arguments over judicial forms, authorities, or applications by legal counsel regarding judicial rules or guidance.[11] On *assize* circuit, the justices presided over summary trials (judge alone), jury trials, or appeals from the decisions of the Territorial courts.

When formulating their judicial decisions, the first generation of justices often referred to a diverse collection of legal materials which included, but was not limited to, Paley on Convictions, the NWT Act, The British North-America Act, and Canadian, American, Australian and English law reports. In virtually every appeal case in the Territorial Law Reports (TLR) there was extensive reliance and reference to English cases. The justices also referred to Admiralty law, the English Mutiny Act, the Canadian Criminal Code after 1892, Phillimore's Private International Law, the Territorial Ordinances, and their own decisions.[12] On occasion, the justices sometimes complained strongly that they had inadequate reference materials. In 1895 for example, Justice Wetmore stated,

---

The Town of Edmonton," and 5 Terr. L.R. 462 in "Re: Isabella Heiminch and the Town of Edmonton."

[11] See 5 Terr. L.R. 458, Lasser v. Bauer, 5 Terr. L.R. 491, Smith v. MacFarlane (No. 1), 6 Terr. L.R. 298, Dominion Bank v. Freedt. All proceedings were in chambers.

[12] See 1 Terr. L.R. 186, (1889); 2 Terr. L.R. 9, (1893), 2 Terr. L.R. 177, (1895).

(total 220, 158 civil law and 62 criminal law)[16], there had previously been a summary or jury trial that was appealed. By comparing a number cases on *assize* that did not appear on the *en banc* court calendar,[17] the evidence conclusively reveals that a minority of the cases made it to the appeal court. Indeed, leave to appeal[18] had to be granted by the court *en banc* as they were the court of final appeal or last resort, and their decisions were binding on all courts in the NWT. Thus, the legal principles, doctrines, precedents, and law flowing from the proceedings of the court on *assize* and *en banc* became the common and precedent law of the NWT.

The proceedings reveal that the justices had a strong belief in the supremacy of the *rule of law.*[19] They also overwhelmingly affirmed the supremacy and legitimacy of the English and Canadian Parliaments of the Imperial and Dominion governments. In addition, they exercised discretionary justice where laws, rules, doctrines or precedents were applied to meet the particular or individual circumstances of litigating parties. Any appeals from the decisions of the court were made to the Supreme Court of

---

[16] The remainder are *assize* appeals and other issues.

[17] PAA accession file 79.266. From 27 May 1887 - 9 Jan 1891 for the Northern Alberta Judicial District alone there were 1064 civil *assize* cases.

[18] See Black's Law Dictionary. Leave to appeal means "Permission or authorization to do something," 890.

[19] Supra, Chapter 1, page 1.

Canada (SCC) in Ottawa or the Judicial Committee of the Privy Council (JCPC) in England, but heard only if those judicial bodies granted the leave to appeal.[20]

THE CIVIL LAW COURTS

The evidence from the TLR reveals that there were four times as many civil cases heard *en banc*, on *assize* or in chambers, as there were criminal cases.[21] Civil cases included mainly the following subjects: company law and private law issues, actions for damages against companies, negligence, breaches of contract, corporate, municipal taxation assessments, master and servant relations, real estate, mortgages and land titles, liens for wages, wrongful dismissal, libel, and alimony. The civil cases reviewed below are the substantive evidence for, and a reflection of, the conflict inherent in the growing population of the NWT. They also reflect the absence of an alternative dispute resolution process in times of extensive commercial and economic growth. Perhaps the most influential determinant in the growth and evolution of the commercial component of the civil law in the NWT was the Canadian Pacific Railway (CPR).

Between 1887 and 1907, the CPR was implicated in

---

[20] Supra, note 18 of this chapter.

[21] The research conducted by the author on the TLR volumes 1-7, from November 1996-March 1997. The cumulative results are five hundred and twenty-one cases in civil law and ninety-three cases in criminal law.

fourteen civil cases on *assize* and *en banc*.[22] Several of the cases included actions in damages for injuries caused by the negligence of the company,[23] for animals destroyed by its trains,[24] and an action for the negligence of a train engineer when he traveled at a dangerous rate of speed through a municipality.[25] The CPR cases also broke new ground at common law in the NWT, and such was the case in 1887 when the court *en banc* heard one of its first appeal cases, Walters et al v. The Canadian Pacific Railway Company.[26]

The Walters case was an action for non-delivery of the plaintiff's goods which he had requested to be stored in the Company warehouse. The CPR had acted both as common carrier and as warehousemen, and the issue litigated was whether the CPR had discharged their duty and liability before the loss of the goods. This case was a significant legal episode in CPR history as they were the main source of rapid transportation in the Prairie West, and any adverse decision would affect their operating viability.

---

[22] See TLR for the CPR civil cases. They are: 1 TLR 88, 4 TLR 227, 5 TLR 60, 5 TLR 123, 5 TLR 143, 5 TLR 187, 5 TLR 190, 5 TLR 420, 5 TLR 503, 6 TLR 168, 6 TLR 420, 6 TLR 423, 7 TLR 56, 7 TLR 327.

[23] See Finlay v. CPR, 5 Terr. L.R. 143, Kenny v. Canadian Pacific Ry. Co., 5 Terr. L.R. 420.

[24] Eggleston v. Canadian Pacific Railway Co., 6 Terr. L.R. 168.

[25] Andreas v. Canadian Pacific Railway Co., 7 Terr. L.R. 327.

[26] 1 Terr. L.R. 88.

In its decision, the court cited numerous English precedents. Justice McGuire, in particular, in finding for the railroad company cited eleven English cases in framing his written opinion. The court also cited an Ontario precedent, which had also been decided in favour of the railroad, regarding the duties of common carriers.[27] The Ontario court ruled that the warehousing of a plaintiff's goods was at the owner's risk and expense. The SCNWT also cited a SCC precedent regarding property in transit.[28] The principles were deemed applicable to common carriers and warehousemen in the NWT. From these sources, the court articulated the common law responsibilities of the CPR as a common carrier and warehousemen in the NWT. The common law rules established in Walters regarding the duties of a common carrier of property became a precedent for future disputes in the NWT. This case also clearly shows how the court adopted, adapted and applied judgments, doctrines and precedents from jurisdictions outside the NWT.

In 1902 Chief Justice (CJ) McGuire presided on the case of Kenny v. The CPR.[29] The case was an action for damages by a passenger for injuries alleged to have been caused by the negligence of the CPR. The plaintiff had been a passenger on

---

[27] Mayer v. Grand Trunk RR, (1880), 31 U.C.C.P. 248.

[28] Grand Trunk RR v. Vogel, (1885), 11 SCR 612.

[29] 5 Terr. L.R. 420.

a Calgary to Edmonton train when the train derailed, fell into a ravine throwing the plaintiff to the ground. Kenny suffered severe injuries to his legs and other parts of his body. McGuire referred to numerous English cases including the 1887 case of -- Foulkes v. Metropolitan Ry. Co.,[30] Bretherton v. Wood and Collett v. London & N.W.R. Co.[31] -- which assisted him in finding the principles and doctrines relevant to his decision. McGuire determined that the CPR had a duty to carry the plaintiff safely, and that agents of the company were still liable for the safe running of a train while CPR tracks and bridges were in an unsafe condition.[32] Again, precedent common law was formulated for the NWT from English precedents.

In 1905, the Court *en banc* heard the case of Eggleston v. The Canadian Pacific Railroad Company.[33] A CPR train near Wetaskiwin had overtaken 250 horses that had been running at large on the unfenced CPR line. Subsequently, 44 of the horses were struck and killed. At issue was whether the CPR

---

[30] 49 L.J.C.P. 361. The case invoked concerned the principle regarding contracts between a defendant and a rail road company. The contract is entered into " … for the purpose of mutually benefiting the traffic of their lines … that is the lines of the two contracting parties … "

[31] Bretherton v. Wood, (1821) 6 Moore, 141; 3 Br. & B., 54; 9 Price, 408; 23 R.R., 556, and Collett v. London & N.W.R. Co., (1851), 16 Q.B. 984; 20 L.J.Q.B., 411; 15 Jur., 1053. The English cases referred to, elucidate the common law duty upon "… common carriers in respect of a passenger to carry him safely and securely … [a] breach of this duty is one which requires not the aid of a contract to support it … ," 425.

[32] Kenny v. CPR, (1902) 5 Terr. L.R. 420.

[33] 6 Terr. L.R. 168, 1 W.L.R. 356, Rev. 36 S.C.R. 641.

discretionary justice, which meant that they would determine which precedents would be applied to the cases heard.[37] Interestingly, in cases where injury occurred or negligence was determined on the part of the CPR, the Court's decisions often went against the CPR.[38] The remaining cases that involved the Company were related to its business in the NWT, and in those cases the court decided in favour of the CPR. This included matters of taxation, business locale, and serving as a common carrier.[39] In cases where the decisions went against the CPR, the decisions appear to have gone against the *rule of law*, and especially the supremacy of Parliamentary law. In Eggleston, where the SCNWT decided against the CPR, ironically it was the SCC who overturned the court and affirmed the CPR's rights and status. The case also showed that, as late as 1905, the court was still coming to terms with its authority regarding a Parliamentary legislated body, the unsettled civil law, and company law. Overall, then, these cases helped to establish common law precedents regarding business operating standards,

---

[36] 36 S.C.R. 641.

[37] Also, see the Consolidated Rules of the Supreme Court of the NWT re: judicial authority. In 1907, Jackson v. Canadian Pacific Railway, 6 Terr. L.R. 423, Justice Wetmore decreed the all encompassing and extensive authority of the Court *en banc*.

[38] See Kenny v. CPR, 1 Terr. L.R. 420, Hansen v. CPR, 6 Terr. L.R. 420, Andreas v. CPR, 7 Terr. L.R. 327, Eggleston v. CPR 6 Terr. L.R. 168, reversed on appeal to SCC.

[39] See 1 Terr. L.R. 88, 4 Terr. L.R. 227, 5 Terr. L.R. 60, 5 Terr. L.R. 123, 5 Terr. L.R. 143, 5 Terr. L.R. 187, 5 Terr. L.R. 192, 5 Terr. L.R.

requirements, and responsibilities in the NWT.

The SCNWT also dealt with many other civil causes, including private matters in the family law area. The first recorded case of an action for alimony was heard in January 1895. In Harris v. Harris,[40] the litigation by Mrs. Harris was an application for alimony without a divorce having been granted. Mr. Harris was alleged to have abandoned Mrs. Harris, and at issue was the status of Mrs. Harris' rights and her "implied" authority in relation to her husband's affairs.

Justice Wetmore apparently chose not to establish a common law precedent regarding the court's authority in matters of alimony. While he accepted that the jurisdiction of the court was original,[41] it was limited to

> ... the powers and authorities exercised by the Courts of Common Law, Chancery and Probate in England on July 15, 1870, and consequently in the absence of express legislation there [was] no jurisdiction to entertain a suit for alimony ...[42]

This case is an example of a justice following the rule of common law within the Imperial context. He did not seek or entertain doctrines, principles, or precedents from jurisdictions beyond England and Canada that may have

---

503, 6 Terr. L.R. 168, reversed by SCC, see 36 S.C.R. 641, 6 Terr. L.R. 423, 7 Terr. L.R. 56.

[40] See Harris v. Harris, 3 Terr. L.R. 289.

[41] Section 8, NWT Act, RSC 1886, c. 50.

Regina v. Simpson.[47] The case was brought to the court by a writ of *certiorari*,[48] and was an application to quash a conviction from a JP.[49] The accused had been convicted of using insulting language to one James May whom he had called a "damned liar." The JP convicted the accused, and fined him $10.00 and $8.15 in costs. In default of the fine, a distress warrant was issued and subsequently two cows were seized by the sheriff and sold for $61.00. Justice Wetmore determined that the statute covering "insulting language" did not exist, nor did the JP have the authority to convict for a non-existent offence. Wetmore quashed the conviction, and in his court decision criticized the JP for his unjustified actions. Wetmore stated that " … the matter charged against the defendant and of which he was convicted is not an offence either at common law or by virtue of any Statute or Ordinance, and therefore that the justice had no jurisdiction."[50] In deciding against the JP, Wetmore also stated that the JP had over-collected for the fine. Wetmore referred to only one precedent case,[51] and stated that

---

[47] Regina v. Simpson, 3 Terr. L.R. 475.

[48] Black's Law Dictionary, Certiorari, "A writ of common law … the writ is issued in order that the court issuing the writ may inspect the proceedings and determine whether there have been any irregularities," 228.

[49] The JP was not named in the report.

[50] 3 Terr. L.R. 476.

although there was no apparent misconduct on the part of the JP, the JP would not be protected from a civil suit by the former accused.

By reviewing the case where *bad law*[52] had been created, Wetmore reinforced the role of judicial review by the court. Wetmore did not cite any case or common law precedents regarding the conviction and the *bad law* that had been created by the JP. He established another precedent, however, when he opined that a judicial official of an inferior court was not to be protected from legal action. In another case where a municipal ordinance contravened the *rule of law*, Justice Scott quashed a by-law because it was unfair.

In 1903, Scott presided over a municipal by-law case, Song Lee v. The Town of Edmonton.[53] The plaintiff, a female who was in destitute circumstances, operated a small laundry and garnered a picayune amount of money from her business. At issue was the fairness of a municipal by-law imposing a $25.00 fee on every person carrying on a laundry business. Scott followed the *rule of law* by citing several English cases as precedents to define the meaning of the words of a

---

[51] See Regina v. Banks, 2 Terr. L.R. 81, deals with intentional misconduct of a judicial official.

[52] Black's, 885. Law is derived either from judicial precedents, from legislation, or from custom. Had there been no judicial review, bad Law would have been created from this JP's decision. However, Wetmore quashed the conviction as a non-existent offence and reestablished the rule of good common law.

statute.[54] He also cited a scholarly publication and a Canadian case as authorities regarding the powers of a municipality to legislate ordinances.[55] Scott ruled that the City of Edmonton by-law in question, which had imposed a $25.00 per annum fee on those who carry on a laundry business, discriminated against " … many women in destitute circumstances who earn a meager support by taking in washing … ".[56] Scott quashed the by-law because it was oppressive and unfair.

In one respect, this decision affirmed the legal status of women, their subservient role in society, and their right to earn "meager support." Ten years previously, in the 1895 case of Harris, Wetmore had also followed the *rule of law* where he denied Mrs. Harris alimony and any recognition of an equal status in law. Harris is an example where the principle of the law triumphed, and Simpson and Song Lee are examples where laws, rules, doctrines, and precedents were applied to meet the particular or individual circumstances of the case. In doing so, the Justices did not compromise the *rule of law* or the applicability of the common law, but followed the *rule of law* to create new common law or affect

---

[53] 5 Terr. L.R. 466.

[54] Ibid., 468, 470.

[55] Also, see Dillion on Municipal Corporations, and City of Montreal v. Fortier, 6 CCC 340, 5 Terr. L.R. 466.

the creation of new statute law. The court also upheld English rules regarding trial verdicts.

In the 1889 case Martin v. Reilly,[57] the court *en banc* presided on an *assize* appeal from a jury decision. At issue was the recovery of $1,250 owing between the plaintiff and defendant who were former partners in a business. The court affirmed the jury decision and upheld the English common law rule that a jury decision should not be disturbed " … even assuming the learned Judge did mis-direct the jury as complained of, in the absence of any substantial wrong or miscarriage … in the trial, a new trial should not be granted."[58] The doctrine was also affirmed by the court *en banc* in the 1891 case Sexsmith v. Murphy.[59]

The Murphy case was an action of detinue[60] for recovery of personal chattels. Leave to appeal to the court *en banc* was allowed because of the discovery of new evidence. The court, however, dismissed the appeal citing the precedent Australian case of The Commissioner for Railways v. Brown.[61] The doctrine in that case held,

---

[56] 5 Terr. L.R. 466.

[57] 1 Terr. L.R. 217.

[58] Ibid., 223.

[59] 1 Terr. L.R. 311.

[60] See Black's Law Dictionary. "Possessory action for recovery of personal chattels unjustly detained," 450.

[61] The Commissioner for Railways v. Brown, (1887), 13 Ap. Cas. 133, 57 L.J.P.C. 72, 57 L.T. 895, (New South Wales).

> … that where the question is one of fact, and there is evidence on both sides properly submitted to the jury, the verdict of the jury once found ought to stand; and that setting aside such a verdict should be of rare and exceptional occurrence.[62]

These cases are examples of English precedents applied in the NWT to preserve historic common law principles. In another case, the *rule of law* was used to prevent the administration of justice from being brought into disrepute.

In the 1890 case of Shorey et al v. Stobart et al,[63] Justice Rouleau's decision was determined by the court *en banc* to have been obtained by fraudulent misrepresentation on the part of the plaintiff. The plaintiffs and defendants were creditors of one E.H. Riley, who was unable to pay his debts. Riley and his mother, Georgina Riley, conceived a fraudulent scheme to defeat and defraud the plaintiffs and defendants out of their claim. A subsequent court judgment of $2,541.42 was awarded to Mrs. Riley from her son. Writs of execution were granted against E.H. Riley. However, the defendant Stobart later assisted the Rileys' fraudulent scheme in order to obtain the proceeds of the judgment. At the *assize* and *en banc* proceedings, English and Canadian precedents had been cited and were deemed applicable. On

---

[62] Cited in Sexsmith v. Murphy et al. In another case MacDonnell et al v. Robertson, 1 Terr. L.R. 438 The Commissioner for Railways v. Brown, 13 Ap. Cas. 133, 57 L.J.P.C. 72, 57 L.T. 895, as per C.J. Tindal 1841 was cited and affirmed.

[63] 1 Terr. L.R. 262.

appeal, however, the court *en banc* was made aware of the fraudulent nature of the evidence presented to the lower court. That evidence had resulted in the plaintiff's decision being obtained by fraudulent misrepresentation.

Interestingly, the *en banc* proceedings also revealed that the justices had never dealt with this type of issue. Nevertheless, the court adopted and applied English common law regarding the abuse of the judicial process, and they also applied judicial discretion when they reversed Rouleau's judgment. The court stated that if the lower court decision was allowed to stand, the decision " … would be a gross abuse (of the judicial process) to allow such a judgment to have validity … ".[64] The court adopted and applied English common law (regarding the lawfulness of the judicial process), and their common law judicial duty (to create appropriate judicial precedents), when they reversed Rouleau's decision. By reversing the decision, the court prevented the administration of justice in the NWT from being brought into disrepute. It was also apparent that the court *en banc* was actively creating precedent regarding their judicial authority to preside on any matter in the NWT. That jurisdiction was applied to a case in 1893.

In the 1893 appeal case of Bonin v. Robertson,[65] the

---

[64] Ibid., 279.

[65] 2 Terr. L.R. 21.

court *en banc* refused to condone the conversion of property (a span of horses) through a fraudulent transaction. In this case, the defendant had mortgaged some horses in the USA to secure a debt, and then brought the horses to south Edmonton in the NWT. She sold the horses to the plaintiff without advising the plaintiff of the mortgage encumbrance. At issue was whether a chattel mortgage given in the USA had force and effect in the NWT. The court *en banc* decreed that they had a discretion as to how far they would give effect to foreign laws. They ruled that the mortgage was void as the mortgage had not been filed in the NWT. They allowed the appeal and another trial judgment of Rouleau was reversed. Both Shorey et al and Bonin v. Robertson created several similar and significant common law precedents for the NWT.

In both cases, the court revealed that it would not exercise its judicial discretion so as to work an injustice against citizens in the NWT. In addition, judgments obtained by fraudulent misrepresentation would not be tolerated or upheld. Rouleau's decisions in both cases were reversed. In Bonin v. Robertson, the court also went beyond English common law precedents as they referred to court decisions from Louisiana and Pennsylvania. By excluding evidence, referring to foreign decisions and invoking common law, both cases are excellent examples where the court exercised their judicial discretion. When the court exercised its

discretion, however, it sometimes relied on obscure *rules of law*. For example, one such case was heard in 1899.

In Kelly v. the Alaska Mining and Trading Company,[66] a case which concerned a lien for wages, Justice Scott and Rouleau on *assize* referred to a number of laws allied to Maritime law to decide in favor of the plaintiff.[67] The plaintiff had been employed on the ships "Alpha" and "M.M. Chessron" which had operated on the Athabasca, Slave and the MacKenzie rivers. Initially, the justices had discussed their jurisdiction regarding their authority to preside over a matter in Maritime law. They decided that in England, the Courts of Chancery had jurisdiction in cases of necessaries and wages on which a lien might be created. The court then determined that it had conclusive jurisdiction in the NWT. Admiralty law was considered because the plaintiff had been employed as a seaman within the meaning of "The Inland Water Seamen's Act."[68] The court also determined that,

> Imperial and Canadian Acts show that the general maritime law is applicable to inland non-tidal waters and the Court of Exchequer has constantly exercised its Admiralty jurisdiction on that assumption … this Court has equal concurrent

---

[66] 4 Terr. L.R. 18.

[67] Ibid., 18. See the head notes for this case. Remarkably, Maritime law and the Inland Waters Seaman's Act were utilized as authorities by the SCNWT. The court had concurrent jurisdiction with the Exchequer Court of Canada in Admiralty matters in as much as the Court of Chancery in England had on 15 July, 1870 concurrent jurisdiction with the Court of Admiralty.

[68] The Inland Seamen's Act, R.S.C. c. 75.

jurisdiction in Admiralty matters.[69]

In this case the court adopted, adapted, and applied English and eastern Canadian rules and common law precedents.

This case also reveals that the justices could be quite innovative and creative in finding precedents and laws to meet the particular or individual circumstances of a litigating party. They referred to obscure rules and precedents of law including a number of Maritime and Admiralty Acts.[70] Some of the authorities cited were Smith's Admiralty Practice and Maritime Law, The Inland Waters Seamen's Act, R.S.C. c.75, The Merchant's Shipping Act, 1854, 17 & 18 Vic. c.104 (Imp.), The Colonial Courts of Admiralty Act, 1890, 53 & 54 Vic. c. 27 (Imp.), The Maritime Jurisdiction Act, 1877, and The Canadian Admiralty Act, 1891, 54 & 55 Vic. c.29. This latter Act was (brought into force by Order-in-Council 2 October 1891), after it was declared that

> ... the Exchequer Court of Canada to be a Colonial Court of Admiralty. It provides (section 4) that its jurisdiction, powers and authorities shall be exerciseable and exercised throughout Canada, and the waters thereof whether tidal or non-tidal or naturally navigable or artificially made so ... [71]

They also referred to the common law of the NWT, The North-

---

[69] See 4 Terr. L.R. 21.

[70] Ibid., 18-27.

[71] Ibid., 18-27.

West Territories Act, R.S.C. c.50, s.48 and The Dominion Statutes of 1891. Indeed, it appears that Rouleau and Scott went out of their way to find for the plaintiff's claim for wages in the amount of $450 plus interest. In addition, they established common law precedents derived from maritime and inland water laws that covered "liens for wages" on river systems in the NWT. Affirming the right of individuals to post liens for wages may also have reflected society's changing standards of socioeconomic morality in the late nineteenth century.

The justices also dealt with sexual morality during this period. In 1899, the case of Ings v. Calgary General Hospital[72] was heard by Justice Scott. The plaintiff Ings sued for wrongful dismissal and for libel. What should have been a routine and obscure case in NWT civil law could be considered a precedent case regarding the status of women. Ings, a medical doctor in Calgary, had been living with a woman (Mrs. Annie Grant) in an adulterous relationship for several years. Ings had recommended Grant for a nursing position at the hospital and subsequently Grant was hired. Ings and Grant were subsequently terminated because " … the plaintiff [was] living in adultery … (and this was) … relevant because it tends to show not only that the latter (female) was not a fit and proper person for a nurse, but

also that he must have been aware of the fact."[73] The issue in this case was wrongful dismissal and libel. However, the case highlighted several other important issues.

The nexus of the case became Ings' relationship with a woman who was not his wife. The case highlighted the disparity between the role of women and their actual status before the courts and society. Although a trained nurse, the woman (Annie Grant) lived in adultery and wasn't a "fit and proper person" to be a nurse. Nurses were supposed to be models of the ideal female personae, subservient and dutiful to doctors, responsible, and tender and caring for patients, husbands and children. Mrs. Grant did not "fit" that role. Additionally, Grant and Ings had abandoned their respective families in Nova Scotia, and had lived in various communities prior to coming to Calgary. However, the issue became the morality of Mrs. Grant. Consequently, Ings was dismissed from the hospital. The court held that the evidence tended to show " … that the woman had been living in adultery or leading an immoral life (which) was evidence bearing on that issue … ".[74] This is the first case where the court decreed a common law rule that a woman was not a fit person to be a nurse because of her morality or licentiousness. Indeed, the decision supported the

---

[72] 4 Terr. L.R. 58.

[73] Ibid., 63.

stereotype of women who lived in adultery or women who sought relief through the courts. The Ings case also reveals that the court influenced and accepted the social, political, cultural and economic *status quo*. On certain issues, namely women, the court was not willing to entertain any form of judicial activism whatsoever.

In another 1899 case, the court *en banc* presided over Re: Nettleship,[75] and reversed Justice Rouleau's former *assize* decision that NWMP officers were biased judicial officials. The original issue had been a NWMP service court proceedings against the deserter Constable Nettleship. Nettleship had abandoned his post and was placed on the deserter's list by Superintendent R. Burton Deane, which meant that Nettleship could be arrested on sight. Nettleship's counsel applied for, and was granted a writ of prohibition by Justice Rouleau, which prevented any arrest from taking place. On appeal by the NWMP to the court *en banc*, however, the justice's ruled that during the service court hearing, the officers of the NWMP had acted as *quasi-judicial* officials and had properly exercised their judicial authority within the terms and conditions of the NWMP Act. The court *en banc* ruled that Nettleship had been placed on the deserter's list because he had abandoned his post.

---

[74] Ibid., 58, head notes.

[75] 4 Terr. L.R. 148.

Indeed, as commissioned officers in the NWMP, it was Superintendent Deane's (also a JP), and the other officer's duty, to place Nettleship on that list. The court also ruled that the officers' duty did not disqualify them from conducting a fair service court hearing. This case upheld several *rules of law* and created new precedents.

The case affirmed the SCNWT jurisdiction as an appeal court of last resort from another judicial body, albeit a NWMP judicial body and Rouleau's assize court. In fact, the SCNWT called Rouleau's decision "incautious" and "premature."[76] The case affirmed the *rule of law* regarding the court's jurisdiction to hear any matter brought before it on appeal. In exercising its judicial discretion, the court was innovative and cited numerous English and Canadian case law precedents and Acts including the NWMP Act of 1894, which they termed analogous to the British Army Mutiny Act.[77] It was the first case where a superior court (SCNWT) upheld the authority of commissioned officers and the validity of the NWMP Act as the *rule of law* in the NWMP. The court also affirmed the common law judicial authority of NWMP officers, and the fairness of the police adjudging the service court law in their own private court system. This case is another example where the court *en banc* exercised

---

[76] Ibid., 164 & 168.

judicial discretion to uphold the *rule of law* -- both the NWMP rule and the court's own authority to preside over any judicial matter in the NWT. Indeed, judicial discretion was applied to the great majority of cases that came before the court in NWT.

The role of the court in the development of law and society was instrumental, and had a formative sway on land administration in the establishment and endorsement of rules and standards for land registration. The system of land registration in the NWT had been established pursuant to a Dominion Act that established the "Torrens System".[78] This system was adopted from Australia and the Registrar of Land Titles in Calgary was " … responsible for the issuing of titles and the recording of all charges on the title."[79] Several cases came before the court as the result of the inconsistencies in this registration system.

The 1895 precedent case of Wilkie et al v. Jellett et al,[80] dealt with land registration and title to property. On 7 March 1891, the Edmonton and Saskatchewan Land Company of

---

[77] Ibid., 156.

[78] The Torrens System was introduced into the NWT 1 January 1887, through the "Territories Real Property Act." It was later modified by amendments to the Act through the "Land Titles Act" of 1894. Documents registered pre-Torrens were brought forward into the Torrens system. The land registration system operated only upon land for which a patent from the Crown had been issued. See Lambrecht, 13. Also, see 1 Terr. L.R. xviii, "An Act respecting Real property in the Territories," (49 Vic. c.26, Dom.). Parliament had originally established the Torrens system in 1886.

[79] Bowker, 63.

Canada owned certain lands which were sold and transferred to the plaintiff. Wilkie had failed to register the title until December of 1893. However, in June of 1893 Jellett obtained a judgment against the company on another matter. He registered his claim against the title and, subsequently, Wilkie claimed that the writ of execution upon the register of the land was a cloud upon the title of the land. The question of law for the court was whether the " … execution against lands duly delivered to the register (were) binding as against a prior but unregistered transfer for value to a *bona fide* purchaser?"[81] The court *en banc* not only reversed a decision of Justice Rouleau, they also ordered the Registrar of lands to remove entries from a land register.

The court created precedent common law when it *enjoined* the sheriff from selling a parcel of land which would have been to the detriment of the plaintiff. English, Canadian and Australian cases were cited by the court to uphold the proprietary rights of the landholder. Professor Bowker has called the Wilkie v. Jellett case a "leading case" which showed the justices " … real concern with making the system work."[82] The case also suggested that the court would not hesitate to change administrative procedures that did not

---

[80] 2 Terr. L.R. 133.

[81] Ibid., 140-1.

comply with its view and interpretation of the law, and how the land registration system was to operate.

In another 1889 land registration case, Morris v. Bentley,[83] Justice Scott ruled that as the result of the Registrar's failure to enter a "memorial" of a mortgage in the register, the plaintiff Morris would succeed in a suit against the Registrar. The case was an action against the Registrar of Southern Alberta for losses caused by the Registrar's failure to enter a memorial of a mortgage on a certificate of title. At issue was the plaintiff's claim against the Registrar for the full amount of his loss, and an entitlement to a mortgage on Bentley's lands for a portion of his loss.

This case showed that the failure of the Registrar to do something, or, as in the former case of having done something detrimental, the court created common law remedies. These cases also reflected the inevitable registration disparities because of the volume of land transfers and title registrations in the NWT. These cases also exemplify how the court established common law administrative rules and regulations regarding what could and could not be done in the land title registration system. The court was influential in regulating and adjudging

---

[82] Bowker, 720. He also suggested that court rulings were "sound and fair."

[83] 2 Terr. L.R. 253.

matters in the land registration system, and the justices exercised their judicial discretion to institute a common law regime for land titles in which people could work with some certainty. Judgments on administrative law, however, were not restricted to land registration. There were also numerous appeals to the justices from the decisions of the Court of Revision.

In 1886, the court *en banc* presided over Angus et al v. The Board of School Trustees of the School District of Calgary.[84] The case was an appeal by Angus from the Court of Revision regarding lands that had been sold by the CPR. At issue was whether former CPR lands were exempt from taxation by such a board. The court ruled that a school board had no authority to make any assessment of taxation for schools on lands in the municipality of Calgary. Citing the *rule of law* from section 127 of the Municipal Ordinance that authorized municipalities to raise taxes, the court *en banc* allowed the appeal and the assessment against the appellants was set aside. In 1899, another taxation case which was a joint action, the Hudson's Bay Company v. Battleford School District, Macdonald v. Battleford School District, and Clinkskill v. Battleford School District,[85] was appealed against a decision of the Court of Revision. Justice

---

[84] 1 Terr. L.R. 111.

[85] 4 Terr. L.R. 285.

McGuire, who heard the appeal, subsequently referred the matter to the court *en banc*. At issue was the construction of portions of the School Ordinance and the location of debts incurred by the HBC.

The court *en banc* decided that even though the HBC headquarters was outside the NWT (London, England), a substantial portion of the Company's business had been carried on in the Territories. The Company, therefore, was subject to school taxes. The court again was innovative and creative in finding precedents to substantiate its reasoning. The court stated that the Company had debts that were "situs", and " … may be said to be 'situated' in some place … within the limits of the said school district."[86] English cases were cited as authority to decide the issue and, consequently, new common law regarding the taxation of Company lands in the NWT was entrenched. In another remarkable case, the court could be innovative and resourceful in finding precedents, and they also engaged in a form of activism when they openly criticized the Lieutenant-Governor of the NWT.

In December of 1900, in the reference case of Re: Edmonton By-Law,[87] the Lieutenant-Governor in Council, his

---

[86] Ibid., 293.

[87] 4 Terr. L.R. 450. Reference cases were a government practice where a superior court was asked to rule on controversial or uncertain issues prior to any stated case coming before the court. See also James G.

honor Amedee Emmanuel Forget through the Attorney-General, F.W.G. Haultain, submitted the Edmonton By-Law reference case to the court *en banc*. The court was asked to decide the validity of a by-law prior to the Lieutenant-Governor giving his assent. The by-law provided for the postponement of the payment of funds and essentially was a scheme by the town, disguised as a by-law, to further avoid payment of the principal of a debenture by equal installments. Although the court ruled against the validity of the by-law, the court also criticized the Lieutenant-Governor at the end of their judgment. The court stated that:

> … the Lieutenant-Governor in Council cannot be a proper party to a cause or matter, and therefore the entertaining of a stated case such as is presented to the Court is simply making the Court or Judges the legal advisers of the Executive.[88]

In reaching this decision, the court questioned its own authority to rule on such a matter under the Judicature Ordinance. It invoked the *rule of law* and suggested that there was no legislation that required them to rule on reference cases. It did, however, review the matter, obey the *rule of law* that affirmed the supremacy of the

---

Snell and Frederick Vaughan, The Supreme Court of Canada: History of the Institution. (Toronto: The Osgoode Society, 1985). "In 1894 Elzear Taschereau challenged the constitutional authority of the Parliament of Canada to make the Supreme Court a court of first instance and an advisory board to the federal executive … ", 136. "The federal Conservative governments of the 1890's sent five reported cases to the Court on reference … ", 293.

[88] See In Re: Edmonton By-Law, 4 Terr. L.R. 455. The Court *en banc* advised the Lieutenant-Governor not to give his assent to the by-law.

legislative council, and, consequently, determined the by-law inappropriate. Justice Richardson's parting comments reflect the annoyance of the court. He stated that "[s]hould a case of similar character be hereafter submitted to us we will consider fully, before investigating the question submitted, whether the case is properly before the Court."[89] This type of criticism by the Court *en banc* was unusual. Although the court was supposed to be an impartial judicial body, it had ruled on the reference case and, consequently, it could be perceived that the court was an extension of the legislative arm of the government. Conversely, by reviewing and deciding the by-law case, the court promoted the common law precedent of judicial review by a court of last resort which had definitive authority in all statute and common law matters.

Judicial review affirmed the court's authoritative status as a supreme court, and was important for its justices. For the government, however, reference cases were an effective mechanism to obtain a conclusive legal opinion and ruling from the court of last resort prior to enacting laws. Indeed, any challenges to the legality of by-laws or Ordinances that had been ruled on by the SCNWT through the reference case mechanism was a challenge to the opinion of the court and the reference process. Perhaps it also helped

to avoid challenges to the law. Finally, throughout the first formative period of the court's jurisprudence, the justices cited several of their former decisions to adjudge appeals to the court.

In 1889, for example, in Turriff v. McHugh,[90] a case where the defendant did not warrant the title of a horse he sold to the plaintiff, the court *en banc* cited a rule from their former judgment in Dickie v. Dunn.[91] That case had established a rule regarding the sale of personal chattels by a vendor. The court had declared that upon a sale, it can be implied that the vendor transferred the title to the chattel, and consequently warranted the title to the chattel.[92] In this case, however, the plaintiff had full knowledge of the "cloud on the title," and consequently the appeal was dismissed.

In 1895, the court *en banc* heard the case of Massey v. McClelland, and Baker v. McClelland.[93] These cases were reference cases by Justice Richardson and concerned land

---

[89] Ibid., 455.

[90] 1 Terr. L.R. 186. " … [T]he court only applies the rule of law that a sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants title," 187.

[91] 1 Terr. L.R. 83.

[92] There was an implied warranty with the title which the vendor transfers to the buyer. " … the court only implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title," 1 Terr. L.R. 187.

[93] 2 Terr. L.R. 179.

that had not been registered as homesteads under the Act.[94] The precedent case of In Re: Claxton,[95] Richardson held that a homestead not registered under the Homestead Exemption Act was liable to seizure and sale under execution. Speaking for the court *en banc* in Massey et al, he held that Massey had no exemption from seizure and sale, and Baker had a temporary exemption for a later execution date. The Claxton case had reaffirmed the principle that Territorial legislation was valid, and had full force and effect as law in the NWT. The rule was extrapolated to the cases at bar, and the rule was subsequently entrenched. When the court cited their own common law rules, they not only affirmed their former judicial decisions and *rules of law*, they also created new "updated" law. That body of law was truly relevant to the NWT.

The selection of civil cases reviewed in this chapter reveal that the Justices of SCNWT *en banc* and on *assize* advanced a form of relative judicial activism. They assiduously applied judicial discretion to the laws, rules, doctrines and precedents, and in addition they did not compromise the *rule of law*. Their over-riding concern seems to have been the particular or individual circumstances of

---

[94] See The Homestead Exemption Ordinance, 57 & 58 Vic., c. 29. Also, see Territorial Real Property Act, Vict. (1888), sec. 16 of 51, c. 20, Vict. (1894), 57 & 58, c. 29.

[95] 1 Terr. L.R. 282.

parties in the cases before them.

It has also been shown that the justices of the SCNWT, on *assize* and *en banc*, presided over all manner of cases in civil law. These cases included issues in company law, family law, administrative law, by-laws, taxation, nineteenth century morality and reference cases. All the cases embodied important, relevant issues that were an echo of societal disputes in the NWT. While they presided, the justices also created a body of civil common law that was tailored and well suited to the NWT. It was also evident that the judicial practices of the justices overwhelmingly affirmed the supremacy and legitimacy of the English Imperial and Canadian Dominion Parliaments.

CHAPTER 5:

THE CRIMINAL LAW COURTS

In addition to the 521 civil appeal cases presided over by the justices' *en banc* and on *assize*, they also heard 93 criminal appeal cases. These cases included reference cases, writs of *certiorari*,[1] substantive law,[2] *rules of law*, and the " … Rules of Court based on those of England and in some cases of Ontario and Manitoba."[3] Additional appeal cases by subject matter included murder, theft of cattle, polygamy, seduction of a female under the age of twenty-one, assault causing bodily harm, midwifery, willfully causing prairie fires, discrimination, conspiracy to defraud, and public order offenses including the illegal sale of liquor. Like the civil appeals heard *en banc*, the criminal appeals *en banc* were heard by the justices twice a year at Regina.[4] Criminal appeals were also heard by the justices on their *assize* circuit. The evidence conclusively reveals that of

---

[1] See Black's Law Dictionary, writ of certiorari. "An order by the appellate court which is used by that court when it has discretion on whether or not to hear an appeal from a lower court," 1609.

[2] Ibid., "That part of the law which creates, defines, and regulates rights and duties of parties … ," 1429.

[3] Bowker, 722.

[4] 8 NWT Amendment Act, 49 Vict., C.25, sec. 15. In 1899, *en banc* civil and criminal appeal cases were also heard in Calgary. See Armour et al v. Dinner et al, 4 Terr. L.R. 30; In Re: Nettleship, 4 Terr. L.R. 148; Queen v. Forsythe, (1900), 4 Terr. L.R. 398; The Union Bank of Canada v. The Municipality of the Town of Macleod, (1900), 4 Terr. L.R. 407; The Queen v. Davidson, (1900), 4 Terr. L.R. 425.

the recorded criminal appeal cases[5] heard by the Justices during those first twenty years, few were heard on *assize*[6] or *en banc*.[7] The criminal cases reported by the editors of the TLR also reveals that the Justices' maintained a strong belief in the supremacy of the *rule of law*.[8] As in the civil cases heard *en banc* and on *assize*, in the criminal cases the justices also invoked, followed and applied the principles, doctrines and precedents from English and Canadian statutes and the common law.

It is evident in the following examples of criminal proceedings (as well as those not cited here) that, during the first formative period, the justices were cognizant of and proactive in the developmental creation of a new criminal law in the NWT. For example, in the 1895 case of the Queen v. Lalonde,[9] the case was concerned with crown responsibility for errors and omissions on judicial documents. Justice Scott, presiding on *assize*, heard the

---

[5] Provincial Archives of Alberta (PAA), accession file 79.266, pages 5-45, 1887-1907.

[6] The break-down of criminal cases were as follows: 1887-1893, 0; 1894, 1 (Richardson); 1895, 1 (Scott); 1896, 3 (Scott 1, Richardson 2); 1897, 0; 1898, 1 (Wetmore); 1899, 5 (Rouleau 4, Scott 1); 1900, 3 (Rouleau 2, Scott 1); 1901, 1 (Richardson); 1902, 1 (Richardson); 1903, 3 (Scott 2, Richardson 1); 1904, 3 (Scott 1, Wetmore 2); 1905, 1, (Wetmore); 1906, 6 (Wetmore 4, Harvey 2); 1907, 0; Total criminal *assize* appeals 29.

[7] Sixty-four criminal cases were heard *en banc* where the justices exercised their appellate jurisdiction. The evidence comes from the author's survey and the analysis of The Territorial Law Reports, volumes 1-7, 1887-1907.

[8] Supra, chapter 1, page 1, note #2.

case by way of a writ of *habeas corpus.*[10] Lalonde had been convicted by a JP of kindling a fire and allowing it to escape. On appeal, Scott reviewed the warrant of committal issued by the JP, and ruled that the committal warrant upon conviction of the accused for allowing the fire to escape " … did not allege the prisoner had been convicted of an offence … ,"[11] contrary to the Prairie Fire Ordinance, and thus, in consequence " … the conviction (could not) be referred to in order to support the warrant."[12] Without a proper record of the conviction being registered on the warrant, the conviction was deemed invalid. Scott applied a definitive criminal code *rule of law*, citing section 886 of the 1892 code[13] and English rules on convictions,[14] to find that the accused had to be discharged. The Lalonde case also affirmed the crown's burden of proof responsibility in judicial proceedings.[15] Indeed, the crown was required to

---

[9] 2 Terr. L.R. 281.

[10] Black's Law Dictionary. "The primary function of the writ is to release from unlawful imprisonment," 709.

[11] 2 Terr. L.R. 281.

[12] Ibid., 281.

[13] Ibid. Section 886 reads, "No warrant of commitment shall be held void by reason of any defect therein, provided it is therein alleged that the defendant has been convicted … ," 284.

[14] Ibid., 281. Also, see Paley on Convictions, 6th Ed.

[15] Black's Law Dictionary. "In a criminal case, all the elements of the crime must be proved by the government beyond a reasonable doubt … the necessity of establishing a fact … the burden of persuasion … ," 196-7. In this case, Scott attributed the clerical error to the crown, which he held voided the warrant of committal.

follow the "letter of the law."[16]

As a former prosecutor,[17] he was very familiar with the *rule of law*, and most likely saw the omission by the crown as a fatal error in the case. In another case, the *rule of law* that had been established in Ontario regarding judicial writs[18] was followed in the 1889 case of The Queen v. Smith.[19] The court *en banc* cited and applied the 1888 Ontario precedent case of Regina v. Beemer,[20] which held that a single judge had no jurisdiction to hear and determine a motion to quash a conviction upon a writ of *certiorari*. These writs had to be issued from the office of the Registrar and had to be made returnable to a superior court.

The court *en banc* declared that a judge of the SCNWT sitting alone did not have the jurisdiction and authority, upon a writ of *certiorari*, to hear and determine a motion to

---

[16] Black's Law Dictionary. "Expression used to denote the exact strict interpretation of a statute, ordinance, regulation, or law," 904. In this case, Scott attributed the clerical error to the crown, which he held voided the warrant of committal.

[17] From the author's research for the book by Louis Knafla and Richard Klumpenhouwer, Lords of the Western Bench. (Calgary: The Legal Archives Society of Alberta, 1997). "Scott was the resident Crown Counsel in R. v. Riel … He also appeared as Crown Counsel in the trials of Poundmaker, Big Bear and those tried for the Frog Lake massacre," 163.

[18] Black's Law Dictionary. Writ. "A written judicial order to perform a specified act, or giving authority to have it done, as in a writ of mandamus or certiorari, or as in an 'original writ' for instituting an action at common law," 1608.

[19] 1 Terr. L.R. 189.

[20] 15 O.R. 266.

quash a conviction for gambling in the NWT. This definitive decision reveals that a single justice on *assize* was not an appeal court of last resort. The court *en banc* also consolidated its appeal status as the court of last resort in the NWT. The case revealed that it sought to establish additional common law rules of court and increase its appellate jurisdiction. A similar purpose can be observed in another 1889 case of The Queen v. Petrie,[21] where the court *en banc* followed the Ontario rules of court as set out in the 1889 case of Regina v. Richardson[22] regarding surety deposits.

When the defendant Petrie filed an appeal against his conviction,[23] he was required to enter into a recognizance and deposit $300 with one or more sureties. However, he had only deposited $200 several days subsequent to the appeal being heard. The court *en banc* held that " … the ends of justice would be served by allowing the applicant to take a new rule *nisi*[24] in the terms of the one discharged … "[25] if

---

[21] 1 Terr. L.R. 191.

[22] 17 O.R. 729. Richardson had been convicted of selling liquor contrary to the Canada Temperance Act. The statute, R.S.C., c. 178, sec. 90, and the rule of court provides that " … no motion to quash any conviction … brought before any Court by *certiorari* shall be entertained unless the defendant is shown to have entered into a recognizance with one or more sufficient sureties … ," 729.

[23] The report's do not indicate what Petrie was convicted for, although by following the Richardson precedent, the Petrie conviction was most likely liquor related.

the defendant wanted to. In this case, the court *en banc* displayed some leniency without reversing the application of the defendant. The court also established new common law rules when it discharged the procedure and granted the defendant leave to take a new Rule that they declared would serve the "ends of justice." In another case, however, Justice Rouleau gave a stricter interpretation to the *rule of law* regarding trial documents.

In the 1889 case of Regina v. G. Keefe,[26] Rouleau ruled on the *assize* appeal that the minutes of an information convicting the accused for liquor possession were insufficient to warrant a conviction. His notebook reads.

> Information not sufficient to warrant a conviction, the conviction does not agree with the minutes of judgment. The minutes only contain adjudication of punishment, conviction shows no jurisdiction on part of J.P., the conviction does not show the locality. Appeal allowed and Conviction quashed on the ground that Minute of Judgment does not adjudicate on the guilt of Defendant. Calgary, 24 April 1889, Chas.B. Rouleau J.S.C.[27]

On that same day, Rouleau quashed several other convictions

---

[24] See Black's Law Dictionary. "The word is often affixed as a kind of elliptical expression to the words rule, order … to indicate that the adjudication spoken of is one which is to stand as valid and operative *unless* the party affected … show cause against it … ", 1047.

[25] The Queen v. Petrie, 1 Terr. L.R. 191. Petrie was not required to deposit the other $100. The $200 was deposited without an affidavit of justification of the sureties or other evidence of their sufficiency. However, the court decided that the money was evidence enough that Petrie was complying with the rule of court.

[26] From the Judicial Notebook of C.B. Rouleau, Stipendiary Magistrate. Book E, 86 to 94. Provincial Archives of Alberta, file # 68.302/1.

for liquor possession, citing discrepancies in the minutes of the judgments.[28] These cases demonstrate that a justice would exercise appellate jurisdiction to quash a charge where an inferior court official failed to adhere to administrative procedures. These cases also affirmed the common law appellate status of a single justice on *assize*. In another decision, an *assize* justice ruled that Indian customary marriages in the NWT were valid contracts.

During the 1889 *assize* trial of the Indian Nan-e-quis-a-ka, Justice Wetmore held that the accused had lived with two women and had only been married (by Indian custom) to his first wife. Interestingly, if the court had held that he was married to the two Indian women, the court would have sanctioned polygamy.[29] At the end of the trial, the accused

---

[27] Ibid.

[28] These cases are unreported, and were discovered in Rouleau's judicial notebook at PAA. See Regina v. Archie McLeod and Regina v. Phill Donohue, Book E, 86 to 94. Provincial Archives of Alberta, file # 68.302/1.

[29] See Sylvia Van Kirk, Many Tender Ties. (Winnipeg: Saults and Pollard Ltd., 1980). Van Kirk has suggested that " [a]ll the western tribes were polygamous … ," 24. She also cited the 1867 case of Connolly v. Woolrich, 11 Lower Can. Jur. 197, in which Justice Coram Monk affirmed the status of customary Indian marriages. She states that the case did not set a precedent, but offers no reasoning or explanation. Her conclusion perhaps is somewhat erroneous as Monk's decision recognized Indian marriages as valid in common law. Also, see the Connolly v. Woolrich (1867), 17 R.J.R.Q. 75, 11 L.C. Jur. 197 trial transcript in Brian Slattery, Canadian Native Law Cases, volume 1. (Saskatoon: University of Saskatchewan, Native Law Centre, 1980), 70-150. Van Kirk has suggested that the decision in the 1886 case of Jones v. Fraser, 12 Q.L.R. 327, 13 S.C.R. 342 held that Indian marriages " … did not constitute a marriage in law," 241, Also, see Constance Backhouse, Petticoats and Prejudice: Women and the Law in Nineteenth-Century Canada (Toronto: The Osgoode Society, 1991), 24. Backhouse cites a portion of Justice Cross's decision from the 1886 case of Jones v. Fraser, Quebec Court of Queen's Bench. He held that Indian marriages were not Christian

was convicted of assault causing bodily harm. At issue was the evidence of the two women who were the accused's Indian wives and witnesses to the offence. The two Indian women had given evidence favourable to the accused's case. However, the evidence of the first wife was excluded and the evidence of the second Indian woman was admitted. Wetmore also excluded as inapplicable English law regarding marriage.[30] While the accused was convicted of assault, the case was reserved for review by the court *en banc*.

The 1889 appeal case of The Queen v. Nan-e-quis-a-ka[31] was the first recorded instance where the court *en banc* affirmed that a law of England was **not** applicable in the NWT. The court ruled that as of 15 July 1870,

> … the laws of England relating to the forms and ceremonies of (Indian) marriage were not applicable to the Territories … (however) … that the evidence quoted was sufficient evidence of a legally binding marriage between M. (Indian

---

marriages although this was not an unremarkable conclusion. Justice Cross also suggested that the pagan Indians were polygamous. The definitive ruling for the NWT in 1889, however, was that Indian customary marriages were recognized as valid in common law, providing the marriage was not polygamous.

[30] Also, see Hamar Foster, "Sins Against the Great Spirit: The Law, the Hudson's Bay Company, and the Mackenzie's River Murders, 1835-39." In Criminal Justice History, volume X (1989), edited by Louis A. Knafla. (Westport: Meckler Corporation, 1989), 23-76. Professor Foster also suggested that Indian custom had not been displaced by English law. Also, see the precedent case of Connolly v. Woolrich (1867), 17 R.J.R.Q. 75, 11 L.C. Jur. 197 presided over by J. Monk of the Quebec Superior Court on 9 July 1867, where he decided that Indian marriages were legally binding. For the excerpt of the trial transcript see Brian Slattery, Canadian Native Law Cases, volume 1. (Saskatoon: University of Saskatchewan, Native Law Centre, 1980), 70-150. The appeal from that judgment is reported as Johnstone et al v. Connolly (1869), 17 R.J.R.Q. 266, 1 R.L.O.S. 253, which upheld the former decision.

[31] 1 Terr. L.R. 211.

> wife) and the prisoner for the purpose of excluding the evidence of M.[32]

Nan-e-quis-a-ka established another important common law precedent in the NWT. The respective courts held that in common law, an Indian marriage by customary law was a valid contract and therefore a valid marriage.[33] This is an example of judicial discretion which recognized customary law which, in turn, established and affirmed a new common law of marriage relating to the NWT. In its judgment, the court *en banc* stated that " … the evidence of Maggie (the first wife) was properly rejected by the trial judge and that the judgment given at the trial should be affirmed."[34]

It can be concluded that the court gave an innovative interpretation regarding the validity of an Indian marriage in common law.[35] It rejected certain "forms and ceremonies" of recognized Christian marriages of England and Canada as inapplicable to Indian customary marriages in the NWT. The court also applied relevant statute law, including the Indian Act[36] that recognized and validated the Indian's

---

[32] Ibid., 211, head notes. In essence, the ruling meant that since only the first marriage was valid, that woman (as his wife) could not give evidence. The court also cited Connolly v. Woolrich, and the doctrine was deemed applicable to NWT.

[33] The authority for this decision was extrapolated from Connolly v. Woolrich, and the precedent was deemed applicable to NWT. The principle was binding on all Indians, " … pagan and Christian alike," 216.

[34] Ibid., 216.

[35] Supra, Backhouse 25, Foster 27.

customary definition of husband and wife. The court, however, then affirmed the English *rule of law* regarding testimony by husbands and wives against each other. The English doctrine held that,

> … as a general rule, a wife (was) not competent or compellable to testify for or against her husband or a husband for or against his wife when either (was) charged with an indictable offence … such a binding and legal marriage (had) been established as to make this rule of law as to evidence applicable.[37]

Another important common law rule was confirmed when the court recognized the contractual nature of customary Indian marriages. In formulating their ruling, the court *en banc* cited, applied and affirmed the 1867 ruling of Mr. Justice Monk in Connolly v. Woolrich.[38] In Monk's ruling, he applied the doctrine and rule that,

> … within the Territories embraced by the Charter of the Hudson's Bay Company … 'The Charter did introduce the English law, but did not at the same time make it applicable generally or indiscriminately, it did not abrogate the Indian laws and useages … Their laws of marriage existed and did exist' … I adopt this view of the law in so far as the marriage customs and laws of the Indians are concerned as among themselves without, however, recognizing as valid any law or custom authorizing polygamy.[39]

---

[36] The Indian Act, R.S.C. c.43, and the amending Act 50-51 Vic. (1887) c.33. Sec.'s 12, 13, 20, 88 cited in Nan-e-quis-a-ka, 1 Terr. L.R. 216.

[37] The Queen v. Nan-e-quis-a-ka, 1 Terr. L.R. 216.

[38] Cited in 1 Terr. L.R. 211, The Queen v. Nan-e-quis-a-ka. See Connolly v. Woolrich (1867), 17 R.J.R.Q. 75, 11 Lower Can. Jur. 197; 3 U.C.L.J. 14; 1 Lower Can. L.J. 253. Also, see the appeal case of Johnstone et al v. Connolly (1869), 17 R.J.R.Q. 266, 1 R.L.O.S. 253.

[39] The Queen v. Nan-e-quis-a-ka, 1 Terr. L.R. 213.

This case clearly shows how the English common law cited by the court in the NWT could be molded and adapted to local circumstances. In another case of customary marriage, however, Justice Rouleau on *assize* extended the *rule of law* regarding an Indian man married and living with two Indian women.

In March of 1899, Rouleau presided at Fort Macleod on the case of The Queen v. "Bear's Shin Bone."[40] Rouleau applied a strict interpretation to the 1892 Criminal Code regarding Indian marriages. He decided that the traditional customs of the Blood Indians regarding marriage violated the 1892 Code. Rouleau convicted the accused of practicing polygamy with two Indian women. Rouleau stated that the accused " … had been married according to the marriage customs of the Blood Indians to two women … and that there was a form of contract between the parties which they supposed binding upon them."[41] Like the 1889 case of Nan-e-quis-a-ka, the customary marriage was a common law contract.[42] However, in that case the 1892 Criminal Code

---

[40] 4 Terr. L.R. 173. See, also Canadian Native Law Cases, volume 3, 513-516. Backhouse briefly mentions the case in her book Petticoats and Prejudice: Women and the Law in Nineteenth-Century Canada, 25-6.

[41] 4 Terr. L.R. 173.

[42] Van Kirk briefly discussed the subject of Indian customary marriages and English law in her book, Many Tender Ties. She suggested that as early as 1821, after the HBC and NWC merged, the HBC tried to formalize and regularize customary marriages by introducing a contract between the two parties " … which stated the husband's economic responsibilities,"

which defined polygamy did not exist and therefore was not applicable. In 1899, however, section 278 of the 1892 Code outlawed the " … (p)ractices … rites, ceremonies, forms, rules or customs of any denomination, sect, society … in a manner recognized by law as a binding form of marriage … to practice or enter into (i) any form of polygamy … "[43] as contrary to criminal law. Throughout this era, for example, the law in the NWT was meant to be enforced against Mormons.[44] Thus Rouleau cited ss.(i) "Any form of polygamy" and ss. (ii), "Any kind of conjugal union with more than one person at the same time … "[45] as applicable to the accused Indian. The conviction established several precedents, aside from affirming the court's role in the forced assimilation of Indians into an Anglo-Christian society.[46]

---

117. English law perhaps would recognize a contractual agreement between two consenting parties.

[43] 4 Terr. L.R., 173.

[44] Ibid., 174, ss. iii " … what among the persons commonly called Mormons is known as spiritual or plural marriage."

[45] Ibid., 173.

[46] This 1899 judgment was also consistent with the 1886 Justice Cross decision in Jones v. Fraser, previously cited by Van Kirk. This case also appears in the SCC records as 13 S.C.R. 342. The peaceful assimilation of the Indians in Canada was Canadian government policy, somewhat unlike the U.S. government war of Indian extermination. See Robert M. Utley. The Lance and the Shield; The Life and Times of Sitting Bull. (New York: Ballantine Books, 1993), 1-498. In Canada, the term assimilation was adeptly side stepped, however, and renamed enfranchisement. Thus, all first nations peoples were perhaps "set free" by English law. See the John L. Tobias article, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy." In Sweet Promises: A Reader on Indian-White Relations in Canada, edited by J.R. Miller. (Toronto: University of Toronto Press, 1991), 122-44. Also, see J.R. Miller's essay "Owen Glendower, Hotspur, and Canadian Indian Policy." In Sweet Promises: A Reader on Indian-White Relations in Canada, edited by J.R. Miller. (Toronto: University of

It would seem that the conviction disqualified certain customary marriages amongst Indians as null and void in common law.[47] This seems to agree with what Sylvia Van Kirk has argued in a portion of her book, Many Tender Ties, that customary marriages reflected the nineteenth century "antipathy" for mixed marriages, and was also perhaps a by-product of the government policy of assimilation. The English and Canadian rules of law regarding Christian marriages were deemed applicable to Indians, and disqualified Indian customary marriages including the practice of men having two or more wives. Interestingly, Rouleau cited the 1889 case of Nan-e-quis-a-ka[48] as precedent for convicting the accused of practicing polygamy.

Toronto Press, 1991), 323-352. These articles deal with the assimilation of Indians in Canada, and the coercive methods employed by the government. The government instituted policy and laws which included the pass system, prohibition of religious ceremonies, forced residential schooling of children, and the denial of rations for violations of the policy and laws. In Petticoats and Prejudice, Backhouse tells us that Justice Cross in Jones v. Fraser also stated that Indians had to be Christianized and had to submit to "civilized law," 24.

[47] Customary marriages included the practice of men taking two or more wives. The Anglo-Christian view regarded this practice as "polygyny." See Olive Patricia Dickason, "From 'One Nation' in the Northeast to 'New Nation' in the Northwest: A look at the emergence of the Metis." In The New Peoples: Being and Becoming Metis in North America, edited by Jacqueline Peterson and Jennifer S.H. Brown. (Winnipeg: The University of Manitoba Press, 1985), 19-36. "Polygyny … was an integral part of their (Amerindians) social and economic framework … it was perfectly acceptable … ," 24. As previously mentioned, Van Kirk stated that it was common for western tribes to have polygamous marriages. The 1867 case of Connolly v. Woolrich had affirmed customary marriages (non polygamous) in common law, however, Van Kirk also stated that the 1886 decision of CJ Ramsay in Jones v. Fraser, ruled that customary Indian marriages (polygamous and/or non polygamous), sometimes called "country marriages," did not constitute a marriage in law. Backhouse in Petticoats and Prejudice suggested that customary marriages were dealt a legal death blow by Rouleau's ruling.

[48] 4 Terr. L.R., 174.

He stated there that …

> … the marriage customs of the Blood Indian Tribe came within the provisions of sub-section (a) of section 278 of the Criminal Code, whether their ceremonies are those of a denomination, sect or society, or not, as their marriages are a form of contract, and recognized as valid.[49]

Clearly, Rouleau had extrapolated and applied a Anglo-Christian interpretation to the doctrine. In this instance he dutifully followed the *rule of law* that ignored the customary law of Indian marriages. Indeed, it was the force[50] of that *rule of law* that not only invalidated customary marriages and the former common law, but also set a new common law precedent that was applicable to Indians. The case is a superb example of a Justice of the SCNWT belief's in the supremacy of the rule of English law, even if it discriminated against Mormons and Indians. This case also highlighted Rouleau's interpretation of discretionary justice. The records reveal that the case was not appealed. Another important case concerning women was the Queen v. Walker,[51] presided over by Justice Macleod with an *assize* jury at Medicine Hat in 1893.

The accused Walker, who was over the age of twenty-one,

---

[49] Ibid., 174.

[50] Black's Law Dictionary. This can be termed the " … power, violence, compulsion, or constraint exerted upon or against a person or thing," 644. In this instance the force would be the judicial process and the resulting penalty upon conviction.

[51] 1 Terr. L.R. 482.

had been charged with the seduction of a female under twenty-one, who was not his wife, but one to whom he was engaged to be married. At the end of the trial, Walker was convicted based on the special finding of the jury. The jurors returned that " … Donald Walker promised to marry Fanny Small … but in November … he seduced her, at the same time renewing his promise of marriage … no other man had connection with her."[52] Walker was found guilty. However, the defense counsel raised objections to Justice Macleod regarding the verdict. On reference to the court *en banc*, the justices held that Macleod had misinterpreted the 1892 Criminal Code section[53] dealing with the offence charged and had, in consequence, misdirected the jury. Macleod charged the jury and stated that in his judgment " … what the legislature intended to punish was 'the seduction of young women under 21 by men over 21 to whom they were engaged.'"[54] The court *en banc* held that Macleod's construction of the statute was incorrect.[55] It stated that " … the ruling of

---

[52] Ibid., 483.

[53] Ibid., 484. The accused had been charged with an offence under section 182 of the Criminal Code of 1892. It read in part that " … every one above the age of 21 years who, under the promise of marriage, seduces and has illicit connection with any unmarried female of previously chase character, and under the age of 21 years of age … " is guilty of an offense.

[54] Ibid., 483-4.

[55] Macleod's decisions were overturned a number of times on appeal to the court *en banc*, however, all the justice's had a number of their decisions overturned at one time or another. See Queen v. Smith (1889), 1 Terr. L.R. 189; McEwen v. The N.W. Coal and Navigation Company (1889),

the learned trial Judge was erroneous, that there had been a mis-trial in consequence, and that in our judgment there should be a new trial, which the Court directs."[56]

In defense of Macleod, however, the 1892 Criminal Code had just been published and brought into use. The absence of common law authorities to assist Macleod with his interpretation of the statute and intent of Parliament perhaps contributed to his misdirection of the jury, although a substantive portion of the evidence relied upon was most likely the evidence of Fanny Small, the alleged victim, and the corroborative evidence of the victim's family. Although Macleod stated he had "grave doubts" about his interpretation and construction of the language of the statute, the case highlighted the court's contemporary interpretation of the *rule of law* regarding men who use the promise of marriage to seduce women under twenty-one.[57] It also affirmed that judicial interpretations from *assize* decisions were subject to review by the court *en banc*. One

---

1 Terr. L.R. 203; Davis et al v. Patrick et al (1893), 2 Terr. L.R. 9. On page 724 of his book, Professor Bowker has suggested that Macleod's strengths and " … virtues were those of a trial judge." His strength, however, appear to manifest themselves from the volume of cases he heard as an *assize* trial judge, not from his legal wisdom.

[56] Ibid., 486.

[57] For an excellent discussion of women, sexual offenses, the court's views on women's sexuality and the criminal law, see Constance Backhouse "Nineteenth-Century Rape Law 1800-92." In Essays in the History of Canadian Law, Vol. II, edited by David H. Flaherty. (Toronto: University of Toronto Press, 1983), 200-247. "Women were to be protected from non-martial sexual intercourse regardless of the methods by which the seducer sought to accomplish his goal," 229.

can only speculate that if the court *en banc* had affirmed Macleod's construction that perhaps there would have been a miscarriage of justice. Conversely, in the "Bear's Shin Bone" case, a contemporary analysis and interpretation of Justice Rouleau's actions suggests that he was apparently not concerned about "cultural pluralism" at that time.

The justices of the court *en banc* did not refer to any statutes or common law precedents as authority to overturn the jury verdict in The Queen v. Walker. The court appears to have relied on the facts, or absence of substantive evidence (reasonable doubt) in the case, to find in favour of the accused. The court also appears to have given a sympathetic (to Walker) construction and interpretation to the meaning of the statute law. Although Walker had been found guilty by a jury, the justices over-ruled the jury decision and found that the misdirection by Macleod was grievous enough to invalidate the verdict. They also concluded that, if the verdict had stood, it would perhaps have brought the administration of justice into disrepute. The accused was discharged and there is no record of any appeal. In 1903, the court dealt with another case of seduction of a female.

In the King v. Lougheed,[58] the *assize* court conviction by C.J. Sifton without jury was quashed by the court *en*

banc. The accused Lougheed had been charged with the seduction of a female under the promise of marriage pursuant to section 182 of the Criminal Code. At issue was not the alleged criminal offense and the seduction of the female, but whether the victim Kate McCutcheon was of previously chaste character. The decision was quashed because the victim, Ms. McCutcheon, was deemed by the court *en banc* to be of unchaste character. An essential element to prove the charge was that a woman be of chaste character. Indeed, the court referred to The American and English Encyclopedia of Law to find the meaning of character.[59] The court found that although there had been a promise of marriage by the accused, Ms. McCutcheon had engaged in fifteen months of week to week illicit connection. The court found that this type of activity predisposed her to be of unchaste character. The court's condescending attitude resonated in Justice Prendergast's statement: "But there must be, at all events, between the two acts of seduction, such conduct and behaviour as to imply reform and self-rehabilitation in chastity, which the behaviour of the young woman in this

---

[58] 6 Terr. L.R. 77.

[59] Ibid., 79. The American & English Encyclopedia of Law, (2nd ed.) vol. 5, p.871. "'[C]'haracter the following is laid down: Under all the Statutes as to seduction, the previous good character for chastity of the woman alleged to have been seduced, is one essential element of the offence and is always in issue; … the injured female should be actually chaste and not merely have a good reputation in that respect."

case leaves no room to infer."[60]

In what can be best described as a case of reverse logic regarding the sexual conduct of the victim, the accused was discharged. This exemplifies the court's criterion for determining which women were of unchaste character, and perhaps the court's own perception of women's morality. The case is also an example of the status of women under the common law. Under part XIII of the 1892 Criminal Code, section 182 was categorized under "offenses against morality," which suggests that the section is part of a larger criminal sanction meant to protect the morality and fragile chastity of women under twenty-one years of age.[61] Chastity was not only a moral virtue but a religious virtue, and as Terry Chapman tells us about moral attitudes in Western Canada, " … the morality laws were in fact chastity laws which resulted not only in a search for immoral people but also unchaste women."[62] Women who were unchaste or who were not "reformed or self-rehabilitated in chastity" were less valuable as marriage prospects.[63] It also epitomizes

---

[60] Ibid., 80.

[61] See Prendergast's ruling on page 78.

[62] See Terry L. Chapman, "Sex Crimes in Western Canada, 1890-1920." Doctoral Dissertation, University of Alberta, 1984, 248. Chapman also concluded that during this era, chastity was never legally defined and that the cases he studied, chastity could be used to refer to a woman's character or her physical condition, that is her virginity. This attribute was also a desirable marriage quality.

the courts' and the common law principle of women as property or as commodities.[64] Finally, in both the Ings and Lougheed cases, women were also held to be the cause of the men's improprieties. In another criminal case, a woman was charged with a criminal offense when she assisted in the birth of a baby.

In the 1903 case of The King v. Rondeau,[65] the accused woman appealed her conviction from a JP for practicing "medicine and surgery."[66] She appealed by way of a writ of *certiorari*. Justice Scott quashed the conviction on *assize*, ruling that the writ had been unnecessary. His strict interpretation and construction of the ordinance, however, followed the *rule of law*. He decided that midwifery was not included within the terms of "medicine and surgery" and that no penalty could be imposed upon the accused. Scott referred to " … an earlier Act in Ontario … "[67] inferring that in

---

[63] See the Constance Backhouse essay regarding women, chastity and their role in society. "Nineteenth-Century Canadian Rape Law, 1800-92." In Essays in the History of Canadian Law, volume II, edited by David Flaherty. (Toronto: University of Toronto Press, 1983), 219, 223-25. Also, see Chapman's, "Sex Crimes in Western Canada, 1890-1920," 248-49.

[64] In marriage, women became the exclusive sexual property of their husbands. Chapman tells us that " … by entering into a marriage contract, women gave their husbands sexual ownership of their bodies and the idea of sexual autonomy for females was an alien concept in both the social and legal setting," 249.

[65] 5 Terr. L.R. 478.

[66] Ibid., section 60 of the Medical Profession Ordinance (C.O. 1898, cap. 52) provides: "No unregistered person shall practice medicine or surgery for hire or hope of reward … be liable to a penalty not exceeding $100," 478.

[67] Ibid., 483. Con. Stat. U.C. cap. 40.

Ontario, like the NWT, there should be nothing preventing women from practicing midwifery. Due to the

> … sparsely settled parts of the province, it would be difficult and in some cases impossible to procure the services of a licensed physician as a midwife. There are many parts of the Territories … not unlike those in some parts of that province at the time the provision was enacted.[68]

This innovative interpretation of the Ordinance is an example of judicial discretion being applied to the unique circumstances in the NWT. The case also affirmed a woman's common law role in society regarding midwifery.

One of the most controversial issues that came before the court concerned the matter of the admissibility of evidence. In the case of The Queen v. Charcoal,[69] the accused had been sentenced by Justice Scott after an *assize* jury had found him guilty of murder. Charcoal had been accused of the murder of his wife's lover, Medicine-Pipe-Stem-Crane-Turning, in September of 1886 on the Blood Indian Reserve. In March 1897, on appeal to the court *en banc*, the jury conviction was quashed. Justice Wetmore, for the court, ruled that the Indian agent on the Blood Reserve, James Wilson, was an *ex officio*[70] justice of the peace and a

---

[68] Ibid., 483.

[69] 3 Terr. L.R. 7. For an extrapolated version of the incident from the trial transcripts, see Hugh A. Dempsey, Charcoal's World. (Saskatoon: Western Producer Prairie Books, 1978), 20. Some of Dempsey's sources were the Terr. L.R., and the Horace Harvey Papers at the Public Archives of Canada, MG-30, E-10, vol. 43.

person in authority. He decided that the admission of guilt made to Wilson by Charcoal through an interpreter was invalid. It was suggested that the confession was induced from the accused which immediately placed the onus on the prosecution to prove that the confession was "free and voluntary." In citing English precedent and common law,[71] Wetmore ruled that the Indian agent Wilson had induced the accused to tell him what had happened. Consequently, the statement and admission of guilt were deemed inadmissible as evidence. In summary, he said, " … without this admission there was no evidence to connect the prisoner with the murder."[72]

The court *en banc* again affirmed its authority to rule broadly on any matter before it.[73] Most importantly, however, the Charcoal decision was the first recorded instance where an accused, found guilty of murder by a jury, had his conviction overturned because the evidence obtained was deemed to have been tainted by the impropriety and conduct of a person in authority. Indeed, the laws,

---

[70] Black's Law Dictionary. "From office; by virtue of the office," 575.

[71] Regina v. Thompson, (1893), 62 L.J.M.C. 93. 2 Q.B. 12; 5 R. 392; 6 L.T. 22; 41 W.R. 525; 17 Cox C.C. 641; 57 J.P. 312 followed regarding free and voluntary statements. Reg. v. Fennell, (1881), 50 L.J.M.C. 126; 7 Q.B.D. 147; 44 L.T. 687; 29 W.R. 742; 14 Cox, C.C. 607; 45 J.P. 312 regarding admissions under inducements.

[72] 3 Terr. L.R. 13.

[73] As noted previously when SCNWT overruled jury verdicts. Also, see note 72 of this chapter, cited in support of free and voluntary statements and admissions of guilt under inducement.

precedents and common law procedures of England that govern the conduct of persons in authority were acknowledged as being applicable to the NWT. Thus, this common law precedent extended to all persons in authority and regulated their conduct while criminal investigations were being conducted. The Charcoal case was also the first recorded case where the duties of persons in authority were clearly articulated by a court of superior criminal jurisdiction. It revealed that the court involved itself in not only the adjudication of criminal matters, but also in the determination of the appropriate conduct of enforcement officials. The case also rendered the first recorded instance of a superior court that regulated the admissibility of "extracted" statements as opposed to "free and voluntary" ones. In another case, the court also fixed a precedent regarding the admissibility of similar fact evidence.

In February of 1898, the Queen v. Collyns[74] was heard by the court *en banc*, and they affirmed the conviction of the accused for theft of cattle. During the *assize* trial, Justice Scott had permitted a new form of evidence to be tendered. The accused had been found in possession of branding irons that had been adapted to cause the obliteration of the original brand characters on the cattle. The conviction was based in part on his possession of the

irons and the branded cattle. On appeal to the court *en banc*, Justice Wetmore cited an Australian case[75] and several English cases[76] that supported the doctrines of similar fact occurrences. The court affirmed the conviction because the branding irons found in the accused's possession were capable of obliterating the brands on cattle. In addition, several of the stolen cattle found in the accused's possession had their brands obliterated and exhibited scars similar to the designs produced by the branding irons in question. Justice Rouleau, however, dissented from the ruling, stating that the crown was only showing that the accused had a " … disposition to alter the brands … without evidence that the prisoner was ever connected with such illegality."[77]

Collyns was the first reported case where similar fact evidence was adduced and admitted at a trial, and then on appeal affirmed by the court *en banc*. The case also exemplified the flexibility of judicial discretion when applied by the court. The decision did not include a strict interpretation of the *rule of law* and the admissibility of evidence. Although similar fact evidence was admitted, it

---

[74] 3 Terr. L.R. 82.

[75] See Makin v. Attorney-General for New South Wales (1894) A.C. 57, cited in 3 Terr. L.R. 83.

[76] Reg. v. Geering (1849) 18 L.J.M.C. 215, Regina v. Dossett (1846) 2 C.& K. 306; 2 Cox C.C. 243, Regina v. Gray, (1866), 4 F.& F. 1102.

only contributed to the weight of evidence against the accused as opposed to being the substantive portion of the evidence.

The decision in this case regarding similar fact evidence may also have been in response to the increasing number of cattle thefts.[78] The court may have been responding to the need for a deterrent to prevent those thefts from the ranching community. The crown's "burden of proof" in cattle theft cases and its responsibility for establishing ownership of cattle was onerous, especially for unbranded cattle or cattle with obliterated brands. The Collyns precedent appears to have lowered the crown's onus and "burden of proof" concerning ownership and identifying brands.

In the NWT, another persistent problem that endangered livestock and property was prairie grass fires. In the 1904-05 case of Rex. v. Canadian Pacific Railway Company,[79] the CPR appealed to the court *en banc* by way of a writ of

---

[77] 3 Terr. L.R. 87.

[78] See William M. Baker, Pioneer Policing in Southern Alberta: Deane of the Mounties (Calgary: Historical Society of Alberta,1993). Superintendent Dean's reports 1888-1914 for Southern Alberta and Calgary are replete with reports of cattle theft and cattle killing. The Annual Reports of The Officer Commanding "E" Division, Calgary from 1890-1915 also are replete with reports of cattle theft. See also PAA, Accession file #79.266, the Northern Alberta Judicial District of SCNWT, 1883-1907. These court records contain numerous cases (approximately 60) of larceny most likely involving cattle, as opposed to horse stealing. After March of 1891 cases headings were changed to read, " … unlawful killing of cattle … killing a cow … cow theft … cattle stealing … stole a cow," 13-40.

[79] 7 Terr. L.R. 286.

certiorari. The Company had been found guilty by JP Cortland Starnes (A NWMP Inspector in 1904) for starting a prairie fire.[80] The JP had ruled that the prairie fire had started because a CPR locomotive had not been equipped with the required spark prevention devices. The prairie fire had started beside the CPR tracks, and had traveled from a point inside the CPR right-of-way for several miles north of the tracks.[81] The appeal case highlighted several important doctrines discussed throughout this thesis.

CJ Sifton inferred that the JP acted as a jury (of peers) when he decided a case. Sifton stated for the court that the JP was justified " … to decide the weight practically in the same manner as a jury … ,"[82] and that the finding of a lower court judge should not be disturbed if there was evidence before him regarding their guilt. The evidence supported the Company as being responsible for starting the fire and the court *en banc* affirmed the conviction. This ruling is unprecedented considering that

---

[80] Contrary to section 2 of the Prairie Fire Ordinance, C.O. 1898, c. 87.

[81] Prairie grass fires were a constant threat and danger, so much so that the Territorial Council enacted The Prairie Fire Ordinance. Also, see Hugh A. Dempsey. Crowfoot: Chief of the Blackfeet (Norman: University of Oklahoma Press, 1972), 149. Crowfoot, complained many times about the prairie fires caused by CPR trains that crossed over reserve land from Cluny to Gleichen, and those fires that destroyed pasture land on the reserve. For NWMP accounts, see William M. Baker. Pioneer Policing in Southern Alberta. Deane of the Mounties 1888-1914 (Calgary: Historical Society of Alberta, 1993), 9. Superintendent Deane of the NWMP concluded that " … locomotives are responsible for a large proportion of these fires … ," 9.

virtually all the JP decisions on appeal to the court had been quashed or reversed.[83] In one 1898 case, for example, the accused had been convicted for a non-existent offense.[84] This shows the SCNWT was actively redeeming the administration of justice in the NWT from being brought into disrepute by erroneous JP decisions. In the CPR case, the court *en banc* found that the Starnes decision was "good law." That may have suggested Starnes was held in higher regard than the civilian JPs.

Justice Wetmore also affirmed the JP's ruling that the Company was guilty. One of the Company's defense arguments was the jurisdiction of the Territorial Assembly to enact law that affected the CPR. It was argued that the Prairie Fire Ordinance was *ultra vires*[85] of the NWT Legislative Assembly, and " … that such Assembly had no power to cast duties or obligations on this company, which was constituted, and its powers and duties (were) prescribed by (an) Act of Parliament."[86] Wetmore decided that the Legislative Assembly of the NWT did have the power, and that

---

[82] 7 Terr. L.R. 287.

[83] The evidence to support this conclusion is gleaned from the Territorial Law Reports, Vol. 1-7, 1887-1907. Cases cited in this chapter include: Queen v. Lalonde - 2 Terr. L.R. 281, Regina v. Keefe - Accession file 68.302/1 (PAA), Regina v. Mellon - 5 Terr. L.R. 301, King v. Rondeau - 5 Terr. L.R. 478.

[84] Regina v. Simpson, 3 Terr. L.R. 475.

[85] Black's Law Dictionary. "An act performed without any authority to act on subject," 1522.

it was a common law duty of the CPR to have its train engines properly equipped with spark prevention devices. Wetmore also implied that it was the intent of Parliament to give authority to the Assembly to make laws. He stated that the Territories were given the common law authority " … to legislate upon all matters of a merely local or private nature and also the power given to legislate in respect to property and civil rights in the Territories."[87]

Thus, Wetmore affirmed the broad interpretation of parliamentary legislation to vest law-making authority in the Territorial Assembly concerning federally incorporated companies engaged in trade and commerce. He also reiterated and reaffirmed the appellate status of the court to preside over and decide any matter that had been legislated by the Imperial and Dominion Parliaments or the Territorial Assembly. He also found that the CPR was criminally liable for causing the fire and refused the CPR an appeal. Finally, like the prairie fires and cattle thefts, liquor and liquor related offenses in the NWT were epidemic. The Justices on *assize* and *en banc* presided over many liquor cases.

Liquor in the NWT was a persistent problem. Indeed, it was partly as a result of liquor and the debauchery of Indians by the whiskey traders in the late 1860s and early

---

[86] 7 Terr. L.R. 291.

[87] Ibid., 292.

1870s that led to the formation of the NWMP. They rigidly enforced the NWT Liquor Ordinance and the NWMP courts imposed harsh penalties. That enforcement mechanism assisted in the prevention of the Prairie West from becoming the wild Canadian West.[88] Liquor cases that came before the courts on *assize* and *en banc* were appeals from convictions of a lower court. In one important case in 1900, Justice Rouleau on *assize* presided over the trial of Regina v. Mellon.[89] The accused appealed his conviction by two JPs for selling liquor to a treaty Indian. The case would have been routine. However, it highlighted an important doctrine in the criminal law. Rouleau's comments are insightful regarding the principle involved. Rouleau stated,

> ... Pepin speaks English fluently, and dresses better than many ordinary white men, and there is no indication whatever in his appearance, in his language or in his general demeanor that he does not belong to the better class of half-breeds.[90]

---

[88] The NWMP actively enforced the liquor laws. The Criminal Court Cases of the Northern Alberta Judicial District at Calgary, 1883-1907 contain many liquor cases. Between Dec 1883- Apr 1891, there were 60 cases before the High Court Judges. This number, however, only reflects liquor cases, not liquor related offenses like assault, assault causing bodily harm, murder, arson, theft, larceny, rape, incest, gambling, break and entry. See PAA Criminal Cases, Accession file 79.266. The number of liquor cases also is paltry in comparison to the number of unrecorded cases that came before JPs. The recorded cases reflect appeal cases. Additionally, the Mounted Police reports and files are also replete with liquor investigations, charges and convictions. See also supra, Opening Up The West, Pioneer Policing in Southern Alberta, The North-West Mounted Police and Law Enforcement, 1873-1905, and William Parker Mounted Policeman.

[89] 5 Terr. L.R. 301.

[90] Ibid., 302.

Rouleau held that the accused, a licensee, did not know and had no means of knowing that the half-breed was an Indian. It was an offence under the Indian Act[91] to provide liquor to Indians. The conviction by the JPs was quashed because the accused did not have the intent to sell liquor to the Indian. Indeed, he did not have *mens rea*,[92] an essential element in proving an offence against the criminal law. Rouleau cited several English and Canadian precedents to validate his decision. However, the *mens rea* doctrine was an essential ingredient missing in this case.

Throughout this chapter the evidence has revealed that the Justices of SCNWT, both on *assize* and *en banc*, invoked, molded, followed and applied principles, doctrines and precedents from English and Canadian statutes and common law. Their judicial decisions emphasized the *rule of law* and, as in the analysis of the civil proceedings examined in chapter 4, there was no evidence of a judicial discretion that compromised that *rule of law* or the applicability of the common law. It is also evident that the justices exercised discretionary justice, as they were cognizant of and proactive in the developmental creation of the criminal

---

[91] Ibid., Section 94 of the Indian Act (R.S.C. 1886 c. 43) provides that, "Every person who sells, exchanges with, barters, supplies or gives to any Indian or non-treaty Indian, an intoxicant … be liable to imprisonment for a term not exceeding six months … ," 301.

[92] Black's Law Dictionary. "As an element of criminal responsibility: a guilty mind; a guilty or wrongful purpose; a criminal intent," 985.

law germane to the NWT. Laws, rules, doctrines or precedents were cited and applied to meet particular or individual circumstances of each case. By-laws were sometimes invalidated and convictions quashed, and in several instances the court did not cite authorities for its decisions and, as the body of last resort, relied on its own legislated and judicial authority. In the end, the judicial practices of the justices overwhelmingly affirmed the supremacy and legitimacy of the English Imperial and Canadian Dominion Parliaments.

CHAPTER 6:

CONCLUSION

The history of the law and judicial institutions of the NWT has received scant attention from legal historians. Professor L.A. Knafla put it well when he suggested that the attention paid to the legal history of Western Canada " … has been a haphazard affair … lacking a critical context and focus."[1] Congruent with that observation, the analysis of any judicial proceedings is virtually non-existent. Professor Wilbur F. Bowker's survey of the "Stipendiary Magistrates and the Supreme Court of the North-West Territories, 1876-1907,"[2] discusses the role of SMs and the Justices in the larger context of the NWT legal history. He cites several cases and also provides anecdotal information for several of the justices.

Professor D. Colwyn Williams, in a series of articles in the Saskatchewan Bar Review, provides an in-depth chronology of the political and legal events of the early NWT.[3] He concludes that the Council of Assiniboia

---

[1] Louis A. Knafla. "From Oral to Written Memory: The Common Law Tradition in Western Canada." In Law and Justice in a New Land. (Calgary: The Carswell Company Limited, 1986). 31-77.

[2] Wilbur F. Bowker. A Consolidation of Fifty Years of Legal Writings 1938-1988. Edited by Marjorie Bowker. (Edmonton: The Faculty of Law University of Alberta, 1989), 691-734.

[3] Williams, D. Colwyn, "The Dawn of Law on the Prairies." In The Saskatchewan Bar Review, Vol. 27, No. 4., Vol. 28, No. 1. (Saskatoon: Law Society of Saskatchewan, 1962), 126-133, 17-69. Also, see D. Colwyn Williams. "Law and Institutions in the North West Territories, 1869-1905." In Saskatchewan Bar Review, Vol. 28, No. 3 (September 1963),

represented " … the beginning of law and order on the Prairies … ,"[4] and J.E. Cote's "Introduction of English Law into Alberta"[5] provides an insightful analysis regarding the accretion of English law into the NWT, and concluded the essay with a "Table of English Statutes in Force in Canada."[6]

Professor L.A. Knafla's treatise "From Oral to Written Memory: The Common law Tradition in Western Canada"[7] discussed the "legal and cultural milieu" of the West. Knafla concluded that the judges on the prairies " … worked hard to establish the independence of the judicial regime and local control over a rapidly expanding society and economy."[8] Professor Knafla's most recent publication[9] is a biographical history of the judges and justices of the Supreme and District Courts of the NWT and Alberta from 1876-1990. What is absent in all the historical literature

---

109-118; Vol. 29, No.2, (March 1964), 51-60; Vol. 29, No. 3 (September 1964), 83-101, Vol. 30, No. 2 (June 1965), 51-66; (Saskatoon: Law Society of Saskatchewan, 1965).

[4] Ibid., vol. 28, no. 2, 68.

[5] J.E. Cote. "The Introduction of English Law into Alberta." In Alberta Law Review, Vol. 3. (Edmonton: University of Alberta Publishing Department, 1964), 262-292.

[6] Ibid., 278-292.

[7] Louis A. Knafla. "From Oral to Written Memory: The Common Law Tradition in Western Canada." In Law and Justice in a New Land. (Calgary: The Carswell Company Limited, 1986), 31-77.

[8] Ibid., 59.

[9] Knafla, Louis A. Richard Klumpenhouwer. Lords of the Western Bench: A Biographical History of the Supreme and District Courts of Alberta, 1876-1990 (Calgary: The Legal Archives Society of Alberta, 1997), 1-229.

above is an incisive analysis of the work of the judges themselves.

This thesis reviews the growth of English law in the NWT from its inception in HBC law, and concludes with an analysis of the proceedings of the SCNWT 1887-1907. The research and analysis of the civil and criminal law has revealed just how active the justices were in developing a common law that would be truly relevant. It also points out and assesses the most important cases that came to constitute the law of the NWT.

First, in summary, the English common law arrived in Canada as an administrative component of an economically based merchant company. The subsequent evolution of the common law in the NWT had been facilitated by King Charles II, who in 1670 granted the HBC Charter to Prince Rupert and the "Company of Adventurers" trading into the Hudson's Bay. During the next 150 years, officers of the Company acted as autonomous judicial officials. They oversaw the operation of Company posts, they administered the Company's colonial or private law which was an extension of and compatible with the laws of England, and they adjudged " … all persons belonging to the Governor and Company, or that shall live under them, in all cases, whether civil or criminal … ."[10] Indeed, the precedents they created became the first

vestiges of a common law germane to the chartered Territories.[11]

The subsequent laws and judicial decisions of the General Court of Assiniboia gave substance to those common law precedents.[12] In the late 1840s, the activities and decisions of the General Court affirmed the grip of English statute and common law as it was perceived in Rupert's Land, the Indian Territories and the NWT.[13] Adam Thom was appointed the first judge (a recorder) of Rupert's Land, where he played a decisive role in the interpretation of the law and creation of common law precedents in Assiniboia. The law which the Company was concerned with consisted of codes which Thom had created. His precedent decision regarding the arrival of English law, however, was affirmed by the Manitoba Superior Court in the 1880s.[14] That court also recognized the statute and common laws of England as applicable to the NWT. During the formative period, moreover, the NWMP became a major influence on the development of the law in the Prairie West.

In 1874, by virtue of their tenure as commissioned

---

[10] Stubbs, 1.

[11] Supra, chapter 2. The King murder of 1802 and the apprehension of Lamothe in the Indian Territories. Also, the 1816 massacre at Seven Oaks.

[12] Supra, chapter 2.

[13] Supra, chapter 2.

officers, a select group of NWMP members were appointed *ex officio* JPs and SMs. These judicial officials conveyed and applied English, Canadian, statute and common law in the NWT. In that process, they created a body of common law precedent that, in turn, was bequeathed to the first civilian SMs and judges of the NWT. In 1876, the first civilian SMs were appointed in the NWT. These officials were the first judicial officials independent of the NWMP, and SMs presided over both criminal and civil cases. They also exercised a more encompassing and extensive judicial authority than a JP. In 1885, SMs were appointed Judges of the High Court of Justice in the NWT, and in 1887 those judges became the first Justices of the SCNWT.

It has become evident throughout this investigation that the first generation Justices of the SCNWT, 1887-1907, were cognizant of and proactive in the developmental creation of common law precedents that were germane to the NWT. Indeed, it can be concluded that the justices exercised a formative influence on the "life of the law." The evidence also reveals that most of them were highly competent and gave diverse interpretations to the statutes and the common law. They adhered to the English and Canadian principles, doctrines, and judicial precedents, and displayed an uncompromising adherence to the rules of law as they

---

[14] Supra, chapter 2. (1886) 3 Man. L.R. 481, (1888) 5 Man. L.R. 17.

perceived them.

Professor Bowker has stated that:

> … [t]he seven volumes of the Territories Law Reports show a substantial body of judgments by the original five members and D.L. Scott … testify to a grasp of legal issues, good research (especially in the absence of adequate libraries), a sense of responsibility, and as far as one can discern from the judgments, an absence of cliques or animosities.[15]

That observation is generally correct. However, it also became evident throughout this investigation that several comments by the court *en banc* suggested that certain members of the court (Macleod, Rouleau) and some of their decisions' were defective, "incautious" or "premature." The decisions by the court, nonetheless, were not "static" and unchanging, but continuously in a state of "flux" that was congruent with the changing environment of the NWT.

The analysis of the common law manifested by the justices *en banc* and on *assize* conclusively reveals that they invoked, molded, followed and applied principles, doctrines and precedents from English statute and common law. They also cited and followed precedents and doctrines of the Supreme Court of Canada and Provincial Supreme Courts. They occasionally referred to American and Australian Court decisions, and they also referred to scholarly papers and publications.

---

[15] Bowker, 727.

Throughout this first formative period, the justices also developed a body of common law that both responded to and contributed to the social, political, cultural and economic milieu of the NWT. The judicial proceedings and common law settled by this Court *en banc* and on *assize* reveal the Justices' strong belief in the supremacy of the *rule of law*. No evidence emerged of a judicial discretion that compromised that *rule of law* or the applicability of the common law. There are examples, however, of a discretionary justice where laws, rules, doctrines or precedents were cited and applied to meet the particular or individual circumstances of a case. Indeed, they sometimes displayed a judicial activism when they actively invalidated or deemed by-laws *ultra vires*.

Throughout this examination and analysis, the primary source materials was the TLR volume's 1-7, 1887-1907. This was contained in 3471 pages of text, and of the 614 decisions reviewed and analyzed, 521 were civil cases (158 *en banc*). The remaining 93 cases were criminal cases (62 *en banc*). Overall, the cases appear to represent an excellent cross section of the legal disputes heard by the court. Several of the justices judicial notebooks were also examined. These included Justice J.F. Macleod, C.B. Rouleau, D.L. Scott, and H. Harvey. There are several other law reports that contain some cases from the proceedings of the

court, (CCC and WLR), however, the TLR appear to represent the most comprehensive and detailed reporting of the courts activities.

On page 136, Table One represents a list of the first generation of SMs, and Judges of the High Court of Justice in the NWT and SCNWT, 1876-1907. The dates also reflect their post-SCNWT judicial tenures in 1907, and reveal that several of the justice's careers, either with the Supreme Court of Alberta or Sasketchewan, extended into the 1920's and in two instances into the 1940's.

On pages 137-140, 3-D color bar graphs provide a comparison of the criminal, civil, *en banc* and *assize* appeal cases heard by the court, 1887-1907. These cases do not include chambers applications or other administrative procedures heard by the court. Graph #1 on page 137 for 1887-1897, and Graph #2 on page 138 for 1897-1907, reveal that there were fewer criminal cases overall (except in 1889) than civil cases. The criminal appeal cases heard up to the Criminal Code (1892), or after it, were either reference cases for decisions on points of law, or important decisions regarding unsettled criminal legal issues. Another explanation for the paucity of criminal appeals to the court *en banc* overall is that either law enforcement was inadequate and very few individuals were caught committing criminal offenses, or there was a reluctance for victims to

complain and inaugurate the criminal legal process. Another explanation is that the majority of criminal cases were heard at the JP or SM level where proceedings were not recorded. The NWMP courts also heard numerous criminal cases that were never recorded. Finally, another plausible explanation was the cost of a criminal legal defense. Those charged with criminal offenses in the NWT were most likely from a lower social economic rank and could not afford a criminal legal advocate.

Conversely, in graphs one and two on the same pages, appellants to the civil appeals process *en banc* suggest that they were indeed financially better off, and were able to afford those civil appeal advocates (R.B. Bennett, J.A. Lougheed, J. Muir, C.C. McCaul, etc.,) who no doubt garnered handsome fees for their legal services. There is also the fact that in the NWT, civil cases involving commercial enterprises, land transactions, estates, and taxation attracted a wealthier clientele, and the appeals contained important issues for the court's consideration. In the third (1887-1897), and forth graphs (1897-1907), which represent the assize court proceedings on pages 139 and 140, the overwhelming predominance of civil proceedings supports these conclusions. In 1899, for example, the justices presided over a total of thirty-three *assize* appeals in their judicial districts; twenty-eight were civil matters,

and five were criminal. Combined, they were the largest number of judicial hearings in any single year. In 1907, the SCNWT presided over nineteen appeal cases *en banc*, fifteen civil and four criminal, also the greatest number of any previous year.

During the court's twenty year existence, Justice Wetmore was the most active jurist. He presided over one-hundred and ninety-two civil and criminal *assize* appeal cases. Wetmore was described by C.C. McCaul as the strongest member of the court. Interestingly, Wetmore presided almost exclusively on civil cases. In fact, volume III of the TLR is a testament to the volume of cases heard by him. It is replete with his judgments. Justice Stuart on the other hand heard a meager five civil cases, although he only became a member of the SCNWT in 1906. Justice Scott presided over eighty-three *assize* criminal and civil cases, Justice Richardson twenty-seven, Rouleau fifteen, Newlands fourteen, McGuire eight, and Harvey six. The remaining members--Macleod, Prendergast, Sifton or Johnstone's *assize* appeals do not appear in the reports. All the justices, however, appear at one time or another presiding *en banc*. The "ebb and flow" of these appeal cases to SCNWT culminated in 1907, when the court became the Supreme Court of Alberta.

Finally, it is evident that several decisions of the justices facilitated the expansion of enduring doctrines and

precedents. Some of these include the duties of common carriers and warehousemen, master and servant relations, contractual relations and business operating standards, land title registration procedures, the supremacy of the *rule of law*, the legal duties of the crown in criminal proceedings, their responsibility regarding "burden of proof," similar fact evidence, the duties of persons in authority conducting criminal investigations, and the all encompassing principle of judicial review by an appellate court. Indeed, the HBC officers, the NWMP officers, JPs and SMs, the Judges of the High Court of Justice, and the Justices of the SCNWT were, as C.C. McCaul adeptly called them, "precursors of the bench and bar" of Alberta.

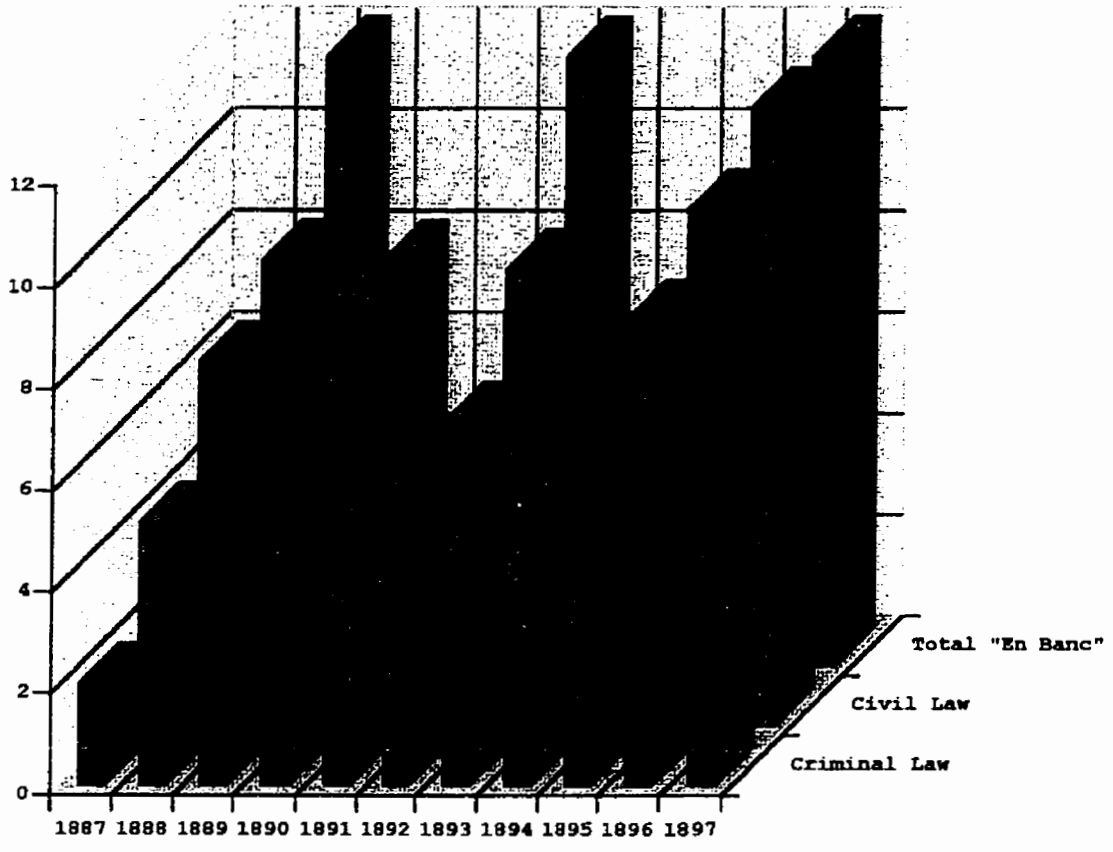
Table One

- James Farquharson Macleod, 1 January 1876 - 5 September 1894.
- Hugh Richardson, 22 July 1876 - 12 November 1903.
- Charles Borromee Rouleau, 28 September 1883 - 25 August 1901.
- Edward Ludlow Wetmore, 18 February 1887 - 16 September 1907.
- Thomas Horace McGuire, 25 April 1887 - 18 February 1902, then appointed Chief Justice, 18 February 1902 - 3 January 1903.
- David Lynch Scott, 28 September 1894 - 26 July 1924.
- James Emile Pierre Prendergast, 18 February 1902 - 18 March 1944.
- Arthur Lewis Sifton, became Chief Justice, 3 January 1903 - 25 May 1910.
- Henry William Newlands, 2 January 1904 - 17 February 1921.
- Horace Harvey, 27 June 1904 - 9 September 1949.
- Thomas Cook Johnstone, 8 October 1906 - 29 November 1913.
- Charles Allan Stuart, 8 October 1906 - 5 March 1926.[16]

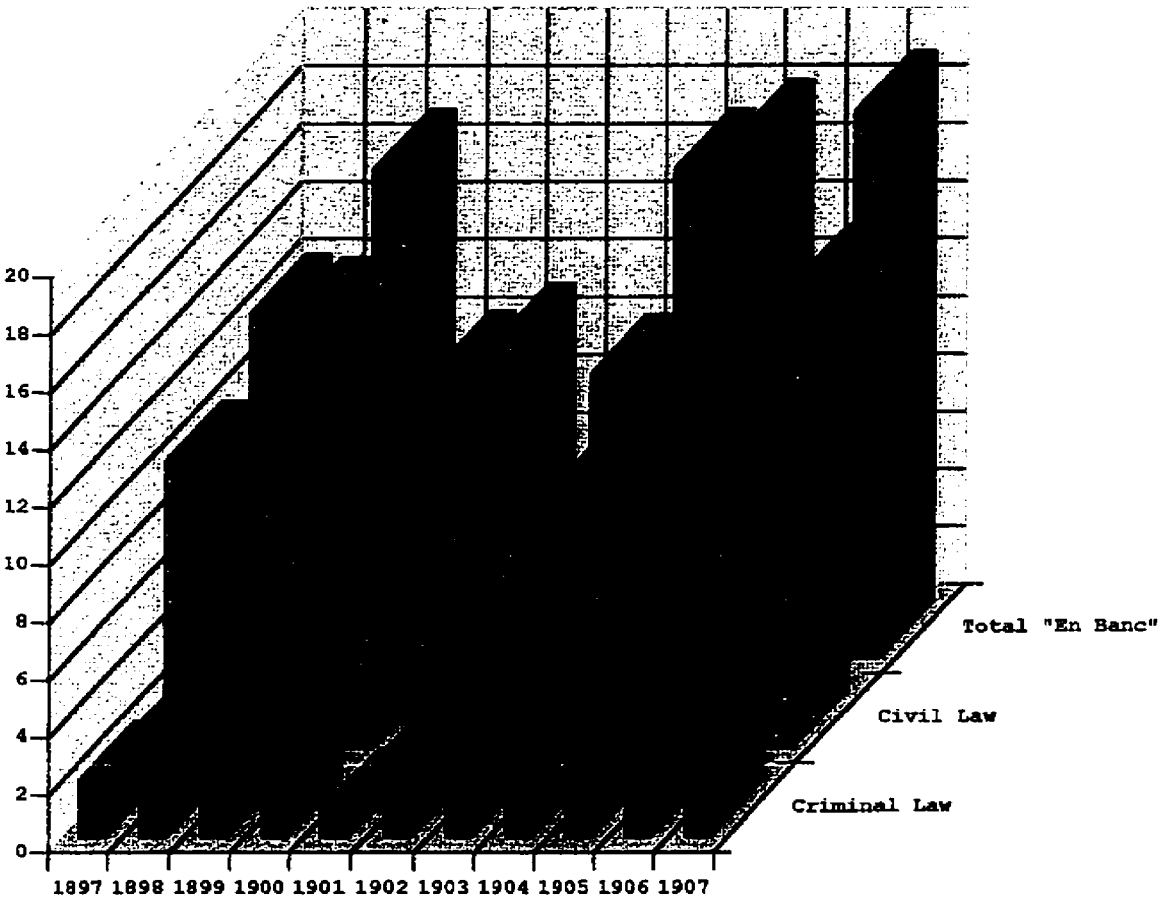
---

[16] This list was compiled from The Territories Law Reports, Volumes 1 - 7, 1887 - 1907. Also, see Louis Knafla and Richard Klumpenhouwer, Lords of the Western Bench: A Biographical History of the Supreme and District Courts of Alberta, 1876 - 1990. (Calgary: The Legal Archives Society of Alberta, 1997), 1-193.

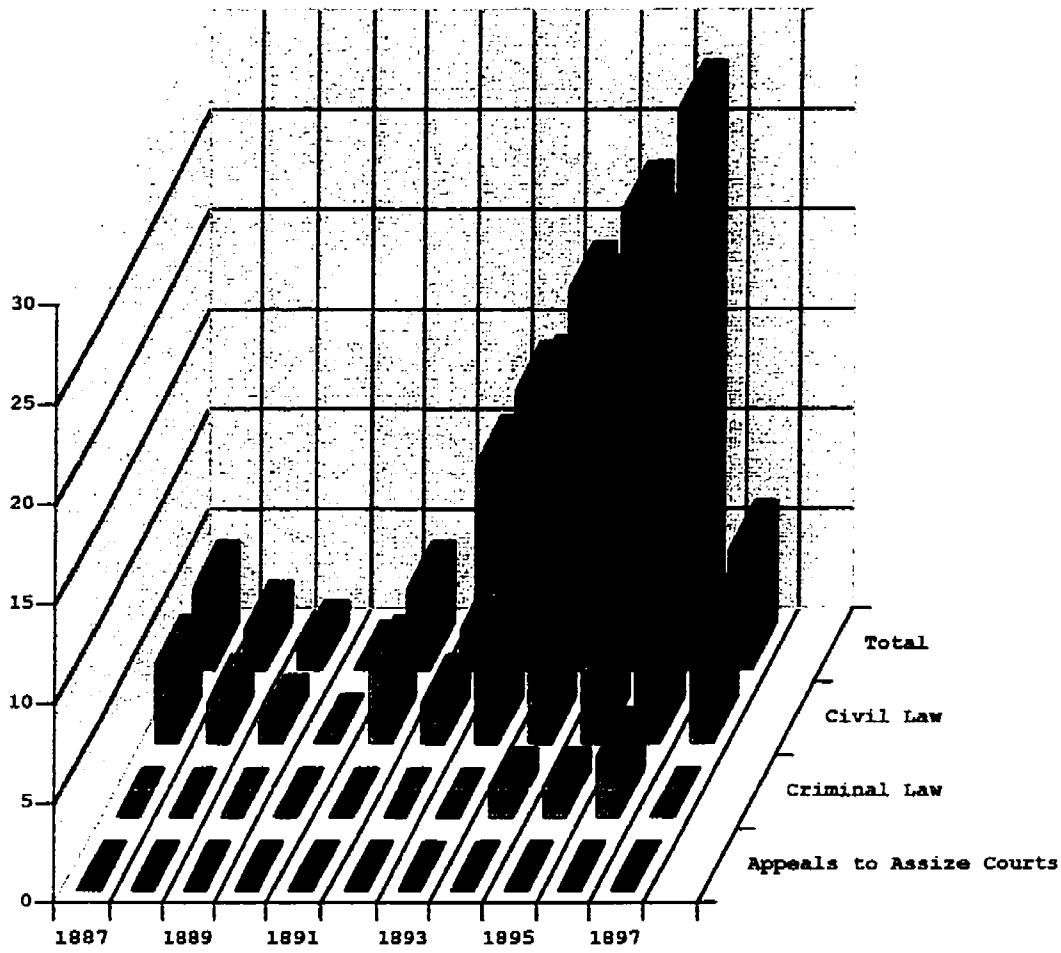
GRAPH #1


12
10
8
6
4
2
0
1887 1888 1889 1890 1891 1892 1893 1894 1895 1896 1897
Total "En Banc"
Civil Law
Criminal Law

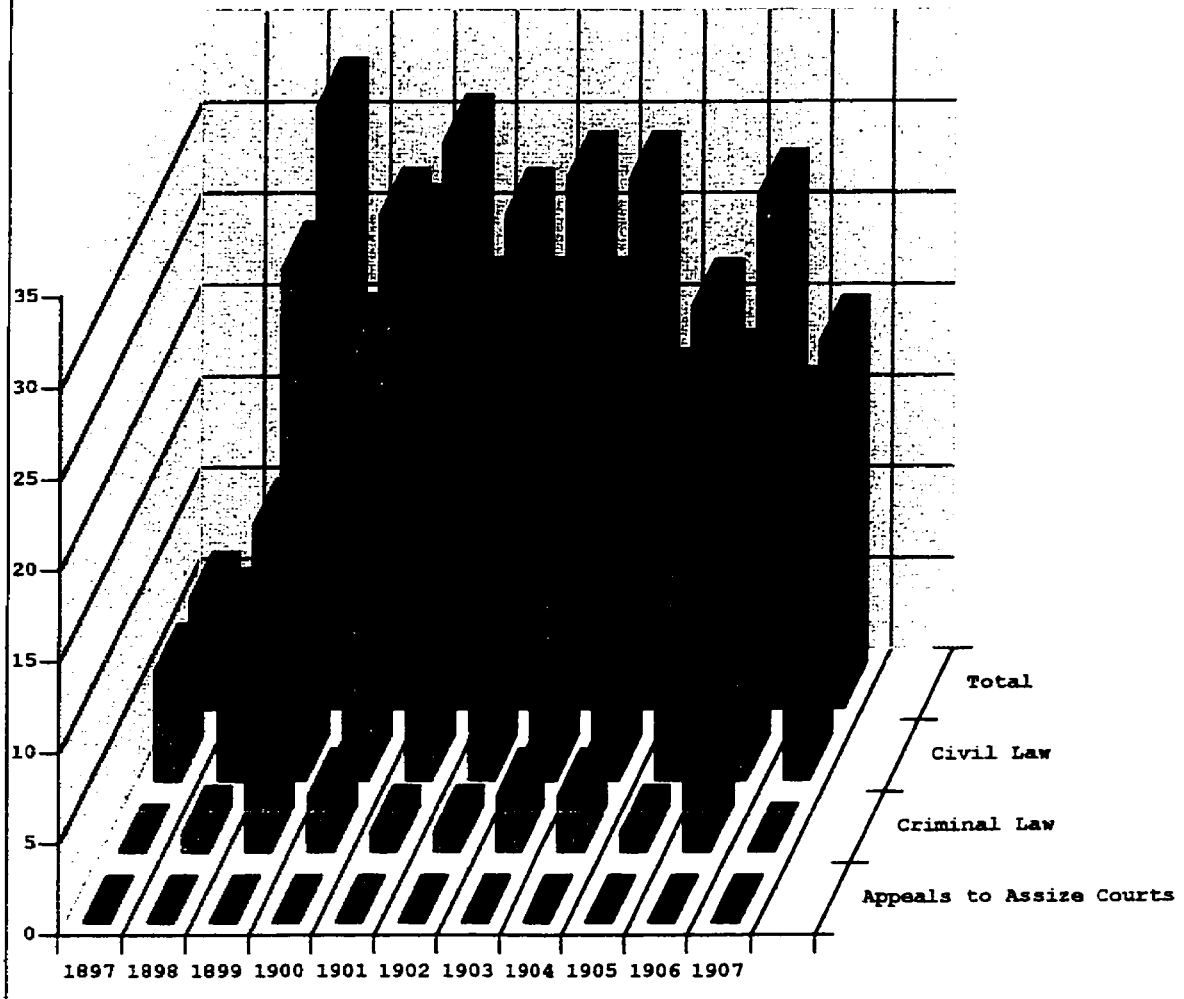
GRAPH #2


20
18
16
14
12
10
8
6
4
2
0
1897 1898 1899 1900 1901 1902 1903 1904 1905 1906 1907
Total "En Banc"
Civil Law
Criminal Law

GRAPH #3


30
25
20
15
10
5
0
1887
1889
1891
1893
1895
1897
Total
Civil Law
Criminal Law
Appeals to Assize Courts

GRAPH #4


35
30
25
20
15
10
5
0
1897 1898 1899 1900 1901 1902 1903 1904 1905 1906 1907
Total
Civil Law
Criminal Law
Appeals to Assize Courts

BIBLIOGRAPHY

Abbreviations

AC	Appeal Cases
Br & B	Broderip & Bingham Common Pleas
CCC	Canadian Criminal Cases
C&K	Carrington & Kirwan's English Nisi Prius Reports (1843-50)
CPR	Canadian Pacific Railway Company
Cox CC	Cox's English Criminal Cases (1843-1948)
F&F	Foster & Finlason's English Nisi Prius Reports (1856-67)
HBC	Hudson's Bay Company
JCPC	Judicial Committee of the Privy Council
JP	Justice of the Peace
JP	Justice of the Peace (Weekly Notes of Cases) (Eng.)
Jur	Jurist Reports (1837-1854)
LCJ	Lower Canada Jurist
LCLJ	Lower Canada Law Journal (1865-68)
LJCP	Law Journal Reports, Common Pleas (Eng.)
LJMC	Law Journal Reports, New Series, Magistrates Cases (Eng.)
LJPC	Law Journal Reports Privy Council (Eng.)
LT	Law Times Reports (Eng.)
LT	Law Times Journal
Moore	Moore's Common Pleas Reports
NCO	Non-Commissioned Officer

NWC	North-West Company
NWMP	North-West Mounted Police
NWT	North-West Territories
OR	Ontario Reports
PAA	Provincial Archives of Alberta
QB	Queen's Bench
QB	English Law Reports, Queen's Bench
QBD	English Law Reports, Queen's Bench Division
R	The Reports, Coke's King's Bench (Eng.)
R & R	Russell & Ryan's English Crown Cases
RCMP	Royal Canadian Mounted Police
RNWMP	Royal North-West Mounted Police
RJRQ	Rapports Judiciaires Revises de la Province de Quebéc (Quebéc Revised Reports)
RLOS	La Revue Légale, Old Series (Qué.)
RSC	Revised Statutes of Canada
SCNWT	Supreme Court of the North-West Territories
SM	Stipendiary Magistrate
SCC	Supreme Court of Canada
SCR	Supreme Court Reports (1876-date)
TLR	Territorial Law Reports
UCCP	Upper Canada Common Pleas
UCLJ	Upper Canada Law Journal (1885-1922)
WLR	Western Law Reporter
WR	Weekly Reporter (Eng.)

Primary Sources

Archival Materials

Public Archives of Alberta (PAA): Judicial Notebook of C.B. Rouleau, file # 68.302/1, book E. 86-94; Judicial notebook of Justice D.L. Scott; Judicial notebooks of Justice J.F. Macleod, file # 74.1/252, 253, 254, 255, 256, 257; Judicial notebook of Justice H. Harvey, file # 73.182.

Accession file 69.305, box 1 - SCNWT files from SM's, (1881-1884); box 2 - SCNWT files from SM's, (1885-87). Accession file 79. 266, Northern Alberta Judicial District SCNWT @ Calgary, 1883-1907, (Criminal and civil court assize cases).

File 83.1, #67 & 71, box 1.a. JP files and trial proceedings.

Judicial notebooks of Justice James Farquharson Macleod, volumes one through seven for the years 1889, 1890, Feb.-June 1891, Supreme Court Sittings, 1890-94, file # M776, Glenbow Museum Archives.

Newspapers

Calgary Herald, 1996.

Government Documents

Canada Sessional Papers - NWMP Annual Reports: Annual Reports of The Officer Commanding "E" Division (Calgary), 1890-1907.

_____, A Chronicle of the Canadian West, North-West Mounted Police Reports for 1875. Calgary: Historical Society of Alberta, ____, 11.

Statutes

The Criminal Code of Canada, 1892, 55-56 Victoria, c. 29.

The Indian Act, R.S.C. 1886, c. 43.

The North-West Territories Act, 1875, c. 49 and 50.

The North-West Territories Amendment Act, 49 Vict., c. 25.

The Ordinances of the North-West Territories, R.S.C., 1886, c. 50.

The Royal Charter Incorporating the Hudson's Bay Company, 1670. (Granted by his Majesty King Charles the Second, in the 22d year of his reign, A.D. 1670).

The Rupert's Land Act, 1868. 31-32 Victoria, c. 105.

BOOKS

Blackburn, Rae Maureen, ed. The Canadian Abridgment, Consolidated Table of Cases, 2nd Edition, Volumes 1,2,3,4. Toronto: Carswell Thompson Professional Publishing, 1995.

Blackstone, Sir William. The Sovereignty of the Law. Selections from Blackstone's Commentaries on the Laws of England. Edited by Gareth Jones. Toronto: University of Toronto Press, 1973.

Burbidge, James S., ed. Canadian Case Citations, volume 7. Toronto: Carswell Thompson Professional Publishing, 1992.

____ The Digest of Annotated British, Commonwealth and European Cases. London: Butterworth and Company (Publishers) Ltd., 1996.

Hale, Sir Matthew. The History of the Common Law of England, (1739). Chicago: The University of Chicago Press, 1971.

Hailsham of St. Marylebone, Lord. Halsbury's Laws of England, 4th Edition, Volume 54, "Consolidated Table of Cases." London: Butterworth's, 1995.

Malor, Jean, ed. The Australian Digest, 2nd Edition. Sydney: The Law Book Co. of Australisia Pty Ltd., 1963.

Oliver, E.H., ed. "The Constitutional Development of the Prairie Provinces", in The Canadian North-West, Its Early Development and Legislative Records, volume 1. Ottawa: Government Printing Bureau, 1914.

____ Opening Up The West, "Being the Official Reports To Parliament of the Activities of the Royal North-West Mounted Police Force from 1874-1881, by Commissioners of the Royal North-West Mounted Police." Toronto: Coles Publishing Company, 1973.

Slattery, Brian, ed. Canadian Native Law Cases, volume 1, 1763-1869; Volume 3, 1891-1910. Saskatoon: University of Saskatchewan, Native Law Centre, 1980.

Stone, Arthur Paul, ed. The Law Reports Digest of Cases and Statutes from 1865 to 1890, volume 3. London: William Clowes and Sons Limited, 1892.

The Ontario Reports, ed. James F Smith, Vol. XV. Toronto: R Rowsell and Hutchison, 1988.

The Territories Law Reports, ed. N.D. Beck, Q.C., Vol. I. Toronto: The Carswell Co., Limited, 1900.

The Territories Law Reports, ed. N.D. Beck, K.C., Vol. II. Toronto: The Carswell Co., Limited, 1906.

The Territories Law Reports, ed. N.D. Beck, K.C., T.D. Brown, Vol. III. Toronto: The Carswell Co., Limited, 1910.

The Territories Law Reports, ed. N.D. Beck, K.C., Vol. IV. Toronto: The Carswell Co., Limited, 1906.

The Territories Law Reports, ed. N.D. Beck, K.C., Vol. V. Toronto: The Carswell Co., Limited, 1906.

The Territories Law Reports, ed. N.D. Beck, K.C., O.M. Biggar, T.D. Brown, Vol. VI. Toronto: The Carswell Co., Limited, 1910.

The Territories Law Reports, ed. T.D. Brown Vol. VII. Toronto: The Carswell Co., Limited, 1912.

The Ordinances of the North-West Territories Edmonton: Jas. E. Richards, Government Printer, 1898.

Secondary Sources

BOOKS

Baker, J.H. An Introduction of English Legal History. London: Butterworths, 1979.

Baker, William M. Pioneer Policing in Southern Alberta: Deane of the Mounties. Calgary: Historical Society of Alberta, 1993.

Bakken, Larry A. Justice in the Wilderness: A Study of Frontier Courts in Canada and the United States 1670 - 1870. Littleton: Fred B. Rothman & Co., 1986.

Black, Henry Campbell. Black's Law Dictionary, 6th Edition. St. Paul: West Publishing Co., 1990.

_____. Chitty's Blackstone: American Edition of 1859, Volume I. New York: _____, 1932.

Bowker, Wilbur F. A Consolidation of Fifty Years of Legal Writings 1938-1988. Edited by Marjorie Bowker. Edmonton: The Faculty of Law University of Alberta, 1989.

Chambers, Captain Ernest J. The Royal North-West Mounted Police: A Corps History. Montreal: The Mortimer Press, 1902.

Cox, Ross. The Columbia River or, Scenes and Adventures During A Residence of Six Years on the Western Side of the Rocky Mountains, Volume II. London: Henry Colburn and Richard Bentley, 1832.

Dempsey, Hugh A. Charcoal's World. Saskatoon: Western Producer Prairie Books, 1978.

Dempsey, Hugh A. Crowfoot: Chief of the Blackfeet. Norman: University of Oklahoma Press, 1972.

Dempsey, Hugh A. William Parker: Mounted Policeman. Edmonton: Hurtig Publishers, 1973.

Denny, Sir Cecil E. The Law Marches West, ed. W.B. Cameron. Toronto: J.M. Dent & Sons (Canada) Ltd., 1972.

Donkin, John George. Trooper in the Far North-West. Saskatoon: Western Producer Prairie Books, 1987.

Friesen, Gerald. The Canadian Prairies: A History. Toronto: University of Toronto Press, 1984.

Gibson, Dale, Lee Gibson. Substantial Justice: Law and Lawyers in Manitoba, 1670-1970. Winnipeg: Peguis Publishers, 1972.

Knafla, Louis A. Richard Klumpenhouwer. Lords of the Western Bench: A Biographical History of the Supreme and District Courts of Alberta, 1876-1990. Calgary: The Legal Archives Society of Alberta, 1997.

Laskin, Bora. The British Tradition in Canadian Law. London: Steven's & Sons, 1969.

Lambrecht, Kirk N.. The Administration of Dominion Lands, 1870-1930. Winnipeg: Hignell Printing Limited, 1991.

MacLaren, Sherrill. Braehead, Three Founding Families in The Nineteenth Century Canada. Toronto: McClelland and Stewart Limited, The Canadian Publishers, 1986.

Macleod, R.C. The North-West Mounted Police and Law Enforcement, 1873-1905. Toronto: University of Toronto Press, 1976.

McConnell, W.H. Prairie Justice. Calgary: Burroughs and Company, 1980.

Morton, Arthur S. A History of The Canadian West to 1870-71 London: Thomas Nelson & Sons Ltd., _____.

Oliver, E.H. ed. "The Constitutional Development of the Prairie Provinces", in The Canadian North-West, Its Early Development and Legislative Records. Ottawa: Government Printing Bureau, 1914.

Phillips, O. Hood. The First Book of English Law, 6th Edition. London: Sweet & Maxwell, 1970.

Snell, James G. Frederick Vaughan. The Supreme Court of Canada: History of the Institution. Toronto: The Osgoode Society, 1985.

Stubbs, Roy St. George. Four Recorders of Rupert's Land: A Brief Survey of the Hudson's Bay Company Courts of Rupert's Land. Winnipeg: Peguis Publishers, 1967.

Thomas, Lewis G. ed. The Prairie West to 1905. Toronto: Oxford University Press, 1975.

Thomas, Lewis Herbert. The Struggle for Responsible Government in the North-West Territories, 1870-97. Toronto: University of Toronto Press, 1978.

Turner, John Peter. The North-West Mounted Police 1873-1893. Volumes 1 & 2. Ottawa: King's Printer & Controller of Stationary, 1950.

Utley, Robert M. The Lance and the Shield; The Life and Times of Sitting Bull. New York: Ballantine Books, 1993.

Van Kirk, Sylvia. Many Tender Ties. Winnipeg: Saults and Pollard Ltd., 1980.

ARTICLES

Backhouse, Constance B. " Nineteenth-Century Canadian Rape Law 1800-92." In Essays in the History of Canadian Law, Vol. II, edited by David H. Flaherty. Toronto: University of Toronto Press, 1983. 200-247.

Bindon, Kathryn M. "Hudson's Bay Company Law: Adam Thom and the Institution of Order in Rupert's Land 1839-54." In Essays in the History of Canadian Law, Volume 1, ed. David H. Flaherty. Toronto: University of Toronto Press. 43-87.

Brown, Desmond. "Unpredictable and Uncertain: Criminal Law in the Canadian North West Before 1886." In Alberta Law Review, Volume XVII, no.3, Edmonton: University of Alberta Publishing Department, 1979. 497-512.

Cote, J.E., "The Introduction of English Law into Alberta." In Alberta Law Review, Vol. 3, Edmonton: University of Alberta Publishing Department, 1964. 262-292.

Dickason, Olive Patricia "From 'One Nation' in the Northeast to 'New Nation' in the Northwest: A look at the emergence of the Metis." In The New Peoples: Being and Becoming Metis in North America. Edited by Jacqueline Peterson and Jennifer S.H. Brown. Winnipeg: The University of Manitoba Press, 1985. 19-36.

Foster, Hamar. "Long Distance Justice: The Criminal Jurisdiction of the Canadian Courts West of the Canadas, 1763-1859." In The American Journal of Legal History. Philadelphia: Temple University School of Law, 1990. 1-48.

Foster, Hamar. "Sins Against the Great Spirit: The Law, the Hudson's Bay Company, and the Mackenzie River Murders, 1835-1839." In Criminal Justice History, Vol. X., edited by Louis A. Knafla. Westport: Meckler Corporation, 1989, 23-73.

Francis, Daniel. "Traders and Indians." In The Prairie West, edited by R. Douglas Francis and Howard Palmer, 2nd edition. Edmonton: University of Alberta Press, 1992. 68-81.

Getty, Ian. "The Role of Mounted Police Outposts in Southern Alberta." In Men in Scarlet. Edited by Hugh A. Dempsey. Calgary: McClelland and Stewart West, _____. 187-197.

Halpenny, Frances G. ed., Dictionary of Canadian Biography, volume XI. Toronto: University of Toronto Press, 1990. 672.

Halpenny, Frances G. ed., Dictionary of Canadian Biography, volume XII. Toronto: University of Toronto Press, 1990. 427.

Halpenny, Frances G. ed., Dictionary of Canadian Biography, volume XIII. Toronto: University of Toronto Press, 1990. 232.

Harvey, Horace. "The Early Administration of Justice in the North-West." In The Alberta Law Quarterly, Vol. 1. Edited by C.A.Perkins, Edmonton: Faculty of Law, University of Alberta, 1934. 1-15.

Hillmer, Norman. "Biggar, Oliver Mowat" in The Canadian Encyclopedia, volume 1. Edited by James H. Marsh. Edmonton: The Hurtig Publishers Ltd., 1985. 171.

Horrall, S.W. "The March West." In Men in Scarlet. Calgary Historical Society of Alberta/McClelland And Stewart West, 1974. 13-26.

Jennings, John. "The Plains Indians and the Law." In Men in Scarlet. Edited by Hugh A. Dempsey. Calgary: McClelland and Stewart West, _____. 50-65.

Knafla, Louis A. ed. "Canadian Legal Culture." In Law and Justice in A New Land: Essays In Western Canadian Legal History. Calgary: The Carswell Company Limited, 1986. 3-29.

Knafla, Louis A. "From Oral to Written Memory: The Common Law Tradition in Western Canada." In Law and Justice in a New Land. Calgary: The Carswell Company Limited, 1986, 31-77.

Macleod R.C. "Canadianizing the West: The North-West Mounted Police as Agents of the National Policy, 1873-1905." In Essays on Western History, ed. Lewis H. Thomas Edmonton: The University of Alberta Press, 1976, 101 -110.

Macleod, R.C. Dictionary of Canadian Biography, Frances G. Halpenny, ed., Vol. XII. Toronto: University of Toronto Press, 1990. 672-5.

Martin, Archer and J.T. Huggard editors. "The Rise of Law in Rupert's Land." In The Western Law Times, Vol. 1, No.3, 4, 5, (June, July, August 1890). 49-59, 73-80, 93-100.

McCaul, C.C. "Precursors of the Bench and Bar in the Western Provinces." In Canadian Bar Review, edited by Charles Morse, Vol. 3. Toronto: The Carswell Company Ltd., 1925. 25-40.

McCaul, C.C. "Constitutional Status of The North-West Territories of Canada." In Canadian Law Times, edited by E. Douglas Armour, Vol. 4, No.1, (January 1884), Vol. 4, No. 2, (February 1884), 49-61 and Vol. 4, No. 9, (July 1884), 309-313. Toronto: Carswell & Co., 1894.

Miller, J.R. "Owen Glendower, Hotspur, and Canadian Indian Policy." In Sweet Promises: A Reader on Indian-White Relations in Canada, edited by J.R. Miller. Toronto: University of Toronto Press, 1991. 323-352.

Parker, C.W. ed., Who's Who and Why. Vol. 6-7. Toronto: International Press Ltd., 1914. 794.

Tobias, John L. "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy." In Historical Perspectives on Law and Society in Canada. Edited by Tina Loo and Lorna R. Mclean. Toronto: Copp Clark Longman Ltd., 1994. 290-305.

Williams, D. Colwyn, "The Dawn of Law on the Prairies." In The Saskatchewan Bar Review, Vol. 27, No. 4.,Vol. 28, No. 1, Law Society of Saskatchewan, 1962. 126-133, 17-69.

Williams, D. Colwyn, "Law and Institutions in the North West Territories (1869-1905)." In Saskatchewan Bar Review, Vol. 28, No. 3 (September 1963), 109-118, Vol. 29, No. 2, (March 1964), 51-60, Vol. 29, No. 3 (September 1964), 83-101, Vol. 30, No. 2 (June 1965), 51-66. Law Society of Saskatchewan, 1965.

_____, "Colonel James Farquharson Macleod, C.M.G." In R.C.M.P. Quarterly, Vol. 1, no. 4. Ottawa: Royal Canadian Mounted Police, 1944.

UNPUBLISHED MANUSCRIPTS

Foster, Hamar. "Law and Necessity in Western Rupert's Land and Beyond, 1670-1870." In papers presented at the 1997 Law and Society in Canada's North-West Territories & Prairie Provinces 1670-1990 conference, Law for Buffalo Law for Musk Ox, held at University of Calgary, 2-5 April, 1997.

Theses

Swainger, Jonathan Scott. "Law in the Parkland: A History of the Red Deer Judicial District, 1907-1920." Master's Thesis. University of Calgary, 1987.

Chapman, Terry L. "Sex Crimes in Western Canada, 1890-1920." Doctoral Dissertation, University of Alberta, 1984.

Cases

Allen v. Pierce, (1895), 3 TLR 319.

Andreas v. Canadian Pacific Railway Co., (1905), 7 TLR 327.

Angus et al v. The Board of School Trustees of the School District of Calgary, (1887), 1 TLR 111.

Bonin v. Robertson, (1893), 2 TLR 21.

Bretherton v. Wood, (1821), 6 Moore 141; 3 Br. & B. 54; 9 Prince 408; 23 R.R. 556.

Collett v. London & N.W.R. Co., (1851) 16 Q.B. 984; 20 L.J.Q.B. 411; 15 Jur. 1053.

The Commissioner for Railways v. Brown, (1887), 13 AC 133; 57 LJPC 72; 57 LT 895, (New South Wales).

Canadian Pacific Railway Company and The Macleod Public School District, (1901), 5 TLR 187.

Canadian Pacific Railways and Town of Macleod, (1901), 5 TLR 192.

Connolly v. Woolrich, (1867), 11 LCJ 197; 3 UCLJ 14; 1 LCLJ 253.

Connolly v. Woolrich and Johnson et al (1867), 17 RJRQ 75; 11 LCJ 197.

Cuzner v. Calgary, (1888), 1 TLR 162.

Davis et al v. Patrick et al, (1893), 2 TLR 9.

Dickie v. Dunn, (1887), 1 TLR 83.

Dominion Bank v. Freedt, (1907), 6 TLR 298.

Re: Edmonton By-Law, (1900), 4 TLR 450.

Eggleston v. Canadian Pacific Railway Company, (1904), 5 TLR 503.

Eggleston v. Canadian Pacific Railway Co., (1905), 6 TLR 168.

Finlay v. CPR, (1901), 5 TLR 143.

Foulkes v. Metropolitan Ry. Co., (1880), 49 LJCP 361.

Granby v. Menard (1900), 31 SCR 14.

Grand Trunk RR v. Vogel, (1885), 11 SCR 612.

Hansen v. Canadian Pacific Railway Company, (1907), 6 TLR 420.

Harris v. Harris, (1895), 3 TLR 289.

Harris v. Harris #2, (1895), 3 TLR 416.

Hudson's Bay Company v. Battleford School District, Macdonald v. Battleford School District, Clinkskill v. Battleford School District, (1899), 4 TLR 285.

Ings v. Calgary General Hospital, (1899), 4 TLR 58.

Re: Isabella Heiminch and the Town of Edmonton, (1903), 5 TLR 462.

Re: P. Heiminch v. The Town of Edmonton, (1903), 5 TLR 459.

Jackson v. Canadian Pacific Railway Company, (1907), 6 TLR 423.

Johnstone et al v. Connolly (1869), 17 RJRQ 266; 1 RLOS 253.

Kelly v. the Alaska Mining and Trading Company, (1899), 4 TLR 18.

Kenny v. Canadian Pacific Ry. Co., (1902), 5 TLR 420.

Keohen v. Cook, (1887), 1 TLR 125.

King v. Lougheed, (1903), 6 TLR 77.

The King v. Rondeau, (1903), 5 TLR 478.

In Re: The Land Titles Act, 1894 and the Canadian Pacific Railway Company, (1899), 4 TLR 227.

Lamont v. The Canadian Pacific Railway Company, (1901), 5 TLR 60.

Lasser v. Bauer, (1903), 5 TLR 458.

MacDonnell et al v. Robertson, (1892), 1 TLR 438.

The Macleod Improvement Company v. Town of Macleod, (1901), 5 TLR 190.

Makin v. Attorney-General for New South Wales, (1894), AC 57.

Martin v. Reilly, (1889), 1 TLR 217.

Mayer v. Grand Trunk RR, (1880), 31 UCCP 248.

McEwen v. The N.W. Coal and Navigation Company, (1889), 1 TLR 203.

Morris v. Bentley, (1889), 2 TLR 253.

Re: Nettleship, (1899), 4 TLR 148.

Queen v. Banks, (1894), 2 TLR 81.

The Queen v. Bear Shin Bone, (1899), 4 TLR 173.

The Queen v. Charcoal, (1897), 3 TLR 7.

Queen v. Collyns, (1898), 3 TLR 82.

The Queen v. Nan-e-quis-a-ka, (1889), 1 TLR 211.

The Queen v. Petrie, (1895), 2 TLR 191.

Queen v. Smith, (1889), 1 TLR 189.

The Queen v. Smith, (1895), 2 TLR 189.

Queen v. Walker, (1893), 1 TLR 482.

Regina v. Beemer, (1888), 15 OR 266.

Regina v. Dossett, (1846), 2 C&K 306; 2 Cox CC 243.

Reg. v. Fennell, (1881), 50 LJMC 126; 7 QBD 147; 44 LT 687; 29 WR 742; 14 Cox CC 607; 45 JP 312.

Reg. v. Geering, (1849), 18 LJMC 215.

Regina v. Gray, (1866), 4 F&F 1102.

Regina v. Mellon, (1900), 5 TLR 301.

Regina v. Richardson, (1889), 17 OR 729.

Regina v. Simpson, (1898), 3 TLR 475.

Regina v. Thompson, (1893), 62 LJMC 93; 2 QB 12; 5 R 392; 6 LT 22; 41 WR 525; 17 Cox CC 641; 57 JP 312.

Rex. v. Canadian Pacific Railway Company, (1904), 7 TLR 286.

Sexsmith v. Murphy et al, (1891), 1 TLR 311.

Shorey et al v. Stobart et al, (1890), 1 TLR 262.

Smith v. The Canadian Pacific Railway Company, (1901), 7 TLR 56.

Smith v. MacFarlane (No. 1), (1903), 5 TLR 491.

Song Lee v. The Town of Edmonton, (1903), 5 TLR 466.

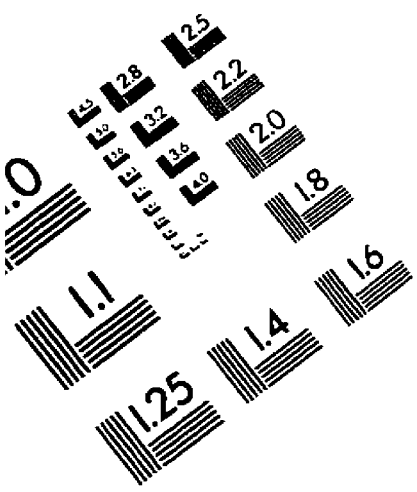
The Trustees of Balgonie Protestant Public School District v. The Canadian Pacific Railway Company, (1901), 5 TLR 123.

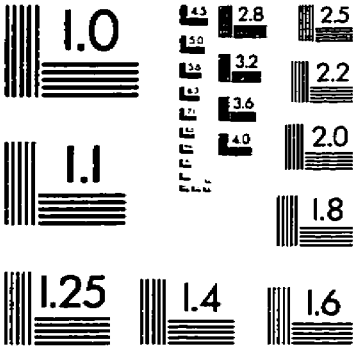
Turriff v. McHugh, (1889), 1 TLR 186.

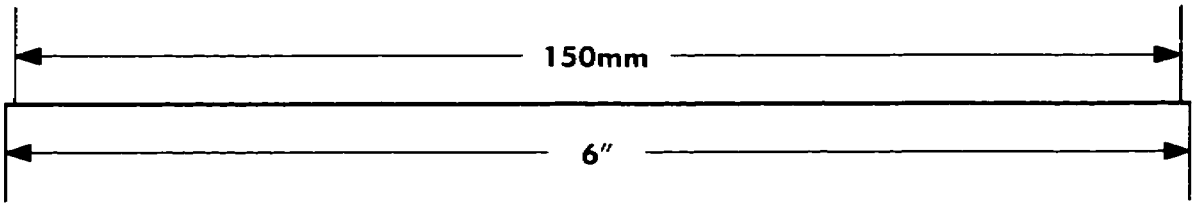
Walters et al v. Canadian Pacific Railway Company, (1887), 1 TLR 88.

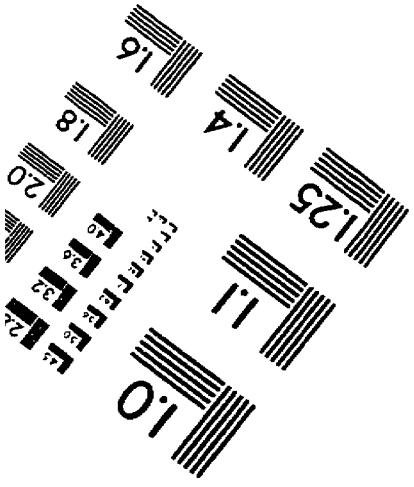
Wilkie et al v. Jellett et al, (1895), 2 TLR 133.

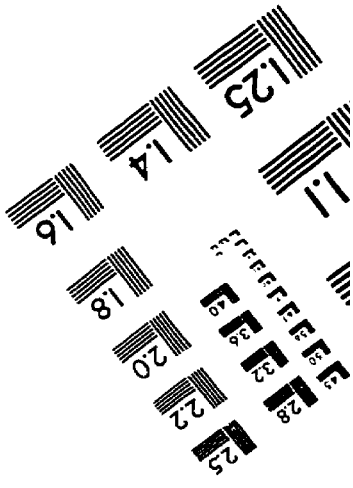
IMAGE EVALUATION
TEST TARGET (QA-3)











APPLIED IMAGE, Inc
1653 East Main Street
Rochester, NY 14609 USA
Phone: 716/482-0300
Fax: 716/288-5989

© 1993, Applied Image, Inc., All Rights Reserved