

Mutiny on the *Beaver*: Law and Authority in the Fur Trade Navy, 1835-1840

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... I decided on leaving them to be dealt with through the slow process of the law, as being in the end more severe than a summary infliction."

I. INTRODUCTION

IT IS CONVENTIONAL TO SEEK THE HISTORICAL ROOTS of British Columbia labour in the colonial era, that is to say, beginning in 1849 or thereabouts. That was when Britain established Vancouver Island, its first colony on the North Pacific coast, and granted the Hudson's Bay Company fee simple title on the condition that they bring out settlers.¹ It is a good place to begin, because the first batch of colonists were not primarily gentlemen farmers or officials but coal miners and agricultural labourers, and neither the Company nor Vancouver Island lived up to their expectations.² The miners were Scots, brought in to help the Hudson's Bay Company diversify and exploit new resources in the face of declining fur trade profits, but

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" James Douglas, Reporting to the Governor and Committee on the "Mutiny of the Beaver Crew, 1838", Provincial Archives of Manitoba, Hudson's Bay Company Archives [hereinafter HBCA] B. 223/6/21.

¹ In what follows the Hudson's Bay Company ("HBC") will be referred to as "they," etc., rather than "it". Whether the Crown had the legal capacity to grant the fee may be doubted: see generally K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).

² Their complaints even included the treatment they had received aboard ship on the voyage out: see letter from J. Douglas to A. Barclay, HBC Secretary (3 September 1849) in H. Bowsfield, ed., *Fort Victoria Letters 1846-1851* (Winnipeg: HBC Record Society, 1979) at 37. Recent studies of the miners include W.J. Burrill, *Class Conflict and Colonialism: The Coal Miners of Vancouver Island During the Hudson's Bay Company Era, 1848-1862* (M.A. Thesis, University of Victoria, 1987) and J.D. Belshaw, "The Standard of Living of British Miners on Vancouver Island, 1848-1900" (1989-90) 84 *BC Studies* 37.

they had been inadequately prepared for life and work on the Northwest coast. In 1850 they downed tools at Fort Rupert (near what is now Port Hardy) to protest working conditions, and the Company's local representatives were furious. The officer in charge confined the men on bread and water, putting two of them in irons.³ The subsequent departure of most of them for the gold fields of California only added injury to insult, and this incident is often regarded as marking the beginning of British Columbia's troubled labour relations. To James Douglas, Chief Factor at Fort Victoria, the miners were not simply men who had breached their contracts, but "mutineers" who had deserted their posts and, although it was illegal, the treatment they had received was "highly necessary." As he put it, "the spirit of Mutiny is contagious, and unless examples are made of the evil disposed there will be an end to all subordination. ..."⁴

But it was neither the end of subordination, nor the beginning of British Columbia's labour history. The latter dates from the fur trade era before colonialization, and the intensity of Douglas' reaction needs to be put in that context.⁵ There were of course no collective agreements in either period: master/servant relations were concerned primarily with individual contracts of service.⁶ But the para-military

³ Letter from Douglas to Barclay (24 February 1851) in *Fort Victoria Letters, supra*, note 2 at 152.

⁴ *Ibid.*, at 153 (the punctuation, and occasionally the spelling, in passages such as this one has been modernized and corrected). The governor at the time, Richard Blanshard, disagreed. All the talk about "*desertion* and *mutiny* is utter nonsense, and the people know it," he wrote. "[T]hey are offences that can only be committed under articles of war, and in some instances under ships articles..." (Letter from Blanshard to Dr. J.S. Helmcken (6 August 1850) quoted in M. Ormsby's introduction to *Fort Victoria Letters, supra*, note 2 at lxxv. Emphasis in original.) Douglas succeeded Blanshard as governor in 1851.

⁵ On the role of BC's native peoples in its labour history, see R. Knight, *Indians at Work: An Informal History of Native Indian Labour in British Columbia 1858-1930* (Vancouver: New Star Books, 1978) and R.S. Mackie, *Colonial Land, Indian Labour and Company Capital: The Economy of Vancouver Island, 1849-1958* (M.A. Thesis, University of Victoria, 1984).

⁶ Ralston has shown that many of the problems at Fort Rupert stemmed from a contradiction between the special terms in the miner's contracts and their "general position as company servants": H.K. Ralston, "Miners and Managers: The Organization of Coal Production on Vancouver Island by the Hudson's Bay Company, 1848-1862" in E.B. Norcross, ed., *The Company on the Coast* (Nanaimo: Nanaimo Historical Society, 1983) 42 at 45.

code of discipline of the Hudson's Bay Company is proof that, in common with most large-scale nineteenth century employers, they had always worried about "combinations," especially in the more remote regions. While one or two troublesome employees were to be expected, a number of them acting in concert might pose a real threat, not only to corporate profits but to security as well. It is this concern, and his own experience in the fur trade, that account for Douglas' intemperate description of events at Fort Rupert.⁷

After all, he had experienced "combinations" before. In 1842, a number of the men at Stikine had conspired to murder the clerk in charge of the fort, and in 1838 there had been a "mutiny" aboard the Company's steamer *Beaver*.⁸ It is the latter, not the strike at Fort Rupert, that must be viewed as the first collective job action west of the Rockies.

II. DISCIPLINE IN THE HUDSON'S BAY COMPANY

IT IS REMARKABLE HOW OFTEN employees and former employees, when asked to describe life in the service of the Hudson's Bay Company west of the Rockies, resorted to maritime analogies. Clerk Charles Beardmore, for example, described the discipline as rather like what one might find on a British warship. "Knocking down and giving a man what is called a pounding, and pumping upon him is very common," he said.⁹ Another former Company man, George Roberts, said that the two most senior officers in the western fur trade were stern disciplinarians, and recommended that anyone seeking a picture of life in New Caledonia should read Dana's *Two Years Before the*

⁷ And, a few months later, at Fort Victoria. According to Blanshard, Douglas had told him that he "no longer dared to speak to any of [his] men," and that he (Douglas) lived in "daily fear of seeing the Establishment [at Victoria] burnt down" and violence that would "end in bloodshed." Douglas conceded that he said these things: letter from Blanshard to Douglas (2 July 1851) and letter from Douglas to Blanshard (3 July 1851) Public Archives of British Columbia (PABC), GR 332, vol. 1 at 342-43.

⁸ The most complete account of the Fort Stikine incident to date is in W.K. Lamb's introduction to E.E. Rich, ed., *The Letters of John McLoughlin From Fort Vancouver to the Governor and Committee, Second Series, 1839-44* (Toronto: HBC Record Society, 1943) xxii.

⁹ "Notes of a Conversation with Mr. Beardmore" taken by Admiral F. Moresby aboard *HMS Portland* at Honolulu (23 July 1851) PABC, GR 322, vol. 1 at 348. Beardmore concluded that "no man in his right senses" would work for the HBC. "Twas worse than transportation."

*Mast.*¹⁰ According to him, Douglas - whom Beardmore described as a "great hand at flogging" - was "dreaded by the Canadians."¹¹ Although Roberts and Beardmore both had grievances against the Company, their views are corroborated to a significant degree by other sources, notably post journals and correspondence.

Perhaps the bleakest assessment of all is that of John Tod, who retired from the service in 1852 and was a member of the colony of Vancouver Island's first Council. New Caledonia, he recorded years later, was "looked on in the light of another Botany Bay." He was referring more to the remoteness and hardships of the place than to the discipline, but he stressed that he and his friends east of the Rockies were careful not to offend their superiors, lest they should be sent west as punishment.¹² Evidently, Tod was among those who did not take sufficient care. In 1823 he found himself transferred to McLeod Lake, where he languished in solitude, and on one occasion very nearly starved.¹³ He ended up serving most of his career on what, by most accounts, was the wrong side of the mountains, wishing for a promotion to chief trader that eventually came, and one to chief factor that did not.

The quasi-military atmosphere surrounding the Company on the coast was well grounded in its legal structure. Not only did the Company's Charter, granted by Charles II in 1670, specifically

¹⁰ The two most senior men were Douglas and John McLoughlin, Sr. New Caledonia was that portion of what is now British Columbia that lies between the Coast Range and the Rocky Mountains, and between 51 degrees 30 minutes and 57 degrees north latitude: A.G. Morice, *The History of the Northern Interior of British Columbia* (Smithers: Interior Stationery (1970) Ltd., 1978) at 1. Morice first published this book in 1904, and he criticizes other definitions.

¹¹ "Notes", *supra*, note 9, and G.B. Roberts, "Recollections", Bancroft Library (Berkeley, California) P-A 83 at 67-68. Senator W.H. Macdonald recalled an occasion during the early days of the colony of Vancouver Island when Douglas punished a Kanaka (Hawaiian) by having him tied to a tree and given three dozen lashes. The man had apparently attempted to steal from the storehouse while on watch: "Sketches of British Columbia", Bancroft Library P-C 4.

¹² J. Tod, "History of New Caledonia and the Northwest Coast," Bancroft Library, P-C 27 at 52-53. In fact, certain parties in England had proposed years earlier that what is now British Columbia become a penal colony, but they had little understanding of what was involved: see R.H. Dillon, "Convict Colonies in the Pacific Northwest" (1955) 19 B.C. Hist. Q. 93.

¹³ G.V.P. & H.B. Akrigg, *British Columbia Chronicle, 1778-1846: Adventures by Sea and Land* (Vancouver: Discovery Press, 1975) at 251.

empower them to legislate with respect to "all ... masters, mariners, and other officers ... in any of their voyages," but mutiny was one of the "leading" offences enumerated in the rather vaguely worded *Code of Penal Laws* published at Moose Factory in 1815.¹⁴ Most infractions were declared to be punishable by fines, loss of pay, confinement in irons, and flogging; mutiny and desertion, however, were singled out as subject to "the same Punishment ... as in the Army and Navy," a threat that hints darkly of keel-hauling and hanging.

But it was largely bluster. The Company's lawyers had advised them against exercising any capital jurisdiction they might have, and they clearly had none west of Rupert's Land.¹⁵ Moreover, mutiny was a notoriously vague conception, even at sea. Almost any disobedience seemed to qualify as "mutinous" for the purpose of justifying corporal punishment, but only the most extreme examples would support a criminal charge.¹⁶ Equally, "mutiny" had long since ceased to be a technical term in the fur trade; it was really only a synonym for collective, or even individual, disobedience. As such, it was punished much as other infractions were, and because there were no courts, it was the Company's senior officers who decided what the punishment should be. Indeed, one of the notable aspects of the "mutiny" on the *Beaver* is the way Douglas, notwithstanding his rhetoric, structured the event so as to treat it as what it really was, *i.e.*, a labour dispute. Another is how the "mutineers," probably for the first time, combined to challenge the legality of the Company's action, as opposed to merely complaining about its harshness or engaging in acts of individual defiance.

¹⁴ The Charter is reproduced in the appendices to the *Report from the Select Committee on the Hudson's Bay Company* (London: The House of Commons, 1857) at 414, and the Code in E.H. Oliver, ed., *The Canadian North-West: Its Early Development and Legislative Records* vol. II (Ottawa: Government Printing Bureau, 1914-15) at 1285-87. "Combination" was also a leading offence.

¹⁵ That is, outside their chartered territories. See H. Foster, "Long-Distance Justice: The Criminal Jurisdiction of Canadian Courts West of the Canadas, 1763-1859" (1990) 34 *Am. J. of Leg. Hist.* 1 at 24-25.

¹⁶ See Blanshard's comments, reproduced *supra*, note 4, and E.W. Symons, *The Law Relating to Merchant Seaman* (London: Longman, Brown, Green & Longmans, 1851) at 47ff.

III. THE BEAVER

THE SHIP INVOLVED IN THE MUTINY arrived at Fort Vancouver in 1836, and looms relatively large in the popular history of British Columbia.¹⁷ It was the first steam-powered vessel on the Northwest coast, and the idea behind the project was that a steamer could navigate fjords and rock-strewn passages where sailing ships could not easily go. Such a vessel would also be stymied neither by headwinds nor by the prolonged calms of the coastal summers, and would save the Company money because its speed and manoeuvrability would permit the closing of some of the more expensive, northern forts.¹⁸ The steamer would carry supplies to the remaining posts, and trade directly with the Indians at intermediate places along the coast.

Built by Green, Wigrams & Green, of Blackwall Yards, London, the *Beaver* was about one hundred feet in length, with two masts and one funnel (see photograph, opposite). Its side paddle wheels, driven by two 35-horsepower engines, pushed it along at about eight knots. Launched on May 2, 1835, and rigged as a brigantine for the long sail around the Horn to Fort Vancouver, the *Beaver* left Gravesend on August 29 under the command of Captain David Home and a crew of twelve. The barque *Columbia*, newly commissioned by the HBC for use as the annual supply ship for the Northwest coast, accompanied it.¹⁹

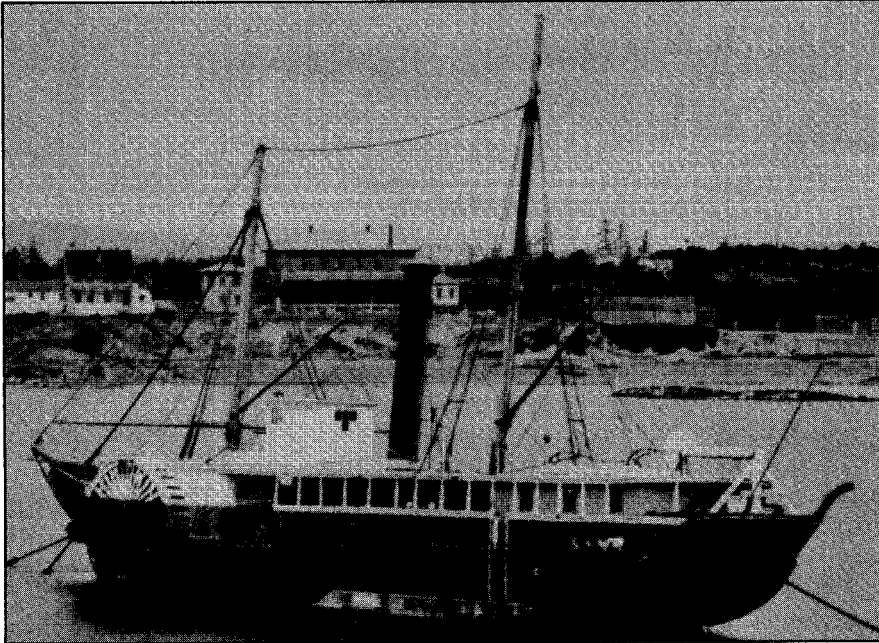
The voyage outward was not an easy one, but the *Beaver* performed well.²⁰ By February of 1836 both vessels had reached Oahoo in the Sandwich Islands, where Captain Home hired on four Kanakas (Hawaiians) to help with the difficult crossing of the Columbia River

¹⁷ Two books on the *Beaver* have been written. The more recent and accessible is D. Pethick, *S.S. Beaver: The Ship that saved the West* (Vancouver: Mitchell Press, 1970). The other is C. McCain, *History of the S.S. Beaver* (Vancouver, 1894).

¹⁸ The *Beaver* was not aesthetically pleasing, so Pethick, *supra*, note 17 refers to the vessel as "it" rather than "she." For quite different reasons, I shall follow suit.

¹⁹ The information in this paragraph is based upon archival sources, but most of it may be more easily found in W.K. Lamb, "The Advent of the Beaver" (1938) 2 B.C. Hist. Qtly. 163.

²⁰ On 17 December 1835, Captain Home wrote to the Governor and Committee in London from Juan Fernandez Island. He reported that the weather had been stormy and he and a number of the crew had been sick, but that the *Beaver* was an "excellent Sea Boat" and sailed very well: HBCA A.10/2.



The S.S. *Beaver* in Victoria harbour in 1870. Photo courtesy of Hudson's Bay Company Archives, Provincial Archives of Manitoba.

bar.²¹ Before departing, the second mates of the *Beaver* and the *Columbia* changed places - apparently there had been some "dissensions" in the *Columbia* - and an incident occurred which, in retrospect, may have some significance. William Wilson, one of the seamen on the *Beaver*, is recorded in the log as having gone ashore without leave "and against positive orders not to go." The log entry is by "the mate," and it goes on to say that the British consul reprimanded Wilson for this and for "his insolence to me on the passage and general bad conduct."²² However, Captain Home wrote "not correct" over this entry. According to him, the consul came aboard at his request to take Wilson off the vessel for punishment. He added that "Wilson showing great contrition for his offence and the rest of the people begging that

²¹ Letter from Home to Governor and Committee (24 February 1836) HBCA A.10/3.

²² The log is apparently lost, but the part of it that records the voyage out is reproduced in E.W. Wright, ed., *Lewis & Dryden's Maritime History of the Pacific Northwest* (New York: Antiquarian Press, 1961) at 15-17.

he not be punished, and that they would be answerable for his conduct in the future, I reprimanded him and send him to his duty."²³

This incident provides some evidence of the relationship between Captain Home and his crew, and how he dealt with disciplinary problems. His successor would take a rather different approach, and it was the successor who found himself facing the "mutiny" which took place two years later. At least seven of Home's crew were still on board at that time, and six of these - including William Wilson - were, in rather different ways, among the most determined of the "mutineers."

The *Beaver* reached the Columbia a little more than two weeks after leaving Oahoo. After a delay caused by the crossing of the bar and the late arrival of the pilot, the latter took the vessel up the river from Fort George (Astoria) to Fort Vancouver, a journey that took from March 26 to April 10. The engines and paddles were then re-installed, along with a nine inch gun from the *Columbia*, and the *Beaver* made its way back downriver towards the Pacific. On arrival, Captain Home anchored in Baker Bay, "a strategic point from which to watch the dreaded Columbia bar," and waited several days for appropriate sea conditions. On June 25 the anchor was weighed and the *Beaver* left on the first of many voyages up the Coast, travelling north as far as what is now the southern part of the Alaskan panhandle. It "never returned to the Columbia in all the years that she served the Hudson's Bay Company."²⁴ The risk to the Company's only steamer was simply too great.

After several months of coasting, the *Beaver* was laid up for the winter of 1836-37 at Nass (Fort Simpson). It had been an important first voyage, because for some time there had been a difference of opinion about the steamer. George Simpson, who was the North American Governor of the HBC, and the Governor and Committee back in London, were enthusiastic about its role in the fur trade; Chief Factor McLoughlin, in charge of the fur trade west of the mountains, was not, and he opposed closing down the northern posts.²⁵ McLoughlin must have felt vindicated, therefore, when Chief Factor Duncan Finlayson, who had gone along specifically to assess the *Beaver's* potential, reported that it used a great deal of wood, and that

²³ *Ibid.*

²⁴ Lamb, *supra*, note 19 at 173, 174.

²⁵ See E.E. Rich, *The History of the Hudson's Bay Company* (London; HBC Record Society, 1958-59), Vol. II at 489, 492-3; Lamb, *supra*, note 8 at xiii-xxii.

it could not travel under steam "in the canals" at night because the drift timber would break the paddles.²⁶ Finlayson also advised that it was better to sail in heavy seas rather than go under steam because, when the paddles plunged into large waves, this "shook the vessel much." McLoughlin was no doubt less pleased, however, with Finlayson's conclusion, which was that the *Beaver* would "give the most effectual blow to the opposition which they have ever met with off the coast, and [would] also lessen in a great measure the traffic carried on amongst the natives themselves."²⁷ This prediction was confirmed by subsequent events, and the verdict of the premier historian of the Hudson's Bay Company is that the Company's new steamer "revolutionized the trade."²⁸

At the conclusion of the season, Captain Home apparently requested promotion to the rank of chief trader.²⁹ When this was denied, he resigned.³⁰ As a consequence, McLoughlin instructed John Work, the chief trader at Fort Simpson, to give command of the *Beaver* to William McNeill, then captain of the *Nereide*, if he thought that the steamer was now capable of carrying out "the business of the Coast summer 1837."³¹ Work, like Finlayson, obviously had confidence in the *Beaver's* abilities, because McNeill did take command. He and his crew covered 3504 miles that second summer, in the course of which they explored Camosun, the future site of Victoria's harbour, at the southeastern end of Vancouver Island.³²

²⁶ Letter from D. Finlayson to McLoughlin (29 September 1836) HBCA, B.223/b/12. By "canals" Finlayson means the narrow channels that are numerous on the Northwest coast.

²⁷ *Ibid.*

²⁸ Rich, *supra*, note 25 at 489. However, Pethick, *supra*, note 17 overdid it when he subtitled his book "the ship that saved the west."

²⁹ Pethick, *supra*, note 17 at 27.

³⁰ He then replaced William McNeill as captain of the HBC vessel *Nereide*. Home drowned in February, 1838, trying to cross the Columbia River in a small sailboat.

³¹ Letter from McLoughlin to Work (no date) HBCA B.223/b/15. Work was Irish, a rarity in the HBC, and became a Chief Factor in 1846.

³² Letter from Douglas to G. Simpson (18 March 1838) HBCA B.223/b/20; letter from McLoughlin to Work (8 December 1836) HBCA B.223/b/15. The Fort Simpson (Nass) Journal describes the site McNeill discovered as "... an excellent harbour and a fine open country along the seashore": HBCA B.201/a/3.

In the ensuing decade, not only would the *Beaver* be used to assist in establishing Fort Stikine (1840), Fort Taku (1840), Victoria (1843) and Fort Rupert (1849), it would also (true to the Governor and Committee's original intention) shut down two of these (Forts Taku and Stikine) and a third, Fort McLoughlin.³³ Thus two relatively southern posts would replace three of the northern ones, a change that had more to do with new economic and political realities than the traditional fur trade.³⁴

IV. CAPTAIN MCNEILL

THE MAN WHO WAS NOW CAPTAIN OF THE *BEAVER* was not cut from the same cloth as his predecessor. What he thought of Home and his approach to discipline is unclear, but a glimpse may be found in a statement McNeill made in August of 1839, well after the mutiny. "I have belonged to a Ship off and on twenty-four years," he said, "and never saw men more indulged in than in the Hon. H.B.Co.'s service."³⁵ This view of the Company's servants as a pampered lot is, to say the least, an unusual one. James Douglas provides what is perhaps a somewhat different picture in a letter to Chief Trader Work, also written in the aftermath of the mutiny.³⁶ "[T]he masters of our vessels," he wrote,

must really study to govern and restrain their men without resorting to illegal and desperate means, which are quite indefensible except in extreme cases where life or property is at stake. Our Naval Service is becoming exceedingly unpopular, through these imprudent exertions of power, and the Board in England has been greatly

³³ Forts Taku (or Durham) and Stikine are on the Alaskan panhandle, and the latter is now Wrangell, Alaska. Fort McLoughlin was located at Bella, B.C.

³⁴ Fort Victoria was established because the HBC anticipated that Fort Vancouver would soon become United States Territory and the Company would need a new depot. Fort Rupert was established to exploit the coal found there.

³⁵ Deposition of W.H. McNeill, sworn at Fort Simpson on 19 August 1839 before Chief Trader Work: HBCA B.201/z/1-4. This deposition and those of Peter Carpenter and John Kennedy, *infra*, notes 50 and 52, were sworn a year and a half after the mutiny, in response to a request from the Governor and Committee, who apparently wished to take legal proceedings against "the most active offenders": letter from Douglas to Governor and Committee (14 October 1839) HBCA A.11/50, reproduced in the *Fort Vancouver Letters, Second Series, supra*, note 8 at 208.

³⁶ Letter from Douglas to Work (21 June 1838) HBCA B.223/b/22.

annoyed with incessant complaints from this quarter proceeding from persons who consider themselves aggrieved. There must be a change of system ...

Of course, what Douglas said to Work was not necessarily what he said to the men or to the Governor and Committee in London.

For his part, William Henry McNeill appears to have been an exceptional seaman with a penchant for severe discipline.³⁷ He was also an American: a circumstance, as it turns out, of no little importance. Perhaps it is also worth noting that he married a Haida woman and then, when she died, a woman from the Nass.³⁸ Above all, McNeill was an effective fur trader - so effective that the Hudson's Bay Company originally employed him, and purchased his ship, in order to prevent him from competing against them.³⁹ This was an unusual move, because Company policy was to ruin competitors by undercutting them rather than buy them out. However, always hard-pressed to find competent and reliable masters for both their ocean-going and "country" fleets,⁴⁰ they must have found McNeill an

³⁷ There were desertions from his first command, the brig *Convoy*, at Juan Fernandez Island in 1825, and he had to take action both in the Queen Charlotte and the Hawaiian Islands when discontent led to "mutinous" and "abusive language." The offenders were either put on a bread and water diet or flogged and sent ashore: Pethick, *supra*, note 17 at 27-28.

³⁸ This was a practice that was becoming less and less common under George Simpson's regime, and by the 1830's such marriages were apparently "exceptional" in the far west: J. Brown, *Strangers in Blood: Fur Trade Company Families in Indian Country* (Vancouver: UBC Press, 1980) at 216. Yet many of the men in this story - e.g., Douglas, McLoughlin, Scarborough, and Alexander Lattie (the pilot who took the *Beaver* up the Columbia) - were married to Indian or Métis. McNeill's first wife was described by a contemporary as a "very large handsome Kigani [Kaigani] woman, with all the dignity and carriage of a chieftainess, which she was": D.B. Smith, ed., *The Reminiscences of Doctor John Sebastian Helmcken* (Vancouver: UBC Press, 1975) at 108. They had nine children before she died in childbirth in 1850. His second wife was the Nisga'a chief, Neshaki: E.P. Patterson, "George Kinzahdah - Simoogit in His Times" (1990) 82 BC Studies 16 at 17.

³⁹ And, in turn, to help them compete against the Americans. As Rich puts it, McNeill "knew the coast, and justified McLoughlin and Finlayson in getting him and his ship into the Company's service, for he often got ahead of the Americans and secured all the skins, and he generally got 'the best share of what ever was to be gleaned'": *supra*, note 25 at 641.

⁴⁰ Ormsby, *supra*, note 4 at xxxii. Helmcken described McNeill as "noted for his kind-heartedness, courage, activity, impetuosity and strictness of discipline, a discipline ... as necessary as well ashore as afloat ...": Smith, *supra*, note 38 at 303.

attractive prospect, and may have therefore been inclined to overlook his methods. Officially, of course, physical abuse administered in "hot blood" was deplored. Nonetheless, it was commonly assumed that corporal punishment was, within bounds, a necessary and unremarkable part of the fur trade west of the Rockies.⁴¹ As Douglas' letter to John Work indicates, concern was expressed only when it began to affect recruitment and attract the attention of the Governor and Committee in London. It seems that this happened at regular intervals during the Company's thirty-seven year rule (1821-1858) on the Northwest coast.

V. THE MUTINY

LATE IN 1837 THE *BEAVER* ONCE AGAIN PUT IN to Fort Simpson for the winter. November and December 1837 were typically dreary, with 20 and 21 rainy days, respectively, and January of 1838 was just as bad.⁴² Towards the end of the latter month - the precise dates differ in the various sources - what was probably a long-smouldering dissatisfaction with McNeill finally ignited. His own account begins with the refusal of the stokers to come ashore and help carry firewood for the steamer down to the beach, but Douglas' report to the Governor and Committee begins a little farther back.

According to Douglas, this "vexatious outburst" began when McNeill was on shore supervising seamen "drawing off spirits from a puncheon." The *Beaver* was at anchor near the fort, and McNeill was called away for a while. When he returned, he found the men "making free with the liquor." He said nothing right away, but "after a short time" (the delay is not explained) he ordered James Starling and William Wilson back aboard ship. They refused to go, "and accompanied their refusal with so much abusive language that Captain McNeill lost patience and chastened them, severely, on the spot, with his cane."⁴³ The next day, McNeill sent a note aboard addressed to the Chief Engineer, Peter Arthur, "requesting" him to send his four

⁴¹ The quoted phrase is in Simpson to Donald Manson, superintendent of New Caledonia, 18 June 1853, cited in Morice, above n.10 at 281-82. The letter warns against the severity of "club law" in New Caledonia and recites a number of complaints.

⁴² "Statement of the number of rainy days at Fort Simpson ... from its Establishment, 1831": HBCA B.201/z/1 at 9d-10.

⁴³ "Report to Governor and Committee" HBCA B.223/b/21 at 92-94.

stokers ashore to carry wood. Arthur sent back that they had refused, maintaining, in effect, that it was not part of their job description.⁴⁴

However, two of the stokers, Richard Slocum and John McLennon, came ashore and told McNeill that they would do the work if the two others, William Gullion and Donald McDonald, would help. These were sent for, and when they arrived McNeill and Chief Trader Work "expostulated" with them, assuring them that this was an exceptional request, unlikely to be repeated. It may be that these arguments were made politely at first, because the two officers knew that time was running out: the *Beaver* had to get to Fort Nisqually on Puget Sound before the express left Fort Vancouver for York Factory. But when Gullion and McDonald "persisted in refusing," McNeill (as he puts it) "punished them as ... they deserved" and sent them back on board. He does not say what this punishment was, noting only that he could not put them in irons because he needed them to stoke the engines.⁴⁵ Douglas, however, is more explicit. The two stokers, he reports, "were flogged with 24 lashes each for disobedience of orders."⁴⁶

At this point, only two seamen and four stokers out of a crew of over thirty (if one includes the thirteen woodcutters, many of whom were Indians or Kanakas) were refusing to work. However, the following morning four more seamen (George Gordon, William Phillips, William Grey and Thomas Lockyer) and the steward, William Burris, sent a letter ashore that was also signed by three of the four stokers.⁴⁷ Addressed to Work, it asserted "the illegality of a foreigner to command a British Vessel and said the *Beaver* was liable to seizure." This clearly changed the nature of the protest, as McNeill was well aware. "The substance of their letter," he said, "was to have me replaced in the command of the Steamer." Then the first mate, James Scarborough, reported that *all* the seamen and stokers had

⁴⁴ McNeill's deposition, *supra*, note 35.

⁴⁵ *Ibid.* It seems that, were the circumstances otherwise, he would not have hesitated to do this. The entry for 31 May 1837 in the Fort Simpson Post Journal reports a "mutiny" on board the *Beaver* that resulted in "several men" being "placed in irons": Bancroft Library, Berkeley, P-C 23. McNeill was captain by then: see *infra*, note 70.

⁴⁶ "Report", *supra*, note 43. This can be compared to the three dozen lashes administered by Douglas for attempted theft while on guard duty, *supra*, note 11, and the "small flogging" plus \$10 fine Beardmore says was imposed upon a blacksmith "who violated a gentleman's daughter": Beardmore, *supra*, note 9.

⁴⁷ McNeill's deposition, *supra*, note 35. Richard Slocum did not sign.

refused to work, and another letter arrived, "printing out the laws of Britain on this subject."⁴⁸

Chief Trader Work, according to Douglas, was "staggered" by these events, and it soon became clear that the crew were relying upon a little book entitled *The Shipmaster's Assistant*. Maintaining a brave front, at least for the moment, Work told the crew that he was aware of the law, but that the articles they had signed made no mention of the nationality of the captain. Moreover, he said, they were "in duty bound to obey the commander" and that the liability of the vessel to seizure was "no concern of theirs." If they knew the law so well, McNeill reports Work as saying, "how dared they to persist in this open Mutiny?" Then Chief Engineer Arthur advised McNeill that he and Engineer John Donald also "could" not work under him, and the true extent of the work stoppage began to emerge.⁴⁹ Even Mr. Scarborough, the first mate, was alleged to be involved. Long after the event, seaman Peter Carpenter deposed that a few weeks before the trouble started Mr. Scarborough had said that "his [Scarborough's] name would soon be placed on the Ship's papers as Captain, [and] that he would then work up Captain McNeill for the Captain had often worked him up."⁵⁰ He had been speaking to the Chief Engineer, Mr. Arthur, at the time.

Arthur's participation in these events was critical. As McNeill put it later, he was the only person in the country who knew how to work the engines, "and well he knew it."⁵¹ He knew other things, too. He was the source of *The Shipmaster's Assistant*, and Surgeon John Kennedy alleged that Arthur told the crew that "[w]e have gained our point, and only stick to your text ... and the day is ours."⁵² He then

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Deposition of Peter Carpenter, sworn at Fort Simpson (16 August 1839) HBCA, B.201/z/7-7d. Carpenter did not sign the men's note to Work, and he refers to a book "out of which they got their law."

⁵¹ McNeill's deposition, *supra*, note 35.

⁵² Deposition of John Kennedy, sworn at Fort Simpson (19 August 1839) HBCA, B.201/z/5-6d. McNeill confirms this, but underlines the word "text" in his deposition. Kennedy spent his most of his career at Fort Simpson, and became a chief trader in 1846. However, he was retired ten years later due to his "habits of intemperance" and died in 1859: G. Williams, ed., *Hudson's Bay Miscellany* (Winnipeg: HBC Records Society, 1975) at 215n.

taught by example, because when Work and McNeill went out to the steamer to make a last attempt to persuade the crew to relent, the engineers changed their "could" not to "would" not work, something that McNeill, who was enraged by their behaviour, says he had tried to commit them to in their first exchange. The engineers then became "violent and impudent in their conduct towards us," and McNeill and Work concluded that if they attempted discipline there might be bloodshed.⁵³

The impasse was resolved by proposing that Chief Trader Work, who was certainly no mariner, take over as Captain, and that McNeill go along as a "passenger" to tell him what to do.⁵⁴ When Work called the crew aft to announce this, they agreed to return to their duties. But when he added that he would report their conduct and that they would "suffer" for it, they responded that "they considered well among themselves what they had been doing and did not fear what might happen to themselves hereafter."⁵⁵ Thus constituted, the *Beaver* proceeded south to Fort Nisqually, arriving sometime in February. There the vessel was left under Scarborough's command while Work, McNeill and Arthur travelled via the Cowlitz portage to Fort Vancouver "to obtain a decision of the difference."⁵⁶

VI. DISCIPLINARY ACTION

CHIEF FACTOR MCLOUGHLIN WAS ON FURLOUGH in Europe when the mutiny took place. It was therefore left to James Douglas to resolve the matter and, for him, it was no contest. In his report to the Governor and Committee he makes no reference at all to the legal issue raised by the men who had refused to sail under McNeill. Instead, he states that Work had been so taken aback by the "general discontent and decided tone of the rioters" that, in order to get away on time, he had "yielded to their unjustifiable demands." Douglas believed that the case

involved the important question of permitting the seamen to choose and depose their officers at pleasure, and directly smote at the root of every form of discipline. It being

⁵³ McNeill's deposition, *supra*, note 35.

⁵⁴ Kennedy's deposition, *supra*, note 52.

⁵⁵ McNeill's deposition, *supra*, note 35.

⁵⁶ "Report", *supra*, note 43.

clear that obedience to officers must be enforced at all hazards ... we determined to continue McNeill in the command. Arthur, after being severely reprimanded, declared his readiness to serve under Mr. McNeill.⁵⁷

This time, it is Douglas who does not elaborate upon the meaning of "severely reprimanded."

On or about March 20, the delegation returned to Nisqually from Vancouver and Work announced McNeill's reinstatement. Douglas simply reports that "some disturbance followed," but McNeill provides details. The crew greeted the announcement by refusing yet again to sail under him, although the engineers said nothing. According to McNeill, they had been told that he would not interfere with them or involve himself in any way with the stokers or the engine room, so they were beginning to withdraw from the mutiny.⁵⁸ The crew, on the other hand, "refused point blank to serve under my command," even when Work threatened to stop their wages. They said that "they knew well what they were about and were prepared to meet all the consequences."⁵⁹

The next day, Work tried a different strategy. He sent ashore four of the men (Wilson, Starling, Gordon and the steward, Burris), clearly hoping that separating them from the rest might undermine the group's solidarity. As they went over the side they told Arthur that "he had got them into the scrape and backed out himself, but that they meant to stick to what he and themselves had agreed to at first."⁶⁰ But separating the men must have helped, because when Work harangued those left on board about the "bad consequences of being led into a Mutiny by scoundrels," all but one of them, William Burns, agreed to resume their duties and accept McNeill as captain. In the end, only Burns and three of the four who had been put ashore - Wilson, Starling, and Gordon - refused to give in.

⁵⁷ *Ibid.*

⁵⁸ The implication that he had interfered with the engineers outraged McNeill. According to his deposition, *supra*, note 35, when he relinquished command of the *Nereide* to go to the *Beaver* the crew had been called aft to be introduced to their new skipper, and no one had objected to his citizenship. He deposed that he "never did interfere" with Arthur or his engines, and that the engineers and stokers were given special privileges with respect to rum and standing watch.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* McNeill was anxious to show that a true conspiracy or "combination" existed, and did not want the engineers to escape punishment.

Douglas made arrangements to have the vacancies that now existed on the *Beaver* to be filled with men from the coastal forts, and proceeded to inflict the “slow process of the law” on the four who could not be persuaded to return to their duties. They were “confined in irons” when they arrived at Fort Vancouver, and on March 27 were brought, one by one, before Douglas. He addressed each of them as follows:

You are sent here, on a charge of having refused to join one of our vessels commanded by Captain McNeill, and by that act, exposed yourself to punishment. But as the law has prevention more than punishment in view, a return to proper and legal conduct is still open to you, subject, however, to defray[ing] the loss you have, by your misconduct, caused the Company. I now for the last time inquire if you are willing to return to your former station on board the Steamer “Beaver.”

Each man refused. Douglas then struck their names off the pay list, and read them this clause from the agreement they had signed with the Company:

... in case the said --- shall at anytime during this contract desert the service of the said Company or otherwise neglect or refuse duly to discharge his duty as such hired servant as aforesaid, then he shall forfeit and lose all his wages, for the recovery whereof there shall be no relief either in law or equity.⁶¹

After listening to this they were returned to confinement at Fort Vancouver for a few days, and then were sent to the “outposts,” *i.e.*, the smaller forts up country. Their status was that of “prisoners at large,” apparently with the option of doing no duty, with a bread and water diet, or working for “the common rations allowed to the other servants of the place.”⁶²

The men remained at the outposts until October of 1838, when Wilson, Starling, and Gordon were sent home on the *Columbia*. There is no mention of William Burns.⁶³ When the three arrived in Eng-

⁶¹ Report, above n.43.

⁶² *Ibid.* What Douglas actually says is a little ambiguous, *i.e.*, that he had sent the men to the outposts, “where they have since remained ... doing no duty, with the option of bread and water diet, or the common rations allowed to the other servants of the place.”

⁶³ Burns may have had other, unrelated problems. In 1836 he had written a letter from Milbanke Sound (Fort McLouglin) that was considered by the Governor and Committee on 7 November 1837. The contents are not revealed, but the Committee ordered that a copy be sent to Captain Home, and that he and the Chief Trader in charge should decide whether it was “advisable” to send Burns back to England: Minutes of the

land, they petitioned the Company for the balance of their wages to March 27, and for the work they had done aboard the *Columbia*.⁶⁴ Notwithstanding the penalty clause in their contracts, this was granted, in return for a release "in full of all demands". Because the regulations for the Company's Northern Department - promulgated by the Governor and Council at Norway House - provided that men under the rank of clerk should work their passage home "without any compensation", the Governor and Committee's decision in this matter seems doubly exceptional.⁶⁵

Although unrelated to the mutiny proper, it is interesting to note that one of the replacements found for the men who were occupying the Governor and Committee's attention carried a surname that would become well known in British Columbia in years to come. Very little is known about John Calder, who, along with James Sangster and Peter Nyoozie, was assigned to the *Beaver* in June of 1838. But it seems highly likely that he married a Nisga'a woman and was the father of Job Calder and grandfather of Arthur Calder, about whom rather more is known. Job became the husband of Victoria Na-qua-on (Long-Arm), the most important chief in the Nass, and in 1887 he made a submission on her behalf to the Federal-Provincial Commission of Inquiry into Indian Affairs on the Northwest Coast. Arthur attended with his father, and became the leader of the first Nisga'a Land Committee. His nephew and adopted son, Frank Calder, who assumed the title of Na-qua-on from his natural father in 1958, was the first Indian ever to be elected to a Canadian legislature. He was also one of the five senior chiefs in whose name the Nisga'a Tribal Council brought its precedent-setting Indian title case in 1969. So the mutiny on the *Beaver* may have played a part, not only in British

Governor and Committee, HBCA A.12/60 at 171.

⁶⁴ *Ibid.*, A.1/61 (31 May 1839) at 124. Douglas advised against paying any wages for the period when the men were "idle", that is, prisoners at large ("Report", *supra*, note 43), but no such claim was made.

⁶⁵ The relevant provision is Regulation 35 of the Company's *Standing Rules and Regulations (1835)*: HBCA, B.239/k/2 at 148. It is not mentioned in the Minutes of the Governor and Committee referred to in note 64, *supra*.

Columbia's labour and legal history, but also in the history of the Indian land question.⁶⁶

VII. THE LEGACY OF THE MUTINY

YET IT HAS ATTRACTED VERY LITTLE ATTENTION.⁶⁷ The Company preferred to keep their affairs private, and in the competitive environment in which fur traders often found themselves, exclusive information was a valuable asset.⁶⁸ Equally, information harmful to the Company could be a serious liability, especially in the hands of their more determined critics, and there were elements of the *Beaver* case that might be embarrassing if not suppressed. It may also be relevant that in 1837 the HBC had requested an extension of their licence to trade in the Indian country, and that a much worse case than the mutiny on the *Beaver* was already blackening the Company's reputation.⁶⁹ In any event, nothing about the mutiny was entered in the ship's log, and by 1849 George Simpson was maintaining that there had never been an "overt act of mutiny" on board any of the Company's country vessels.⁷⁰

⁶⁶ See *Calder v. A.G. B.C.* (1973), 34 D.L.R. (3d) 145 (S.C.C.). The relationship, if any, between the John Calder of the *Beaver* and Job Calder remains to be established, but Mr. Frank Calder confirmed in an interview with the writer in August of 1990 that it seems very likely that John Calder was his great-grandfather.

⁶⁷ Rich, in his definitive history of the HBC, mentions the incident but gives no details: *supra*, note 25 at 646, 692. Pethick, *supra*, note 17 at 34 gives it two short paragraphs. McCain, *supra*, note 17 and P.C. Newman, *Caesars of the Wilderness* (Markham, Ont: Viking Canada, 1987) say nothing about it at all.

⁶⁸ A. Harper-Fender, *Organizational Change in the Hudson's Bay Company, 1821-1841* (Gettysburg College, 1987) [unpublished]. See also Rich, *supra*, note 25, vol. I at 57.

⁶⁹ See H. Foster, "Sins Against the Great Spirit: The Law, the Hudson's Bay Company, and the Mackenzie's River Murders, 1835-1839" (1989) 10 *Criminal Justice History: An International Annual* 23. The HBC's licence was renewed 30 May 1838.

⁷⁰ Letter from Simpson to Governor and Committee (30 June 1849) HBCA A.12/4 at 525, cited by Ormsby, *supra*, note 4 at xxxiin. In a letter to the Governor and Committee dated 31 October 1842 (Fort Vancouver Letters, Second Series, *supra*, note 8 at 80), McLoughlin refers to a mutiny "on board the Steamer when Capt. Home commanded her". Pethick, *supra*, note 17 at 51n, says this is an error, citing the HBC archivist for the proposition that there was a "mutiny" aboard the "*Nereide* (Capt. Home) about the end of May 1837". However, if the entry in the Fort Simpson Post Journal for 31 May 1837 is correct (see *supra*, note 45), there may well have been two "mutinies" on the *Beaver* during McNeill's tour of duty as captain.

It is true that Simpson had a career-long tendency to forget inconvenient details, but on this issue he was probably correct. Calling what happened aboard the *Beaver* a mutiny had no discernible effect on the crew, nor did it result in the extreme penalties prescribed by law for mutiny properly so called - quite the reverse. So there was little point in maintaining that characterization after the fact. Moreover, the law was not at all clear. In a passage headed "Mutiny Defined," one nineteenth century legal author noted a tendency to call ordinary insubordination mutiny, and then went on to say how important it was to understand that, unless a seaman's conduct came within the *Piracy Act*, "a master [would] not be justified in putting him in irons, and bringing him home in confinement on a charge of mutiny."⁷¹ On the other hand, the relevant provision of that statute also proscribes making or endeavouring "to make a revolt," and it was no defence that the seaman involved did not intend to "run away with the ship" in order to obtain redress of their grievances.⁷² The situation is therefore somewhat confused, and Douglas' actions reflect this.⁷³ Although he did his share of fulminating about the "mutiny," he did not treat it as such. Instead, he made each seaman's individual refusal to work at Fort Vancouver - rather than the collective actions at Forts Simpson and Nisqually - the focus of his inquiry, thereby de-emphasizing the element of "combination" that he otherwise deplored.⁷⁴

Even more interesting, nowhere in his report to the Governor and Committee does Douglas allude to the reason that the men put forward for refusing to sail under McNeill. At one point he even says that when all the seamen and stokers joined in this refusal, they did so

⁷¹ Symons, *supra*, note 16 at 47-48, referring to *An Act for the more effectual Suppression of Piracy* (U.K.) 11 & 12 Wm. III, c.7, s.9.

⁷² *R. v. Hastings & Meharg* (1825), 1 Mood. 82; 168 E.R. 1194. The united opposition to McNeill's authority seems to put the crew of the *Beaver* within the section. But there was no actual violence and the legal authority of the captain was in question, so a conviction was probably unlikely.

⁷³ It is instructive that a leading authority on military law, first published in 1896, also notes how often "mutinous conduct" has been incorrectly called mutiny, and analogizes to merchant marine law: W.W. Winthrop, *Military Law and Precedents* (Washington: Government Printing Office, 1920) at 578-79.

⁷⁴ In *R. v. M'Gregor & Lambert* (1844), 1 Car. & K. 429; 174 E.R. 878, Lord Abinger told the jury that, even in a charge of making a revolt, "revolt" meant "something more than the disobedience of one man."

“without bringing forward any charge or complaint.” This is curious. The relatively lenient treatment of the “leading mutineers” is also interesting. Although the Governor and Committee had, by their standards, been generous to the seaman who returned to England, according to Douglas they had also seemed quite keen on taking legal proceedings against those who had taken the lead in the affair.⁷⁵ Nonetheless, he cleared John Burris, the steward, and James Scarborough, and the latter soon left the *Beaver* to become master of the HBC schooner *Cadboro*. As for the engineers, they were “still attachable,” and in October of 1839 Douglas was of the opinion that their conduct “entitle[d] them to no indulgence”. They deserved “severer treatment than either seamen or stokers, as their influence alone prevented the mutiny from being crushed on its first appearance”.⁷⁶ Yet McLoughlin advised the Governor and Committee in the autumn of 1840 that they too had been “pardoned”. Mr. Arthur, he said, had brought his allegedly intemperate taste for alcohol under control, and had performed to everyone’s satisfaction.⁷⁷ He was not even docked any wages.

Part of the explanation for this leniency is that the Company needed men, especially those with specialized training, and legal proceedings in England might reveal more about life on the Northwest coast than the officers there wanted the Committee, or the public, to know. (McNeill, for example, was quite circumspect in his deposition about the precise nature of the discipline he had imposed.) They were therefore required to temper their inclination towards corporal punishment enough to avoid being censured for brutality, yet not so much that discipline broke down. A failure in either direction could adversely affect the trade. The position of a man like Douglas, forced to navigate between these two perils, is aptly illustrated by the following passage from the letter accompanying his report to London. Referring to the mutiny as a “conspiracy,” he noted that when it first broke out

⁷⁵ Letter from Douglas to Governor and Committee (14 October 1839), *supra*, note 35, advising them that because several of the men had left the service and the rest had been “virtually pardoned,” the Committee’s “design of proceeding legally against them will be ... frustrated.”

⁷⁶ *Ibid.* In his deposition of 19 August 1839 McNeill continued to assert Scarborough’s guilt.

⁷⁷ Letter from McLoughlin to Governor and Committee (20 November 1840) reproduced in *Fort Vancouver Letters, Second Series, supra*, note 8 at 21.

the officers, anxious to crush it in the bud, made several severe examples; but ... in its subsequent stages, your orders for the prevention of corporal punishments have been obeyed, and I am happy that circumstances permitted their literal observance, without relaxing the discipline of the service.

The most unpleasant of our duties is, decidedly, the enforcement of order among a class of men with whom obedience is the result neither of upright principle, nor of the dread of legal penalties, but, in almost every case, proceeds from a high degree of respect for their officers. And although, when that feeling is deficient, we are often compelled to use strong measures in repressing insolence and arresting the dangerous progress of insubordination, our worst enemies would find it difficult to authenticate a single instance of gratuitous cruelty or of punishment inflicted without sufficient & absolving cause.⁷⁸

In this passage Douglas clearly acknowledges the Committee's "orders" about corporal punishment, and more or less says that, once the men were out of McNeill's hands, their orders were followed. This was done, he says in his formal report, by subjecting the men to the "slow process of the law," a process which could be even more unpleasant than a "summary infliction," *i.e.*, a beating administered on the spot.⁷⁹ However, Douglas strongly implies that he and his officers cannot refrain from inflicting physical punishment in every circumstance, and that he expects the Committee to understand this.⁸⁰

In fact, the Governor and Committee's "orders" about corporal punishment had been issued (or perhaps re-issued) as recently as November of 1837. A man named William Brown had asked to quit the service and come down to Fort Vancouver. However, he had left behind an infant child less than a year old at Fort Langley, which was contrary to a Company regulation requiring fathers either to take their children out of the country with them or to make reasonable provision for their maintenance.⁸¹ Douglas therefore ordered Brown

⁷⁸ Letter from Douglas to Governor and Committee (18 October 1838) HBCA B.223/b/20 at 2-28d.

⁷⁹ Report, *supra*, note 43.

⁸⁰ There is also a difference between saying that it would be difficult for a critic to "authenticate" a case of excessive punishment, and that none had in fact been inflicted. This is especially so if, as Charles Beardmore, *supra*, note 9 alleged, there was "no stated punishment in the Hudson's Bay Company's service." It seems that not even the vaguely worded Penal Code of 1815, *supra*, note 14 was invoked in such situations.

⁸¹ Regulation 42 of the *Standing Rules and Regulations* of the Northern Departments, *supra*, note 65.

to return to Fort Langley and wait another year so the child could safely accompany him. Because he refused, he was confined, tied to a cannon, and flogged. When he lodged a complaint about his treatment, the Governor and Committee told Douglas and McLoughlin that they could not "sanction ... the infliction of corporal punishment" because it was illegal and might lead to an unfortunate investigation in a court of law. In fact, it did not, but only because Simpson paid Brown twenty pounds "privately ... to compromise the matter," releasing the Company from all claims. Significantly, the Governor and Committee also complained that they had been unable to respond promptly to Brown's "very grave charges" because the case had not been reported to them by McLoughlin. This of course raises the question of how many other cases went unreported, and underlines the relatively unfettered authority of the senior officers in the fur country to interpret regulations. In fact, Douglas' view that the rules did not permit Brown the option of making provision for the child, rather than taking it with him, seems erroneous. If so, this aspect of the case went unnoticed, or at least unmentioned.⁸²

VIII. THE LEGAL PROCESS ON THE NORTHWEST COAST

IN ADDITION TO BEING THE FIRST RECORDED "STRIKE" in what is now British Columbia, the mutiny on the *Beaver* provides valuable evidence of the meaning of "law" and legal process to the various actors in the western fur trade, and a rare glimpse of how the Hudson's Bay Company dealt with serious infractions. This is especially clear when one considers the questions of the legality of the corporal punishment that was imposed, the enforceability of the forfeiture clause in the seamen's contracts of employment and, finally, the legal validity of McNeill's appointment as captain.

When Douglas spoke of the slow and severe process of the law, he clearly did not mean an impartial, judicial inquiry into all the legal issues raised by the work stoppage. There was no "court" on the Northwest coast, and even if British law applied in some fashion to the Company's people, there was no British judge there to enforce it. The law Douglas meant was a mix of British law and Company regulations, interpreted and applied by the Chief Factors by virtue of their commissions as officers or, in some cases, as Justices of the Peace for

⁸² See correspondence from 1837-1840 summarized in *Fort Vancouver Letters, Second Series, supra*, note 8 at 1-2n.

the Indian Territories.⁸³ Thus far, it had been the only law, subject to no effective appeal. However, by waving a copy of *The Shipmaster's Assistant* at Work and McNeill, the "mutineers" were invoking a different law. They were asking that the rules be applied as they would be in a British court, and that they be granted the same rights that mariners in other British ships had around the world. In short, they were inviting into the fur country the very legal regime that, in a decade or so, would formally arrive with Blanshard, the first colonial Governor. This of course was a two-edged sword, because that regime was really no friendlier to workers than the Company's. But on this occasion it was to their advantage, and the men, or at least some of them, knew it.

Douglas' "slow process" involved confining the strikers in irons on a meagre diet, subjecting them to the strict terms of their contracts in a hearing over which he presided, and then sending them to an outpost for an even longer period before allowing them to work their passage home. However, the harshness of this must not be over-emphasized. Administered by justices of the peace, labour law in England was little better. Although a breach of contract by the master was regarded as a civil matter, a breach by the servant "was a criminal offence, punishable by imprisonment and flogging," until well into the latter half of the century.⁸⁴ The law was just as lop-sided where debtors were concerned. It was a creditor's game, and until 1838, the year of the mutiny, anyone liable on a simple debt could be arrested on *mesne* process without a judicial hearing of any kind.⁸⁵

Douglas' assessment of the legal process was therefore right on the money, both in England and on the Columbia, and so long as he had judicial authority, some of what he did was probably lawful. Can it be so considered? Simpson thought so, and told the Select Committee in 1857 that a Chief Factor's commission under the Charter of 1670 was

⁸³ See generally "Long-Distance Justice", *supra*, note 15.

⁸⁴ A.H. Ruegg, Q.C., "Changes in the Law of England Affecting Labour" in Council of Legal Education, *A Century of Law Reform* (London: MacMillan, 1901) 241 at 251-52.

⁸⁵ See *The Judgments Act, 1838* (U.K.), 1 & 2 Vict., c.110, abolishing arrest on *mesne* process; *The Debtors Act, 1869* (U.K.), 32 & 33 Vict., c.62, *re* final process; and P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979) at 190. G.R. Rubín has argued that even this change was illusory: see "Law, Poverty and Imprisonment for Debt, 1869-1914" in G.R. Rubín & D. Sugarman, eds. *Law, Economy and Society, 1750-1914: Essays in the History of English Law* (Abingdon: Professional Books, 1984) at 241.

equivalent to that of a Magistrate. He did not mention that the Northwest coast was not in Rupert's Land but the Indian Territories and was therefore beyond the ambit of the HBC's Charter, but his position was never challenged in court. The problem is that Douglas was not made a Chief Factor until 1839, a year after his decision in the *Beaver* case. He did have a commission as Justice of the Peace for the Indian Territories issued pursuant to the *Canada Jurisdiction Act*, but this too may have been no help, because it conferred jurisdiction only to send criminal offenders to Lower Canada for trial. As either a Justice or a chartered magistrate he could take depositions, issue process, and perform marriages but, it would seem, little else.⁸⁶ Something had to be done, however, and it is hardly surprising that those in charge were not overly concerned about legal niceties such as these. Rightly or wrongly, Douglas was a Magistrate so far as the Company - and probably the British government - was concerned.

A more interesting problem is whether the incidents on the *Beaver* and at Fort Simpson, and the men's contracts of service, should be regarded as subject only to the general law of contract or to the specialized rules of maritime law, as well. If maritime law applied, the canings and floggings administered by McNeill were probably legal, because a master could "correct" his crew by confinement and even corporal punishment so long as it was reasonable, his position being "analogous to that of a parent over his child..."⁸⁷ But if maritime law did not apply, McNeill's actions were illegal. Only someone with authority equivalent to that of an English Justice of the Peace could authorize such punishment, and perhaps the seamen concerned could, by invoking the time-honoured jurisdictional fictions of the common law, sue in England for damages.⁸⁸ As we have seen, the Company

⁸⁶ See *Report of the Select Committee*, *supra*, note 14 at 1191-92, and *An Act for extending the Jurisdiction of the Courts of Justice in the Provinces of Lower and Upper Canada, to the Trial and Punishment of Persons guilty of Crimes and offences within certain Parts of North America adjoining to the said Provinces* (U.K.) 43 Geo. III, c.138. The commission issued to Douglas under this statute in April of 1837 is in the National Archives of Canada, Reel C-3946, Vol. 15. However, given that Work took the depositions in the *Beaver* case, it may be that the Company regarded Chief Traders as Magistrates, too.

⁸⁷ Symons, *supra*, note 71 at 43-44, and see the leading case of *Lamb v. Burnett* (1831), 1 Cr. & J. 291; 148 E.R. 1430.

⁸⁸ That is, by alleging that Fort Simpson was a parish in Middlesex. A legal opinion given the Company in somewhat different circumstances suggests that there may have been some difficulty with this argument, however: see HBCA A.39/1 at 117-120d.

claimed that their Chief Factors had magisterial authority, but in 1838 McNeill was not even a Chief Trader.

The seamen's contracts of employment raise a related issue, and in this context it is the general law rather than maritime law that would favour the Company. The agreements they signed appear to have been so-called "entire" contracts, which meant that wages were not due and payable until the employee had worked the entire term of the agreement. As Oliver Wendell Holmes, Jr., put it, speaking of such arrangements:

The work is payment for the money, as much as the money for the work, and one must be paid for in advance. The question is [which one]? ... An answer cannot be obtained from any general theory. The fact that employers, as a class, can be trusted for wages more safely than the employed for their labour, that the employers have had the power and have been the law-makers, or other considerations, it matters not what, have determined that the work is to be done first. The grounds of decision are purely practical ...⁸⁹

(On the Northwest coast, these grounds presumably included the lack of any place to spend money that might be paid in advance.) A rather harsh and important twist to the common law provided that the duty to pay could not be apportioned: if a servant quit before his term was complete or was discharged, he was owed nothing. Thus, if only the ordinary law of contract applied, the "mutineers" might well have to "forfeit and lose" all their wages.⁹⁰

However, if maritime law applied, the Company's rights were not as extensive as the common law and the wording of their contracts might suggest. By virtue of the *Merchant Seaman's Act* of 1835 it was

⁸⁹ O.W. Holmes, *The Common Law* (Cambridge: Belknap Press of Harvard University Press, 1963) at 263-64, quoted in P. Karsten, "Bottomed on Justice: A Reappraisal of Critical Legal Studies Scholarship Concerning Breaches of Labor Contracts by Quitting or Firing in Britain and the U.S., 1630-1880" (1990) 34 *Am. J. of Leg. Hist.* 213 at 245.

⁹⁰ The quoted words are from the agreement cited in the text accompanying note 62, *supra*.

It is this aspect of such contracts that has attracted the attention of scholars, who disagree whether or not American judges made the common law rules harsher during the first part of the nineteenth century, thus favouring - consciously or not - capital and entrepreneurs over custom and labour. Scholars such as M.J. Horwitz, in *The Transformation of American Law 1780-1860* (Cambridge: Harvard University Press, 1977), say yes; others, notably A.W.B. Simpson, "The Horwitz Thesis and the History of Contracts" (1978-79) 46 *U. of Chicago L.R.* 533, say no. The most recent contribution to the debate is Karsten's, *supra*, note 89, who also says no. Insofar as England is concerned, Atiyah, *supra*, note 85 at 488 seems to agree with Horwitz.

unlawful to carry a crew member who did not have a written agreement in statutory form, and the form forbade clauses "contrary to or inconsistent with the Provisions or Spirit of this Act."⁹¹ Without examining a copy of the complete agreement, it is impossible for anyone to say whether it was in the correct form; however, the Act went on to prescribe only partial loss of pay for absence from or neglect of duty "without sufficient cause." It did authorize complete loss of pay for "absolute desertion," but only if the circumstances were entered in the log book at the time and certified by a "credible witness."⁹² Thus, even if the agreements were in statutory form, the clause authorizing forfeiture of all wages was probably unenforceable. And even if the men were guilty of "absolute desertion," in which case even the Act authorized complete forfeiture, McNeill's failure to enter the desertion and the attending circumstances in the log book might protect them.⁹³

Because the work stoppage on the *Beaver* involved the crew of a British vessel, it seems obvious that these provisions of the *Merchant Seaman's Act* are applicable, which would explain why the Company paid Wilson, Starling and Gordon their wages. On the other hand, the Company may have deliberately used their standard form agreement for ordinary servants because they had been advised that the Act did not apply to regular employment in their country fleet, where men worked on shore as much as at sea. On this view, the Company may have granted the petition for wages partly because this argument might not fly, partly to keep the men quiet about conditions. But also, and most importantly, because the crew was right about the law respecting foreign nationals commanding British vessels.

According to the *Navigation Act*, the applicability of which is beyond doubt, only a British subject could be master of a British ship.⁹⁴ Not only did the Company know this, but they had taken somewhat elaborate steps to disguise the true chain of command on

⁹¹ *An Act to amend and consolidate the Laws relating to the Merchant Seamen of the United Kingdom, and for forming and maintaining a Register of all the Men engaged in that Service*, (U.K.) 5 & 6 Wm. IV, c.19, ss. 2 & 3, & Schedule A.

⁹² *Ibid.*, ss. 7-9.

⁹³ In the 1840's and '50's Parliament would interfere even more extensively with maritime freedom of contract: Atiyah, *supra*, note 85 at 543-44.

⁹⁴ *An Act for the Encouragement of British Shipping and Navigation* (U.K.), 3 & 4 Wm. IV, c. 54, s. 16.

the *Beaver*. The evidence lies in a letter that Chief Factor McLoughlin had sent to Chief Trader Work in November of 1837, about six months after McNeill took command of the *Beaver* and just over two months before the crew refused to sail under him. In it, the head of the Hudson's Bay Company west of the mountains explains what can only be described as a corporate dodge, an attempt to avoid the law by only formally complying with it. "As Captain McNeill is not a British born subject," he wrote,

if he falls in with an English cruiser while in command of the Steamer, it would expose her to seizure; you will please make out the papers in the name of Mr. Scarborough, for which his pay will be raised to Eighty Pounds p. annum from 1st June 1837. [It should be] perfectly understood that the command is still to be with Captain McNeill, and on falling in with any British Cruiser, Mr. Scarborough may step forward, and Declare himself Master, and be fully justified in Calling upon the crew to defend the Company's property, and resist seizure.⁹⁵

These instructions clarify the meaning of Scarborough's statement to the Chief Engineer, overheard by seaman Carpenter, that his name would soon be placed on the ship's papers as captain.⁹⁶ It is an odd way for a mutineer to speak, but makes perfect sense in the context of McLoughlin's little scheme for evading the requirements of the *Navigation Act*. Given Scarborough's assigned role, it is hardly surprising that he might be looking forward to "working up" a man like McNeill.

Thus, the crew of the *Beaver* knew that they had something on the Company and used this legal knowledge, together with the indispensability of the engineers, to demand the removal of an unpopular master. They prevailed only for a while, but concessions (for example, his promise to keep out of the engine room) were extracted as a condition of McNeill's reinstatement, and Scarborough was given a command of his own. The ordinary seamen did not fare as well, but even the ones who were sent home suffered a penalty much less severe than their contracts appeared to authorize. Those who stayed probably went back to a working life only marginally better than before, subject to a "club law" that, at least in New Caledonia, got progressively worse in the 1840's and 50's.⁹⁷

⁹⁵ McLoughlin to Work, 16 November 1837, HBCA, B.233/b/15 at 109.

⁹⁶ *Supra*, note 50 and accompanying text.

⁹⁷ *Supra*, note 40 and accompanying text.

IX. MCNEILL'S SUBSEQUENT HISTORY

AS FOR MCNEILL, although he did not manage to prevail in the matter of Scarborough and Arthur, he went on to complete a highly successful career, marred only by the continuing obstacle of his citizenship. In June of 1838 Douglas told McNeill that the Governor and Committee felt he had done an excellent job, and that he would be promoted to chief trader if he would become a British subject. He did not, but they promoted him in 1839 anyway, avoiding the issue of his citizenship by moving him ashore four years later when he resigned as master of the *Beaver* to take charge of Fort Stikine.⁹⁸ Before assuming this position he went to England for a brief visit, and on the return journey to the Columbia 'commanded' the HBC vessel *Cowlitz* by employing the same device he had used on the *Beaver*. The Governor and Committee's sailing instructions to William Heath, the vessel's captain, were that Heath was to understand that, although he had the "nominal command" of the ship, the "chief authority" was vested in McNeill, whose instructions he was "on all occasions [to] follow".⁹⁹

McNeill became a Chief Factor in 1856, and retired in 1863 while in charge of Fort Simpson. In 1869 he signed a well-known petition to President Grant, asking for the annexation of British Columbia by the United States. He died in 1875. The town of Port McNeill, just down the coast from Fort Rupert, is named after him, and most published references to him praise both his character and his contribution to the history of British Columbia.¹⁰⁰

⁹⁸ Letter from Douglas to McNeill (16 June 1838), HBCA B.223/b/22 at 18d. But his citizenship continued to cause other problems. In 1850, for example, Simpson objected to McNeill being posted to Honolulu, on the ground that his temper and citizenship made him "the most likely man in the service to job & traffic on private Account, [and] to promote his own interests even at the expense of the Company's." Two years later, McNeill was told that he could not buy land on Vancouver Island unless he became a British subject: see correspondence referred to in *Fort Victoria Letters, supra*, note 2 at 91n, 234, and 234n, and additional information in E.E. Rich, ed., *The Letters of John McLoughlin From Fort Vancouver to the Governor and Committee, Third Series, 1844-46* (HBC Record Society, 1944) at 314ff.

⁹⁹ *Fort Vancouver Letters, Third Series, supra*, note 97 at 316-17. Bowsfield remarks that the Company had "ignored" the illegality of McNeill's position for years but, as these examples show, a more accurate assessment is that they covered it up: *Fort Victoria Letters, supra*, note 2 at 234n.

¹⁰⁰ *Ibid.* at 318 and Captain J.T. Walbran, *British Columbia Coast Names* (Vancouver: J.J. Douglas, 1971), first published in 1909. See also the biography of McNeill in McCain, *supra*, note 17 at 37-40.

X. THE AFTERMATH

WHEN THE COLONY OF VANCOUVER ISLAND WAS ESTABLISHED, the Company's commissioned officers lost any judicial authority they may once have had, because the new Governor and his appointees became the colonial judiciary. Many key players were slow to understand this. As the colony's first Magistrate said many years later about the reaction to Douglas' commission as Governor, "there was a great deal in [it] about flotsam and jetsam - infiefs and outfiefs I was told - but no one knew what they meant and cared not either."¹⁰¹ Dr. John Sebastian Helmcken, the author of these remarks, had been sent to Fort Rupert when the miners struck in 1850, and arrived after the officer in charge had already confined the men and slapped their ring-leaders in irons. Only a colonial Magistrate had the jurisdiction to do this, but Chief Trader William Henry McNeill, formerly of the *S.S. Beaver*, was now in command of Fort Rupert, and he had established some time ago that he too was not a man to worry overmuch about legal flotsam.

"As to law," Helmcken wrote on another occasion, "in our heads precious little found place there." This is hardly surprising. Vancouver Island was still a fur trade outpost, and the trader's view of law and legal process as a combination of hard discipline and vaguely defined sanctions died hard. It was a familiar, even a natural response for those in authority to make when legal rules frustrated, or even only complicated, their plans, especially when such rules were cited by underlings determined to challenge existing relations. Even today, traces of this response can be detected in some official actions.¹⁰² It

¹⁰¹ The source of this quotation and the one in the preceding paragraph is Smith, *supra*, note 38 at 136 and 309. Douglas, as we have seen, conceded that McNeill's actions were illegal, but nonetheless described them as "highly necessary" (*supra*, notes 3 and 4 and accompanying text).

¹⁰² For example, in June of 1987 organized labour in British Columbia initiated a 24 hour general strike. The Attorney General then sued to prevent persons from "circulating any writing advocating the use of force, including work stoppages, slowdowns, [and] study sessions ... as a means of accomplishing governmental change in the Province, including ... showing Her Majesty has been misled or mistaken in her measures, [and] pointing out errors in the government of the Province..." This wording was based, not on the mutiny provisions of the *Criminal Code*, but on ss. 59-61, which deal with sedition. However, the Code - unlike the endorsement on the writ - specifically exempts from liability those who, in good faith, "show that Her Majesty has been mistaken" or "point out errors in government". The action was dismissed, ostensibly on technical grounds: *A.G. B.C. v. Georgetti et al.* (1987), 38 D.L.R. (4th) 763 (B.C.S.C.). No mention appears to have been made of the *Canadian Charter of Rights and Freedoms*.

is true that the 'law' did make its first, tentative appearance on the decks of the *Beaver*, but by March of 1838 the *status quo ante* had been more or less restored, and the pattern of British Columbia's labour relations set. The province's earliest collective job action, like many that were to follow, can therefore be described as only a qualified success.