IX

Company Justice: Origins of Legal Institutions in Pre-Confederation Manitoba

DALE GIBSON

I. Justice Under Siege

THE 17th DAY OF MAY 1849 was Ascension Day, a religious holiday for Roman Catholics. Inhabitants of the Red River Settlement, now the city of Winnipeg's junction of the Red and Assiniboine Rivers, were mostly Métis of that faith. The predominantly Métis throng that surrounded the settlement's tiny courthouse was not in a festive mood that morning. Many were armed and all were grimly determined to prevent conviction in a controversial legal dispute, the most important in the settlement's history, slated to be determined that morning. They were also angry because the decision to hold the trial on Ascension Day appeared to have been motivated by a desire to keep them away from the trial.

The case was a prosecution of Métis fur-trader Guillaume Sayer for violating the Hudson's Bay Company's fur-trade monopoly.[1] The Company's field headquarters, housed in two forts, Upper and Lower Fort Garry in the Red River Settlement, was the hub of a sprawling fur trading empire. The Company's Royal Charter of 1670 had granted it the exclusive right to trade in furs everywhere in the vast area, known as Rupert's Land, drained by rivers emptying into Hudson's Bay. While the Company had encouraged, or at least tolerated, activities of independent "middle-men" like Sayer, so long as they sold their pelts to it, that attitude had changed when it became clear that the free-traders were also serving the Company's American rivals. They decided to make an example of Sayer.

Along with a fur-trade monopoly, the Hudson's Bay Company's charter granted it sweeping governmental powers throughout Rupert's Land. Precisely how sweeping those were was a matter of dispute,[2] but the Company considered itself the sole local ruler, responsible only to British authorities. For the part of Rupert's Land that encompassed the Red River Settlement and contiguous territory, an area known as Assiniboia, the Company had appointed a governor and had established both a legislative body, the Council of Assiniboia, as well as a system of courts. It was to the settlement's senior court, the General Quarterly Court of Assiniboia, that had summoned Guillaume Sayer to justify his fur-trading activities. The Company

1 *The Honourable Hudson's Bay Company* v. *Pierre Julleaum Sayer*, 17 May 1849, Quarter Court of Assiniboia, Minutes, Provincial Archives of Manitoba, Winnipeg.

2 See discussion *infra* at 5ff.

sought, in effect, to protect its commercial interests by litigation in a court it had created, staffed by judges it had appointed. The incestuousness of the process contributed to the glowering mood of the crowd through which the members of the court shoved their way, in order to enter the courthouse to begin the proceedings.

The Quarterly Court was composed of the magistrates, or "petty sessions judges," from Assiniboia's four judicial districts, presided over by the governor, a career soldier named Major W.B. Caldwell. Because neither he nor the magistrates were legally trained, the court also included an officer known as the Recorder of Rupert's Land, who was a lawyer. The first Recorder was Adam Thom, appointed in 1839 and still in office when the Sayer trial was held ten years later.[3] Thom was an intelligent, industrious and able lawyer whose arrogance, intolerance and Company-mindedness made him the focus of much community resentment. His legal knowledge, skill, and strength of personality ensured that, although he was not the nominal leader of the Quarterly Court, he dominated it in practice.

It may well have been Adam Thom, undeterred by the fact that he was both judge and legal advisor to the Company, who first prosecuted Sayer and who suggested holding the trial at a time when most of Sayer's supporters could be expected to be in church celebrating Ascension Day. He must have been dismayed, on arrival at the Upper Fort Garry courthouse from his home near Lower Fort Garry, to learn that the latter ploy had failed. The Métis had attended a special early mass in order to be present at the trial, and had been exhorted from the steps of St. Boniface Cathedral by Louis Riel, Sr., to ensure that Sayer's rights were defended. They were approximately 300 strong, and they faced no significant resistance, Governor Caldwell having wisely instructed the settlement's small militia to stay home in order to avoid confrontation.

Sayer's case was first on the docket, but when called the accused failed to appear. The mob refused to surrender him to the court's jurisdiction. The other cases on the docket went ahead and then the Sayer case was called again. When there was still no response, the court sent Sheriff Alexander Ross to discuss the matter with the demonstrators. Ross returned without Sayer, but with a delegation headed by James Sinclair and Peter Garrioch.

Sinclair, a capable and well-educated young Half-breed[4] leader acted as spokesman for the delegation. As a free-trader himself, Sinclair had a strong personal interest in the outcome of the case. He was, however, a reasonable man who preferred rational solutions to violence. He presented the court with a document listing the grievances of the Métis and Half-breed populations. In addition to free trade, and an end to restrictions on American imports, they demanded appointment of Métis and

---

3 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), chapter 1.

4 The term "half-breed", unacceptable in modern usage, is used here because it was in common use at the time. The mixed-blood population, usually described as "Métis" today, then had one of two birth identities; one, French-and-Native, and the other, Scottish-and-Native. The former group referred to themselves as "Métis". The term "Half-breed" was used in English to refer to both groups. Sayer, a Francophone, would have called himself "Métis". Sinclair and Garrioch, Anglophones, would have considered themselves "Half-breeds".

Half-breed members to the Council of Assiniboia, and the "immediate removal of Mr. Recorder Thom from the settlement, and his replacement by someone who would address the Court in both French and English."

The demand for Thom's removal was the culmination of growing hostility toward the Recorder, whose personality had become a divisive force in the settlement. Born and educated in Scotland, Thom had come to Montreal in 1832, where he had followed a successful career in journalism. While holding the position of editor of the *Montreal Herald*, he undertook the study of law, and after a year of study and part-time service under articles of clerkship with a Montreal lawyer, he was called to the bar of Lower Canada in May 1837.

When Lord Durham arrived in Canada the next year in search of a solution to the political difficulties plaguing that colony, he decided to recruit local assistants, and his attention was directed to the energetic editor. Thom accepted a position as Assistant Commissioner of Enquiry, and accompanied Durham back to England late in 1838 to help write the historic Durham Report, published the following year. That assignment came to an end about the time the Hudson's Bay Company was looking for a lawyer to act as recorder at Red River and Thom, who was acquainted with Company Governor George Simpson, was appointed to the post.

In terms of professional ability, it was a sound choice. Unfortunately, however, Adam Thom's personal make-up included liabilities which more than offset his assets. He was a stern, uncompromising man, who would not make concessions to the settlement's lack of familiarity with legal formalities. He frequently displayed an irascible temper, and he seldom saw fit to leaven the law with mercy. Even more disturbing, for a community with a large French-speaking population, was Thom's opposition to the use of the French language or French institutions in a British colony. He was in total accord with the Durham Report's proposals for anglicising Lower Canada; in fact, some historians believe he was chiefly responsible for writing those portions of the Report. It was hardly surprising that Thom's anti-French attitudes, reflected in much of his day-to-day work as judge and advisor to the Governor and Council of Assiniboia, should have been addressed in the litany of grievances presented to the Quarterly Court by James Sinclair at the opening of the Sayer trial.

After reading the grievance document, Recorder Thom asked Sinclair in what capacity he appeared before the court. When Sinclair replied that he and his colleagues were "delegates of the people," Thom explained that they had no right to appear in that capacity before a court. Then he went on, in his pontifical way, to explain the Hudson's Bay Company's charter powers, including its exclusive right of trade. Sinclair countered by challenging the legality of the charter. In support of his argument, Sinclair showed the court an issue of the *London Times*, published the previous fall, reporting that the British government was giving serious consideration to a petition presented by A. K. Isbister on behalf of Red River dissidents, denying the charter's validity and requesting self-government.

Realising, perhaps, that the discussion was somewhat premature, the court then turned its attention to the problem of getting the trial under way. Sinclair was offered the choice of acting either as foreman of the jury, with his colleague Garrioch as a member, or as counsel for Sayer. Sinclair conveyed this offer to those he represented and apparently persuaded them to agree. He returned accompanied by Sayer, for whom he announced he would appear as counsel. With them came as many armed

supporters as the small courtroom would hold, who apparently intended to allow the trial to proceed only so long as it met their approval.

The jury that had served in previous cases that day was still assembled, but Sinclair objected to several of its members, as well as to a number of others whom the court suggested as replacements. Eventually an acceptable jury, composed about equally of French and English-speaking members was chosen, and the trial proceeded.

The evidence was straightforward. The most dramatic moment occurred when Chief Factor Ballenden, acting as prosecutor, presented the accused's young son as the chief prosecution witness. The boy had been instructed by his parents to be truthful and told the court of seeing his father engage in fur-trade transactions. Sayer did not deny these activities; he claimed that he had been given permission by a Company representative to engage in trade. This was disputed by Ballenden, who seems to have acted as witness as well as prosecutor.

Adam Thom then charged the jury, reviewing the evidence and explaining the Company's legal rights under its charter. Although the text of his remarks has not survived, it is unlikely, in view of Thom's previous comments about the charter powers, that he left much opportunity for a 'not guilty' verdict. In any event, when the jury returned from its deliberations foreman Donald Gunn announced that Sayer had been found guilty.

The tension in the courtroom must have been explosive. The Métis inside and outside the small building were determined not to accept that verdict, and neither the court nor Sheriff Ross had the power at their command to enforce the jury's decision.

The pressure began to ease, however, when foreman Gunn turned to prosecutor John Ballenden and recommended mercy in view of the fact that the accused had thought he had the right to trade. Here was an opportunity to avoid violence and Ballenden seized it. He told the court that the Company's only concern was in having its legal rights judicially vindicated, which the jury's verdict had accomplished. He was therefore willing to agree that Sayer should not be punished and that charges against the other alleged free-traders should be dropped.

To the spectators, the absence of punishment was tantamount to acquittal, making the guilty verdict a mere technicality. One of the Métis jurors shouted to his colleagues outside the courthouse: "Le commerce est libre!" and the mob took up the chant as it marched off to celebrate its victory over the Company. In the long run, the crowd had correctly assessed the decision. Recognising that it was not possible to enforce its trade monopoly in the face of general public hostility, the Company made no further attempts to prosecute free-traders.

The Sayer trial illustrated several problems to which the administration of justice in Rupert's Land by the Hudson's Bay Company was prone: (a) the questionable legality and uncertain governmental scope of the Company's charter; (b) systemic flaws that weakened the Company's legal system; and (c) the inherent practical difficulties involved in imposing legal norms on a frontier society. These themes were common to all legal arrangements for Assiniboia, both before and after the Sayer debacle. The first, the legal uncertainty about the Company's governmental powers, was a constant concern.

II. Charter Uncertainties

When, on 2 May 1670, King Charles II granted a charter[5] to the "Governor and Company of Adventurers of England Trading Into Hudson's Bay" which combined governmental authority with a fur-trading monopoly in the remote wilds of North America, scant attention was paid to legal niceties. In assuming the right to grant the Company jurisdiction over this huge tract, English authorities ignored any rights of the Aboriginal inhabitants and gave short shrift to the claims of France, whose colony in the northeastern part of the continent had indefinite western boundaries. It was also debatable whether the royal prerogative could grant such sweeping legal rights on the sole authority of a royal charter without parliamentary approval, and whether the language of the charter was sufficiently clear to bestow all the powers the Company claimed.[6]

As to the Native population, the charter took a frankly conquistatorial approach, authorising the Company to "send either ships of war, men or ammunition" to Rupert's Land "for the security and defence of the same" and to:

> continue or make war or peace with any prince or people whatsoever, that are not Christians, ... as shall be most for the advantage and benefit of the ... Company, and of their trade ....[7]

This callous British attitude toward Aboriginal people was eventually moderated, almost a century later, by the Royal Proclamation of 1763, but even that reform, purporting to ensure that Indians:

> should not be molested or disturbed in the possession of such parts of our dominions and territories as, not having been ceded to or purchased by ... [the crown], are reserved to them, or any of them, as their hunting grounds ....[8]

does not appear to have been applicable to Rupert's Land.[9] While modern approaches to the question of Aboriginal rights might cast doubt on the Company's legal entitlement to exercise governmental authority over the Native populations, such doubts never surfaced during the Hudson's Bay Company's régime.

The possibility that France might exert a competing claim to some of the territory granted to the Company was implicitly acknowledged by the charter's self-confine-

5 The Charter is in E.H. Oliver, *The Canadian North-West — Its Early Development and Legislative Records*, (Ottawa: Government Printing Bureau, 1914), vol. I at 1735. It was given legislative sanction 19 years later: (1689) 2 William III & Mary II, 1st Sess., a private statute noted in Vol. VI, *Statutes of the Realm*, following 2 William III & Mary II 10. The existence of the Charter and the rights it conferred were also acknowledged in several subsequent statutes: 1707, 6 Anne, c. 37, s. 23; 1745, 18 George II, c. 17, s. 4; 1774, 14 George III, c. 83, s. 1; 1803, 43 George III, c. 138; 1821, 1 & 2 George IV, c. 66, s. 66, s. 14, though only by way of non-derogation clauses or other incidental references.

6 For an excellent survey of these and other jurisdictional uncertainties concerning Rupert's Land, see Hamar Foster, "Long Distance Justice" (1990) 34 American Journal of Legal History 1.

7 Oliver, *supra* note 5 at 150.

8 Reprinted in Revised Statutes of Canada [R.S.C.] 1970, Appendix 123 at 127.

9 An interpretive problem arises from the fact that the quoted passage can be construed as meaning either that: (a) *all* lands not ceded to or purchased by the Crown are reserved for Indians, or (b) only those portions of the unceded and unpurchased lands which the Crown has expressly *chosen to designate* as "reserved" are accorded that status. The latter interpretation seems stronger.

ment to territory "not already actually ... possessed by the subjects of any other Christian Prince or State,"[10] as well as by its restriction of the Company's war-making authority to adversaries "who are not Christians."[11] The British government appeared, however, to have concurred in the Company's view that no part of Rupert's Land was "already actually ... possessed" by French subjects. Although the accuracy of that assumption was never tested conclusively, the possibility that it was wrong remained a cloud on the Company's authority throughout its two centuries of responsibility for Rupert's Land.[12]

There was doubt as well, at least in hindsight, as to whether it was within the unilateral legal authority of the crown to give away a quarter of a continent to a private corporation, even if the territory and corporation were English. This concern weighed heavily with three prestigious British lawyers whom the Company consulted in 1803. They feared that the royal prerogative did not provide sufficient authority for making such a grant, and that the various statutory confirmations and acknowledgments of the charter failed to make up for the deficiency, at least as far as it concerned the trading monopoly. Given the sweep of early prerogative powers, even in the constitutionally storm-tossed seventeenth century, and the absence of significant hints of doubt in the statutes which subsequently made reference to Hudson's Bay Company rights, these concerns were probably misplaced or exaggerated.[13] They were substantial enough, however, to give Company opponents a plausible basis for attacking its authority.

Another source of uncertainty about the legal status of Rupert's Land lay in the charter's ambiguity as to some of the governmental powers it granted. The Company's claim to absolute authority in Rupert's Land, subordinate only to British laws and governmental institutions, found support in the provision which designated "the said Governor and Company ... the true and absolute lords and proprietors of the same territory ... saving always the faith, allegiance and sovereign dominion due to ... [the crown],"[14] and in that which placed Rupert's Land under the "power and command" of the Company, subject to the same saving clause, and stated that:

> [T]he ... Governor and company shall have liberty, full power and authority to appoint and establish Governors and all other officers to govern ... [the territory, including] ... power to judge all persons be-

---

10 Oliver, *supra* note 5 at 143.

11 *Ibid.* at 150.

12 An 1857 opinion of the Law Officers of the crown concerning the legality of the Charter pointed out, for example, that the Company's rights were subject to the question "whether, at the time of the Charter, any part of the territory now claimed by the ... Company could have been rightfully claimed by the French, as falling within the boundaries of Canada, or Nouvelle France ...: " *Report of the Select Committee*,discussed in *supra* note 6, Appendix 9, 402ff. The evidence of W. Mac. D. Dawson to the Select Committee, *ibid.*, Appendix 8, 394ff., had asserted French ownership prior to 1763.

13 Foster, *supra* note 6 at 13, remarked that "the real reason for these doubts is that parliamentary supremacy and free trade ideas had made what may have been legal in 1670 appear highly dubious in 1803."

14 Oliver, *supra* note 5 at 144, emphasis added. The term "and proprietors" could be construed to restrict the provision to matters relating to ownership of the territory, however.

longing to the said Governor and Company, or that shall live under them, in all causes, whether civil or criminal, according to the laws of this Kingdom, and to execute justice accordingly.[15]

The Company was also empowered to "transport and carry over such number of men, being willing thereunto, or not prohibited, as they shall think fit," presumably as settlers, to "colonies, plantations, towns or villages" it might establish in Rupert's Land, and to:

govern them in such legal and reasonable manner as the said Governor and Company shall think best, and to inflict punishment for misdemeanours or impose such fines upon them for breach of their orders as ... formerly expressed.[16]

There can be little doubt that these provisions were intended to grant the Company plenary jurisdiction, subject only to overriding crown authority, with respect to the executive and judicial aspects of government in Rupert's Land. The Company's charter powers might have been less complete as regards the making of laws, however.[17] The charter granted it authority to "make, ordain and constitute ... reasonable laws, constitutions, orders and ordinances," including reasonable "pains, penalties and punishments" for their breach,[18] but the scope of this legislative power was somewhat restricted by the requirement that the Company's laws be both "reasonable" and "not contrary or repugnant, but as near as may be agreeable to the laws, statutes or customs" of Great Britain. Company legislation was also limited to that which:

shall seem necessary and convenient for the good government of the said Company, and of all governors of colonies, forts and plantations, factors, masters, mariners and other officers employed ... in any of the territories and lands aforesaid.[19]

Even the judicial power bestowed on Company officials was required to be exercised "according to the laws of this Kingdom."[20] These constraints could be construed to mean that the Company's authority to make local laws was limited to internal management of Company affairs and discipline of Company employees. If so, some of the ordinances eventually enacted by the Council of Assiniboia to govern community life at Red River, and enforced by the courts of Assiniboia at the time of the Sayer trial, were of questionable validity. Even if the Company's legislative ambit were thus restricted, a matter never resolved conclusively, the governmental powers which the charter purported to confer on the Company were undeniably extensive.

---

15 *Ibid.* at 149-50. Although the meaning of the term "all persons that shall live under" the Company is open to some uncertainty, the most likely interpretation given the breadth of the Company's proprietary rights and executive powers in Rupert's Land, is that it was intended to cover everyone present within the territory, including the Native population.

16 *Ibid.* at 151.

17 Foster, *supra* note 6 at 3, suggests that this was so.

18 Oliver, *supra* note 5 at 145-6.

19 *Ibid.* at 145.

20 *Ibid.* at 150. Another possible restriction was the requirement that all such legislation was to be enacted at Company meetings convened "for or about the said trade": *ibid.* at 144, emphasis added.

In some respects, they were more extensive than the Company had any interest in exercising. This was certainly so for the Native inhabitants of Rupert's Land, whom the Hudson's Bay Company régime mostly left to their own devices, juridically speaking, unless their conduct had a detrimental impact on the Company or its employees. This was also the Company's attitude, generally speaking, toward the personnel of rival fur-trading organisations. Although the charter prohibited the presence in the territory of any British subjects other than those employed or licensed by the Company,[21] and even authorised the Company to arrest interlopers,[22] Canadian-based fur traders operated in the southern parts of Rupert's Land from an early date with very little interference from, or even contact with, their chartered counterparts on the Bay. Although the Company may in theory have had the authority under its charter to adjudicate the disputes of, and make other legal dispensations for, these outsiders, it had, in practice, neither the desire nor the occasion to do so.

III. Canada Jurisdiction Act, 1803

If the Hudson's Bay Company could not, or would not, administer law to persons not in their employ, who could? The problem came to a head one morning in August 1802, at a remote Indian village in the wilderness of Rupert's Land, when two fur traders employed by competing Montreal-based companies got into an argument over a quantity of beaver skins. The furs were in the lawful possession of a young XY Company employee, Joseph Lamothe, when a North West Company trader called James King tried to take them away. After warning King to desist, Lamothe produced a pistol and shot him fatally.[23] To establish Lamothe's guilt or innocence, it would be necessary to hold a criminal trial. But where? And under whose authority? Even if it had occurred to anyone to seek the Hudson's Bay Company's assistance, it was highly unlikely that the Company's officers, hostile to all competition, would have agreed to help. In any event, the nearest Hudson's Bay Company establishment where a trial might be held was a long way away.

At first it was assumed that the matter should be dealt with in Montreal, where both the North West Company and the XY Company had their headquarters, so Lamothe and a witness to the shooting made the arduous journey to Lower Canada. A grand jury in Montreal indicted Lamothe for murder, but before the trial could be held serious doubts were raised about the jurisdiction of the courts of Lower Canada to hear a case based on incidents occurring beyond the territorial limits of the colony. Although the western boundaries of Canada were uncertain, it was unlikely that they embraced Rupert's Land. Yet if they did not it was difficult to see how any North American authorities other than those of the Hudson's Bay Company had any right to exercise jurisdiction over the case. Chief Justice Alcock consulted anxiously about the problem with the Governor of Lower Canada, Company officials and British authorities, but no easy answers were forthcoming.

---

21 Ibid. at 146-7.

22 Ibid. at 151-2.

23 A.S. Morton, *A History of the Canadian West to 1870-1* (London: Nelson, 1939) at 513.

Growing tired of waiting for these interminable discussions to conclude, Lamothe eventually returned to the forest. So far as he was concerned the matter had ended, but the legal questions that his case raised could not be disposed of so simply. In an attempt to remedy the situation, authorities in Lower Canada persuaded the British Parliament in 1803 to pass a statute known as the *Canada Jurisdiction Act*.[24] It created more problems than it solved.

Rather than establishing a resident magistrate and military post west of the Great Lakes, as the XY Company had requested, the *Act* gave the courts of Lower Canada jurisdiction to try persons charged with criminal offences committed "in the Indian Territories." The governor of Lower Canada was authorised to appoint magistrates with jurisdiction in the "Indian Territories," and several officers of the North West Company (which absorbed the XY Company the same year) were named justices of the peace. Major cases were to be tried in Canada, however. It was possible for the governor of Lower Canada to vest jurisdiction over a particular case in the courts of Upper Canada if he felt that it could more conveniently be heard there, but the standard procedure required the accused and witnesses to be transported all the way to Montreal. The *Act* also empowered any person to arrest another on suspicion of crime and take him to Canada for trial, a procedure that would be abused by fur companies wanting to get rival traders out of the way for a while.

The most serious shortcoming of the *Canada Jurisdiction Act* was that it failed to make clear the relationship between the judicial machinery for which it provided, and that which had been established under the Hudson's Bay Company charter. The North West Company took the view that the *Act* completely superseded the charter as far as the administration of justice was concerned. The Hudson's Bay Company, on the other hand, argued that the *Canada Jurisdiction Act* did not apply to Rupert's Land at all, since it referred only to crimes committed within "the Indian Territories and other parts of America not within the limits of the Provinces of Upper or Lower Canada, or ... the United States of America, *and ... therefore not cognizable by and jurisdiction whatever*" [emphasis added]. The Hudson's Bay Company contended that crimes committed within its territory were "cognizable" by the jurisdiction established under its charter and that the *Canada Jurisdiction Act* therefore did not apply to Rupert's Land.[25]

For the first few years after enactment of the *Canada Jurisdiction Act*, this difference of opinion had no serious consequences. Each company simply applied the procedure that it thought applicable to activities of its own employees. But in 1809 a legal controversy arose involving employees of both companies. This brought the dispute into prominence, and incidentally provided a graphic illustration of how the *Canada Jurisdiction Act* could be abused.

In August of that year, at a trading post near Lake of the Woods, a North West Company clerk, armed with a sword, seized goods from an Indian who had been dealing with Hudson's Bay Company traders. When employees of the latter company

24 43 George II, c. 138.

25 Foster, *supra* note 6 at 15, suggests that because the incident which gave rise to the *Canada Jurisdiction Act* was a killing that took place in Rupert's Land, the better interpretation was that the *Act* did extend to Rupert's Land.

saw what was going on, they attempted to take back the property obtained from them, but the Nor'wester slashed about with his sword, wounding several of them. One of the Hudson's Bay Company men, John Mowat, got a gun and when the swordsman attacked a second time Mowat killed him. As soon as word of this incident reached the North West Company post at Fort William, an armed party was sent out to arrest Mowat. After being apprehended he was held captive at Rainy River and Fort William for a total of ten months before being transported to Montreal for trial. During much of that period he was kept in irons, and he claimed that when he became seriously ill at Fort William he was denied the services of the post physician. When Mowat finally arrived at Montreal in late August 1810, the two defence witnesses who were brought with him were arrested and charged with complicity in the killing. The grand jury subsequently refused to indict the witnesses, but Mowat was convicted of manslaughter and sentenced to six months' imprisonment, plus branding on the hand.[26] Hudson's Bay Company officials were incensed by the Mowat case, not only because of the delay, partiality and cruelty for which the rival company was responsible before trial, but also because they believed that the courts of Lower Canada had no jurisdiction over matters occurring in Rupert's Land.

IV. The Selkirk Settlement, 1811-20

The outcome of this jurisdictional controversy was of great import to a Scottish nobleman, Thomas Douglas, the earl of Selkirk. He had become interested in establishing an agricultural settlement in Rupert's Land under the aegis of the Hudson's Bay Company, and was concerned about the Company's legal right to grant him land and powers in the area. In 1809 he sought the advice of a group of prominent British lawyers, headed by Sir Samuel Romilly. They advised him that the Hudson's Bay Company possessed, under its charter, exclusive legislative, executive and judicial powers of government over Rupert's Land and everyone within the territory. In their view the *Canada Jurisdiction Act* did not apply to the area.[27] On the basis of this opinion, Lord Selkirk decided to proceed with his ambitious scheme to create an agricultural colony on the banks of the Red River.

In 1811 the Hudson's Bay Company transferred ownership of 116,000 square miles of its territory to Lord Selkirk. The area was centred on the junction of the Red and the Assiniboine Rivers, and took its name, District of Assiniboia, from the latter river. From the former came the name of the community, Red River Settlement, established near the junction by the first small group of Selkirk settlers in the autumn of 1812. The deed of conveyance from the Company to Lord Selkirk transferred ownership only; it did not give Selkirk any governmental jurisdiction. The Company retained its legal power under the charter to administer justice and to exercise all other functions of government in Assiniboia. It was for this reason that Miles Macdonell, whom Selkirk chose as the first leader of his colony, was designated a governor of the Company and thereby clothed with the Company's legislative and judicial powers. To be certain that these powers could not be challenged by reason

---

26 See Morton, *supra* note 23 at 526. For a fuller account, see Foster, *supra* note 6 at 19.

27 Bryce, *The Makers of Canada*, vol. V (Toronto: Morrey, 1910) at 143.

of the questionable legal status of the charter, Selkirk also arranged to have Macdonell appointed as a magistrate for the 'Indian Territories' under the disputed *Canada Jurisdiction Act*.[28] Several Hudson's Bay Company officials received similar appointments. Since those who had previously been appointed as magistrates under that *Act* had all been North West Company officers, the scene was now set for unsavoury competition in the administration of justice.

Both Macdonell and Selkirk appreciated, from the beginning, the importance of establishing a satisfactory system of justice for the new settlement. In May 1812, before he and the first small band of immigrants left York Factory for Red River, Macdonell wrote to Selkirk stating: "We must immediately have some kind of judicature in the Colony. " He suggested that it would be wise at first to impose martial law, backed by the "coercive power" of fifty mounted troops.[29] Selkirk was in complete agreement about the need for effective judicial arrangements fearing that if they were not quickly established the Company's jurisdictional powers might be taken away by legislation.[30] He had hoped that the Company committee in London would lay down judicial procedures for the settlement in time to assist Miles Macdonell in the early months of his administration. The Committee decided to postpone the matter, however, so Selkirk felt compelled to offer his governor some interim guidance on the subject. He was hesitant to do so because, although he had studied Scottish law for two years, he was not a fully qualified lawyer. Nevertheless, as he explained to an associate, with Macdonell in "a situation altogether new," it was "quite impossible for me to do as the Committee have done and adjourn the subject altogether until next year." [31] So on 13 June 1813, more than a year after Macdonell's request, Selkirk sent him a long and typically thorough letter of interim instructions concerning the administration of justice.

Selkirk explained to Macdonell that the Company's territories were not subject to the *Canada Jurisdiction Act* and that the Company's charter placed full judicial authority on the local governor and his council; but he stressed that Macdonell could not lawfully exercise this authority without appointing a council, which had not yet been done. He also gave instructions to appoint a sheriff, supported by a posse of "a few trusty men ... allowed an extra pay for this duty. " He rejected, for the time being, at least, Macdonell's proposal of martial law, and expressed the opinion that the sheriff's posse, "if they are well officered and trained to exact obedience, ... will give you nearly as much security as you could derive from a more regular military force."

Macdonell appeared to have been in possession of at least two sets of law books: Blackstone's *Commentaries on the Laws of England* and Burn's *Justice of the Peace*.[32] But Selkirk cautioned him against attempting to follow legal forms and procedures too closely:

---

28 *Quebec Gazette*, 12 December 1811.

29 Oliver, *supra* note 5 at 177.

30 Selkirk to Macdonell, 13 June 1813: Oliver, *supra* note 5 at 178.

31 Selkirk to Andrew Colville, June 5, 1813: Selkirk Papers, N.A.C., El - 1 (2), Vol. III at 629."

32 See Oliver, *supra* note 5 at 186.

It is scarcely possible that you should not fall into mistakes in applying technical forms to which you are not accustomed, and that would have a worse effect than if without pretending to understand or adhere to forms you attend only to essentials that your conduct may be liable to no question on the score of impartiality and moderation.

For the trial of all serious cases he strongly urged the use of a jury, even though he felt that most of the settlers were less than ideally equipped to serve as jurors.

Selkirk attempted to have his instructions reviewed by one of the lawyers he had previously consulted about the Company's legal powers, but there was apparently not enough time to do so before the departure of the ship carrying the letter to Miles Macdonell.[33] Despite the lack of professional guidance, his advice was generally sound. When a supplementary set of instructions, dealing with matters such as rules of evidence, forms of punishment, and powers of arrest, was sent to Macdonell the following year, legal advice had been taken. It contained nothing that contradicted Selkirk's earlier orders.[34]

Selkirk's judicial instructions were too late to be of assistance in the Red River Settlement's first legal controversy. John MacLean, a settler who arrived on the same boat as the instructions in 1813, was wealthier than most of the other immigrants. He and his family brought a maid to their frontier home, as well as crates of fancy dishes and silverware, and these marks of affluence aroused considerable jealousy and hostility among the other settlers. When, on the journey from York Factory to Red River, a silver teaspoon belonging to someone else turned up among the MacLean's possessions, the family was accused of theft.

Trial of the case presented difficulties. Miles Macdonell had not yet appointed a council, so the judicial powers granted by the charter could not be exercised. The procedure established under the *Canada Jurisdiction Act* had, therefore, to be followed. The only available magistrates appointed under that *Act* were Miles Macdonell at Red River and Chief Factor William Auld at York Factory. Matters were complicated by the fact that the complaint was filed at York Factory, but the defendants were by that time at Red River.

William Auld took depositions from the complainant and immediately made them public. Then he wrote to Macdonell, enclosing the depositions and expressing the view that the MacLean family was guilty of "a felonious and fraudulent taking away." Macdonell, after taking depositions from Mr. and Mrs. MacLean and their maid, reached the opposite conclusion. He believed that the MacLeans were innocent, the teaspoon having been maliciously planted among their goods. He wrote to Auld, disagreeing with his findings,[35] and then wrote an indignant letter to Selkirk complaining about Auld's handling of the case. It was, he charged:

... a most vindictive and cruel persecution instead of an act of justice. Every means was taken to make it as public as possible, and impress people's minds with the family's guilt, the evidence being taken in a general way and not in a form of a regular information as usually taken before the magistrate and no individual being particularly accused or suspected.[36]

33 Selkirk to Colville, *supra* note 31.

34 Oliver, *supra* note 5 at 186.

35 Selkirk Papers, NAC, E1/1 (3), at 198.

36 *Ibid.*, E1/1 (4), at 1176.

With the two magistrates holding contrary views, Red River's first legal dispute ended inconclusively. There may, however, have been a community judgment of guilt implicit in the fact that the MacLeans spent the winter of 1813-14 alone at Red River, while the other settlers retreated to Pembina.[37]

A few steps were taken in 1814 and 1815 to improve the colony's machinery for the administration of justice. Early in 1814 Macdonell finally established a council, which enabled him to make use of his judicial powers under the charter.[38] At the same time he appointed Red River's first sheriff, John Spencer. In May 1815 the Hudson's Bay Company at long last enacted an ordinance concerning the administration of justice in Rupert's Land.[39] Despite these improvements, however, Red River's legal system remained primitive and lacked the strength to cope with any serious challenge to its authority. Forces of disorder were building in the colony that would soon present such a challenge.

If Miles Macdonell's indignant reaction to Auld's behaviour in the MacLean case showed that he possessed a sense of fairness, his dealings with the North West Company demonstrated that he had received short measure of certain other leadership qualities, such as common sense and discretion. Selkirk's instructions to Macdonell had cautioned him to "keep clear of any unnecessary collision with the N.W. Co.," and to confine his actions to "what is strictly necessary for preserving the peace and good order of the settlement." However, Selkirk had then gone on, injudiciously, to suggest that in order to prevent the North West Company's acquiring prescriptive rights to any of his property, a notice to quit should be served on the officers of any North West post that had been occupied for a length of time approaching the twenty-year prescriptive period. With little heed for the precarious position of the settlement, Macdonell proceeded to carry out this assignment in August 1813. Although there was no intention to act on the notices, which were mere formalities designed to prevent the accrual of prescriptive rights, the peremptory manner in which they were imposed contributed materially to a deterioration of friendly relations between the people of Red River and the Nor'westers.

Then, in January 1814, Macdonell issued an order prohibiting the export of pemmican and other commodities from Assiniboia. Since Assiniboia was a provisioning area for a large part of the North West Company's fur-trading territory, compliance with the regulation would have seriously hampered its operations. Hostility to the order ran high. Although the dispute was eventually settled by negotiation, the resentment that it provoked caused a serious deterioration in relations between the colony and the North West Company. A series of hostile incidents followed, aggravated by the issuing of further eviction notices by Macdonell in October 1814.[40]

North West Company officers decided that the situation had become intolerable, and launched a campaign of deception, intimidation and violence designed to

---

37 W.L. Morton, *Manitoba: A History* (Toronto: University of Toronto Press, 1957) at 49.

38 Macdonell to Auld, 4 February 1814: Selkirk Papers, NAC, E1/3, at 959.

39 Oliver, *supra* note 5 at 193.

40 *Ibid.* at 190-191.

obliterate the colony. Exercising their powers as magistrates under the *Canada Jurisdiction Act*, the Nor'westers arrested both Miles Macdonell and his sheriff, John Spencer, on charges of theft, and transported them to Montreal for trial. Without their leaders, the rest of the settlers were easy to expel from Red River. A large number of them were induced to leave for the east in North West Company canoes immediately after Macdonell and Spencer were removed. The rest of the colonists were subjected to threats, violence and arson at the hands of Métis loyal to the Nor'westers and distrustful of the newcomers. They succumbed on June 25th. After signing an armistice agreement with the Métis leaders,[41] and writing an apologetic explanation to Lord Selkirk,[42] the settlers left their trampled crops and the smouldering ruins of their former homes, and fled to Jack River at the top of Lake Winnipeg. As Macdonell had stressed in his first letter to Selkirk about legal matters, the rule of law could not be effectively maintained in the absence of an effective police or military force. Unfortunately, the lesson was to be repeated several times before adequate law enforcement machinery finally came into existence.

The most calamitous of these lessons occurred all too soon. The Jack River refugees returned to Red River in the fall of 1815 under the bold leadership of Colin Robertson, and in early spring a new Governor, Robert Semple, arrived. Robertson and Semple carried out a number of retaliatory raids against North West Company establishments, culminating in the burning of Fort Gibraltar, the North West Company post at Red River. An atmosphere of great animosities prevailed. In June 1816 a party of Métis led by Cuthbert Grant, moving across the prairie northwest of the settlement, was intercepted by Semple and several settlers near a grove called Seven Oaks. An argument ensued, and when someone fired a shot, a pitched battle erupted that did not end until twenty colonists, including Governor Semple, lay dead on the prairie. Only one Métis was killed. The Nor'westers followed up the bloodshed by driving the disheartened settlers back to Jack River once more.

Meanwhile, Selkirk was en route from Montreal to Red River. The 1815 pillage of the colony had convinced him that his presence, and that of an armed force to keep the peace, were essential to survival of the settlement. He came to Montreal to negotiate with the governor of Lower Canada for the provision of British troops at government expense, but was not successful. At one point Selkirk was promised a small bodyguard composed of officers and men from the de Meuron regiment, British mercenaries of Swiss and German origin, recently engaged in the Napoleonic wars; but a decision to disband the regiment caused the promise to be withdrawn. This gave Selkirk an opportunity to hire the released de Meurons himself, and about 95 officers and men were recruited to accompany him to Red River. They were paid wages during the journey and were given a choice on their arrival of either a land grant at Red River or return passage to Europe. Although such an arrangement would still leave the colony without a fulltime law enforcement body, Selkirk counted on enough de Meurons becoming settlers that a sheriff's posse of citizens would be an effective guardian of law and order. Selkirk also succeeded in having himself

---

41 *Ibid.* at 196.

42 *Ibid.* at 195.

appointed a justice of the peace for the "Indian Territories" under the *Canada Jurisdiction Act.*

Encouraged by these developments and by the good news that Robertson had re-established the settlement the previous fall, Selkirk left Montreal in early June 1816, believing that stability was returning to Red River. When he reached Sault Ste. Marie, however, he learned of the 'Seven Oaks Tragedy.'

The behaviour of certain North West Company officers, and of Selkirk himself, in the aftermath of Seven Oaks, showed the shameful state to which the administration of justice in Rupert's Land had fallen. A group of Nor'westers led by Archibald McLeod, approaching Red River from the north a day or two after the tragedy, came upon a large flotilla of settlers fleeing to Jack River and detained them for two days. Like Selkirk, McLeod was a justice of the peace for the "Indian Territories." He used his authority as an excuse to subject the refugees to abusive and frightening searches and cross-examinations, and attempted to make them all take oaths never to return to Red River.[43] Eventually, after arresting a few of the settlers as suspects or witnesses of the Seven Oaks affair and sending them to Fort William, McLeod allowed the rest to continue their bitter journey to exile at the top of Lake Winnipeg.

Selkirk retaliated swiftly by taking his de Meuron soldiers to Fort William, seizing the outpost and freeing the Red River prisoners. Then, making use of his judicial powers, he subjected both the premises and the North West Company employees to lengthy examinations in search of evidence of complicity in the Red River violence. Considerable damning evidence was uncovered, as a result of which Selkirk sent several North West Company employees to Montreal under arrest to face trial.

Since he appeared to have conducted the investigation in a proper manner,[44] Selkirk could not have been seriously faulted if he had then left Fort William. Unfortunately the line between his magisterial responsibilities and his personal interests seemed to have blurred in his mind, as it frequently did in the minds of his rival magistrates, and he decided to retain possession of Fort William for the winter, thereby interfering seriously with the routine trading activities of the North West Company. Moreover, he authorised the commanding officer of the de Meurons, assisted by Miles Macdonell, to lead raiding parties against a number of North West Company posts on their way to recapturing the Hudson's Bay Company fort at Red River. In doing so he seems to have overlooked his own admonition to the Nor'westers that the law would not countenance retaliatory conduct.[45] Then Selkirk allowed himself to become involved in a highly questionable "purchase" of the contents of Fort William from an alcoholic resident partner of the North West Company, who purported to have authority to contract on behalf of the Company. He later claimed to have been coerced by Selkirk.[46]

---

43 J. M. Gray, *Lord Selkirk of Red River* (Toronto: MacMillan Co., 1963) at 149-150.

44 *Ibid.* at 159.

45 *Ibid.* at 160-161.

46 *Ibid.* at 171-173.

The Nor'westers responded to these moves by persistent attempts to place Selkirk under arrest. Warrants for his arrest were issued on two occasions by magistrates sympathetic to their Company, and an under-sheriff from Upper Canada, spurred by an £800 reward offered by the Company, doggedly pursued Selkirk for several months. Selkirk denied the legality of these warrants and refused to obey them.[47] When the under-sheriff tried on one occasion to accomplish his task by force, Selkirk placed him under restraint.

The horror of Seven Oaks, and the disgraceful manner in which the machinery of justice was being used by rival commercial organisations for private purposes, finally prodded the government into action. A royal commission was appointed to investigate the lawlessness. Then the commissions of all justices of the peace and magistrates for the 'Indian Territories' were withdrawn, leaving the commissioners as the only judicial officers acting under the *Canada Jurisdiction Act* in the northwest.[48]

The two commissioners were both lawyers, the first to come to Assiniboia. Both were portly and unsuited by physique and temperament to the rigours of canoe travel in the wilderness, but there the resemblance ended. The chief commissioner, Lower Canadian politician William Coltman, was astute and fair-minded. His colleague, John Fletcher, was a pompous Quebec magistrate whose constant drunkenness and extreme officiousness lent a comic opera aspect to the expedition. On one occasion a man was imprisoned overnight for questioning Fletcher's drunken boast that his legal powers were so great that he could cause anyone to be hanged, or even drawn and quartered, within an hour.[49] Samuel Gale, a Montreal solicitor who came to Red River that summer as Selkirk's legal advisor, spent much of his time keeping an eye on Fletcher. Fortunately, it was Coltman rather than Fletcher who directed the commission's activities.

Coltman arrived at Red River not long after Selkirk's own arrival from Fort William in the summer of 1817. The first task he undertook was to bring about a restitution of seized property between the Nor'westers and the settlers. This exercise had some heart-breaking consequences, as when horses were allowed to graze in a crop of barley planted by the settlers on the site of the former North West Company fort:[50] but Coltman insisted that the letter of the law be observed. An investigation of the past two years' violence then took place, and evidence was gathered in preparation for a series of legal battles that would soon commence in the Canadian courts.

---

47 The first warrant was prepared at York, but no judge would sign it, so it was brought to Sault Ste. Marie by a Constable Robinson, and eventually signed by an aged and alcoholic justice of the peace there. When Robinson served the warrant on him, Selkirk decided, on the basis of the discrepancy in handwriting and the notoriety of the justice of the peace involved, that it was not genuine: *ibid.* at 186-7. His refusal to obey the second warrant, served by the undersheriff, was based on the government order annulling all judicial powers in the "Indian Territories," which he claimed deprived the warrant of legal effect: *ibid.* at 200-201.

48 *Ibid.* at 200.

49 Ibid. at 227.

50 *Ibid.* at 232.

For Selkirk, the summer of 1817 was a productive one. The Jack River exiles returned to Red River once more, and the colony was re-established on a firmer basis than ever. With the assistance of Coltman, Selkirk negotiated with the local Indian chiefs a treaty aimed at extinguishing their claims of Aboriginal title to the colony.[51] In return for two hundred pounds of tobacco a year, Selkirk was granted long stretches of the Red and Assiniboine Rivers, together with an area of six miles' radius, centred on the junction of the rivers.

Another important matter that had to be addressed before Coltman and Selkirk left the colony that autumn was establishment of a reliable police force. Coltman suggested creation of a local constabulary to be known as the "Watch and Ward." Selkirk agreed to appoint and pay a force of sixteen men and proposed a de Meuron officer, Captain Frederick Matthey, as commander. When Coltman objected that Matthey was under subpoena to stand trial in Montreal in connection with the raids on North West Company forts, it was agreed that the command would temporarily be given to Frederick de Graffenried, another de Meuron, until Matthey's return from the east.[52]

By fall, when Lord Selkirk began the long journey, via the United States, to take part in the Canadian court proceedings, he was in high spirits. His optimism was bitterly betrayed by events. He confidently expected the courts to punish those guilty of murder, destruction and plunder against the people of Red River, especially after publication of the Coltman Commission Report which, while attributing some fault to Selkirk and the Hudson's Bay Company, placed most of the blame on the Nor'westers.[53] But the courts reached different conclusions; when the protracted legal battles in the courts of Upper and Lower Canada were finally over, the bulk of the charges against enemies of the colony had been either stayed or dismissed. The most noteworthy of these cases was *R.* v. *Bollcher and Brown*,[54] a prosecution for the murder of Governor Semple, in which the jury reached an acquittal verdict within minutes of retiring. The murderer of one of the settlers was convicted, but his sentence was never executed because of lingering doubts concerning the appropriate legal jurisdiction over the area.[55] Selkirk, on the other hand, was held liable in damages for imprisoning two persons, including the under-sheriff who had been trying to effect his arrest. Although many reasons could be advanced for this unfair result, the most fundamental was undoubtedly that justice could not be effectively administered from a distance.

When a demoralised Selkirk died from tuberculosis in 1820, no one doubted that a major contributor to his death was the disastrous litigation, to which he had

---

51 Oliver, *supra* note 5 at 1288 for the text of the complete treaty.

52 The negotiations between Selkirk and Coltman, and the resulting commissions, will be found in the Selkirk Papers, NAC, E1, vols. 11 & 12, at 3752-4120.

53 Gray, *supra* note 43 at 320.

54 *Ibid.* at 291-300, gives a good description of the trial, based on two rival contemporaneous accounts.

55 See evidence of W. McD. Dawson, *supra* note 12 at 397.

dedicated the last three years of his life as recklessly as he had devoted his fortune to the establishment and survival of the Red River settlement.

V. Recovery and Growth, 1821-35

Meanwhile, the colony had slowly re-established itself. Despite agricultural setbacks, it had begun to take on a somewhat more stable aspect after the violence subsided. The man who succeeded Semple as Governor of Assiniboia was Alexander McDonell, who had been Semple's sheriff, and had led the settlers back from their second Jack River retreat. Although there was no sign of early governmental action on the colony's request for troops,[56] the armed force that Coltman had styled the "Watch and Ward" remained, with Captain Matthey relieving de Graffenried as commander in June 1818.[57]

Although the validity of the colony's legal system was still in doubt, instructions dispatched to Governor McDonell in 1818 proposed a rather clever scheme for dealing with civil disputes pending "the establishment of a legal Judicature."[58] Disputants should be persuaded to submit the disagreement to one or two of their neighbours for arbitration. If they refused, the cases could be heard by a court composed of "four or five of the principal persons belonging to the settlement," together with a jury of five, seven, or more. Since it was recognised that such a tribunal would have no legal authority, both parties had to agree beforehand to abide by the decisions of the makeshift court. Failing that, uncooperative disputants could be "sent to Coventry," which meant that they would be outlawed:

> The individual who refuses to submit to the judgment of his neighbours has no right to expect that his neighbours should assist and protect him; they have a right to say that he must defend himself by his own efforts; that he is fair game to anyone ... who is not afraid to make a prey of him, and that if his property be stolen or even his life endangered, it is no concern of theirs to repel or to punish the aggression.

This would likely produce the desired results because, as the instructions pointed out, "it is no slight punishment even in a civilized country but in a situation like yours it would be doubly severe." How frequently this process was resorted to is not known.

Clearly evident in these instructions was a reluctance to rely on the charter powers that Selkirk had once asserted. Both Selkirk and those who administered the settlement on behalf of his estate had become reconciled to the use of informal expedients, until such time as the government established regular machinery for the administration of justice. The colonists found this state of affairs highly unsatisfactory, however, as an 1821 letter to Selkirk's executor from a Red River resident indicated:

> A Code of Laws, and a Governor Semple to administer the same, is the only thing necessary to secure the peace of this country, and the prosperity of its inhabitants. If you cannot retain the sanction of gov-

56 Draft petition from Scottish Red River settlers to the Prince of Wales, Selkirk Papers, National Archives of Canada [NAC], E/1, vol. 12, at 4118.

57 Oliver, *supra* note 5 at 58.

58 *Ibid.* at 204.

ernment, the Hudson's Bay Company perhaps would take themselves to administer justice in their own territory.[59]

The Company and the Selkirk estate, unwilling to take matters into their own hands, continued to wait for the government to act.

Governmental intervention finally came in the form of a statute passed in 1821.[60] After reciting that it was passed because competition between the Hudson's Bay Company and the North West Company had caused "animosities and feuds" resulting in "a state of continued disturbance," the statute confirmed that the 1803 *Canada Jurisdiction Act* applied to Hudson's Bay Company charter land, but made certain improvements in its provisions. Whereas the 1803 *Act* had given primary jurisdiction to the courts of Lower Canada, those of Upper Canada were now given increased authority because they were closer to the scene. In addition the British government was empowered to appoint special courts and judges within the "Indian Territories," with jurisdiction over non-capital criminal cases and civil claims for less than £200. The Hudson's Bay Company's charter powers were not extinguished; jurisdiction under the statute was clearly intended to be in addition to the legal powers of the Company's governor and council.[61] The *Act* required that both companies enter into bonds, ensuring that they would keep the peace and deliver to law enforcement authorities any of their employees charged with criminal offences.

This *Act* never came into full operation. The Hudson's Bay Company did enter into a £5,000 bond to keep the peace,[62] and a few serious cases were tried by the courts of Upper Canada, but in most respects the *Act* remained unimplemented; because the fur-trade rivalry that prompted it came to an end the same year, with the absorption of the North West Company by the Hudson's Bay Company. In May 1822, the British government gave notice that it had no immediate plans to appoint courts or judges for the "Indian Territories," and was satisfied to leave the administration of justice to the Company in accordance with its charter powers.[63] The Hudson's Bay Company would continue to be responsible for the legal system until the province of Manitoba was formed in 1870.

As soon as it was settled that the Company, and the Selkirk estate, as delegate of the Company, were to be left in charge of administering Assiniboia, steps were taken to improve the legal system. A new governor, Andrew Bulger, was appointed to replace Alexander McDonell in May 1822,[64] and the instructions issued to him left no doubt that henceforth both legislative and judicial authority were to reside in the governor and his council.[65] Bulger had not expected to perform judicial functions, and was apprehensive that his lack of legal training would prevent his doing so

---

59 *Ibid.* at 217.

60 *An Act for regulating the Fur Trade, and establishing a Criminal and Civil Jurisdiction within certain parts of North America* 1 & 2 George IV, c. 66.

61 *Ibid.*, section 14.

62 Report 1857, *supra* note 12, question 1024.

63 Oliver, *supra* note 5 at 221.

64 *Ibid.* at 219.

65 *Ibid.* at 221-3.

effectively.[66] He was assured by his instructions, however, as others had been before him, that he need not worry much about legal formalities, so long as "substantial justice is done."

Generally speaking, the new governor and his successors during the next dozen years were successful in rendering "substantial justice." Although Bulger was at Red River for only a year, historian Alexander Ross claimed that by the end of his term "the colony for the first time began to exhibit the character of system and regularity."[67] The next three governors of Assiniboia, Pelly, McKenzie, and Christie, were all responsible, under the powerful influence of George Simpson, the Company's brilliant governor for North America, for improvements in the colony's legal machinery. By 1835, when the Selkirk estate surrendered its interests in Assiniboia to the Company, a reasonably effective, if rudimentary, legal system was in operation.

Several obstacles had to be overcome before this result could be achieved, foremost among which was the general state of lawlessness to which the colony had become accustomed. Not long after Bulger arrived at Red River, he described the state of affairs as follows:

> By far the greater part of our population, I am assured, are sunk in vice and depravity, and daring enough to despise our laws, and openly defy our magistrates. The well-disposed part of the community have seen with sorrow and alarm, the march of wickedness among them, but could not, without endangering their persons and property, attempt to arrest its course.[68]

So great was the evil, he said, that no one could be found to act as magistrate. Even allowing for Bulger's snobbishness and his penchant for exaggeration, it was clear that the problem he described was serious. Its causes were easy to determine: the violence practised by all parties to the recent fur-trade disputes, uncertainty about the source of legal authority in the area, the absence of adequate policing arrangements, and the rowdiness of many of the former de Meuron troops who had been expected to meet the latter need. Finding a remedy was more difficult.

Establishment of an effective police force was an obvious requirement. Captain Matthey continued to exercise some police functions with the assistance of a few of his former comrades in arms, but the de Meurons were a greater source of trouble than of stability. A more satisfactory constabulary was clearly needed. The Company resolution appointing Bulger as Governor recognised this need.[69] It designated a new sheriff of Assiniboia, William Kemp, and empowered the Governor to "enrol and arm such members of the Company's servants and other male inhabitants of the ages from 18 to 45" as he might deem expedient for defence and protection of the settlement. In order to train this police force, Bulger was authorised to employ some of the former de Meuron troops as instructors, and he was to be paid 10 shillings a day to act as commander. Strangely, although there can be no doubt that Bulger was

66 *Ibid.* at 43.

67 A. Ross, *The Red River Settlement* (London: Smith, 1895) at 76.

68 Oliver, *supra* note 5 at 224.

69 *Ibid.* at 222.

anxious to have a strong constabulary for the colony,[70] he appeared not to have acted on these instructions. Perhaps the necessary financial assistance was not forthcoming from the Company, or perhaps Bulger did not have time during his short and busy stay at Red River to look after the matter. Whatever the reason, he did no more than appoint two constables, Donald Murray and Donald McKay,[71] in March 1823.

To Bulger's successor, Robert Pelly, went the credit for the first substantial improvement in the colony's police. In October 1823, Pelly established a force consisting of High Constable McKenzie, two bailiffs and twenty "regular" constables, all of whom were to be paid on a part-time basis, assisted by about fifty "special" constables, who were to serve gratuitously. In an emergency, all other settlers could also be enlisted, since their land contracts with the Selkirk estate bound them to assist in maintaining law and order.[72] The cost of this force, unlike the one that Bulger had been authorised to organise, was to be borne by the Selkirk estate, although in later years the Company contributed £100 per annum for this purpose.[73] The possibility of charging the settlers a fee to pay for the police was considered,[74] but nothing came of the suggestion for several years.

Captain Matthey, the former commander of the "Watch and Ward," did not get on well with Governor Pelly, and he left the colony in 1824, claiming to have been unfairly treated.[75] His indignation stemmed partly from his exclusion from the new police organisation, and partly from a disagreement with the Company over a certain loan it had made to him.[76]

One factor that made the administration of justice difficult at first was the refusal of local Hudson's Bay Company officers to respect the governor's legal authority. During the winter of 1822-23, John Clarke, the company's chief factor at Fort Garry, as re-built Fort Gibraltar was now called, subjected the settlers to searches, seizure of their property, and interference with their shipment of goods. Then, in the early part of May 1823, an event took place which left no doubt about Clarke's contempt for the governor's powers.[77]

Governor Bulger was working in the colony store at Fort Douglas one day when two men appeared at the door demanding to speak to him. One was badly injured, his head bound by a blood-soaked handkerchief. They claimed that the wounds had been inflicted by a Company employee named Pensonant, who had also beaten two other settlers severely earlier the same year. To investigate the charges, Bulger called a meeting of his council, which summoned the accused to appear before it. Chief

---

70 "Nothing but the presence of a military force to aid the civil power can prevent the country from becoming very soon a den of thieves, for no honest man will remain in it": letter from Bulger, quoted in Oliver, *ibid.* at 224.

71 *Ibid.* at 231.

72 Simpson to Colville, 8 September, and 21 November, 1823; *ibid.* at 257-8.

73 Council minutes, 12 February 1835; *ibid.* at 269.

74 Simpson to Colville, 8 September 1823; *ibid.* at 257-8.

75 *Ibid.* at 58.

76 Selkirk Papers, vol. 26, Provincial Archives of Manitoba [PAM].

77 Council minutes, 3 May 1823; Oliver, *supra* note 5 at 235ff.

factor Clarke refused to allow his employee to appear, on the ground that the governor and council of Assiniboia had no jurisdiction over "internal affairs" of the Company. Having no adequate law enforcement agency at his disposal at that time, Bulger's only recourse was to adjourn the hearing and address an indignant communication to Company officials in London.

As it turned out, this complaint was unnecessary; before receiving it the governor and committee of the Company in London had written a strong letter to George Simpson, in response to earlier complaints, pointing out that Clarke's harassment of the settlement was illegal, and that in future he and his employees must respect the judicial authority of the governor and council of Assiniboia.[78]

One group of persons allowed to remain outside the scope of the legal system was the Aboriginal population. Because they were coming into ever increasing contact with the settlers, it was more difficult than it had been in the past to ignore the crimes of Natives entirely; but there was still great reluctance to apply the settler's normal legal sanctions to them. A murder trial conducted by Governor Pelly and his council in 1824 provided a good illustration. A Saulteaux had killed and scalped a woman of his own tribe, attempting to pass the scalp off as that of a rival Sioux warrior. After hearing the evidence, Pelly instructed the interpreter to tell the accused "that he has manifested a disposition subversive of all order, and that if he should not be punished in this world, he is sure to be punished in the next." Then he turned the man loose.[79]

Where Indian violence was directed against the persons or property of the Company or settler population, on the other hand, retribution was swift and merciless, although it was again usually without any pretence of legality. The account of a retaliatory action taken in the district of Moose a few years after the above episode offered an example.[80] After the killing of a Hudson's Bay Company trader and his family, a group of Company officers hunted down the Native band thought to be responsible and peremptorily shot all the males without even the semblance of a trial. An eyewitness report of the incident concluded, after describing the "executions" in great detail: "Thus happily ended the expedition ... making complete and effective the vindication of law and order ...."

Most of the major legal problems that arose during this period concerned title to land. Many inhabitants of the colony had no legal claim to their land other than squatters' rights, and those who had legal rights often lacked adequate documentary evidence of their claims. Because of the turbulent nature of the colony's early years, many of the arrangements with Selkirk settlers were ineptly drafted[81] or purely verbal, and accurate records were not kept. When settlers began to convey their land to others, the confusion was compounded. Alexander McDonell had been instructed

78 21 May 1823; *ibid.* at 240ff.

79 Ross, *supra* note 67 at 76-7.

80 G.H. Gunn, "Justice à la Mode in Rupert's Land a Hundred Years ago," PAM, quotes a contemporary report of the events, which occurred in 1832.

81 A. Martin, *The Hudson's Bay Company Land Tenures* (London: W. Clowes, 1898) at 21ff; confusion about these rights arose partly from a widespread belief that the Company and Lord Selkirk had granted only leasehold interests. Martin's refutation of this belief is convincing.

to keep a land registry,[82] but if he did so it was of no assistance, because he seemed maliciously to have destroyed all public documents in his possession when replaced as governor by Bulger. The Hudson's Bay Company's grant to Selkirk had stipulated that retired Company employees should be given land grants at Red River and when the Company absorbed the North West Company in 1821 redundant employees applied in such numbers that more confusion and many boundary quarrels resulted.[83] The basis for solution of many of these problems was finally laid in January 1825, by establishment of a land registry at Red River, and a public notice calling upon all settlers to have their claims examined and their titles properly registered.[84]

While the real property system was at this formative stage, an unsuccessful attempt was made by Bishop Provencher to introduce French landholding practices for certain property in what is now Saint Boniface. A very large land grant on the east side of the Red River had been made to the Roman Catholic church. In September 1821 Bulger received a letter from a priest on behalf of Bishop Provencher, asking a number of questions about legal rights, including whether there would be any objection to the church's granting some of its land along the Seine River to settlers according to the seigneurial, or feudal, system then employed in Lower Canada. Bulger was quick to reject the suggestion:

> The right of exacting "lods et ventes," such as is possessed, under the French or Feudal Laws, by the Seigneurs in Lower Canada, is not recognized, and, I may say, will never be permitted to be exercised, within the territory granted by the Hudson's Bay Company to the Earl of Selkirk.[85]

Although the Governor of Assiniboia and his Council possessed very wide legislative powers, little was done during this period to enact laws or regulations for the colony. The only significant enactments appear to have been a series of regulations passed 4 May 1832, imposing fines or imprisonment for setting fires more than fifty feet from one's own house, or for borrowing another's horse without permission, as well as dealing with stray pigs and horses, regulation of public fairs, and the duty of settlers to provide three days' labour on public works each year or pay taxes in lieu.[86]

VI. Governor and Company, 1835-70

An important watershed in Assiniboia's history was reached in 1835, when the Selkirk Estate sold its interest in the colony back to the Hudson's Bay Company. From that time until the Province of Manitoba was created, the Company was the sole local legal authority for the area.

By this time the population of Assiniboia had grown to almost 4,000 and the primitive machinery of justice that had served it in the past was no longer adequate. The Company's North American governor, George Simpson, was very much aware

---

82 Oliver, *supra* note 5 at 216.

83 Letters between Bulger and Clarke, 23-25 April 1823, *ibid.* at 232-5.

84 Martin, *supra* note 81 at 33.

85 *Ibid.* at 200ff.

86 Council minutes, 4 May 1832, in Oliver, *supra* note 5 at 263.

of this problem. When he called the Council of Assiniboia for the first time after the change of ownership, he presented it with a proposal for reform of the legal system, which the council adopted unanimously.[87]

The principal weakness of all previous schemes for administering justice at Red River had been lack of adequate funds. Both the Selkirk estate and the Company had provided some financial support, but it had never been sufficient to afford adequate protection for the settlement. The Company, prior to the change of ownership, had contributed only £100 annually toward the cost of police protection.[88] It had also paid Cuthbert Grant, the amiable giant who had led the Métis at Seven Oaks, an annual salary of £200 to act as "Warden of the Plains," but Grant's position was not essentially that of a peace-keeper. "Warden of the Plains" was chiefly a public relations appointment, intended to encourage loyalty to the Company by the Métis and Natives over whom Grant exercised great influence, and to discourage them and him from co-operating with American fur traders. When the Warden was occasionally employed in a constabulary capacity it was chiefly to enforce violations of the Company's fur-trading monopoly. Simpson described Grant's position in a personal journal, as "a sinecure afforded ... entirely from political motives."[89]

An important feature of the new scheme was that for the first time an adequate revenue was assured. The Company contribution was to continue unchanged, but the major source of funds for the new justice system was to be a new duty on imports and exports. With money raised in this way it became possible to construct the colony's first courthouse and jail, to strengthen and re-organise the police force, and to establish a more satisfactory system of courts. [90]

Among the most significant improvements made were those concerning the police. When introducing his proposals to the council, Simpson remarked that law and order had received "little more than nominal support" from the existing police force. Accordingly, that organisation was disbanded, and a new "Volunteer Corps" created. The force consisted of a commanding officer paid £20 a year, a sergeant-major who received £12, four sergeants paid £10 each, and fifty-four privates at £6 each. The policemen were obligated to serve up to twenty-eight days a year. If called upon more often, they were to be paid on a daily basis. The first commanding officer was the Sheriff of Assiniboia, Alexander Ross, a scholarly adventurer who had settled at Red River in 1825, after fifteen years in the fur trade on the west coast. Ross possessed great courage and ability, and the force he assembled included several formidable individuals, including Jean-Baptiste Lagimodière, whose snow-shoe trek to Montreal in 1816 was a local legend.[91] That the Volunteer Corps was serious in its intention to keep the peace was shown by its purchase in 1837 of

87 Council minutes, 12 February 1835, *ibid* at 266.

88 *Ibid.* at 269.

89 Quoted in D. MacKay, *The Honourable Company* (Indianapolis: Bobbs Merrill, 1966) at 201.

90 The courthouse and jail were housed in a small structure erected inside the walls of Upper Fort Garry. In 1838 Louis Plouffe was hired as jailor at a salary of £20 per year: PAM, Red River Settlement, Council of Assiniboia, 1.

91 Lagimodière's oath of office as constable is quoted verbatim in F. Bowness, "The Coming of the Law," *Winnipeg Free Press*, 7 May 1932.

twenty-five rifles and bayonets.[92] For the first time since the settlement was founded, residents had cause to feel reasonably secure from unlawful behaviour.

The 1835 changes included creation of Assiniboia's first proper judicial system, which was, with occasional changes and elaborations, to serve the settlement for the remainder of the Hudson's Bay Company's reign. Assiniboia was divided into four judicial districts: the area around the junction of the two rivers, the areas above and below the junction on the Red, and above it on the Assiniboine. For each district a magistrate (or "justice of the peace", the terms were used interchangeably) was appointed: James Sutherland, Robert Logan, James Bird and Cuthbert Grant, respectively. Each received £5 annually.[93] The magistrates' courts, known as "Petty" or "Petty Sessions" courts, sat once every three months in each district. They dealt with both minor criminal charges and civil claims involving less than forty shillings.

To handle the more serious cases and also to hear appeals from Petty Sessions courts, a General Quarterly court was established, composed of the governor and council of Assiniboia and all the magistrates. It assembled at the governor's residence at the end of each month in which the Petty Sessions courts sat. Although the resolution which created it made no reference to juries, the General Quarterly Court adopted the practice of relying on juries to resolve most questions of fact.

Two years later, in June 1837, further changes were made in the court system.[94] The number of judicial districts was reduced to three, the Middle District absorbing the area along the Red River above the forks, and the number of magistrates in each district was increased to two, Alexander Ross, John Bunn and George Cary being added to the roster. The senior magistrate in each district was designated "President." The most important change was that in future all Petty Sessions hearings were required to take place before at least three magistrates, one of whom would have to be from outside the district. The composition of the General Quarterly Court was also altered, to consist of the governor, or the Company's principal officer in Assiniboia, together with at least four magistrates. At the same time, the civil jurisdiction of the magistrates was extended to £5, and the purchase of magistrates' manuals and copies of Burn's book, *Justice of the Peace*, was authorised for each judicial district.

Introduction of the stern institutions of law and order to Red River was not altogether popular with the inhabitants. Alexander Ross gave an account of a criminal prosecution in April 1836, that illustrated the difficulty of enforcing harsh laws in a frontier community. A man called Louis St. Denis was convicted of theft by the first jury to hear a case at Red River and sentenced to public flogging. When the punishment was administered the same day, a large crowd of St. Denis' friends and others who gathered to witness the event became so enraged by the brutality of the flogging that the police had to form a cordon to prevent interference. The sentence was fully executed, Ross says, but:

---

92 Council minutes, 16 June 1837, in Oliver, *supra* note 5 at 281ff.

93 Council minutes, 13 June 1836, *ibid.* at 277. Although not passed until more than a year after the magistrates' appointment, the council's resolution was stated to be retroactive.

94 Council minutes, 16 June 1837, *ibid.* at 280.

the ... spectacle of ... being stripped and flogged before the public gaze had raised a spirit of indignation against the poor flogger. His task being accomplished, he no sooner stepped outside the ... police circle, than one fellow called out, 'Bourreau, Bourreau' ('Hangman'); another threw a chip at him; a third improved upon the example by throwing mud, while the bystanders, with one voice, called aloud, 'Stone him! Stone him!' The poor frightened ... (man) ... ran, as he probably thought, for his life, and had not gone many yards before he tumbled and fell headlong into a hole, which gave rise to an uproarious burst of laughter, mingled with hisses. Here, however, the police interfered, and the bespattered official being dragged out of the pit, was locked up in the fort till the people dispersed. So strong was the public feeling against this mode of punishment, that some five years afterwards, when the same disagreeable service was required to be performed, not a person could be got to act outdoors. On this occasion, therefore, the flogging took place within the prison walls, the official being masked, and for further security, locked up till dusk, when he was dismissed unknown.[95]

Having delegated its judicial functions to the magistrates and the General Quarterly Court, the Council of Assiniboia began to pay more heed to its legislative role. In 1835 the earlier regulations concerning use of fire, trespassing animals, and horse theft were re-enacted, with slight modifications.[96] Sale of beer to Natives was prohibited in 1836[97] and informers of such offenses were, in 1837, awarded a share of the resulting fines.[98] Also in 1837 one aspect of the Aboriginal insulation from the legal system was removed by a resolution that "the evidence of a Native be considered valid and be admitted as such in all Courts of this settlement." The difficulty of administering oaths to non-Christian witnesses was overcome by treating unbaptised Native witnesses in the same way as children: establishing through questioning their understanding of the need to be truthful.[99] In 1838 the laws relating to trespassing animals were again revised.

A. The Thom Régime: 1839-54

Alexander Ross commented, with evident pride, that the settlement was administered effectively at this stage "without the aid of lawyers." But the increasing complexity of law and government at Red River created a need for professional assistance, and when the Company again reorganised the government of Rupert's Land and Assiniboia in 1839, provision was made for the colony's first full-time, legally trained judge. Given the title "Recorder of Rupert's Land," the new judge was not to form a new tribunal; he was simply to be another member of the General Quarterly Court. In practice, however, the recorder soon became, by reason of his training, a particularly influential member of the court, and before long the other members were reduced to distinctly subordinate roles. In the words of an observer: " ... these take no active part in the proceedings, and merely watch the cases and assist with their advice when called on to do so by the judge."[100]

---

95 Ross, *supra* note 67 at 187.

96 Council minutes, 30 April 1835, in Oliver, *supra* note 5 at 274.

97 Council minutes, 13 June 1836, *ibid.* at 277.

98 Council minutes, 16 June, 1837, *ibid.* at 280.

99 See, for example, the examination of Rayome, an unbaptised Salteaux Indian, in *The Public Interest* v. *Capinesesweet*, Q.C.A. Records, PAM, 4 September 1845. This was not consistently followed in later years, however. See, for example, *Public Interest* v. *Francois*, *ibid.*, 20 November 1856, where similar evidence was not allowed to be introduced.

Adam Thom was the man chosen to fill the position of recorder. Shortly after Thom's arrival came a second lawyer, a twenty-two year old Edinburgh solicitor named John Black, appointed to act as Thom's assistant. But since Thom seemed to require very little assistance, Black drifted into general clerical and managerial duties with the Company.

For his first few years after taking up residence at the recently constructed Lower Fort Garry, Recorder Thom seemed to do the job well enough. In spite of limited experience in legal matters, his decisions were generally sound and the procedures he introduced were in accord with accepted legal practice elsewhere. In 1841, Thom prepared a consolidation of the laws of Assiniboia which, when passed by the council, brought all the proliferating regulations of the colony together in one document of fifty-eight sections.[101] Like most of his work, the code was skilfully done. But storm clouds were gathering.

Thom's attitude about the applicability of legal sanctions to the Native population differed markedly from that which had previously prevailed. In the fall of 1839, not long after he arrived at Red River, Thom summoned the first grand jury in the colony's history. Its task was to determine whether a charge of murder should be brought against a young Native boy who had killed one of his friends with an arrow. In the past such incidents were overlooked or treated leniently, but Thom insisted on invoking the same legal procedures that would have been applied if members of the non-Native community had been involved. The grand jury indicted the accused but he was acquitted at trial by reason of being under the age of fourteen and therefore immune from criminal liability.[102] The next person indicted for murder by a grand jury, in February 1845, was also a Native, accused of killing his wife. He too was acquitted by the jury, although found guilty of the lesser charge of assault.[103]

The third Native tried for murder by Thom was not so fortunate. It was Red River's first hanging.[104] The accused was a Salteaux named Capinesesweet, charged with the murder of two persons: a rival Sioux and, accidentally with the same bullet, a member of his own tribe. He was tried before a jury four days after the killings took place in September 1845. No one represented him or spoke on his behalf, even though there was some evidence that a successful defence might have been possible.[105] Capinesesweet was convicted and immediately hanged in public from a gallows erected on the walls of Fort Garry. The hangman, perhaps mindful of the abuse that the public flogger had suffered a few years previously, wore a mask to hide his identity.

A few months prior to the Capinesesweet trial the Council of Assiniboia had, probably at Thom's urging, decreed for the first time that intoxicated Natives should

---

100 Council minutes, 15 June 1838, in Oliver, *supra* note 5 at 283.

101 Council minutes, 25 June 1841, *ibid.* at 295ff.

102 Thom's account of the case is quoted by Stubbs, *supra* note 3 at 19.

103 *Ibid.* at 22.

104 Report 1857, *supra* note 12, questions 5028 and 5029.

105 Stubbs, *supra* note 3 at 12ff. See also Ross, *supra* note 67 at 331, and Begg, *History of the North West*, vol. I (Toronto: Hunter, Rose & Co.) at 264.

be imprisoned. The high incidence of drunkenness among the Native population had been one of the settlement's most troublesome problems for many years; but previous laws had been directed solely against those who intoxicated them. The new law displayed a much less tolerant attitude toward Natives. After stating that " ... the Natives, though less guilty than their seducers, are yet not wholly innocent ...," it stipulated that any Native found intoxicated should, in default of providing two sureties, be imprisoned until he prosecuted the person who furnished him with liquor.[106] Since most Natives were unable to furnish sureties and unlikely to prosecute a criminal proceeding effectively, the law ensured that for the first time large numbers of Indians would languish in the colony's gaol. After watching the hanging of Capinesesweet from the walls of Fort Garry the Indian population of Red River expressed intense hostility toward Adam Thom, the person who seemed chiefly responsible for subjecting them to the strictures of alien laws.

It is not difficult to imagine the feelings of the Natives when, only a few months later, a non-Native who pleaded guilty to killing another was sentenced to a mere fine of one shilling.[107] The charge may have been manslaughter rather than murder—the court record is unclear—but even so, the extreme leniency of the sentence provided a disturbing contrast to the execution of Capinesesweet.

The courthouse and goal were moved outside the walls of Upper Fort Garry in 1844.[108] The Company erected a tiny wooden structure "within reach of the Fort guns," in exchange for the old court building within the fort, which it took over for commercial purposes. Sheriff Ross was appointed "Governor" of the new prison. The reason for the change of location was stated to be that it was "exceedingly dangerous and inconvenient to have the public gaol within the walls of Fort Garry." Another motive may have been a desire to dissociate the Company from the administration of justice in the public mind. Such was probably also the reason for moving meetings of the Council of Assiniboia from the Fort to the courthouse a few years later.[109]

Residents of Red River were not deceived. They knew that all members of the Council of Assiniboia were hand-picked by the Company, and that many of the laws they created and administered were calculated to benefit the Company's commercial interests. They also knew that Recorder Thom received from the Company a handsome annual salary of £700, and that he served as resident legal advisor to the Company in addition to being judge for the Red River Settlement. Conflicts between the interests of the Company and the community occurred with increasing frequency during the second half of the 1840s, as the Company attempted to enforce its fur-trading monopoly against a growing number of free-traders. The colony knew that when attempting to resolve such conflicts, its public officers were likely to regard their loyalty to the Company as paramount. This subservience to Company interests

106 Sections 24 to 27 of the 1841 consolidation, *supra* note 101 contained the old rules. The new ones were passed by the council, 19 June 1845; Oliver, *supra* note 5 at 321.

107 Q.C.A. Records, 19 February 1846, PAM: *Public Interest* v. *Peter Hayden.*

108 Council minutes, 3 July 1843, and 19 June 1844, in Oliver, *supra* note 5 at 310-11.

109 This change took place in December 1848, shortly after Major Caldwell took over as Governor: Council minutes, 7 December 1848, *ibid.* at 350.

on the part of the governor and his councillours was out of step with developments in other parts of British North America where responsible government was finally being established. This was especially unfortunate on the part of the recorder whose judicial status ought to have implied a high level of impartiality. Resentment regarding Adam Thom's pugnacious personality developed in many parts of the community, and complaints from Red River residents began to be received at the Company's head office in London and by the British government.

At about this time, an ill-advised change was made in the colony's law enforcement arrangements. The sixty-man "Volunteer Corps" established in 1835 had done an effective job of safe-guarding law and order in the settlement; so effective in fact that some people began to ask whether such an expensive police force was any longer required. The position of constable had come to be regarded as a lucrative sinecure, yielding £6 a year in return for quite minor services. In 1843 a petition signed by a number of Métis residents requested either that the force be disbanded or that its membership be rotated each year, so as to allow more persons to benefit from membership. The council agreed in July of that year to accept the second alternative. Half of the constables would be replaced each year by new men, to be chosen by ballot of the residents.[110] At the same time, the position of sergeant-major was abolished and the number of sergeants reduced from four to three.

Discipline must have been difficult to maintain in an elected police force whose members regarded their positions as sinecures. At its annual general meeting in 1844, the council was made aware of considerable disorderly conduct on the part of police constables and responded by requiring the constables to present certificates of good conduct from their commanding officer to collect their salaries,[111] and by reducing the size of the force by a further eight members. In June 1845, the Corps was disbanded altogether. In its place, a force of only fifteen men was established, each paid on a piece-work basis with a guaranteed annual stipend of £12.[112]

For awhile, the colony was shielded by good fortune from the consequences of this questionable decision. Great Britain became involved in a dispute with the United States in 1846 over the boundary between British and American territories on the west coast, and a regiment of regular British troops, about 350 in number, was dispatched to Red River in the fear that war might break out, prompting an American invasion of the Hudson's Bay Company territory. The border dispute was settled before the troops arrived at Red River, but the Company persuaded British authorities to leave the regiment in the colony for the next two years.

The troops were housed at both Upper and Lower Fort Garry (forcing Recorder Adam Thom, who lived at the Lower Fort, to move to a house of his own). They constituted by far the most effective law enforcement agency the settlement had ever known, so while they remained at Red River, the inadequacy of the fifteen-man civil police gave no cause for concern. But when it became known that the government intended to withdraw the troops in the summer of 1848, the Council of Assiniboia

---

110 Council minutes, 3 July 1843, *ibid.* at 307ff.

111 Council minutes, 19 June 1844, *ibid.* at 311ff.

112 Council minutes, 16 June 1845, *ibid.* at 315ff.

dispatched an urgent petition to the Company's London officials, pointing out the grave risks that would arise if the colony were left with inadequate police protection.[113] No doubt the council sensed the resentment against the Company and its officers that was smouldering among various sections of the population. The government agreed to replace the troops with a smaller force, but the arrangement proved to be disappointing.

The new contingent arrived in 1848 under the command of Major W.B. Caldwell. It consisted of fifty-six retired British soldiers, known as "pensioners," given land grants by the Company in return for an undertaking to serve for seven years as part-time militiamen.[114] Like the de Meurons who had served in a somewhat similar capacity earlier, Caldwell's pensioners were not a dependable source of protection. Many left the colony before their term of service was over, and those who stayed were chiefly concerned with their own affairs. They often caused more disorder than they quelled.[115] Alexander Ross, writing in 1852, commented:

> Our police force are by far too few, and so managed that it is impossible they can answer any good purpose. They are paid too much for all that they really do, and by far too little to induce them to devote their time and energies to such duties as are required by policemen.[116]

Ross had been commanding officer of the defunct Volunteer Corps, so he could not claim to be an entirely disinterested observer, but there was ample evidence to support his view.

In addition to commanding the pensioners, Major Caldwell had other important duties. The British government had commissioned him to investigate "charges of maladministration and harsh treatment towards the natives" and "allegations ... of an insufficient and partial administration of justice ... " that were being levelled against the Company in increasing numbers.[117] His ability to probe these complaints impartially was gravely prejudiced by the fact that the Company, perhaps by coincidence and perhaps not, appointed him Governor of Assiniboia in place of Alexander Christie. Caldwell was no more able to serve two masters than anyone else on the Company payroll, and it was no surprise that his half-hearted investigation failed to uncover any serious problems.[118] The resentment of many of the settlement's inhabitants soon found expression at the Sayer trial.

The Sayer trial had serious consequences for the administration of justice at Red River. Two weeks after the trial, at a meeting of the Council of Assiniboia held to discuss the demands that dissidents had tried unsuccessfully to have considered at the trial,[119] the council agreed, among other things, that the recorder should in future

---

113 Council minutes, 18 November 1847, *ibid.* at 339ff.

114 Martin, *supra* note 81 at 75. Martin quotes the terms of recruitment in Appendix L. There were twenty-five pensioners left at Red River when the period of service ended in 1855.

115 Ross, *supra* note 67 at 366.

116 *Ibid.* at 397.

117 Oliver, *supra* note 5 at 345-46.

118 Ross, *supra* note 67 at 367.

119 Council minutes, 31 May 1849, in Oliver, *supra* note 5 at 351ff.

speak in French when French-speaking parties appeared before the court. As to the demand that Thom should be removed from Red River, the council's decision was equivocal. It stoutly announced that no violence against the recorder would be tolerated, but it remained silent about Thom's future. When George Simpson paid a visit to Red River the following month, he received a petition for Thom's dismissal, and although refusing to accede completely to the demand, he instructed Thom not to attend either the court or the council for a year.

This cooling-off period did not have the intended effect, largely because Thom continued to antagonise the residents of Red River. In February 1850, he was sued personally by a man called Matheson, who had built a veranda for him. Thom had refused to pay because the demand for payment had been made verbally rather than in writing. This was not the first time Thom had been sued in the courts of Assiniboia. Back in 1843 a servant girl had obtained a judgment in the Petty Sessions court against him for wrongful dismissal, and he had angered the magistrates in question on that occasion by persuading the girl to settle for far less than she had been awarded.[120]

In the Matheson case, Thom convinced the court that the lack of a written demand by the plaintiff constituted a sufficient defence to the claim, but he managed to stir up more hostility to himself in the process. In the first place, he objected strenuously that half the jurors, chosen by Cuthburt Grant because Sheriff Ross had refused to have anything to do with the case, were Métis. Thom complained that they would not understand anything said in English. Interpreting the council's decision the previous May, that the judge should speak the language of the parties, as extending to juries as well, he demanded a wholly English speaking jury. While he succeeded in having the composition of the jury altered, the insulting way in which he expressed his demand angered Cuthbert Grant and again antagonised the French speaking portion of the population. Another source of indignation was the technical nature of Thom's defence to Matheson's claim. When Major Caldwell announced that the defence would be upheld, the normally self-possessed Alexander Ross lost his temper and shouted what must have been in many spectator's minds: "There is neither law nor justice in the community."

Thom's conduct during the first major case he tried on returning to the court after the year's leave of absence provided conclusive confirmation that he was unfit for the bench.[121] The settlement had been buzzing with rumours of a clandestine love affair between the wife of Chief Factor Ballenden and Captain Christopher Foss, an officer in Major Caldwell's regiment of pensioners. Mrs. Ballenden, expelled from her husband's home on the basis of these rumours, had sought refuge with Recorder Thom and his wife. Then, claiming to be victims of malicious lies, she and Foss, on Thom's advice, had commenced a defamation action against those who accused them of adultery. The principal defendant was a Company officer named Pelly.

Since Thom supported the plaintiffs' cause openly and energetically, the defendants were understandably shocked to see him on the bench when the court convened

120 Dale Gibson, "Scandal at Red River: The Judge and the Serving Girl," (1990) The Beaver, at 30.

121 The following account is based on Stubbs, *supra* note 103 at 36ff.

to hear the case. Apparently unaware that the recorder's period of suspension had expired, they charged that the Métis had been bribed to permit the temporary lifting of the suspension for this occasion. They were unable to prove that contention, however, and their more plausible motion to disqualify Thom, on the ground that he had acted as attorney for the plaintiffs, was also rejected by him. As the trial progressed, Thom displayed an obvious bias in favour of the plaintiffs throughout. At one point he even left the bench to testify for the plaintiffs, before resuming his place and charging the jury. Two other members of the Court, Dr. Bunn and Sheriff Ross, also acted as witnesses.

The jury agreed with Thom's view of the case, awarding damages totalling £400 to the plaintiffs against all defendants, but the victory was short-lived. Evidence came to light about six months later, establishing beyond doubt that Mrs. Ballenden and Foss were indeed associated in adultery, but it was doubtful that the damages were ever paid.

The Foss case brought Adam Thom's removal from the bench. Major Caldwell, who had previously stood up for him, but could not condone his acting as counsel, witness and judge in a single case, reported the matter to the Company's London officers. Revocation of Thom's appointment as recorder and councillor went from London in December 1850 and was announced to the Council of Assiniboia in May 1851.[122]

Adam Thom did not leave Red River at that point. Placing his economic welfare before his pride, he agreed to accept the position of clerk of the court and legal advisor to the Company, in return for the same salary he had received as recorder. He was not the first clerk; in 1848 W.R. Smith, who would probably qualify as the west's first civil servant, had been appointed clerk of the court and the council, as well as "Executive Officer" of the colony for other purposes, at one-tenth the salary Thom received.[123] When Thom was demoted to clerk, Smith was reduced to assistant clerk.

The same meeting of the Council of Assiniboia that heard the announcement of his demotion, requested Thom to prepare, with the assistance of Dr. Bunn and Rev. LaFleche, a "report of the state of the law" in Assiniboia.[124] The resulting report, presented to the council in November 1851,[125] and adopted by it in July 1852,[126] took the form of a new consolidated code of regulations, prefaced by a general description of the relation of these laws to the common law and statutes of England.

The new code made one very significant change. Previously the English law that applied to Assiniboia had been that which had existed on 2 May 1670, when the Company's charter was granted. Thom's report pointed out that the law as of that date was very difficult to ascertain from the small collection of law books available at Red River, and that even when it could be determined it was often found to contain "antiquated absurdities" which "shock the common sense of the community." To

---

122 Council minutes, 1 May 1851, in Oliver, *supra* note 5 at 363.

123 Council minutes, 10 October 1848, *ibid.* at 348.

124 Council minutes, 1 May 1851, *ibid.* at 366.

125 Council minutes, 27 November 1851, *ibid.* at 369ff.

126 Council minutes, 13 July 1852, *ibid.* at 386-87.

overcome these difficulties, the new code decreed that the laws of England as of 20 June 1837 (Queen Victoria's accession) "shall regulate the proceedings of the general court."

In most other respects, the new code simply updated the consolidation Thom had prepared in 1841. Its provisions reflected the concerns of a community that was moving from frontier conditions to a stage of increased stability. They dealt with such matters as the spread of fire, stray animals, haying privileges, construction and maintenance of roads, intoxication of Natives, customs duties, marriage licences, police, and the administration of justice. Most of the laws passed during Thom's tenure were relatively minor improvements which had not altered the basic legal and governmental structure set up in 1835. The office of coroner had been established in 1839.[127] The diet of gaol inmates had been set at one pound of pemmican a day[128] and in 1841 it had been decreed that no prisoner should be allowed to improve the diet at his own expense, except on a physician's instructions.[129] The administration of intestate estates had been first provided for in 1844.[130] The colony's first corporation, the Public Library, had been created in 1848.[131] An attempt to incorporate the Presbyterian congregation several years later was rejected when the Company's London Committee stated, probably incorrectly, that the charter did not authorise creation of corporations. Nothing was said about the Public Library.[132] The use of printed legal forms originated in 1850 when Adam Thom was authorised to draft and have printed blank forms of summonses, subpoenas and warrants.[133]

As the laws of the colony increased in complexity, the problem of making them known to the growing population became more difficult. In 1836 it had been considered sufficient to provide each member of council with copies of the minutes,[134] but more effective methods of dissemination were soon found necessary. A number of expedients were employed. The council posted laws at Fort Garry and the courthouse,[135] magistrates published them at quarterly court sessions,[136] and copies were left with various public officers and prominent citizens throughout the colony.[137] Eventually, the practice developed of posting new laws on the doors of the colony's churches.[138] The council decided to buy a small printing press in 1850

---

127 Council minutes, 4 July 1839, *ibid.* at 291.

128 Council minutes, 4 July 1839, *ibid.* at 291.

129 Council minutes, 25 June 1841, *ibid.* at 299.

130 Council minutes, 19 June 1844, *ibid.* at 312.

131 Council minutes, 10 October 1848, *ibid.* at 349.

132 Council minutes, 22 June 1854, *ibid.* at 402.

133 Council minutes, 16 October 1850, *ibid.* at 362.

134 Council minutes, 13 June 1836, *ibid.* at 278.

135 Council minutes, 19 June 1845, *ibid.* at 326.

136 Council minutes, 4 July 1839, *ibid.* at 292.

137 Council minutes, 25 June 1841, *ibid.* at 306, and 19 July 1845, *ibid.* at 326.

138 Council minutes, 19 July 1845, *ibid.* at 326.

but the company intervened,[139] so the former methods of publication were retained until a newspaper was finally established at Red River several years later.

After Thom's demotion, Governor Caldwell served as the settlement's chief judge. He was uneasy in the role and self-conscious about his lack of familiarity with legal procedures and terminology. In fact, he once described his judicial endeavours as "a farce" and referred apologetically to the fact that his court was a "court of equity," which merely "tried to do justly between man and man."[140] He did not seem to realise that his approach was a great improvement over Thom's legalism. Laudable as his objective was, however, Caldwell was not notably successful in achieving it. Although well-intentioned, he was old-fashioned and inflexible, with little understanding of settlers' problems. A new recorder was badly needed.

B. Francis G. Johnson, 1854-58

Finally, in June 1854 the Council of Assiniboia learned that Adam Thom would leave Red River.[141] Having negotiated a financial settlement with the Company, he returned to Britain to spend the remainder of his life in relative obscurity, writing esoteric religious tracts. Before leaving he turned over "the Law Library" to the new recorder of Rupert's Land, Francis G. Johnson.

In Johnson the company had chosen well; at thirty-seven, he was one of Montreal's leading barristers.[142] The reason he was willing to leave his practice to become Recorder of Rupert's Land was that his wife had died a few months previously and he wished to escape painful associations. He was completely bilingual and had a reputation for scrupulous propriety.

If there was a trace of haughtiness in Johnson's elegant dress and cutting wit, it was compensated by his affability and his talent for mixing with all elements of the community. Indeed, he joined so enthusiastically in the social life of the colony that within a few months of his arrival there were rumours that one of the local young ladies would soon become the second Mrs. Johnson. The rumour became fact in March 1856.

Francis Johnson was recorder from the spring of 1854 to the summer of 1858. For the last three years he replaced Caldwell as governor as well. During that period Red River experienced one of its least eventful interludes in the administration of justice. In the year commencing August 1855, for example, there were no cases for the General Quarterly Court to try at three of its four sessions and only one at the fourth sitting. During the same period, the Petty Courts heard only eleven criminal cases and twenty-seven actions of debts.[143]

This is not to say that the settlement was entirely tranquil. The events of the past had left a strong residue of dissatisfaction with Hudson's Bay Company rule in Red River and, as contacts with the outside world multiplied, the problem intensified.

---

139 Council minutes, 27 November 1851, *ibid.* at 366.

140 Report 1857, *supra* note 12, question 5438.

141 Council minutes, 22 June 1854, in Oliver, *supra* note 5 at 402.

142 See Stubbs, *supra* note 103 at 48ff. for a fuller biography of Johnson.

143 Report 1857, *supra* note 12, Appendix 2B.

Rapid settlement of the American west and the introduction there of democratic government provided a stark contrast. In Upper Canada, where good agricultural land was becoming scarce, there was increasing support for Canadian annexation of Rupert's Land. Early in 1857 a former Company employee, Roderick Kennedy, came to Red River from Toronto seeking signatures for a petition calling upon the Legislature of Canada to take over the area. Francis Johnson attended Kennedy's meetings but, although he dissuaded some settlers, the petition bore 574 Red River signatures.

A Select Committee of the British parliament held a series of hearings from February to July 1857 into the manner in which the company governed its territories. This brought to light most of the causes for discontent with company rule, including the disgraceful conduct of Adam Thom as recorder and the Kennedy petition. The committee's report that summer called for eventual annexation by Canada of Red River and the other habitable portions of Rupert's Land.[144] No action was taken and the company went back to it's business. Neither the Company nor the government was allowed to forget the recommendation, however. A wave of immigration from Upper Canada, beginning about 1857, brought to Red River a group of persons who criticised Company government constantly.

With immigration increasing, hostility to the Company growing, and visits from American frontier ruffians becoming more frequent, the colony needed an effective law enforcement agency. Major Caldwell's pensioners had never constituted a formidable force and even that modicum of security had disappeared in 1855, when their contract expired and Caldwell returned to England. Luckily, no serious disorders occurred, but residents were uncomfortably aware that if trouble did arise they would be helpless to deal with it. The settlement breathed easier, therefore, when in 1857 the Company succeeded in persuading the British government to send a detachment of regular troops to Red River once more. For the next four years the Royal Canadian Rifles, garrisoned at Lower Fort Garry, ensured that law and order prevailed in the community.

C. Dr. John Bunn: 1858-1861

Francis Johnson decided in 1858 to return to the more eventful life of practising law in Montreal, and for the next three years Assiniboia was without a lawyer. Johnson's replacement as governor was William MacTavish; his successor as recorder was the colony's physician, Dr. John Bunn.[145]

Dr. Bunn was a remarkable person. Born of mixed English, Scottish, and Aboriginal blood at Moose Factory about 1800 and educated in Scotland, he possessed diverse talents and unbounded energy. Long before becoming recorder, he had been one of the most active and influential governmental officers in Assiniboia. In February 1835, just three years after becoming a licentiate of the Royal College of Surgeons, Edinburgh, and returning to Red River, Bunn had been invited

---

144 *Ibid.*

145 See Stubbs, *supra* note 103 at 90*ff.*, for a thorough biography of Bunn. Also see Oliver, *supra* note 5 at 61-2.

to attend the historic meeting of the Council of Assiniboia at which George Simpson announced the reorganisation of the colony's government. Made a member of the Public Works Committee at that time and appointed to the council proper the following year, Bunn remained a member for the rest of his life. When Alexander Ross died in 1856, Bunn became sheriff of Assiniboia and governor of the gaol, and in 1849 he replaced Rev. McCallum as coroner. The doctor's judicial experience was also extensive; he had served on the Lower District Petty Court since 1837, first as magistrate and later as president.

When he took on the duties of recorder, Bunn retained all his former appointments, and continued as well to minister to the medical needs of the settlement. Although he must have been extraordinarily busy, he always found time for social activities, displaying a taste for dancing and drinking that annoyed some of the more strait-laced members of the community. There was no evidence that the quality of his work suffered from the wide range of responsibilities and diversions he undertook.

Bunn's lack of legal training did not seem to hamper his effectiveness as recorder. His energy, intelligence and empathy more than compensated for an absence of a formal legal education, and there is evidence that his lay common sense sometimes improved upon the law. By allowing an accused person to testify in his own defence, and by apportioning damages between plaintiff and defendant in a contributory negligence case, for example, he anticipated English law by many years.[146] Judge Johnson had rejected all testimony of unbaptised Aboriginal winesses, refusing to follow Thom's practice of accepting unsworn evidence from non-Christian Natives after examining their understanding of the need to be truthful. Bunn on the other hand favoured Aboriginal participation in community affairs on their own terms. During his years the practice developed of accepting the evidence of Natives who had been "sworn according to the Indian custom."[147]

One May morning in 1861, after taking a walk along the banks of the flooded Red River, John Bunn suddenly died. The many positions he had held were soon filled by other men: James Ross, the son and brother of former sheriffs, was made sheriff and governor of the gaol; Dr. C.J. Bird was appointed coroner; replacements were found for Bunn's positions on the council and petty court; and the Company was requested to look for a suitable person to act as recorder. But the colony's loss was irreparable; John Bunn's whole had been much greater than the sum of his parts.

D. John Black: 1862-70

When the question of replacing Bunn as recorder first arose, the Company was disinclined to act, believing that the British government would soon grant colonial status to Assiniboia. However, when it became obvious that the government was in no hurry to bring about such a change, it was decided to fill the post. In 1862 the Company appointed a recorder who had the benefit of both legal training and

146 *Public Interest* v. *Patneaud & La Doux*, and *Morgan* v. *Foix*, Q.C.A. Records, PAM.

147 Compare Johnson's decision in *Public Interest* v. *Francois*, Q.C.A. Records, 20 November 1856, with Thom's approach in *Public Interest* v. *Boucher, ibid.* 20 December 1860. The practice continued after Bunn's death: *Public Interest* v. *Favel, ibid.* 21 May 1862.

familiarity with conditions in Assiniboia. He was John Black,[148] the Scottish solicitor who had come to Red River in 1839 as Adam Thom's assistant. Black had held a number of important commercial positions with the Company in subsequent years; he had moved to Australia when his wife died in 1854. When appointed recorder, he was serving as minister of lands in the New South Wales government.

John Black possessed undisputed integrity and courage. If he sometimes tended to be loquacious and over-pious, these traits did not interfere with his ability to get along with, and command the respect of, all elements of the community. He arrived at Red River in the Spring of 1862 aboard a paddlewheel steamboat from St. Paul. The new Governor-in-Chief of Rupert's Land, A.G. Dallas, appointed after Sir George Simpson's death in 1860, had just arrived to direct operations at Red River personally. As Black stepped ashore he may have been conscious that the final chapter in the story of the Hudson's Bay Company's long reign over Rupert's Land had begun.

In some respects, the settlement had not changed much during Black's eight year absence. The tiny wooden building where he would hold court still stood just outside the walls of Upper Fort Garry, where it had been erected shortly after he came to Red River as a young man. Its facilities were far from satisfactory.[149] Half of the structure, to the right of the central corridor, was the gaol. The courtroom that occupied the other half was Lilliputian; the jury-box was crowded, the bench cramped, and the small clerk's table also had to serve as counsel table for "agents" (relatives, clergy, Company officers and other educated persons) who were allowed to speak on behalf of litigants. The witness box and high prisoner's clock completed the furnishings, leaving little room for spectators behind the small railing. Moreover, as one of the councillors commented: "the very imperfect ventilation of the court-house has long been a subject of remark."[150]

The judicial system was also basically unchanged. The General Quarterly Court dealt with serious cases, but the citizen magistrates of the three petty courts continued to bear the brunt of the day-to-day administration of justice. They also carried out many non-judicial functions, such as the supervision of public works' funds.[151] Hearings before the magistrates often took place in their homes and were usually quite informal. More heed was paid to fairness and common sense than to legal technicality. One observer commented that the proceedings "savoured ... of arbitration." The son of one of the magistrates recalled that when his father "concluded that the parties were about equally to blame, he compelled them to advance from the sides of the room to the centre and shake hands in the presence of the court, as a declaration of their intention to live peaceably from that time forward."[152]

---

148 See Stubbs, *supra* note 84 at 135*ff*., for an extensive biography of Black.

149 George Bryce, "Illustrated History of Winnipeg," *Free Press*, 21 June 1905.

150 Stubbs, *supra* note 103 at 146 quotes a good description of the courtroom interior. The comment about ventilation comes from a letter to the editor printed by *The Nor'wester*, 4 November 1862.

151 Council minutes, 27 March 1860, and 10 May 1860, in Oliver, *supra* note 5 at 458, 460.

152 R.G. MacBeth, *The Selkirk Settlers in Real Life* (Toronto: W. Briggs, 1897) at 68, and Begg, *The Creation of Manitoba* (Toronto: A.H. Harvey, 1871) at 3.

The laws of Assiniboia had not been much altered during Black's absence. Consolidated once more, in April 1862[153] just before he arrived, they had been printed for the first time on the press of the west's first newspaper, *The Nor'wester*.[154] The differences between this new code and Thom's 1852 version were slight. The only subject that had received frequent legislative attention in the ensuing decade was the increasingly difficult problem of regulating the sale and use of liquor.

In the condition of life at Red River, the new recorder must have noticed profound changes. Improved transportation links with the outside world and the sudden wave of immigration had turned the settlement from a quiet agricultural community to a boisterous, undisciplined town. Fortune-seekers from Upper Canada and the United States arrived at Red River in great numbers, some as transients and some as permanent residents. The boat that brought John Black, for example, carried almost two hundred other passengers. The small village that had sprung up between Point Douglas and Upper Fort Garry was fast becoming the commercial centre of the settlement, with numerous makeshift saloons to slake the newcomer's thirst.

Large numbers of Sioux, driven north by the United States' government's attempted military solution to the "Indian question," were causing concern to both new and old settlers. The newcomers from Canada and the United States, generally critical of the Hudson's Bay Company, found an outspoken advocate in *The Nor'wester*. Assiniboia's Métis population was becoming increasingly uneasy about the new immigrants, both because their settlement of the prairie and related buffalo slaughter was driving the buffalo out of reach and because they were almost exclusively, and often intolerantly, English-speaking and Protestant. To administer justice successfully in such restless circumstances involved a much greater challenge than had faced the law enforcement authorities at any time since the unruly days before 1821. Such were Winnipeg's origins.

In attempting to meet this challenge, the authorities had almost no armed force at their disposal. Troops of the Royal Canadian Rifles had returned to Canada in 1861, and neither the government nor the company was prepared to pay for a replacement. Although the local constabulary still existed, it consisted of only eleven constables, three for each of the petty court districts, one for the little village between Fort Douglas and Fort Garry,[155] and one for liquor law enforcement.[156] This token force, chosen by the magistrates for three-year terms,[157] was entirely inadequate to deal with concerted breaches of the peace.

This inadequacy was strikingly demonstrated by one of the first cases tried by the General Quarterly Court after John Black's arrival. A Headingley clergyman called Corbett was charged in February 1863 with attempting to procure the abortion

---

153 Council minutes, 13 March 1862, in Oliver, *supra* note 5 at 485, and council minutes, 8 and 11 April 1862, *ibid.* at 485ff.

154 Council minutes for 3 November 1864, *ibid.* at 548 refer to "the *printed* Laws of Assiniboia of 11th April, 1862."

155 Council minutes, 9 January 1862, *ibid.* at 481

156 Council minutes, 9 April 1861, *ibid.* at 476.

157 Council minutes, 3 August 1854, *ibid.* at 403.

of his pregnant serving girl. Public interest ran high because of the nature of the case, and intensified when Corbett, stoutly asserting his innocence, claimed to have been framed by the Company for giving evidence against it to the Select Committee in 1857. Many believed him.

His trial, lasting nine days,[158] was the longest in Assiniboia's history, perhaps because advocates were employed more extensively than before. Four "agents" crowded around the tiny clerk's table. Acting for the prosecution were John and Thomas Bunn, sons of the late recorder, and for the defence were James Ross and Frank L. Hunt. Hunt, who had abandoned a law practice in Detroit to take up farming at Red River, was probably the first fully qualified lawyer to appear before the courts of Assiniboia. His role was slight, compared with the other agents. They had given legal advice to Red River residents from time to time in the past, and both Ross and Thomas Bunn were admitted to the legal profession in later years. Ross, who appears to have had some legal training, conducted almost the entire defence in the Corbett case. He had recently been dismissed as sheriff and governor of the gaol for having criticised Company rule in a newspaper article, so he probably undertook Corbett's defence with more than the advocate's customary zeal.[159]

Ross's enthusiasm could not overcome the damning evidence of prosecution witnesses, however. Corbett was convicted and sentenced to six months' imprisonment. A number of his former parishioners, still convinced of his innocence, petitioned the governor for clemency and when he refused the request, they decided to take matters into their own hands.

On 20 April 1863, a mob forced its way into the little gaol and set Corbett free. Police apprehended the ring-leader, one Stewart, but that caused an even more dangerous situation to develop. On the morning of 22 April, forty or fifty armed men presented themselves before Governor Dallas, demanding Stewart's release. Dallas faced an extremely difficult decision. A sizable group of loyal citizens had gathered at the gaol to defend it against these lawbreakers, but a confrontation would lead to bloodshed. Dallas also feared that Sioux bands in the vicinity might be encouraged to attack the settlement if they saw the residents divided among themselves. While refusing to release the prisoner himself, he therefore gave orders that force should not be employed to resist the gaol-breakers. Triumphantly, the "rescuers" marched to the gaol, violated the cell door once more, and led Stewart to freedom.[160]

Henry McKenney, who had replaced Ross as sheriff and governor of the jail,[161] promptly laid informations against those involved in both outrages. This gave the magistrates as unpleasant a choice as had faced the governor: either to issue warrants, which they did not have the power to enforce, or ignore two very serious violations of the law. Meeting as a group, the magistrates decided, "with a degree of reluctance amounting to pain," not to issue the warrants and all the lawbreakers, including Corbett and Stewart, were allowed to remain at large.

---

158 See Stubbs, *supra* note 102 at 147ff, for a fuller description of the trial.

159 Council minutes, 25 November 1862, in Oliver, *supra* note 5 at 514.

160 Council minutes, 29 April 1863, *ibid.* at 522ff.

161 Council minutes, 25 November 1862, *ibid.* at 515.

The magistrates reported to the Governor[162] that although it was still possible to administer justice in ordinary cases, "it is evident that the interests of order and authority stand on a precarious footing, and that, at any time, they may be compromised when a case arises to engage any great amount of popular feeling." They stressed that only re-establishment of a military force in the colony would remedy the situation. The Council of Assiniboia endorsed this view but no military protection was ever provided. The remaining period of Company rule was marked by growing disrespect for law and increasing reliance on self-help and side-arms to protect individual interests.

The British government's attention was distracted by matters of much greater import. In the United States a fratricidal war raged which, because of Britain's real or imagined support for the Confederate states, caused a dangerous deterioration in Anglo-American relations. In Canada, a governmental impasse led to a proposal for confederation of all Britain's North American possessions, but a distressing array of obstacles remained. The people of Assiniboia would have to look after themselves.

All things considered, justice was administered remarkably well during these twilight years of Company government. Recorder John Black announced shortly after taking office that his goal would be humane adjudication rather than observance of the strict letter of the law. He wrote in a letter to the editor of *The Nor'wester* that frontier courts should avoid "subtle refinements and ingenious technicalities," striving instead to achieve "substantial justice."[163]

Probably as a result of this attitude, John Black played an even more predominant role on the General Quarterly Court than previous recorders. The governor ceased sitting with the court when Black arrived in 1862 and there is no record of magistrates sitting with the recorder after August 1867.

Black was assisted in carrying out his duties by two able clerks: W.R. Smith, who had resumed the clerk's role when Adam Thom returned to Britain, and then Thomas Bunn, who took over when Smith retired in 1868.[164] The unenviable task of executing orders of the courts in an unruly and poorly policed community continued to be carried out by Sheriff Henry McKenney.

The laws of Assiniboia were altered in several respects while Black was recorder. The most significant change was the decision in January 1864 that the laws of England applicable to proceedings of the General Quarterly Court should be those currently in force from time to time, rather than those in force at the date of Queen Victoria's accession.[165] Other amendments gave the General Quarterly Court the power to make its own rules,[166] to appoint guardians,[167] and to supervise administration of intestate estates.[168]

---

162 Council minutes, 28 April 1863, *ibid.* at 523ff.

163 *The Nor'wester*, 11 September 1862.

164 Council minutes, 17 December 1868, in Oliver, *supra* note 5 at 598.

165 Council minutes, 7 January 1864, *ibid.* at 354.

166 Council minutes, 3 November 1864, *ibid.* at 548.

167 Council minutes, 31 August 1865, *ibid.* at 558.

168 Council minutes, 29 November 1866, *ibid.* at 569.

Few major improvements were made in law enforcement arrangements. Fear of a Native insurrection in the summer of 1866 prompted the council to authorise establishment of a temporary volunteer force of fifty to one hundred armed and mounted men,[169] but the idea was never implemented because the threat never materialised.

The council had reason to regret its inaction later the same year, when a convicted murderer, whose death sentence had been commuted by the governor, was threatened by a lynch mob of the victim's kinsmen. Disaster was only averted by surreptitiously spiriting the prisoner out of the colony, transferring him from one Company post to another until he was finally banished to New Caledonia.[170]

In March and April 1867, the council again discussed forming a permanent armed body composed of local men, but it reached the reluctant conclusion that such a force would be prohibitively expensive. All that the council felt able to do was to increase the size of the existing constabulary slightly and attempt to improve its quality.[171] Some increase in police effectiveness probably resulted. Three constables were assigned to the part of the community that had begun to be described as the Town of Winnipeg, for example.[172] But the law could be broken with impunity by anyone who enlisted the support of a sizable and determined group of allies. In January 1868, Sheriff McKenney attempted to levy execution against property of Dr. John Schultz, an entrepreneur of great ability but limited scruple, later prominent in Manitoba politics. When he resisted the seizure by force, Schultz was imprisoned, but while he awaited trial a party of friends, led by his formidable wife, broke into the gaol and released him. A special meeting of the council convened to determine how to respond, but all that came of it was a decision to swear in one hundred special constables on the day of Schultz's trial. No attempt was made to re-arrest Schultz or to prosecute his wife and accomplices for gaol-breaking.[173]

Residents of the growing settlement at Portage La Prairie had even less protection than the people of Red River. Being outside the boundaries of Assiniboia, Portage La Prairie lacked satisfactory governmental and judicial arrangements. To remedy the situation, a large group of residents led by Thomas Spence attempted to form a government in January 1868. They designated the area surrounding their settlement as "Manitobah" and elected a governing council, with Spence as "President." Laws were passed imposing taxation and steps were taken to construct a courthouse and gaol. These efforts ended in failure when the Hudson's Bay Company refused to pay taxes to the new régime and the British government informed Spence that he was acting unlawfully. The last trace of confidence in Spence's government was erased by the "treason" trial of a settler who refused to abide by the "laws" of the elected

169 Council minutes, 23 June 1866, *ibid.* at 567.

170 Stubbs, *supra* note 102 at 161.

171 Council minutes, 12 April 1867, in Oliver, *supra* note 5 at 574-76.

172 The Town had requested special constables in March 1866 (Council minutes, 28 March 1866, *ibid.* at 565). The request had not been granted at that time, but the council minutes for 18 May 1868, *ibid.* at 586, record that the appointments of the three town constables were to be continued "for another year."

173 Council minutes, 23 January 1868 and 5 February 1868, *ibid.* at 582-84.

council. Shortly after the trial got under way, a number of the man's friends, brandishing arms, took over the courtroom and led the accused to freedom. Before they left, one of their number proclaimed what their conduct had clearly proved: "We hae nae laws."[174]

On more than one occasion, residents of Portage La Prairie and their district requested to be made part of Assiniboia, but the Council of Assiniboia always refused. From time to time, however, the council had allowed the courts and sheriff of Assiniboia to deal with cases from Portage la Prairie.[175] Where it derived the authority to do so was not clear. Not long after the Schultz gaol-break, a killing took place at Portage La Prairie. Alex McLean shot Baptiste Demarrais while the latter was attacking McLean's father. A charge of manslaughter was laid and the General Quarterly Court of Assiniboia assumed jurisdiction. The trial took place in September 1868.[176] As defence counsel, McLean retained Enos Stutzman, a legless lawyer from Pembina, Dakota Territory, and one of the most colourful characters of the American frontier. His horsemanship, legal acumen, business judgment and political cunning had won him a reputation of legendary proportions. Stutzman handled the case skilfully, and McLean was acquitted. Had he not been, the court would have been hard pressed, since McLean and a group of friends sat armed in the courtroom prepared to resist any other verdict with force. In reality, the senior judicial body of Assiniboia had no more power to impose its authority on the accused than a "Manitobah" tribunal would have had.

Both Schultz and McLean had drawn most of their support from the "Canadians," the recently arrived English-speaking immigrants from Upper Canada. Because of their control of the colony's only newspaper and many business enterprises, they had an influence disproportionate to their numbers. This influence was employed to campaign for abolition of Company government and annexation of Assiniboia to Canada. The arrogance and intolerance of these newcomers aroused deep resentment among the French speaking population; seldom had the ugly lines of ethnic division been so pronounced in the community.

VII. Louis Riel and Provisional Government, 1869-70

Antagonism led in turn to profound suspicion by the Métis about negotiations that had been going on since shortly after the 1867 Canadian confederation, concerning the transfer of Rupert's Land from the Hudson's Bay Company to Canada.

The west was vital to Canada, both as a source of new agricultural land and as a link with British Columbia. There was considerable risk that the United States, in the grip of a strident "manifest destiny" philosophy, might turn its powerful and demobilising army to Ruperts Land if swift actions were not taken to secure the area for Canada. Accordingly, a British statute was passed in 1868[177] empowering the

---

174 *Portage La Prairie Leader*, 27 June 1957.

175 Council minutes, 29 December 1868, in Oliver, *supra* note 5 at 601.

176 Council authorised the hearing 6 August 1868, *ibid.* at 587. For a fuller description of the trial, see Stubbs, *supra* note 102 at 161.

177 31-32 Victoria, c. 105.

Crown to accept a surrender of Hudson's Bay Company lands, and then to admit the territory to Confederation pursuant to section 146 of the *British North America Act* ,1867. It provided that existing legal institutions should continue to function until new ones were created.

When it seemed that negotiations would soon bear fruit, the Canadian government took unwise premature actions which, although intended to save time, ultimately caused considerable delay. Surveyors were dispatched to Assiniboia to prepare land descriptions for use in the formal conveyance; and William McDougall, the man chosen as lieutenant-governor of the new territories, was sent to Red River to pave the way for establishment of a new government as soon as the transfer took place. McDougall's retinue included an attorney-general, a chief of police, and several other prospective governmental officers.

In its haste, the Canadian government had neglected to consult the local population about these arrangements. Resentment was intense, especially among the Métis, who feared that their land would be taken away; and when the surveyors began to work on Métis land in October 1869, festering indignation turned to action. Under the leadership of Louis Riel Jr., the Métis decided to resist the surveying and prevent the arrival of the governor-designate, until satisfactory terms could be negotiated. Utilising the organisational and disciplinary pattern of the buffalo hunt, they quickly formed an armed force which accomplished these primary objectives with little difficulty. The surveying halted and the McDougall entourage was forced to remain at Pembina. To ensure against counteractions by McDougall or the local "Canadians," Upper Fort Garry was seized and a military-style "provisional government" established. The governor and council of Assiniboia were outraged at these actions but were powerless to prevent them.

Not all legally constituted authorities ceased to function in Assiniboia at that stage. Although the Council of Assiniboia met for the last time on 30 October 1869, the regular courts continued to operate for the next month or two in respect of matters not related to the uprising. In fact, Riel's first convention of delegates from various parts of the settlement, meeting in the little courthouse in November, adjourned to allow the General Quarterly Court to hold its regular session.[178] When the courts finally stopped operating in December, it was largely because of a foolish decision by governor-designate McDougall.

Cooped up in hostile Pembina with winter closing in, McDougall was impatient to move on. His "Canadian" informants at Red River assured him that as soon as the formal transfer from the Company to the government took place, enabling him to exercise lawful authority, he would be able to proceed to the settlement with the support of most inhabitants. He had been told by the Canadian government that he could expect the transfer to occur about December 1st. In these circumstances, McDougall decided to gamble. He issued a proclamation to the people of Assiniboia claiming legal authority over the colony as of December 1st. Then he dispatched an agent, bearing the proclamation, to round up armed support for his entry into the settlement. This failed when many who supported it were imprisoned by Riel. When

---

178 W.L. Morton, *Alexander Begg's Red River Journal* (Toronto: Champlain Society, 1956) at 61.

McDougall received word from Ottawa that the transfer had not taken place after all, and that in view of the current climate of opinion it would not likely occur soon, he and his would-be government returned in disgust to Canada at the end of December.

McDougall's ill-timed proclamation probably hastened the demise of the Company courts. It was widely believed that all Company institutions would lose their authority the moment the transfer to the crown took place. This was not true, as the legislation provided for continuation of existing institutions until replaced; but the belief was so widespread that when McDougall's proclamation announced the transfer, it became impossible for the courts of Assiniboia to command continued respect; they ceased to sit regularly after December 1869.[179] Probably for this reason, in January 1870 Riel's first provisional government empowered "Adjutant-General" Ambrose Lépine to administer justice for the settlement.[180]

The Canadian government's ambassador to Red River, Donald A. Smith, held a large outdoor meeting at Upper Fort Garry in January 1870, during which he evidently convinced the rebels of the government's conciliatory intentions. All segments of the community were persuaded to take part in a second convention. It agreed to send a three-man delegation, including Recorder John Black, to Ottawa to present a "Bill of Rights," and to negotiate on behalf of the settlement. For the interim, the convention confirmed on behalf of the entire community the existence and authority of the provisional government, and of Riel as its president. Riel and the provisional government took this as a mandate to instruct the negotiation delegates and to alter the terms of the Bill of Rights. [181] Significant progress was also made in fashioning other temporary legal and governmental machinery for use until the settlement's constitutional fate could be settled.

A new court structure was agreed, similar to the old one, except that there would be five petty court districts instead of three,[182] and a distinction would, for the first time, be made between magistrates and justices of the peace.[183] The sheriff and most constables and judges who had held office under the Hudson's Bay Company were to be re-appointed, plus several new magistrates and justices of the peace. James Ross, the former sheriff and occasional advocate, was named "Chief Justice of the Supreme Court," presumably because Black would be absent with the negotiating team.

These developments were interrupted by an episode that was to have a profound effect on Manitoba history. In the latter part of February, before the new arrangements took effect, a group of "Canadians" from Portage la Prairie decided to rescue the

---

179 According to Morton, *ibid.* at 301, Riel drew attention at the second convention to the fact that the February session of the General Quarterly Court did not take place, and expressed concern that no steps were being taken to investigate a recent murder. The convention decided that the sitting of the Court should be postponed until May: *The New Nation*, 18 February 1870.

180 Orders of the Provisional Government, 8 January 1870, in Oliver, *supra* note 5 at 913-14.

181 W. L. Morton, *Manitoba: Birth of a Province*, (Toronto: University of Toronto Press, 1967) at xvi, xvii.

182 *The New Nation*, 18 February 1870.

183 *Ibid.*, 20 May 1870.

political prisoners being detained by Riel at Upper Fort Garry. After arriving at Red River and enlisting a few allies, they learned that their expedition was in vain because Riel had already released most of the prisoners. But Riel's anger was roused. He placed the would-be rescuers in prison, and decided to execute their leader. Donald Smith and others persuaded Riel not to take such drastic action on that occasion, but he remained determined to assert the authority of his provisional government in some dramatic fashion. When an arrogant young man named Thomas Scott became unruly shortly thereafter, the provisional government decided that he should be executed.

This time Riel would not be dissuaded. On 3 March 1870, Scott was brought before a court-martial presided over by Adjutant-General Ambrose Lépine, charged with insubordination and assaulting his guards. The trial was brief and lacked most of the protections that courts customarily accord to accused persons. A majority of the tribunal found Scott guilty and sentenced him to death. On 4 March, he was led to a location outside Fort Garry's walls, where he was instructed to kneel, and was shot to death by a firing squad.

Toward the end of March, the Red River emissaries departed for Ottawa. Although they encountered an angry reception in the east, where news of Scott's death had caused a storm of public indignation, their negotiations with governmental officials eventually produced agreement on terms for Rupert's Land's entry to the union. This resulted in a transfer of the territory from the Hudson's Bay Companys to the crown, and then passage of the *Manitoba Act*,[184] by the Parliament of Canada on May 12 to serve as the constitution of the new province. The final step required to form the province was a British order-in-council[185] which, on 23 June, transferred the former Hudson's Bay Company's lands to Canada as of 15 July 1870.

John Black never came back to Manitoba. He had wanted to resign the previous year, but had been asked to stay until the end of Company control. Now, although only fifty-three years of age, Black returned to Scotland where he lived in quiet retirement until his death in 1879.

It was several months before the newly created government of Manitoba could begin to function, so the provisional government carried on in the meantime. Elected representatives from all parts of the colony formed a legislature under Riel's presidency near the end of March and passed a revised code of laws based on the laws of Assiniboia.[186] James Ross was sworn in as chief justice about the same time,[187] and a sitting of the General Quarterly Court was scheduled for the second Tuesday in June.[188] There is no evidence that the court did in fact sit or that James Ross ever actually performed any judicial functions. Lower courts were in operation,

184 33 Victoria, c. 3.

185 G.F.G. Stanley, *The Birth of Western Canada: a History of the Riel Rebellions* (Toronto: University of Toronto Press, 1961) at 121.

186 *Minutes of Meetings of Committee Appointed by Legislative Assembly of Assiniboia to Codify and Arrange the Laws*, 4 April 1870, PAM.

187 Minutes of Provisional Government, 26 March 1870, *ibid.*

188 Minutes of Provisional Government, May 7, 1870, *ibid.* Note that the term "Supreme Court," which had earlier been adopted, was not used.

however, continuing with the magistrates appointed by the Council of Assiniboia[189] until new petty courts established by the provisional government began to sit. *The New Nation,* the newspaper with which the rebels had replaced the suppressed *Nor'wester* reported on 1 July 1870, that "the first District Court under the regime of the Provisional Government" had sat at the Fort Garry courthouse a few days previously, with A.G.B. Bannatyne and two associate magistrates presiding. It also intimated that other district courts were about to commence operations. These "Riel courts" did not operate for long, however.

The provisional government came abruptly to an end on 24 August 1870, when a mixed contingent of British and Canadian troops, under the command of Colonel Garnet Wolseley, arrived at Fort Garry. The Red River emissaries to Ottawa had agreed to the Wolseley expedition in the hope that its presence would provide the law enforcement strength that had been lacking in the settlement for so long. Until shortly before their arrival, Riel believed that he had nothing to fear from Wolseley and his troops. He planned to hand over the reins of government peaceably. But as August progressed he began to receive reports that the mood of the expedition was belligerent, so he decided at the last minute to flee. The advancing force found Fort Garry empty.

A new lieutenant-governor had been appointed for Manitoba: the Honourable Adam G. Archibald. Since Archibald was travelling some distance behind the military expedition, he prevailed upon Donald A. Smith to assume the responsibilities of civil government on behalf of the Hudson's Bay Company until his arrival. On 2 September 1870, Smith surrendered this last vestige of authority to Archibald and the Company's two hundred-year reign as governor of the north-west was over.

---

189 Ross Papers, PAM, contain a letter (#418) dated 13 June 1870, stating that a magistrate under the old commission was employed in connection with a certain shooting in order to ensure the legality of his authority. The Legislative Assembly of Assiniboia passed an Act on 26 March 1870, providing that the former judicial officers should continue in office, but that "it is not considered expedient to hold any court before the next session of the Legislature": *The New Nation,* 15 April 1870.