

## XII

### The North

---

GRAHAM PRICE

THE NORTHWEST TERRITORIES COVER one third of the total area of Canada. Yet today it is only a part of what it once was. In 1870 it also included Alberta, Saskatchewan, most of Manitoba, Northern Ontario, Northern Quebec and the Yukon. In 1880 the Arctic Islands were added. In 1898 the Yukon was severed out; in 1905 Alberta and Saskatchewan were created; and in 1912 Ontario, Quebec and Manitoba expanded to their present sizes.<sup>1</sup> Things then settled down. Boundaries remained static. The NWT seem destined to be whittled down again.<sup>2</sup> The Carruthers Commission in 1986 rejected division, as the Drury Commission did approximately ten years later. But the Inuit remained tenacious.<sup>3</sup> Nunavut loomed on the horizon.<sup>4</sup> On 1 April 1999, the Inuit of the central and eastern arctic, unified by language and a land claims settlement, will reclaim their homelands.

Prior to 1896, in both the Yukon district and the remaining Northwest Territories, Natives were in the majority. In the Yukon, that changed with the influx of Klondike gold seekers; in the NWT, it continues to the present; and when Nunavut draws apart, non-Natives will at least equal in number Natives, if not become the majority in the Mackenzie region.<sup>5</sup>

In pre-contact times, before alien legal and administrative concepts were forced upon them, Natives had their own social organisations and internal mechanisms of control.<sup>6</sup> The imposition of Anglo-Canadian legal institutions introduced unfamiliar

---

<sup>1</sup> See Appendix "A", Donald Kerr and Deryck W. Holdsworth, eds., *Historical Atlas of Canada III: Addressing the Twentieth Century* (Toronto: University of Toronto, 1990) Plate 2 and notes at 163; also see R. Louis Gentilcore ed., *Historical Atlas of Canada II: The Land Transformed, 1800-1891* (Toronto: University of Toronto Press, 1993) Plate 21 and notes at 164.

<sup>2</sup> "Drawing a line in the tundra" *Globe & Mail*, 4 May, 1992.

<sup>3</sup> "Accord sets up new Inuit territory" *Globe & Mail*, 31 October, 1992.

<sup>4</sup> *Nunavut Act*, S.C., 1993, c. 28; *Nunavut Land Claims Agreement Act*, S.C., 1993, c. 29.

<sup>5</sup> Christopher Gora, "Jury Trials in the Several Communities of the Northwest Territorial" (1993) 13 *Windsor Yearbook of Access to Justice* 156 at 158, 159.

<sup>6</sup> K. Coates, *Best Left As Indians* (Montreal: McGill-Queen's University Press, 1991) xix. "Retaliatory violence is a form of social control and ... kinship and other relationships usually kept such violence—which was governed by customary expectations and principles of liability—within acceptable limits": Hamar Foster, "International Homicide in Early British Columbia" in J. Phillips, T. Loo and Lewthwaite, eds., *Crime and Criminal Justice: Essays in the History of Criminal Justice*, vol. V (Toronto: The Osgoode Society, 1994) 53. Aboriginal law was "based upon collective responsibility for consequences" and not on individual responsibility for intentional acts: *ibid.* at 55. Aboriginal culture remains "non judgmental and reconciliation focused": Gora, *supra* note 5 at 173. See also Catherine McClellan, *A History of the Yukon Indians: Part of the Land, Part of the Water* (Vancouver:

notions of governance and dispute resolution. The literature until recently<sup>7</sup> did not address Native institutions. One reason was that "seldom"<sup>8</sup> did explorers, fur traders, missionaries, scientists, adventurers, police, administrators, and court officials record details of Native societies and customs. When they did they tended to deprecate indigenous cultures. And Natives, themselves wedded to an oral tradition, became lost in literate cultures. So records have a non-Native perspective. The myth and romance and heartbreak<sup>9</sup> of the North are captured in stories of the Klondike sourdoughs,<sup>10</sup> the Yukon exploits of Sergeant Preston of the Mounties and his faithful dog, King, the manhunt for Albert Johnson the Mad Trapper of Rat River,<sup>11</sup> the tragedy of the lost patrol<sup>12</sup> and the heart-rending trials of Kikkik.<sup>13</sup> On a more sober scale an "Ottawa-based perspective [permeated records of some of] the agents of southern Canada involved in opening up the Canadian North."<sup>14</sup>

---

Douglas & McIntyre, 1987).

<sup>7</sup> "Generations of non-Aboriginal historians and popular writers once saw Indian Law [in simplistic terms—blood for blood]. Then legal anthropologists who listened to the elders, examined the surviving evidence carefully, and took a broader view that provided a more thoughtful analysis": Foster, *supra* note 6 at 52.

<sup>8</sup> Coates, *supra* note 6 at 4.

<sup>9</sup> An eclectic sample includes: Richard Finnie, *Lure of the North* (Philadelphia: David McKay Company, 1940); Ray Price, *The Howling Arctic* (Toronto: Peter Martin Associates Limited, 1970); Max Ward, *The Max Ward Story* (Toronto: McClelland & Stewart, 1991); Alex Inglis, *Northern Vagabond, The Life and Career of J. B. Tyrrell, The Man Who Conquered the Canadian North* (Toronto: McClelland & Stewart, 1978); Philip Godsell, *Pilots of the Purple Twilight* (Toronto: The Ryerson Press, 1955); Vilhjalmur Stephansson, *The Friendly Arctic* (New York: The MacMillan Company, 1922); J. A. Wilson, "Gentlemen Adventures of the Air" National Geographic Magazine (Washington: National Geographic Society, November 1929); Jack Sissons, *Judge of the Far North* (Toronto: McClelland & Stewart, 1968); S. E. Jenness, ed., *Arctic Odyssey, The Diary of Diamond Jenness 1913-16* (Ottawa: Canadian Museum of Civilization, 1991); Charles Camsell, *Son of the North* (Toronto: Ryerson Press, 1954); C. S. Houston and I. S. MacLaren, *Arctic Artist, the Journal and Paintings of George Back, Midshipman with Franklin, 1819-1822* (Montreal: McGill-Queen's University Press, 1994).

<sup>10</sup> The Robert Service poems and in particular "The Cremation of Sam McGee" spring to mind. Another example is Tappan Adney's *The Klondike Stampede* (Vancouver: University of British Columbia Press, 1994), originally published in 1900.

<sup>11</sup> T. P. Kelley, *Rat River Trapper* (Toronto: Paper Jacks, 1972); D. North, *The Mad Trapper of Rat River* (Toronto: The Alger Press Ltd., 1972); D. North, *Trackdown* (Toronto: MacMillan, 1989).

<sup>12</sup> Dick North, *The Lost Patrol, The Mounties' Yukon Tragedy* (Vancouver: Raincoast Books, 1995).

<sup>13</sup> Time-Life magazine covered the trials. Kikkik, her husband and children and other Inuit families were stranded in the central barren lands. A quarrel occurred and Kikkik's husband was shot. Kikkik then stabbed her husband's murderer. Kikkik with her children set out over 40 miles of drifting tundra to the nearest Hudson's Bay Company post. On the trail, Kikkik left her two youngest children behind in an igloo. Before they could be rescued, one died. Kikkik was tried at Rankin Inlet in April 1958 for murder and then for criminal negligence causing death. John Parker, later a justice in the Yukon, prosecuted, and Sterling Lyon, later premier of Manitoba and presently a Court of Appeal justice there, defended. Acquitted in both trials, Kikkik's circumstances left a deep impression on Sissons, *supra* note 9 at 99-110.

<sup>14</sup> Coates, *supra* note 6 at xvi.

## I. Explorers and Whalers in the North

Native and non-Native interaction in the North took on various forms. Two early ones were European arctic explorations and American whaling expeditions. The first recorded explorer was Martin Frobisher in 1576<sup>15</sup> to Baffin Island. Fear and suspicion sometimes produced tension and conflict, like the documented clash in 1577 between a group of Inuit and Frobisher's men. The previous year the same Inuit group had captured five of Frobisher's men, who were "never seen again."<sup>16</sup> This clash, and sporadic ones<sup>17</sup> for the next three centuries, underscored the unsettled nature of this interaction when British naval expeditions, British overland expeditions (the most famous of which were those of John Franklin's parties) and latterly American expeditions came in contact with the Inuit.<sup>18</sup>

Whalers, like explorers, came to the North for a selective purpose. Theirs was limited to the geographical periphery of the NWT and Yukon land mass. As early as the 1840s whalers centred activities in the eastern arctic at Cumberland Sound on Baffin Island. Inuit served as laborers and suppliers of fresh meat. By the 1860s

<sup>15</sup> I am ignoring the suggestion that Erik Thorvaldssons (Erik the Red) in 982 explored the Cumberland Peninsula of Baffin Island. Allan Cooke and C. Holland, *The Exploration of Northern Canada* (Toronto: The Arctic History Press, 1978) 13. W. A. Kenyon, *Tokens of Possession, The Northern Voyages of Martin Frobisher* (Toronto: Royal Ontario Museum, 1975) at 52, documents a clash during Frobisher's second voyage in 1577.

<sup>16</sup> *Dictionary of Canadian Biography* (Toronto: University of Toronto Press, 1966) vol. I, at 317 [hereinafter DCB]; and W. A. Kenyon, *Arctic Argonauts* (Waterloo: Penumra Press, 1990) at 31, 32.

<sup>17</sup> For example, during Henry Hudson's expedition in 1610–11, the crew mutined. Four of the mutineers were later killed by Inuit in Hudson's Strait: see DCB, *supra* note 16 at 377; Cooke and Holland *supra* note 15 at 27, and, for another incident see *ibid.* at 151–52, where Franklin's 1925–27 expedition encountered "hostile eskimos" near the mouth of the Mackenzie River delta. A further example include the Inuit murders in 1771 at Bloody Falls on the Coppermine River. The HBC sponsored the barrenland journey of Samuel Hearne, which was marred when the party's "Indian companions butchered a hapless party [of Inuit]." : R. Glover, ed., *Samuel Hearne, a Journey From Prince of Wales Fort in Hudson's Bay to the Northern Ocean* (Toronto: Macmillan, 1958) at xxvi.

<sup>18</sup> Graphic illustrations are found in Gentilcore, *supra* note 1, Plates 2 and 3. This is the best way to follow the routes taken. A sample of the exploration literature includes, Cooke and Holland, *supra* note 15 *passim*; A. Low, *The Cruise of the Neptune* (Ottawa: Government Printing Bureau, 1906), Chapter 4, "A Historical Summary of the Discoveries and Explorations in Arctic America"; J. Bernier, *The Cruise of the Arctic, 1908–09* (Ottawa: Government Printing Bureau, 1910) Chapter 15, "Canadian Expeditions to Hudson ... Bay and Northern Waters"; G. Smith, "Sovereignty in the North" in R. MacDonald, ed., *The Arctic Frontier* (Toronto: University of Toronto Press, 1966); T. H. Levere, *Science and the Canadian Arctic. A Century of Exploration 1818–1918* (Cambridge: Cambridge University Press, 1993) at 371–377, and chapter 5 on the Franklin expeditions; Pierre Berton, *The Arctic Grail: The Quest for the Northwest Passage and the North Pole, 1818–1904* (Toronto: McClelland & Stewart, 1988); E. E. Rich, *The History of the Hudson Bay Company 1670–1870*, 2 vols (London: Hudson's Bay Records Society, 1958–59); William Wonders, "Unrolling the Map of Canada's Arctic" in Morris Zaslow, ed., *A Century of Canada's Arctic Islands* (Ottawa: The Royal Society of Canada, 1981); Hugh Wallace, "Geographical Explorations to 1880" in Morris Zaslow, ed., *ibid.*; Allan Cooke, "A Gift Outright: The Exploration of the Canadian Arctic Islands After 1880" in Zaslow, ed., *ibid.*; Owen Beattie and John Geiger, *Frozen in Time, Unlocking the Secrets of the Franklin Expedition* (Saskatoon: Western Producer Prairie Books, 1987); Doug Wilkinson, *Arctic Fever: The Search for the Northwest Passage* (Toronto: Clark Irwin & Company, 1971).

whalers pushed into Hudson Bay. By the late 1870s, this environmentally exploitative industry had exhausted whale stocks in the Bay. The same scenario repeated itself in the last decade of the nineteenth century at Herschel Island, off the north coast of the Yukon, in the Beaufort Sea.

No police or judicial or governmental officials were available to regulate Inuit-whaler interactions. American whalers predominated in Hudson Bay and the Beaufort Sea areas, with their concepts of "marine justice." Inuit families often lived on board ship<sup>19</sup> and the Inuk men participated in the hunt, manning several whale-boats. Farther north in the Baffin Bay region, the Scots still controlled the industry. Inuit did not usually participate in the sea chase and their contact with Europeans arose only at the few land-based whaling stations.

The excesses that occurred at the Herschel Island whaling grounds did not occur in the eastern arctic, where excessive use of alcohol was "never practiced."<sup>20</sup> By contrast, "the hive of debauchery"<sup>21</sup> encouraged by unrestricted liquor that was Herschel Island in the 1890's led to an anarchy<sup>22</sup> "limited only by the tenuous authority of the ships' captains."<sup>23</sup> This led within twenty years to an almost total wipe-out of the indigenous delta Inuit population.

Canadian police came belatedly<sup>24</sup> to Herschel Island in 1903, at the urging of an Anglican missionary, Isaac Stringer. Police authority was arguably even more tenuous than that of the whaling captains. In 1906 all that Sergeant Fitzgerald could do with a crew member who threatened to shoot his captain was to take the sailor

<sup>19</sup> Low, *supra* note 18 at chapter 10.

<sup>20</sup> *Ibid.* at 271.

<sup>21</sup> It is difficult to assess accurately the nature of Herschel Island society in the 1890s. Steffansson described it as "an outpost of civilization"; the Nome Press as the "sodom of the Arctic." Comptroller White of the North West Mounted Police later asserted that it was "difficult to convince the goody-goody people that in the development and settlement of a new country allowances must be made for the excesses of human nature." K. Coates and W. Morrison, *Land of the Midnight Sun, a History of the Yukon* (Edmonton: Hurtig Publishers, 1988) at 132.

<sup>22</sup> "In a drunken frenzy, on November 3, 1895, [the Inuit] Pysha beat his wife and killed his little daughter by beating her head against the wall of his house. On December 3, an indignant crowd of whalers seized him, handcuffed him to an upright log, stripped him to the waist, gave him 100 lashes and ordered him to leave the island that day, never to return. C. E. Whittaker, the [resident] missionary ... laid on the first dozen lashes. The punishment deranged Pysha [who] set off to the west and murdered eight [Inuit] at Flaxan Island. He was later executed by the [Inuit] at Point Barrow." John R. Bockstoce, *Whales, Ice, and Men* (Seattle: University of Washington Press, 1986) at 279.

<sup>23</sup> K. Coates, *Canada's Colonies, a History of the Yukon and Northwest Territories* (Toronto: James Lorimer & Company, 1985) at 144. Several examples may be cited: (1) In March 1968 a dozen seamen deserted from the wintering whale ships. A few days out on their journey overland to the Klondike goldfields, ships officers overtook them, killing one man and capturing six. W.G. Ross, *Arctic Whalers, Icy Seas* (Toronto: Irwin Publishing, 1985) at 176. (2) On 1 September 1896, during a drunken brawl the third mate of the *Balena* shot and killed the second mate. Bockstoce, *supra* note 22 at 277. (3) When desertions occurred—and they did each year—the captains went after the runaways because, if the departures were ignored, "soon the for'castles would be sparsely inhabited." When they were returned "often with appalling frostbite—those [who] were healthy enough to stand punishment were always put in irons": Bockstoce, *ibid.* (4) Captain Bodfish, when disciplining one of his crew, was stabbed by another crewman. Bodfish had the attacker put in irons and "triced up" in the rigging: Coates and Morrison, *supra* note 21 at 127.

<sup>24</sup> "When Sergeant Fitzgerald's two-man party arrived they were told that they were six years too late": Bockstoce, *supra* note 22 at 270.

aboard and instruct the captain to look after him.<sup>25</sup> No charges were laid because no law court existed before which to bring the offender.<sup>26</sup>

The situation at Herschel Island can be graphically illustrated by events in 1896. That winter twelve hundred people lived on ship or on the Island. The task of feeding this group with fresh meat fell to Inuit families within a radius of 200 miles. In this "virtual boom town" the whaling crews "operated as if Herschel Island were a no man's land," which in a sense it was. Until 1894 when the first North West Mounted Police arrived in Dawson, Yukon, there was no official representation by the Canadian government within a thousand miles of the island.<sup>27</sup>

By 1903 the whaling industry was in rapid decline. Herschel Island, though, continued to operate into the late 1930s as a trading and administrative centre for the western arctic. With the decline in fox prices spurred by the Great Depression, the fur trade declined. Police relocated their headquarters to Aklavik in the Mackenzie Delta in 1937. The Island had a brief rekindling of its former prominence when, in the summer of 1923, a series of Inuit murder trials were heard there.<sup>28</sup> Otherwise, the 34-year presence of the police on the Island proved remarkably quiescent. The police had "little real effect on the operations of the whalers"<sup>29</sup> or the Inuit attracted to the Island. If the whalers did not wish the police to pry into their business they simply avoided Herschel Island. In the case of the Inuit, the police improvised and treated them "leniently and with restraint."<sup>30</sup>

In the first decade of the twentieth century the Canadian government began to send patrols into the eastern arctic to assert Canadian sovereignty. Low's 1903-04 trip on the *Neptune* and Captain Bernier's several trips from 1904 to 1911 on the *Arctic* carried a small escort of police.<sup>31</sup> Superintendent Moodie established the first

<sup>25</sup> Coates and Morrison view this as the Royal North West Mounted Police working with the ship's captains, who welcomed their assistance in keeping disorderly crewmen in line: *supra* note 21 at 134-35. See also W.R. Morrison, *Showing the Flag* (Vancouver: University of British Columbia Press, 1985) at 84, 103.

<sup>26</sup> R.N.W.M.P Report, Canada, Sessional Papers, 1907, No. 28 at 131. A better example is perhaps that of Charlie Klengenber. He absconded in 1905 from Herschel Island on the *Olga* with its nine man crew. The next summer he returned with only five men. Klengenber claimed that two had fallen through the ice and drowned, one had died of natural causes and the fourth he had been forced to shoot and kill to defend himself from murder. Scepticism prevailed. Klengenber then surreptitiously left the island. The truth emerged: Klengenber had arbitrarily killed the engineer, one man had starved and frozen to death in chains in the forehold, and the two who had "fallen through the ice" had witnessed the engineer's murder: Bockstoce, *supra* note 22, and Morrison, *supra* note 25 at 110-111. Klengenber voluntarily returned to Herschel Island in late 1907. For lack of convincing testimony a hearing against him was dropped. The Americans persisted. The *Olga* was an American ship, its crew were American citizens. Eventually Klengenber was arrested at Barrow, taken to San Francisco, indicted and tried for murder. Klengenber was evidently an accomplished liar and because jurors were not sure that the "revised stories of the crewmen ... were true," Klengenber was acquitted: William R. Hunt, *Distant Justice: Policing the Alaskan Frontier* (Norman: University of Oklahoma Press, 1987) at 179.

<sup>27</sup> Coates and Morrison, *supra* note 21 at 125.

<sup>28</sup> G. Price, "Remote Justice: The Stipendiary Magistrate's Court of the Northwest Territories (LL.M. thesis, University of Manitoba, 1986) Appendix A.

<sup>29</sup> Morrison, *supra* note 25 at 83.

<sup>30</sup> *Ibid.* at 86.

<sup>31</sup> In 1903-04, Major Moodie was accompanied by a staff sergeant and four constables. Low, *su-*

police detachment in Hudson Bay at Fullerton Harbour in 1903. Faced with the problematic exercise of police jurisdiction—“Moodie’s writ ran only as far as he could travel”<sup>32</sup>—a plan emerged to place a series of posts in strategic locations. From these the police could undertake extensive patrols. The varied nature of these patrols encompassed journeys of discovery, the quiet introduction to isolated groups of Inuk’s to the “whiteman’s” law,<sup>33</sup> and the solidification of Canadian sovereignty in the arctic.<sup>34</sup> All three aspects occupied the police into the early 1930s. Thereafter, with sovereignty on a firmer footing in the arctic archipelago, the police were left to concentrate on the difficult task of acculturation of the Inuit to non-Native customs.<sup>35</sup>

## II. Interaction and the Fur Trade

Prior to 1900 the North’s share of “blood and gore” crystallised in four broad categories: instances that found Native against Native,<sup>36</sup> those where Natives attacked non-Natives,<sup>37</sup> killings of Natives by non-Natives or their representatives,<sup>38</sup> and finally altercations between non-Natives.<sup>39</sup>

pra note 18 at p. xvii.

<sup>32</sup> Morrison, *supra* note 25 at 93.

<sup>33</sup> *Ibid.*, chapters 10 and 11, and Annual Police Reports published in Canada, Sessional Papers.

<sup>34</sup> Morrison, *supra* note 25 at 93.

<sup>35</sup> *Ibid.* at 171–72.

<sup>36</sup> Examples included: (1) Copper Indians clandestinely and without provocation killed one of the Martin Lake Slaves. “The song of death is again revived between the inveterate tribes and when the quarrel will end is uncertain”: letter, Smith to Factors and Traders of Northern Department, 28 November 1831, Hudson’s Bay Company Archives, Winnipeg, B/200/b/10, at 20 [hereinafter cited as HBCA]; (2) a savage massacre by Chipewyans of a group of Inuks near the mouth of the Coppermine river. This occurred at “Bloody Falls” during Samuel Hearne’s land journey from York Factory to the arctic coast and return, 1770–1772. See, for example, Coates, *supra* note 23 at 42. Other examples may be found in Price, *supra* note 28 at 79, note 30.

<sup>37</sup> Examples included: (1) Hudson Bay traders John Spence and Murdoch Morrison killed, cut to pieces and devoured by starving cannibal Natives: letter, Lewes to Chief Factor, 15 November 1842, HBCA, B/200/b/15 folio 3. When the facts are clearly ascertained an exemplary punishment ought to be inflicted: letter, Bell to Lewes, 11 September 1842, *ibid.*, folio 33. The cannibals, La Petite Rat and Petit Vieux, were “threatened with instant death if they did not reveal the whole [truth]”: letter, Christie to Lewes, 19 January 1843, *infra* folio 47. The women thought to have done this deed cannot be punished “as beyond all manner of doubt they were impelled to the dreadful alternative by the most pressing demands of hunger”: letter, Sir George Simpson to Lewes, 5 June 1843, HBCA, B/200/b/17 folio 4; (2) The murder of North West Company clerk Duncan Livingston’s party by a group of Inuit. The incident occurred in 1797 near the mouth of the Mackenzie River. After an altercation, the lone non-Native survivor, James Sutherland, was taken to the river, weighted down with a large stone, and thrown into the water where he drowned: Theodore J. Karaminski, *Fur Trade and Exploration* (Vancouver: University of British Columbia Press, 1983) at 15. (3) Hood’s murder by an Iroquois member of Lieutenant John Franklin’s British Arctic land expedition (1819–22). John Richardson, a non-Native member of the expedition avenged the murder. He executed the Iroquois: Cooke and Holland, *supra* note 15 at 143–4. Further examples may be found in Price, *supra* note 28 at 79, note 31.

<sup>38</sup> An example was the 1759 “massacre” at Little Whale. HBC employees left two Inuit alone with an apprentice boy. The two Inuk ransacked the post and abducted and later killed the boy. Two Inuk hostages taken for the safe return of the apprentice boy were shot when the hostages began a fight for their freedom: E.E Rich, *The Fur Trade and the Northwest to 1857* (Toronto: McClelland & Stewart, 1967) at 121.

<sup>39</sup> Four poignant examples included: (1) In early 1781 at Lac La Ronge, Peter Pond and a clerk

From the first two categories, until 1899,<sup>40</sup> no judicial proceedings arose. A partial explanation was the attitude of the Hudson's Bay Company. Only in incidents where non-Natives were the perpetrators might the company's commercial activities be endangered. Otherwise incidents were to be downplayed or ignored.<sup>41</sup> The nature of the fur trade also limited and formalised Native contact with non-Natives, hence fewer opportunities for conflicts. Natives only came to the trading posts in the Yukon and Mackenzie River basins once or twice a year. Finally the HBC looked with a jaundiced eye on the "civilising" efforts of the Anglican and Roman Catholic clergy: the Oblates in the upper and central Mackenzie River valley, the Anglicans in the Yukon and the Mackenzie River delta.

In the third category, resort to the concurrent original criminal jurisdictions provisions in a variety of statutes produced several trials. Those of de Reinhard<sup>42</sup> in 1818 at Montreal, and Cadien<sup>43</sup> in 1838 at Trois Rivières were examples. In the latter, no judicial apparatus existed in the Mackenzie River basin to try Cadien, convicted of multiple murders that occurred at a Hare Indian encampment near Great Bear Lake.

For the fourth category, strong rivalries among non-Native fur traders led to partisan conflicts and the spilling of blood. In the Mackenzie River basin the HBC and its rival North West Company came to use the law "primarily as an instrument of trade war."<sup>44</sup>

were invited to dinner by Mr. Wadin. Ill-will came to the fore, Wadin was shot. Pond and the clerk, tried for the murder at Montreal the next year, were acquitted: W. K. Lamb, ed., *The Journals & Letters of Alexander Mackenzie* (London: Cambridge University Press, 1970) at 76. (2) In the spring of 1787, John Ross, a competitor of Peter Pond in the Athabasca trade, was shot in a scuffle with Pond's North West Company men: *ibid.* at 78. (3) In 1816–17 the HBC and NWC clashed at Fort Wedderburn on Lake Athabasca. A.N. McLeod of the NWC, operating as a magistrate under an appointment under the *Quebec Act* (1774) and 1803 legislation (Sec. 2), used his position to intimidate and imprison various HBC officers. Release occurred only after confiscation of HBC's trade goods and on condition that HBC men took no further part in trading: Rich, *supra* note 38 at 222, 229, and 233–4; Cooke and Holland, *supra* note 15 at 137, 140, and 146; Campbell, *The Northwest Company* (Vancouver: Douglas & McIntyre, 1957) at 241–46; A. S. Morton, *A History of the Canadian West*, 2d ed. (Toronto: University of Toronto Press 1973) at 605–09. In the next four years until merger in 1821 of the HBC and NWC, representatives of each company obtained warrants in Montreal to arrest their counterparts in the fur country. (4) In 1833 Russian fur traders refused to permit Peter Skene Ogden to sail up the Stikine River through Russian territory. The panhandle remained after the 1825 Russian-British treaty within the Russian sphere. Under that treaty British subjects could travel on rivers originating on British soil which passed through Russian territory to the Pacific. When the Russians ignored the terms of the treaty, this "touched off a diplomatic furore that soured British-Russian relations for most of the decade": Coates and Morrison, *supra* note 21 at 19.

<sup>40</sup> The *Sabourin* was a case heard in Edmonton before Justice Rouleau in 1899.

<sup>41</sup> One example: those who killed John McLoughlin, an HBC officer at Fort Stikine in 1842, were not brought to trial. Embarrassment played its part. "The Company, traditionally rather obsessed with privacy received too much of just the sort of attention it did not want [when Cadien was tried at Trois Rivières in 1838]": Hamar Foster, "Killing Mr. John: Law and Jurisdiction at Fort Stikine 1842–1846" in John McLaren, Hamar Foster and Chester Orloff, eds., *Law for the Elephant, Law for the Beaver* (Regina: Canadian Plains Research Centre, 1992) 147 at 177.

<sup>42</sup> Price, *supra* note 28 at Appendix C.

<sup>43</sup> Hamar Foster, "Sins Against the Great Spirit: The Law, the Hudson's Bay Company, and the Mackenzie River Murders, 1835–1839" (1989) 10 *Criminal Justice History* 23.

<sup>44</sup> Hamar Foster, "Long Distance Justice: the Criminal Jurisdiction of Canadian Courts West of

For example, Oiseaux du Plan of the North West Company was charged in 1804 with robbery of beaver furs belonging to William Clark of the HBC. Brought to London for trial, the HBC-instigated prosecution foundered on jurisdictional grounds and du Plan was discharged. Such intense competition inspired merger in 1821.<sup>45</sup> Thereafter the HBC got on with the business of commercial expansion northward.

In the Yukon River basin, fur trade rivalries led to less serious clashes. Despite the 1825 treaty establishing the boundary separating Russian and British interests, the Russian American Fur Company continued to penetrate eastward into the British trading zone. Governor George Simpson of the HBC pushed to open an inland access to the Yukon River basin and thereby “strike back over land at the Russian traders.”<sup>46</sup> During the 1830s, HBC sponsored expeditions explored what is now northern British Columbia. By 1839, negotiation permitted the HBC to lease the Alaskan panhandle. No longer challenged, the HBC during the 1840s and early 1850s exploited marginal trade possibilities in the Southern Yukon. Occasional clashes with the T’lingit occurred: in 1852 the Natives ransacked and destroyed Fort Selkirk. Abandoning the Southern Yukon, the HBC came to concentrate its activities lower down the Yukon River, at Fort Youcon. Established in 1847, that fort encroached into the Russian trade zone but they reacted passively. Similarly, local Natives occasionally “hinted that they might attack the post unless conditions of trade improved... The best [the traders] could do was to point out ... that to destroy Fort Youcon would hurt them economically.”<sup>47</sup>

Mechanisms to regulate activities of the few non-Natives there and to minimise conflict between them and Natives were rudimentary. The HBC relied on its legal right granted under royal letters patent<sup>48</sup> issued 2 May 1670 by Charles II. Owing to commercial expediency this translated into a monolithic thrust to stimulate trade. The HBC, as an English crown prerogative delegate, modestly exercised provisions for legislative and judicial powers.<sup>49</sup> The company made its rules serve as guidelines, and then only for its officers and employees. Outside HBC forts the “aboriginal law continued in force.”<sup>50</sup> Governor Simpson reinforced this position when testifying

the Canadas 1763–1859” (1990) 34 *American Journal of Legal History* at 17: “The law became a discredited weapon of choice.”

<sup>45</sup> For a history of the trade rivalry and eventual merger, see R. Cole Harris, ed., *Historical Atlas of Canada, I: From the Beginning to 1800* (Toronto: University of Toronto Press, 1987) Plate 61. See also Lamb, *supra* note 39.

<sup>46</sup> Coates and Morrison, *supra* note 21 at 19.

<sup>47</sup> *Ibid.* at 29.

<sup>48</sup> Commonly called the Hudson’s Bay Company Charter, this crown directive incorporated a company named “The Governor and Company of Adventurers of England Trading into Hudson’s Bay.” The articles of incorporation included the power “to make ordeyne and constitute such and soe many reasonable Laws Constitutions Orders and Ordinances as... shall seeme necessary and convenient for the good Government of the said company” in Rupert’s Land. *Charters, Statutes and Orders in Council Relating to the Hudson’s Bay Company* (London: Hudson’s Bay Company, 1963) at 13–14.

<sup>49</sup> Foster, *supra* note 44 at 3, 5.

<sup>50</sup> M. Walters, “British Imperial Constitutional Law and Aboriginal Rights” (1992) 17 *Queen’s Law Journal* 350 at 383. “The Queen’s law ... was not the law of the Indian country.” Foster, *supra* note 6 at 51.



before a British Parliamentary Committee in 1857: “aboriginal peoples in the Company’s territory had always been considered to be self governing.”<sup>51</sup>

The HBC position was one of economic self-interest. To ignore and therefore leave murder in what they called the “Indian Territories” to go “generally ... unpunished by English law”<sup>52</sup> was to avoid the expense of law enforcement. The Cadien murder case, sent to Lower Canada for trial, had proven financially draining for the Company.

The HBC evinced little concern for polygamy, infanticide or the “maltreatment” of the aged among Natives, as by contrast did missionaries charged with the Christian salvation of “pagan souls.” Of greater concern to the HBC was American vigorous enforcement of the 141st longitude boundary after their Alaskan purchase in 1867. Reluctantly the HBC by 1869 withdrew from Fort Youcon (on the American side), without open confrontation. With its monopoly formally broken when it surrendered Rupert’s Land, and with “Rupert’s Land and the North Western Territory” being transferred to Canada in 1869–70,<sup>53</sup> company trading interests in the Yukon occupied second position behind emerging mining interests. In the Mackenzie District, the trade monopoly continued into the 1920s and in the eastern arctic even later.<sup>54</sup>

### III. The Yukon Territory

#### A. Law and Order in the Klondike Boom

The orgy of gold lust at Dawson, Yukon, lasted only a few short years. Preceded by a twenty-five year build-up of somnolent dimensions, the mining frontier began with small prospector forays into the Yukon River valley in the early 1870s. By 1882, about “50 white men were wintering in the region .... They [drafted] a set of mining laws ... and selected the first mining recorder.”<sup>55</sup> Later came tiny establishments at Fortymile and Glacier Creeks.<sup>56</sup> Social activity revolved around a “community of miners.” Several have written about the characteristics of the miners’ camps and their meetings to resolve contentious issues.<sup>57</sup> Drinking and gambling were kept

<sup>51</sup> *Ibid.* at note 97; Imperial House of Commons, 1857, Select Committee Report, para. 1747 to 1757. See also Foster, *supra* note 44 at 43: “... no attempt was made to apply the statutes to Indians ...”

<sup>52</sup> Foster, *ibid.* at 47.

<sup>53</sup> Text in *supra* note 48.

<sup>54</sup> The HBC used its virtual “monopoly of the transportation system and southern markets to defeat competition and dictate the nature of the regional economy ...”: K. Coates and W. Morrison, *The Alaska Highway in World War II: the U.S. Army of Occupation in Canada's Northwest* (Toronto: University of Toronto Press, 1992) at 16.

<sup>55</sup> Coates and Morrison, *supra* note 21 at 50.

<sup>56</sup> M. Gates, *Gold at Fortymile Creek, Early Days in the Yukon* (Vancouver: University of British Columbia Press, 1994).

<sup>57</sup> Coates, *supra* note 23 at 75; O. Stone, “The Mounties as Vigilantes” (1979) 14 *Law and Society Review* 83 at 84ff.; Coates and Morrison, *supra* note 21 at 58–63; David R. Williams, “Mining Camps and Frontier Communities of British Columbia” in Louis Knafla, ed., *Law and Justice in a New Land* (Calgary: Carswell, 1986) at 215; Gates, *supra* note 56 at 29; John Philip Reid, “The Layers of Western Legal History” in John McLaren, et al., *supra* note 41 at 31–8. A parallel can be found in the use by courts of Aboriginal sentencing circles, especially in small communities: Ross Green, “Aboriginal Sentencing and Mediation Initiatives: the Sentencing Circle and Other Community Par-

under group control, debts and claim disputes settled by a simple majority vote. Natives rarely were involved.

The miners' meeting had roots in "the early system of camp government in California and the American west."<sup>58</sup> It flourished after 1885 in the Yukon where the scattered small-scale societies that comprised the camps lacked designated agents of government or law enforcement. It served not only as a "community court" but as the "basic regulator of mining society."<sup>59</sup> Needs of the whole community were made paramount and members in the meeting judged the offender not only on "his past deeds but on what he was likely to do in the future."<sup>60</sup> Some, termed this "forward-looking" justice; others, "preventive" justice!

To the Canadian government the heavy number of American prospectors raised at least two worries. It saw them as schooled in *laissez-faire* individualism, thought to bring a certain "boisterousness" to the camps.<sup>61</sup> This proved a specious concern. There was "very little evidence of homicide [or violence or drunkenness] on the early mining frontier in the Yukon valley."<sup>62</sup> Of greater concern were American threats to Canadian sovereignty. To combat the latter, and to begin to collect until now unpaid taxes on gold and furs, the federal government sent two NWMP to Fortymile Creek. A twenty-man contingent headed by Inspector Constantine arrived the year following, in 1895. Even before the gold rush, the "authoritarian paternalism of the police"<sup>63</sup> had replaced American frontier democracy.<sup>64</sup> And even when this was appreciated, "it was not generally resented" by prospectors.<sup>65</sup>

The gold rush began on Bonanza Creek in the summer of 1896. This brought more NWMP who, by the spring of 1898, numbered almost 200 men along the gold rush route. That same year saw the formal severing of the Yukon Territory. Its

ticipation Models in Six Aboriginal Communities" (LL.M. thesis, University of Manitoba, 1995).

<sup>58</sup> In California mining communities, a group of citizens typically styled "vigilance committees" or "vigilantes" singled out the criminal element for censure. Stone, *supra* note 57 at 86, 109. In this sense, the police were "legal vigilantes."

<sup>59</sup> Coates and Morrison, *supra* note 21 at 60.

<sup>60</sup> *Ibid.* at 61.

<sup>61</sup> Roger D. McGrath, *Gunfighters, Highwaymen & Vigilantes* (Berkeley: University of California Press, 1984).

<sup>62</sup> Coates and Morrison, *supra* note 21 at 62, 73; Morrison, *supra* note 25 at 21, 25, 43, and 47. Morrison at page 47 remarks: "of serious crime there was never very much in the Yukon."

<sup>63</sup> Morris Zaslow, *The Opening of the Canadian North* (Toronto: McClelland & Stewart, 1971) at 96–100. Constantine had a wide range of powers, including those of police magistrate of the Yukon Judicial District of the NWT, land agent, and gold commissioner. In describing the Yukon as a "police state where the police wielded the widest discretionary powers," Zaslow notes that there were 300 police backed by a 200-man army contingent styled "The Yukon Field Force": *ibid.* at 138.

<sup>64</sup> Coates, *supra* note 23 at 76; Morrison, *supra* note 25 at 24.

<sup>65</sup> Stone, *supra* note 57 at 100. Stone's thesis is that the camps were generally law abiding. The majority usually acted in a fair way. Zaslow asserts that Ogilvie claimed in May 1897 that "the miners were glad to give up their meetings as a way of adjudicating disputes and that they welcomed the arrival of the rule of law—even Canadian law": Zaslow, *supra* note 63 at 135. The police, by and large, did just what the miners' meeting would have done, hence there was no resentment. The only "perversion" occurred when the miners' meeting was dominated by undesirables: that class of non-producing adventurers attracted by the hope of making money at the expense of others.

creation marked the culmination of a move toward more local control that had begun when the Yukon district of the Northwest Territories was set up in 1895. This had the advantage, for Yukoners, of undercutting the territorial government's initiative to tax the locals by selling liquor licences in Dawson. Ironically, a separate territory now ensured federal government dominance.

Along the Chilcot-White Pass route and in the goldfields gambling, drinking and prostitution came under the "flexible-tolerant" hand of the police.<sup>66</sup> By contrast, no calming influence resided at Skagway, Alaska. There, Jefferson "Soapy" Smith, a small-time crook, ruled in the "classic american cowtown" way.<sup>67</sup> Despite the presence of a sheriff and a U.S. marshal, robbery and murder were daily occurrences. The NWMP were determined that such frontier vigilante justice not be imported by the thousands of American stampeders coming into the Yukon. Physical geography aided this: few practical ways to leave the Yukon existed, all of them were "closely guarded" by the police.<sup>68</sup> Nonetheless, theft, fraud and assault crimes were high. Constantine expressed a viewpoint of the time, explaining why: "the majority of the newcomers are from the [U.S.A.], many ... could well be spared in any community. The rush has brought in toughs, gamblers, fast women, and criminals of almost every type .... A number of the people ... appear to be the sweepings of the slums."<sup>69</sup> Two trends emerged. First, serious crimes of violence were few. In a thirteen year period, only twelve murders occurred; all resulted in convictions, and all but one of the offenders were executed.<sup>70</sup> "Guns and gun play were almost unheard of."<sup>71</sup> Secondly, though crimes of theft, fraud and assault were prevalent, the conviction rate was low. In part this arose from the police practice of "blue ticketing"<sup>72</sup>—an illegal practice amounting to a form of deportation. Choosing the option of leaving and having the charges dropped, "bad characters" avoided a conviction and many weeks on the wood pile.

A skeletal civil service composed of a small coterie of officials, headed by the federally appointed Commissioner, performed tasks imposed by new federal legislation.<sup>73</sup> The first Territorial Council, all appointed, consisted of the registrar of lands, the gold commissioner, the territorial court judge, the legal advisor and the com-

<sup>66</sup> Coates and Morrison, *supra* note 21 at 106; Zaslow, *supra* note 63 at 136. Gambling and prostitution were tolerated since they were too pervasive, until both were outlawed in 1901. More mundane and diverse duties occupied police time: delivering the mail, registering claims, collecting customs duties, and acting as coroners, health officers, Indian agents, tax collectors, and even returning officers at elections.

<sup>67</sup> Coates and Morrison, *supra* note 21 at 88. Frontier violence has been examined in a scholarly fashion; see McGrath, *supra* note 61, especially the Appendix. The popular view that Canada was spared this violence has been challenged: R. C. Macleod expressed a partial rethinking of his ideas in "Law and Order on the Western-Canadian Frontier" in McLaren, *et al.*, *supra* note 41 at 90–95.

<sup>68</sup> Coates and Morrison, *supra* note 21 at 103.

<sup>69</sup> Zaslow, *supra* note 63 at 135.

<sup>70</sup> Coates and Morrison, *supra* note 21 at 108.

<sup>71</sup> Zaslow, *supra* note 63 at 135.

<sup>72</sup> Coates and Morrison, *supra* note 21 at 108.

<sup>73</sup> *The Yukon Territory Act, S.C., 1898, c. 6.*

manding officer of the NWMP. Some elected representatives to Council soon followed. By 1908 all were elected.

The court structure quickly evolved. Conceived as a one-man operation in 1897,<sup>74</sup> by 1902 it consisted of three territorial court judges supplemented by police magistrates. Of the former, C.A. Dugas was appointed in 1898,<sup>75</sup> J.A. Craig two years later, followed by C.A. Macaulay in 1902 who had been appointed a police magistrate in 1901.<sup>76</sup> Appeals were taken to the three territorial court judges sitting *en banc*. Final appeal went directly to the Supreme Court of Canada in Ottawa. Within a decade "it was obvious that the three judges did not have enough work to do."<sup>77</sup> Craig and Dugas were pensioned off; Macaulay remained as the only territorial court judge. This development mirrored the rapid decline in Yukon judicial expenditures and population after 1902.<sup>78</sup>

Legal activity, while the boom lasted, was heavily influenced by the presence of U.S.-trained lawyers. Since they could not practice officially in the Territory, Dawson law offices sometimes recruited them to provide "back-room" service to American clients. Another device proved more widespread: financial brokerage firms run by Americans offered legal advice. This lasted until the Alaska gold strikes in 1903 drew away substantial numbers.<sup>79</sup>

Among Canadian lawyers two discernible groups were noted. Of 82 lawyers admitted between 1898 and 1912, almost 50 came to the Territory before 1901.<sup>80</sup> This Klondike group had many experienced lawyers<sup>81</sup> attracted to the frontier from established practices elsewhere in Canada, tempted to participate as prospectors and investors. The post-Klondike arrivals showed far less experience.<sup>82</sup>

<sup>74</sup> T. H. McGuire, a Supreme Court Justice of the NWT assigned to the Yukon Judicial District, resided in Dawson over the winter of 1897-98.

<sup>75</sup> See Dugas, "Sittings of Court at Whitehorse 1901-1921" Yukon Territorial Archives (YTA), Whitehorse, Y.R.G. 1, Series 7, vol. 8, file 2745(5).

<sup>76</sup> See Macaulay, YTA, Y.R.G. 1, Series 2, vol. 13, file 12333.

<sup>77</sup> Coates and Morrison, *supra* note 21 at 175. See also Burt Harris, "The Short Stakes of Men: The Yukon Legal Profession, 1898-1912" (M.A. thesis, University of Calgary, 1988) at 105.

<sup>78</sup> Harris, *ibid.*, Table 11 at 129. In 1902, expenditures were \$120,400.00; in 1912, \$56,385.00.

<sup>79</sup> Harris is not sure how extensive this was, *ibid.* at 13.

<sup>80</sup> *Ibid.* at 15ff.

<sup>81</sup> Nathaniel Francis Hagel was an example. After twenty-five years of practice, eight in Toronto, the latter seventeen in Winnipeg, Hagel pulled up stakes in 1898 to go to British Columbia. In 1900 he "accepted a retainer of \$12,000.00 to go to Dawson City on a wealthy mining claims [case]"; Roy St. G. Stubbs, *Lawyers and Laymen of Western Canada* (Toronto: Ryerson Press 1939) at 38. Hagel remained in Dawson City until 1905. He made enormous fees at the Yukon Bar. In the course of his career he joined the bars of Ontario, Manitoba, British Columbia, NWT and the Yukon. Interestingly his only murder defence loss occurred at Dawson City. Labelle, who murdered seven men on the gold trail, was hanged. Other lawyers included F.C. Wade, first crown prosecutor and legal advisor to the Council; W.H.P. Clement, author of the "Law of the Canadian Constitution"; J. B. Pattullo, whose firm attracted a large share of legal work at Dawson; W. L. Walsh, later a Supreme Court Justice in Alberta; and C.C. McCaul, a prominent Edmonton lawyer in the 1910s and '20s. For their careers see Harris, *supra* note 77, chapter 2.

<sup>82</sup> Harris, *supra* note 77 at 16, 27, and 30. J. A. Clarke would be an example. He referred to sitting police magistrate Macaulay as a "bull-con" judge unfit for his present position. Harris, *ibid.* at 71. Clarke was charged with misappropriation of money in 1902. Harris, *ibid.* at 84, note 134.

During the boom, court docket delays rapidly escalated because of a lack of judges and a court vacation inappropriately scheduled from 1 July to 15 September. Failure to anticipate the absence of witnesses and litigants from the Yukon during the winter months added to delays. The case backlog was only partially relieved by appointments of Craig and Macaulay. More helpful was the decision taken in May 1901, at the urging of the Yukon Bar Association,<sup>83</sup> to rearrange the court vacation from 1 October to 31 January, to accommodate those who went to southern Canada for part of the winter.

Legal disputes could be resolved in several forums. Wage disputes occupied the police magistrate.<sup>84</sup> Miner's lien issues, intricate shareholder and investor issues and appeals from the gold commissioner challenged the three territorial judges. Mine claim disputes came before the gold commissioner.<sup>85</sup>

Of the last, a heavy caseload focused initially on claim boundaries and later on water rights, royalty tax, crown reserves and hydraulic leases. Many disputants were lawyers and, if not, lawyers sought appearances before the gold commissioner's Court because of large fees to be earned. By 1906, with legislative changes, this lucrative source of legal business ended.<sup>86</sup> Even earlier, sometimes lucrative dabblings in mining claims were permitted by territorial officials and even the territorial judge, until eliminated in March 1899. Exceptionally, Justice Dugas, "perhaps as a [misguided] assertion of judicial independence, did not give up his claims."<sup>87</sup>

## B. The Klondike Bust, to World War II

Collapse in the Yukon was swift. By 1911 the population had dropped to 8512 people, down from 27,219 in 1901. The biggest loss was in Dawson. At the height of the gold rush it had 20,000 people; in 1921, only 800 residents. Post gold rush society "represented a return to the scale and pace of development of ... the pre-Klondike period."<sup>88</sup> The region was again dominated by a single industry and a single town,<sup>89</sup> the population highly transient, and federal interest marginal. This

<sup>83</sup> No Law Society of the Yukon existed. One was proposed in 1901. The Bill never passed. Harris, *supra* note 77 at 34.

<sup>84</sup> Disputes arose in several contexts. In July 1898, at the height of the boom, Dawson comprised 33 saloons, 42 restaurants, 33 brokerage, mining and law offices, 16 doctors and 2 hospitals (NAC, RG 85, vol. 665, file 3008, NWMP to Commissioner, 20 July 1898).

<sup>85</sup> Harris, *supra* note 77 at 93. Also see Table 9, at 127. Appeals went to the Minister of the Interior until 1901. Thomas Fawcett, first gold commissioner, ran an incompetent and corrupt operation. He was probably honest but, because of understaffing and overwork, records were lost and officials bribed. Fawcett enjoyed little respect. An appeal to him was as likely as not to be met with dismissal in an arbitrary, unjust or illegal manner. O. Stone, "Urbanism, Law and Public Order: A View from the Klondike" in K. Coates and W.R. Morrison, eds., *For Purposes of Dominion: Essays in Honour of M. Zaslav* (North York: Captus Press Inc., 1989) at 98.

<sup>86</sup> Harris, *supra* note 77 at 96. A Board of Arbitrators now heard disputes. With an informal process, lawyers were shelved; *Yukon Placer Mining Act*, SC, 1906: Harris, *ibid.* at 99. With minimal work the gold commissioner's caseload "dropped into unreported obscurity."

<sup>87</sup> D. R. Morrison, *The Politics of the Yukon Territory, 1898-1909* (Toronto: University of Toronto Press, 1968) at 23, note 50.

<sup>88</sup> Coates, *supra* note 23 at 86; and Morrison, *supra* note 87, Appendix A.

<sup>89</sup> White Horse Rapids', later Whitehorse, did not emerge as the dominant centre until the Sec-

fate applied, with some licence, to the NWT after 1905 and especially so after the Manitoba, Quebec, Ontario boundary extensions in 1912. In place of gold and Dawson came furs and Ottawa.

In the "bust" phase, miners continued to come north. Gold and other metal extraction continued to be the mainstay of the eroding economy. The minimal legal business that occupied civil courts in the 1920s and 1930s emanated from this mining activity. In the criminal sphere, crime of a serious nature occurred rarely.<sup>90</sup> Commissioned police officers doubled as police magistrates to deal with routine cases: game regulation infringements and liquor law infractions. This accorded with Police Commissioner O'Brien's view that in the "isolated parts of the country all except capital cases should be heard by police officers."<sup>91</sup> Otherwise the police made frequent patrols to outlying points, the only way to exercise a lawful presence in an "immense territory with a scanty population."<sup>92</sup> Many of these long and arduous patrols were less about law, more about sickness and distress.

Despite government expectations to the contrary Natives did not provide much work for the police. In the 1920s the Old Crow Indians repeatedly ignored<sup>93</sup> prohibitions against gambling and drinking. The nearest court was at Dawson, hundreds of miles away. To preserve some measure of authority, police patrolled to Old Crow in October 1927. With the Chief present, the RCMP officer offered a caution: even for less serious offences, perpetrators "could be brought to Rampart House and kept there until it was time for them to go to Dawson for trial."<sup>94</sup>

Simplicity in economic activity minimised the need for law, and its administration was minimal in the extreme during these "always afternoon years."<sup>95</sup> After the First World War, the Yukon's constitutional development "went into reverse."<sup>96</sup> The federal government slashed the civil service, reduced the territorial council to three elected officials and combined the office of commissioner with that of the gold commissioner.<sup>97</sup> That office in turn was abolished in 1932 and its responsibilities

and World War. It served as the link between the railhead of the Whitepass & Yukon Railway and the Yukon River system.

<sup>90</sup> *RCMP Annual Report*, Canada, Sessional Papers, 1924, No. 28, at 34 and 1928, No. 28 at 52. Exceptions include: (1) the Smith murder where the defendant was convicted and sentenced to life in prison: *RCMP Annual Report*, 1926, at 41; (2) murder of Pelly Jim by Jackie MacIntosh, trial 8 January, 1927, leading to a conviction for manslaughter and three years imprisonment: *RCMP Annual Report*, 1927, at 45; (3) four accused charged with rape were all acquitted by a jury at Keno. "We could not send those boys to prison": *RCMP Annual Report*, 1929, at 54.

<sup>91</sup> Letter to secretary of the NWT Council, 7 September 1934, NAC, RG 85, vol. 1870, 540-1-1.

<sup>92</sup> *RCMP Annual Report*, Canada, Sessional Papers, 1925, No. 28, at 38.

<sup>93</sup> Coates and Morrison, *supra* note 21.

<sup>94</sup> *RCMP Annual Report*, Canada, Sessional Papers, 1928, No. 28, at 54.

<sup>95</sup> Coates and Morrison, *supra* note 21 at 217. "The 1920s and 1930s were perhaps the Yukon's winter years." Coates and Morrison, *supra* note 54 at 18. "The Yukon was static or declining in this period; it was a land where the future seemed already to have happened."

<sup>96</sup> R. Stuart, "The Impact of the Alaska Highway on Dawson City" in K. Coates, ed., *The Alaska Highway* (Vancouver: University of British Columbia Press, 1985) at 190. Zaslow characterises this as institutional regression or disintegration: *supra* note 63 at 124.

<sup>97</sup> *Yukon Act Amendment*, S.C., 1918, c. 50, s. 1. The Governor-in-Council could even abolish the territorial council. That had been proposed (*Dawson Daily News*, 8 April 1918) but in the end the lim-

passed to a lower level official, the territorial Comptroller George Jeckell. The "narrow range of territorial government" can be seen in Jeckell's consolidated functions: comptroller (1913 onwards), agent for public wards, income tax inspector, chief registrar of land titles, and senior territorial executive upon abolition of the office of gold commissioner.<sup>98</sup> Until his retirement in 1947, Jeckell was a "virtual dictator, ruling the Territory on behalf of the federal Government."<sup>99</sup> His administration found a parallel in Commissioner Fred White's administration.

Coincident with this administrative rationalisation came a proposal in 1918 to abolish the Territorial Court. After intense lobbying Ottawa retained it, but in a reduced form. Its fulltime justice would hold court sessions only during the summer.<sup>100</sup> This was a pyrrhic victory. Since the 1912 *Yukon Act* amendments,<sup>101</sup> when the only justice of the court was absent from the Territory, the federal cabinet could appoint a temporary judge. As early as 1915, Justice Macaulay established the pattern of going "outside" to Vancouver during the winter, returning the following summer to dispose of accumulated court business. In Macaulay's absence, others such as John Black, legal advisor to the Council and Clerk of the Territorial Court, residing at Dawson, filled in as needed.<sup>102</sup>

During these years of part-time judicial services, three lawyers resided in the Territory, one at Whitehorse, two at Dawson. Of these two, one was the territorial government legal advisor. The two in private practice, George Black and Willard Phelps, had come to the Territory during the gold rush period. Both were heavily involved in politics.

#### IV. The Northwest Territories, to 1920.

In 1905 major parliamentary initiatives created Alberta and Saskatchewan out of the Northwest Territories. With the southern portion gone the federal government could retrench and rationalise its commitments to the "rump" NWT. Its constitutional structure became highly susceptible to Ottawa's centralising control. The first commissioner of the restructured Territories, Frederick White, resided in Ottawa, an

ited representative council was retained. *Dawson Daily News*, 23 and 31 January 1919. *Yukon Act Amendments*, s. 2: "The Governor-in-Council may abolish any position created under the Act, and transfer to any officer the functions of the position abolished."

<sup>98</sup> Stuart, *supra* note 95 at 190.

<sup>99</sup> Coates, *supra* note 23 at 131. In 1936 the name changed from comptroller to controller. Jeckell's support group was not numerous. In 1932 the administrative staff complement in Dawson were two federal and two territorial employees, with a territorial agent at Mayo and Whitehorse. *Dawson Daily News*, June 14 and 26 1932.

<sup>100</sup> *Dawson Daily News*, 8 April 1918, and 23 and 31 January 1919.

<sup>101</sup> *Yukon Amendment Act*, S.C., 1912, c. 56, ss. 6-7.

<sup>102</sup> *Dawson Daily News*, 15 October 1915. "Even the Territory's two judges were not permanent residents; they took turns spending the months from September to March outside the Yukon": K. Coates and W.R. Morrison, *The Sinking of the Princess Sophia* (Toronto: Oxford University Press, 1990) at 16. The source for this quote comes from correspondence dated 3 June 1909. After 1912 there was only one territorial court justice and Macaulay went out every winter; Black was appointed when Macaulay was absent. In March 1916 in a criminal libel prosecution against G. Fowlie, Black ordered production of documents. Macaulay disposed of the case on his return to the Territory in July 1916: *Dawson Daily News*, 27 March and 3 July 1916.

absentee ruler from 1905 to 1918. No Legislative Council was ever appointed during his time in office. Only the Commissioner-in-Council could enact ordinances.<sup>103</sup> So White was free of the burden of any new legislation. He carried on under the general appointment provision in the *Northwest Territories Act*, appointing officers as required: a few justices of the peace, a coroner, a marriage licence issuer, commissioners of oath, a registrar of vital statistics, and a sheriff.<sup>104</sup> When necessary he resorted to the increasingly outmoded ordinances passed before 1905. Once the "uncertainty about the physical integrity of the Territories" had been resolved in 1912,<sup>105</sup> the relatively "civilised" southern portion of the NWT was severed from White's administrative control.

If the NWT did not require the "full panoply of judicial institutions," a simple, economical yet effective court structure would do.<sup>106</sup> Stipendiary magistrates, supplemented by local justices of the peace, had successfully fulfilled this requirement prior to 1886 in what became Alberta, Saskatchewan and Manitoba. They were now called upon to do so again. These stipendiaries possessed the jurisdiction and powers of a provincial superior court judge. Early in his tenure as Commissioner, White expressed views on the NWT court structure:

The appointment of several Stipendiary Magistrates would involve large expense and in some places, it would be difficult to find residents having the qualifications. Police patrols extend from Keewatin to the Mackenzie river. All reports respecting crime pass through the hands of the Commissioner [of Police] and with his facilities of travel, and police lines of communication, he is in a position to proceed from Regina to any point in Keewatin, or in the far North, more expeditiously than a Judge of one of the regular courts.<sup>107</sup>

The first appointee was in 1907, but Bowen Perry took only a few trials.<sup>108</sup> The second appointee in 1910, E.C. Senkler, was until 1907 a gold commissioner in the Yukon.<sup>109</sup> The federal government anticipated judicial activity surrounding construction of the Hudson Bay railway from The Pas to Churchill. This called for "the prompt and effective administration of justice,"<sup>110</sup> but Senkler's appointment lasted

<sup>103</sup> *Northwest Territories Act*, R.S.C., 1906, c. 62, s. 7. The ordinances passed prior to 1905 by the Northwest Territories Legislative Assembly continued in force.

<sup>104</sup> *Ibid.*, s. 16.

<sup>105</sup> John Bovey, *The Attitudes and Policies of the Federal Government Towards Canada's Northern Territories, 1870-1930* (M.A. thesis, University of British Columbia, 1967) at 147; *Manitoba Boundaries Extension Act 1912*, S.C. 1912, c. 32; *Quebec Boundaries Extension Act, 1912*, S.C., 1912, c. 45; and *Ontario Boundaries Extension Act, 1912*, S.C. 1912, c. 40.

<sup>106</sup> The phrase is W.L. Morton's, made in the context of the court structure of the Northwest Territories in 1885. The comment, though, is apt: Morton, *The Queen v. Louis Riel* (Toronto: University of Toronto Press, 1979) at xiii-xix.

<sup>107</sup> White to Deputy Minister of Justice, 25 May 1906, NAC, RG 85, vol. 177, 542-3-1; see also Department of Justice, file #1519/06.

<sup>108</sup> One was the Joseph Fiddler murder case heard in 1907 at Norway House, NWT: Fiddler and J.R. Stevens, *Killing the Shaman* (Moonbeam: Penumbra Press, 1985) is an account of the trial.

<sup>109</sup> Senkler was gold commissioner from 1899 to 1907. He also served at various times as public administrator, legal advisor to the Yukon Council, and for a brief time as judge of the mining court. Memorandum, 29 June 1938, of Alberta Legislature: Cumming, NAC, RG 85, vol. 600, 2395.

<sup>110</sup> Department of Justice file #752/1910.



only two years. After the boundary extension in 1912 there was no place in the NWT "as at present constituted where the services of Mr. Senkler, as Stipendiary Magistrate, could be utilized to advantage."<sup>111</sup>

This left commissioned police officers to fill in as justices of the peace, to administer justice in "outlying districts" of the Northwest Territories.<sup>112</sup> A wide latitude was accorded them. This followed the precedent set by Superintendent Moodie who, in 1904 when establishing the Cape Fullerton post on the west side of Hudson Bay, took his instructions broadly, interpreting the law as he saw fit.<sup>113</sup>

The police could only partially administer summary criminal justice. They needed some higher court to sanction and punish perpetrators of serious crime. Without one, the police were stymied.<sup>114</sup> But at no time did Commissioner White perceive a need for resident courts. In this he espoused Sir John A. Macdonald's view from 1879:

It is not wise at this time to impose upon a new country all the complex systems of common law and equity which [exist] in the other Provinces. At present the law ... both civil and criminal [is], perhaps, cheaply and roughly administered, but [is] quite sufficient for all present needs.<sup>115</sup>

The governments of Laurier until 1911 and Borden from 1911 to 1920 also perceived the judicial needs of the NWT to be minimal. Until 1920, the Territorial administration budgeted nothing for the administration of justice.<sup>116</sup>

Police patrols alone exerted minimal governmental and judicial control in the Mackenzie, Keewatin and Franklin Districts. The same fears and suspicions that characterised earlier localised whaler-Inuit contacts repeated when traders, missionaries and police interacted with Inuit in the central and high arctic. One commentator reminded authorities that the Copper Inuit of the Coronation Gulf region prior to 1910 "had never seen a white man [and] were living in the Stone Age."<sup>117</sup> The explosive situation inherent in the juxtaposition of a group of non-Native men, of varied backgrounds, meeting central arctic Inuit<sup>118</sup> produced several dramatic murder investigations. Between 1913 and 1923 criminal trials at Edmonton, Calgary, Pond Inlet and Herschel Island produced initial leniency, followed by imposition of the full rigours of the Canadian Criminal Code of 1892.

<sup>111</sup> White to Deputy Minister of Justice, 30 September 1912, NAC, RG 85, vol. 177, 542-3-1.

<sup>112</sup> White to Minister of Interior, 9 May 1906, NAC, *ibid*.

<sup>113</sup> W.R. Morrison, "The Mounted Police in Canada's Northern Frontier 1895-1940" (Ph.D. thesis, University of Western Ontario, 1973) at 97. "Use your own judgment ... it is not the wish of the Government that hurried or harsh measures with reference to the laws should be made": F. Goudreau to Moodie, 18 September 1904, NAC, RCMP Comptroller correspondence, vol. 293.

<sup>114</sup> For example, in 1914 at Fort McPherson an attempted murder charge against a Native woman did not proceed beyond the preliminary inquiry. The evidence had not justified sending the accused "outside" for trial. *R.N.W.M.P., Annual Report, Canada, Sessional Papers, 1915, no. 28, at 186.*

<sup>115</sup> *Debates*, House of Commons, 1879, at 680.

<sup>116</sup> The total budget for the Government of the Northwest Territories never exceeded \$9,800.00 during White's administration. The Commissioner was paid \$1,000.00 per year and Mission School Grants were approximately \$3,000.00 to \$4,000.00 per year.

<sup>117</sup> Diamond Jenness, *Eskimo Administration: II. Canada* (Montreal: Arctic Institute of North America, 1964) at 35, footnote 1.

<sup>118</sup> Zaslow, *supra* note 63 at 247-8.

## V. Territorial Administration, 1921–1939

One commentator described the Mackenzie District of the 1920s in eloquent terms:

Living among or dependent upon the native population of the Mackenzie basin ... was a fluctuating number of whites—trappers and prospectors, traders, mission workers, agents of the government, a few artisans and transportation employees. These included the inhabitants of the forty or fifty tiny settlements, many of them a century old, which hugged the waterways ... [down] to Aklavik. Despite their age they remained pioneer communities, outposts of white settlement in the midst of miles of wild, virtually empty territories and inhabited mostly by relays of transient white residents.<sup>119</sup>

The inhabitants' tranquillity was momentarily shattered in August 1920 with the discovery of oil along the Mackenzie River near Fort Norman. Fearing a "black gold rush," the administration opened offices at Fort Smith, Fort Norman and Fort Resolution. Coincidentally a treaty party spent the summer of 1921 travelling down the Mackenzie River, trying to persuade the Dene to "quit claim"<sup>120</sup> their Aboriginal rights, so that the District might be made ready for the expected commercial boom. In the end, the "Second Klondike"<sup>121</sup> did not occur. The District slipped back into its quiescent routine, and the police continued to provide the only effective administration.<sup>122</sup>

The four-man appointed Territorial Council in this decade ruled with "benign neglect." In eight years, there were only seven council sessions and in some years it did not meet at all.<sup>123</sup> Council's concerns centred on protecting the still viable fur trade and the predominantly Native population. "Its principal activity consisted in

<sup>119</sup> Morris Zaslow, *The Development of the MacKenzie Basin, 1920–1940* (Ph.D thesis, University of Toronto, 1957) [unpublished] at 608.

<sup>120</sup> Treaty 11 covered the Mackenzie District north of Great Slave Lake. The Treaty Commissioner was Henry Anthony Conroy. As background see R. Fumoleau, *As Long As This Land Shall Last* (Toronto: McClelland & Stewart, 1974), and Thomas Berger, *Northern Frontier, Northern Homeland*, 2 vols. (Ottawa: Minister of Supply and Services, 1977) vol. 1, at 166 ff.

<sup>121</sup> *RCMP Annual Report*, Canada, Sessional Papers, 1921, No. 28 at 27; Bovey, *supra* note 105 at 153: "To officials of the Department of the Interior it seemed that the Klondike stampede was almost to repeat itself, with petroleum instead of gold the quest of a legion of prospectors.... Many of the Department's officials [were Yukon veterans] and they had a lively awareness of the 'lessons of history.' They were determined that the Government of Canada would be prepared." As Finnie related, writing in 1921, "if the coming season demonstrates an undoubted deposit of oil, we can anticipate a big influx of people next year": letter, Finnie to Walter, 9 May 1921. Major McKeand, later a stipendiary magistrate, toured the Mackenzie River on an inspection trip in 1921.

<sup>122</sup> The *Annual Reports* for the police in this decade detailed many activities undertaken by them. They were game enforcers, timber agents, game licence issuers, collectors of customs duties, income tax collectors, assistants to the public administrator in the handling of estates, issuers of government pay checks, recipients of naturalisation applications, takers of the census, distributors of liquor rations among the liquor permit holders, collectors of fur export taxes, and enforcers of federal shipping legislation. (Zaslow, *supra* note 119 at 640–42.) They also delivered the mail, dispensed welfare to Natives, acted as returning officers at elections, performed duties as land agents and mining recorders, treated the sick, issued radio licenses, took meteorological readings, supervised civil service exams, made general check-ups of Native living conditions, settled disputes that might arise, conveyed students to and from residential schools, etc.

<sup>123</sup> Bovey, *supra* note 105 at 154.

controlling white trappers and traders, changing the game regulations, establishing game preserves and making grants to hospitals and schools.”<sup>124</sup>

By the end of the decade Council’s focus began to shift. The advent of the mining industry and improvements in communication and air transportation produced a mobile and transient population. Southern non-Natives in greater numbers came into the Mackenzie District. The police could no longer, as before, keep track of residents and their conduct. The previous relatively low crime rate<sup>125</sup> began slowly to increase and the enlightened “police state, [began] to crumble and break down.”<sup>126</sup> In response, Council’s legislative thrust switched from protecting the fur trade economy to regulating commercial activities. More sophisticated legislation and judicial controls evolved leading by the end of the 1930s to appointment of a resident, legally trained, stipendiary magistrate installed at Yellowknife.

In the 1920s the administration opted for two part-time, nonresident judges: one from Alberta, the other a practicing lawyer from Montreal. Judge Lucien Dubuc’s appointment in 1921 permitted him later that year to preside at Fort Providence over the jury conviction of LeBeaux for the murder of his wife and child, and thereafter to go north, down the Mackenzie River on criminal circuit in the summers of 1923, 1924, 1926, 1929 and 1931. The appointment of Louis A. Rivet led to the jury conviction on circuit at Pond Inlet in August 1923 of two Inuit for the murder of the independent trader Robert Janes.<sup>127</sup> The circuit arrangement bore a striking resemblance to that employed by Justice Macaulay in the Yukon. Permanently resident in Vancouver prior to the First World War, Macaulay’s annual summer assizes had taken him by ship from Vancouver, up the inland passage to Skagway, then by train to Whitehorse and finally by river steamer to Dawson. While on circuit, he heard cases at Whitehorse, Dawson and in later years at Mayo.<sup>128</sup>

The circuit system depended on open river navigation in both Territories, until the 1930s when air travel supplanted the lengthier, more arduous river steamer travel. The first air circuit in the Mackenzie District occurred in August 1934. The court party flew from Edmonton to Coppermine on the arctic coast. Five years earlier regular air service between Whitehorse, Mayo and Dawson allowed Macaulay to avoid the more tiring paddle steamer journey.<sup>129</sup>

<sup>124</sup> Zaslow, *supra* note 119 at 649.

<sup>125</sup> *Ibid.* at 643; an examination of the justices of the peace quarterly returns in the period 1922–25 substantiated this point. Fines or short terms of imprisonment followed from RCMP prosecuted convictions for such crimes as assault, cruelty to animals, swearing in public, illegal possession of liquor, petty theft, and game infractions: NAC, RG 85, vol. 170, 540–4–1. J.W. Harris, JP, referred to the “severe reprimand I received last year for inaction in matters connected with infractions of the *Northwest Territories Game Act*.”

<sup>126</sup> Jenness, *supra* note 117. The “enlightened” police state continued in the Franklin District.

<sup>127</sup> Price, *supra* note 28; G. Price, “The King v. Alikomiak” (1991) *Manitoba Law Journal* 204.

<sup>128</sup> In 1922, Macaulay, writing to O.S. Finnie, described his annual circuit to the Yukon. Coming from Vancouver, he went on circuit between June and September as required: NAC, RG 85, vol. 1870, 540–1–1(1).

<sup>129</sup> Yukon Territorial Archives, Whitehorse, search file: Aviation.

## VI. The Central and Eastern Arctic

Formalisation of Canadian law in the Keewatin and Franklin Districts in the NWT moved at a slower pace but it still dislocated life styles of the Inuit.<sup>130</sup>

Dr. Urquhart, longtime resident in the NWT, writing in 1947 sought to explain this process:

the [Inuit] ... for generations has wrested a living ... in a country where only a hardy and intelligent race could survive. He is making a good job of slowly assimilating a certain amount of civilization while still retaining his independence, pride, and his ability to carry on and care for himself... The [Inuit] is naturally law abiding and even though he may not always quite understand the meaning and purpose of the law, his natural tendency is to obey it. His communal life has taught him that the wishes of the individual must be subordinate to the good of the majority ... For a number of years the government of Canada [has tried]... to keep[the Inuit] independent, self reliant and self supporting.<sup>131</sup>

The Canadian government, bowing to “slavish, short-sighted economising considerations,”<sup>132</sup> sought to “freeze in time” Inuit interaction with non-Natives. In seeking to protect the Inuit from harmful influences, so long as they lived within the Canadian law, government encouraged them to maintain traditional ways of life.<sup>133</sup> As well, uncertainty over the legal status of the Inuit—were they Indians as defined in the Indian Act?—played its part. Not until 1924 were Inuit officially designated within the responsibility of the Department of Indian Affairs. Legal clarification of this status followed in 1939.<sup>134</sup>

In the 1920s the Territorial administration resurrected the eastern arctic patrol last active in 1911, to aid scientific exploration and to provision police posts. From an expanding network of posts, the RCMP patrolled the central barren lands and the arctic archipelago, seeking to deflect for the Inuit the harsher effects of change.<sup>135</sup>

<sup>130</sup> Instances of Inuit community justice continued into the 1960s. Coates and Morrison, *supra* note 21 at 61, remark on the parallels to be drawn between miners’ meetings and Inuit social controls. For the Inuit, an unreliable person was a danger to their survival in a harsh environment. Death, as preventive justice, was therefore justified. *R. v. Shooyook and Ayoot*, TC, unreported, Spence Bay, 1966, is an example. One of the Inuk women living at an isolated hunting camp near Levesque Harbour began to do strange things. She wrecked some boats and camp equipment. She tried to kill her husband. Desperate, the group decided that if she could not be scared away, then two men of the group, one of whom was her son, were to kill her. A community execution was ordered and carried out. A jury convicted the two of manslaughter. A. Morrow, “Adapting Our Justice System to the Cultural Needs of Canada’s North” in Louis Knafla, ed., *Crime & Criminal Justice in Europe & Canada* (Waterloo: Wilfred Laurier University Press, 1981) at 264.

<sup>131</sup> C.A. Urquhart, “Eskimos of the Canadian Western Arctic” in C.A. Dawson, ed., *The New North-West* (Toronto: The University of Toronto Press, 1947) at 281–82. Dr. Urquhart presents a perspective of racial determinism.

<sup>132</sup> Morris Zaslow, “Administering The Arctic Islands 1880–1940: Policemen, Missionaries, Fur Traders” in Zaslow, ed., *A Century of Canada’s Arctic Islands* (Ottawa: The Royal Society of Canada, 1981) at 75.

<sup>133</sup> S. Grant, *Sovereignty or Security* (Vancouver: University of British Columbia Press, 1988) at 33, 38. To facilitate this a number of game preserves were set aside. These included the Mackenzie Mountain Preserve, the Yellowknife Preserve, the Thelon Game Sanctuary, and the Arctic Islands Preserve.

<sup>134</sup> By revision to the *Indian Act*, effective 19 July 1924, the Superintendent of Indian Affairs also took charge of Inuit affairs: *Indian Act*, S.C., 1924, c. 4; and, *Eskimo Reference*, [1939] SCR 104.

<sup>135</sup> Gillies Ross in a compelling way observed that once the whaling era ended the HBC and independent traders “encouraged the Inuit to return to the land... and come into the posts only occasion-

Left to a role that “did not change in essentials between 1922 and 1940,”<sup>136</sup> their extensive patrolling facilitated the performance of many non-police functions. These were the same varied roles that police performed earlier in the Klondike and were still performing in the Yukon and the Mackenzie Districts.<sup>137</sup>

The Depression brought forth a “cry for retrenchment in the civil service.”<sup>138</sup> The NWT and Yukon Branch of the Department of the Interior was dissolved. The Eastern Arctic Patrol, operating since 1921 to bring “the white man’s law and order” to the Inuit, was reduced to a routine operation of supplying and relieving the medical officer at Pangnirtung and several police posts.<sup>139</sup> Ten years later the obsession for economy gave way to the distracting and diversionary influences of the war effort.

## VII. World War II and Its Aftermath

The perceived threat of a Japanese invasion spurred reaction on several fronts. The Alaska Highway,<sup>140</sup> the Canadian Oil pipeline (CANOL), and the Northwest Staging and the Crimson Air Staging airfield projects<sup>141</sup> brought massive inputs of American money and men. An invasion of another kind had occurred.

The “army of invasion” built highways, oil pipelines and airfields, and by early 1944 had largely completed its tasks. During the construction period the large number of disciplined soldiers and workers limited criminal activity. An uneasy, concurrent jurisdiction existed between American military authorities and the RCMP.<sup>142</sup> American military police zealously enforced their military regulations, at times overstepping their authority and Canadian jurisdiction. This led to protests from the RCMP, by 1944 headquartered at Whitehorse. When working together, the police had several rape and indecent assault cases to investigate; and with liquor more available, drinking offences, among Natives especially, skyrocketed.<sup>143</sup> When the construction phase peaked, violent assaults and offences against morality mark-

---

ally.... [This] reversed the trends toward population centralization... and frequent cultural interaction with a large number of whites... which had characterized the whaling period. Trading interrupted, suspended and even reversed some of the acculturative influences that had affected the native people of the Arctic Islands during the nineteenth century.” W.G. Ross, “Whaling, Inuit & the Arctic Islands” in Zaslow, ed., *supra* note 132 at 47.

<sup>136</sup> Morrison, *supra* note 25 at 172.

<sup>137</sup> *Supra* note 122.

<sup>138</sup> R. Finnie, *Canada Moves North* (Toronto: MacMillan & Co., 1943) at 68.

<sup>139</sup> Jenness, *supra* note 117 at 50.

<sup>140</sup> Coates and Morrison, *supra* note 54; Coates, ed., *supra* note 96.

<sup>141</sup> The oil pipeline between Norman Wells and Whitehorse, where a refinery was built, was shut down in March 1945, and the refinery dismantled by Imperial Oil and sent to Leduc, Alberta. The Crimson Air Staging Route linked airfields in the United States and Great Britain. Canadian airfields were built at Coral Harbour, Southampton Island and Frobisher Bay, now Iqaluit.

<sup>142</sup> “The idea of shared legal responsibility through concurrent jurisdiction might have seemed fine in theory, but it caused problems in practice.” Coates and Morrison, *supra* note 54 at 110.

<sup>143</sup> This police move from its headquarters at Dawson City presaged the move of the capital to Whitehorse in 1953. George Black, the Federal MP, also moved in 1944. The lack of a road to Dawson was one handicap, as was the lack of a reliable airfield. Controller Jeckell resisted a move until his retirement in 1947. His successor, Gibben, recognised the inevitable and supported the move. See, Coates and Morrison, *supra* note 21 at 244.

edly decreased.<sup>144</sup> Overall, “there were comparatively few crimes of violence and little real public or military disorder in the region,” during World War II.<sup>145</sup>

On the administrative front, because of the “scale and pervasiveness of United States involvement, [Americans] ... assumed de facto control of much of the Yukon Territory.”<sup>146</sup> Controller Jeckell’s refusal to relocate to Whitehorse from Dawson in part permitted this. The Yukon continued to be served by RCMP commissioned officers, still acting as police magistrates when required.<sup>147</sup>

In post-war Yukon, inadequate administrative structures, the legacy of pre-war years of financial stringency, needed overhaul.<sup>148</sup> The office of commissioner, resurrected in 1948, went to J.E. Gibben. Two commissioners rapidly followed him—A.H. Gibson in 1950 and Fred Fraser in 1951. The office came under increasing scrutiny, especially when commissioners did not consult Council members before acting. The growing pains engendered when trying to make representative government work became more visible. Fraser was instructed in 1952 to follow more stringent guidelines and “rein in” the Council. Fraser acted accordingly, immediately clashing with supporters of more local governmental autonomy.<sup>149</sup> Various sobriquets followed: Fraser was “Little Caesar,” “Little Napoleon” and “the Ottawa Cowboy.” One year after his appointment Fraser returned to Ottawa. His successor, W. G. Brown, arrived to preside over the move of the capital from Dawson to Whitehorse, without consultation with the elected Yukon councillors.

The post-war NWT retained the “relatively simplified judicial machinery in keeping with the small scattered population.”<sup>150</sup> Five stipendiary magistrates, none of them full time judges, remained primarily focused on their more onerous administrative tasks. Deputy Commissioner R.A. Gibson in the 1930s had exploited the opportunity to appoint civil servants who, in their “spare” time at no extra salary, could look after judicial matters. The first civil servants so appointed were Alex Norquay and Mackay Meikle in 1936. Later appointees—J.E. Gibben and Charles Perkins before World War II, Fred Fraser and Frank Cunningham and A. H. Gibson after the war—were legally trained; but they continued to perform dual administrative and judicial functions. It proved an economical way to administer justice.

In the Yukon, the same judicial economies were practiced.<sup>151</sup> In 1941 when Justice Macaulay retired from the Yukon Territorial Court, the administration suggested that

<sup>144</sup> M. Zaslow, *The Northward Expansion of Canada, 1914–1967* (Toronto: McClelland & Stewart, 1988) at 231.

<sup>145</sup> Coates and Morrison, *supra* note 54 at 123.

<sup>146</sup> Coates and Morrison, *supra* note 21 at 251.

<sup>147</sup> In 1941, at Dawson, even a police corporal held an appointment as a police magistrate. Usually only officers with the rank of inspector were appointed.

<sup>148</sup> J.E. Gibben accepted partial responsibility. Concerned with his first wife’s illness, “things went awry:” Fraser to Fraut, 22 October 1951, NAC, RG 85, vol. 12555, file #510-6-1, part 2.

<sup>149</sup> Letter, Minister Winters to Fraser, 4 March 1952, NAC, RG 22, vol. 6f, file # 40-2-30. This was a literal reading of the *Yukon Act* provisions. The commissioner should administer the government of the Territory under instructions from the Governor-in-Council or the Minister of Resources and Development.

<sup>150</sup> C.C. Lingard, “Administration of the Northland” in C.A. Dawson, ed., *supra* note 131 at 23.

<sup>151</sup> R.A. Gibson was very candid about this. After a visit to Dawson in 1941 he observed that Mr.

the judicial work could be taken care of “satisfactorily by a stipendiary magistrate who would be of great assistance to Controller Jeckell, who is overworked.”<sup>152</sup> Such a proposal necessitated an amendment to the *Yukon Act* and abolition of the Territorial Court. In the end abolition did not occur; rather, a simple amendment to the *Yukon Act* left the territorial court unimpaired, with stipendiary magistrate Gibben appointed as its acting judge.<sup>153</sup>

Gibben’s situation was illuminating. When he moved from Yellowknife to Dawson in 1941 he had “sufficient all round training to be exceptionally useful.”<sup>154</sup> From 1941 to 1946 he acted as the “stand-in” Territorial Court justice, adding to this duty in 1944 that of legal advisor to the government. In 1947, after serving as an assistant to Controller Jeckell for one year, he assumed the controller’s position. Within the span of two years he held the highest ranking judicial and administrative positions in the Yukon. Relinquishing briefly his judicial functions, he concentrated on administrative matters, filling the reconstituted office of Commissioner in 1948. By 1950 the office of justice of the Territorial Court at Whitehorse beckoned.<sup>155</sup>

Duality brought on role conflict. To whom did a stipendiary magistrate owe first loyalty? Was he to promote governmental executive interests, or was he to see justice done between the parties, including often the government, who appeared before him? As well, the exercise of administrative functions led to close ties with senior civil servants in Ottawa, further confusing judicial and executive roles. Judicial officers would know and be capable of introducing, even subconsciously, administrative policies into their judicial decisions. The executive in Ottawa did take inappropriate liberties, criticising judicial decisions directly rather than letting the appeal process take its course. Such magistrates were kept subject to executive control, financially and even in the form of an “executive circular” from time to time issued by Deputy Commissioner Gibson.<sup>156</sup> A more glaring incident arose when Gibson, before a theft case was tried, “directed” Stipendiary Magistrate Charles Perkins to find the two accused guilty.<sup>157</sup>

---

Love, the court clerk, had to be told that his job entailed other administrative duties when his court duties were finished. “I straightened this out for him...and told Controller Jeckell to see that value was had in the way of service for full remuneration paid”: letter, 15 August 1941, R.A. Gibson to Gibben, NAC, RG 85, vol. 9, 20-1A. Gibson in 1939 suggested that St. Germain be asked to revise the Ordinances of the Northwest Territories. “He is paid a salary and it does not seem unreasonable to ask him to undertake a task of this nature [in his free time] without extra remuneration”: Memorandum, R. A. Gibson, 26 October 1939, NAC, RG 85, vol. 895, 9567.

<sup>152</sup> Memorandum, Gibson to Jackson, 4 February 1941, NAC, RG 85, vol. 1870, 540-1-1-1: contemplating that the stipendiary would assist in financial matters and perform the functions of a legal advisor to the Yukon Council, except when the functions of the stipendiary magistrate clashed with those of legal advisor.

<sup>153</sup> *Yukon Territory Amendment Act*, S.C. 1941, c. 30, s. 1 adding s. 69A, “(2) Every Stipendiary Magistrate so appointed shall have and may exercise the powers, authorities and functions now vested in the judge of the [Territorial] court.”

<sup>154</sup> Memorandum, R.A. Gibson, 25 June 1941, NAC, RG 85, vol. 1870, 540-1-1-1; “Gibben has an excellent record as a Magistrate and is a thoroughly capable executive officer”: Minister of Mines and Resources to Minister of Justice, 25 June 1941, NAC, RG 85, vol. 1870, 540-1-1-1.

<sup>155</sup> At a stipendiary magistrate’s salary, *Dawson Daily News*, 19 June and 26 August 1941.

<sup>156</sup> NAC, RG 85, vol. 177, 542-3-2 and 542-3-3.

<sup>157</sup> Perkins’ Recollections, Glenbow Alberta Archives, at 36: “R.A. Gibson was too accom-

This duality was not unique. In early nineteenth-century Upper Canada, judges were “usually either pawns or partisans of the [colonial] Governor and were often leading members of the Executive or Legislative Councils, or both.”<sup>158</sup> Chief Justice Robinson best exemplified this situation. In 1830, additional to his judicial duties, Robinson drafted governmental legislation, held the position of president of the Executive Council, gave advice to the governor and acted as speaker of the Legislative Council. In 1831, Colonial Secretary, Lord Goderich, urged Robinson to “exhibit a cautious abstinence from all proceedings by which he might be involved in any political contention of a party nature.” Robinson resigned from the Executive Council of Upper Canada (Ontario).<sup>159</sup>

Like Robinson, Chief Justice Begbie, in the mid-nineteenth century in the colony of British Columbia found himself part of that “very small apparatus” which administered a very large colony. He was as much a member of the government as a supposedly impartial jurist.<sup>160</sup> The stipendiary magistrates in that same colony until 1867 often did the work of Indian agent, land commissioner and gold commissioner, in addition to their judicial duties.<sup>161</sup>

By the late-nineteenth century, examples could still be resurrected to show the close ties between the executive and the judiciary. Stipendiary Magistrate Richardson, up to 1886, acted as law clerk to the Legislative Council of the Northwest Territories and legal adviser to the lieutenant governor.<sup>162</sup> In 1896, Chief Justice Strong of the Supreme Court of Canada became “closely involved” in restructuring of the Conservative cabinet after the federal election held earlier that year.<sup>163</sup>

Little wonder then that stipendiary magistrates in the “colonial” atmosphere that characterised the Northwest Territories in the 1930s and 1940s performed a variety of duties. The northern judges, part of a small coterie of experienced and qualified persons, found thrust upon them tasks and duties that few others were able and qualified to do.

These appointments did not produce a judiciary steeped in jurisprudence. Many appointees were professional “lightweights” ; several had no legal training at all; some were timid and restricted in their judicial approach; and a few probably political

---

plished an administrator to have literally directed me, but it was an inescapable inference from his letter.” In the 1980s a number of cabinet ministers resigned when interference on behalf of the accused became known. In 1943, the John Salois case came before Gibben at Dawson. George Black, Salois’ counsel, appealed the sentence of three months. Black approached both St. Laurent, the Minister of Justice, and Crerar, the Minister of Mines and Resources, to have the case disposed in favour of Salois on appeal. Instructions filtered down to R.A. Gibson who wired Jeckell “to please talk the case over with Gibben.” This occurred before the appeal was heard. Wire: Gibson to Jeckell, 19 June 1943, NAC, RG 85, vol. 1870, 540-1-1-1.

<sup>158</sup> William Lederman, “The Independence of the Judiciary” in Lederman, ed., *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981) 109 at 148.

<sup>159</sup> Patrick Brode, *John Beverly Robinson* (Toronto: The Osgoode Society, 1984) at 181-5.

<sup>160</sup> David R. Williams, “Begbie and Duff” (1985) 43 *The Advocate* 749.

<sup>161</sup> Hamar Foster, “Law and Priorities in British Columbia” in Knafla, ed., *supra* note 57 at 177.

<sup>162</sup> *Debates*, House of Commons, 11 May 1886, at 1204; *Journals*, Council of the Northwest Territories, 1987, at 28.

<sup>163</sup> James Snell and Frederick Vaughan, *The Supreme Court of Canada: a History of the Institution* (Toronto: The Osgoode Society, 1985) at 71.



payoffs.<sup>164</sup> Others were “touched, in varying degree, with the occupational hazard of judges—the proclivity to confuse themselves, on occasion with the Supreme Being.”<sup>165</sup> Only one appointee had ever practiced law in the NWT. None of the stipendiary magistrates were born or grew up there. All were “outsiders” who brought a southern Canadian perspective to judicial duties, just another example of agents of “southern expansion intruding into the north” —harbingers of a new southern way of life.<sup>166</sup>

Federal government reorganisation in 1953 led to creation of the Department of Northern Affairs and Natural Resources. This presaged a court restructuring in the NWT. The stipendiary magistrates court was “disestablished” in 1955. Replacing it was a hierarchial court structure that mirrored in part the one in the Yukon: police magistrates and one Territorial Court judge at Yellowknife. Unlike the Yukon, where appeals had gone to the Court of Appeal in British Columbia since 1912, an appeal court for the Territories was not set up until 1960.<sup>167</sup>

### VIII. Northern Legal Inheritances

To speak of inheritances is to speak of the past and future. Sitting in late 1955 in either Yellowknife or Whitehorse, what might a “crystal ball gazer” have predicted? The “considerable metamorphosis” that has actually carried the North to the twenty-first century?<sup>168</sup>

Change since 1955 has indeed been dramatic. Aided by technology—aniak satellite,<sup>169</sup> modern telecommunications, increased scheduled air service—court circuits in the NWT are highly regularised. Five resident Territorial Court judges, located at Iqaluit, Hay River, and Yellowknife travel each month on circuit to communities on Baffin Island, the high arctic, the Mackenzie River delta, the central arctic, and the central Mackenzie River and Great Slave Lake regions. Three resident superior court justices attend to increasingly sophisticated civil and criminal cases. More than 100 lawyers now reside in the NWT, mostly at Yellowknife. The majority are in private practice. At least forty are employed by the territorial and federal governments. This represents a dramatic increase over twenty-four years. In 1971, only ten resident lawyers attended to legal business: two worked for the territorial government, two for the federal Department of Justice and the remaining six were in private practice. All resided in Yellowknife. The one superior court justice, William G. Morrow, resided there too. He and the only resident magistrate, Peter Parker, disposed of all court cases.<sup>170</sup>

<sup>164</sup> Price, *supra* note 28, chapter 10.

<sup>165</sup> Jack Worsell, former clerk of the court at Whitehorse, in correspondence to the author.

<sup>166</sup> This is Morris Zaslow’s theme.

<sup>167</sup> *The Yukon Act, S.C.*, 1912, c. 56, s. 2; *R.S.C.* 1927, c. 215, s. 78.; and, *An Act to Amend the Northwest Territories Act, S.C.*, 1960, c. 20, s. 6.

<sup>168</sup> Letter: The Hon. Mr. Justice Mark de Weerd, Territorial Court of the NWT, to the author, 24 October 1991.

<sup>169</sup> For example, an Inuk at Cambridge Bay may choose from several TV stations, including CBC from Vancouver and NBC from Detroit.

<sup>170</sup> This information comes from discussions with justices in the Territories and the author’s own

Changes in the Yukon have been no less dramatic. Three resident territorial judges go on regular circuits by road or air. When required, the one resident superior court justice does so also. Of approximately ninety resident lawyers, virtually all in Whitehorse, nineteen are employed by the territorial or federal governments. The rest are in private practices. Twenty-eight years earlier, when Justice Henry Maddison came to Whitehorse, only eight lawyers were there, one a government lawyer.<sup>171</sup>

These institutional changes result from the changing demographic character of both Territories. While the "high-grading" mentality of previous temporary residents still, in part, remains—make money as a trader, a miner, an oil worker, a bureaucrat, and then return to southern Canada, to their "real home"—increasing numbers have stayed to enlarge settlements. Whitehorse and Yellowknife, the NWT capital since 1967, cater to the needs of non-Native majorities with modern amenities. In Aboriginal settlements, Old Crow for example in the Yukon, several Dene settlements on the Mackenzie River and Inuit settlements along the arctic coast, non-Natives remain a minority. The clash of divergent cultures survives as an "explanation" for aberrant criminal behaviour among Natives.<sup>172</sup>

Both Territories remain unequals at Canada's constitutional bargaining table. Neither are close to achieving provincial status.<sup>173</sup> Nor do they yet enjoy any constitutional guarantee of permanence and stability. They exist only through ordinary legislation passed by Parliament, legislation that is not constitutionally entrenched and leaves them administrative appendages to the federal government.<sup>174</sup>

For much of the twentieth century, each Territory effectively remained a federal colony, ruled by a commissioner, the federal government's plenipotentiary, who had almost unlimited power and discretion. For appearance sake, he was assisted by an appointed, and later elected, Council. The colonial atmosphere begat a colonial legal system. In the NWT, judges were sent "out to the colony" to administer justice, just as judges had been sent out to the colony of the Northwest Territories between 1870 and 1886 to administer justice in what is now Alberta, Saskatchewan and Manitoba.

In the twentieth century, the structure of society in each Territory has become more formal and sophisticated, with more identifiable institutions and a gradually more responsive localised bureaucracy. Judicial controls have evolved from fur traders' "rough justice" to the policeman's "paternal" justice that has now been supplanted by the circuit court's formal justice.

But both Territories still operate outside of the mainstream of southern Canada. These two "backwaters" remain largely ignored. While the North has been a source

recollections.

<sup>171</sup> Discussion with The Hon. Mr. Justice Maddison in August 1992.

<sup>172</sup> Heino Lilles, "Some Problems in the Administration of Justice in Remote and Isolated Communities" (1990) 15 *Queen's Law Journal* 327; William G. Morrow, "A Bench with a View" (1990) 28 *Alberta Law Review* 779 at 815.

<sup>173</sup> Gordon Robertson, former Deputy Commissioner of the NWT argues that neither Territory could stand on its own financially. Both require massive federal government assistance; both benefit from the continued protection of the federal government.

<sup>174</sup> R. Dussault & L. Borgeat, *Administrative Law*, vol. 1 (Toronto: Carswell, 1985) at 164.

of myth and romance, one overriding consideration—southern Canadian apathy—has prevailed. In 1939, Vilhjalmur Steffansson, Arctic explorer, observed: “Canada is less interested in her Arctic domain than most people suppose ....”<sup>175</sup> This was echoed by Prime Minister Louis St. Laurent in 1952 in an oft-quoted passage: Canada “ha[s] administered these vast Territories in an almost continuing state of absence of mind.”<sup>176</sup> In the North, the challenge for the late 1990s is to focus that Canadian mind to the North’s enormous potential. For the North has given Canada a rich legacy of Native rights’ decisions and other innovations. Cases concerning customary marriage and customary adoption,<sup>177</sup> Aboriginal hunting and fishing rights,<sup>178</sup> Native land claims,<sup>179</sup> and discriminatory claims<sup>180</sup> dot the case reports beginning in the late 1950s. Northern refinements, reforms and proposals have included amending the *Jury Act* to allow Aboriginal juries, giving interpreters an expanded role in jury trials, simplifying the jury charge, altering the physical configuration of the court and promoting the virtues of sentencing circles involving community participation.<sup>181</sup> This last should be especially attractive to the rest of Canada. It can take much from the consensus style decision making characteristic of Dene and Inuit social control that such circles advocate. Co-operation and avoidance of position-taking, flexibility and tolerance are other legal inheritances that continue to enhance the North’s place in Canada.

---

<sup>175</sup> V. Steffansson, “The American Far North” (1939) 17 *Foreign Affairs* 517.

<sup>176</sup> *Debates*, House of Commons, at 697–8.

<sup>177</sup> *Re: Noah Estate* (1961) 36 WWR (ns) 577; *Re: Katie’s Adoption Petition* (1961) 38 WWR (ns) 100; *Re: Beaulieu’s Petition* (1969) 67 WWR 669; *Re: Deborah* [1972] 3 WWR 194.

<sup>178</sup> *R. v. Sikyea* (1962–63) 40 WWR (ns) 494, overturned on appeal (1964) 2 CCC 325, upheld by SCC [1964] SCR 642; *R. v. Sigereak* (1966) 4 WWR 1 overturning the case at trial and overruling *R. v. Kogogolak* (1959) 28 WWR (ns) 376 and *R. v. Kallooar* (1965) 50 WWR (ns) 602; *R. v. Tootalik* (1970) 71 WWR 435, reversed on appeal (1970) 74 WWR 740. Sissons comments on these cases in his book *Judge of the Far North*, *supra* note 9.

<sup>179</sup> *Re: Paulette* [1973] 6 WWR 97 reversed [1976] 2 WWR 193 (NWTCA) affirmed [1977] 1 WWR 321 (SCC).

<sup>180</sup> *R. v. Drybones* (1967) 60 WWR 321, affirmed (1967) 61 WWR 370 (NWTCA), affirmed (1970) 71 WWR 161 (SCC). This is arguably the most important decision under the Canadian Bill of Rights.

<sup>181</sup> Gora, *supra* note 5 at 156; Heino Lilles, *supra* note 172; H. Lilles, “A Plea for More Human Values in our Justice System” (1992) 17 *Queen’s Law Journal* 328; *R. v. Moses* 71 CCC (3rd) 347, Stuart J., Yukon Territorial Court, comments on sentencing circles.