

The Development of Criminal Law Courts in Pre-1870 Manitoba

RUSSELL SMANDYCH*
&
KARINA SACCA**

I. INTRODUCTION

THIS PAPER IS PART of a larger work on the transformation of dominant mechanisms of legal ordering and social control in western Canada from 1670 to 1870.¹ One of the goals of this research is to make use of the wealth of primary historical data on private justice and social control contained in the archives of the Hudson's Bay Company.² In 1670, a royal charter granted by the English monarchy gave the Hudson's Bay Company the exclusive right to rule over an area that encompasses most of what is now the western part of Canada. As part of its original charter, the Hudson's Bay Company was given the power to enact any laws and regulations not repugnant to the laws of England that were deemed necessary to govern its relations with its servants and to maintain social order in the territory of Rupertsland.³ In 1821, the Company was granted a license to extend its trade

* Associate Professor, Faculty of Arts, Department of Sociology, University of Manitoba.

** Graduate, University of Manitoba, Faculty of Law.

¹ The research for this paper was undertaken as part of a three year research program funded by the Social Sciences and Humanities Research Council of Canada on "The Transformation of Legal Ordering and Social Control in pre-1870 Manitoba: A Study of the Development and Interaction of Aboriginal, Private, and State-run Justice Systems." Research funding was also received from the Criminology Research Centre and the Legal Research Institute of the University of Manitoba. The two principal co-investigators for the research program are Russell Smandych and Rick Linden, of the Department of Sociology, University of Manitoba. We would also like to acknowledge the valuable research assistance for this paper provided by Paul Nigol and Ruth Swan.

² The Hudson's Bay Company Archives (HBCA) now exist as part of the Provincial Archives of Manitoba in Winnipeg. The HBCA contain a detailed historical record of the operation of the Hudson's Bay Company in western Canada from the 1670s to the end of the 19th century.

³ *The Royal Charter Incorporating the Hudson's Bay Company, 1670*, reproduced in E.H. Oliver, ed., *The Canadian Northwest: Early Development and Legislative Records*, Vol. 1 (Ottawa: Government

monopoly and legal authority to encompass the territory referred to as “Indian country,” which included all of the land beyond Rupertsland whose rivers drained into the Pacific and Arctic oceans.⁴ In effect, the Charter of 1670, along with later enabling legislation, gave the Board of Governors of the Hudson’s Bay Company the authority to govern a territory that covered approximately five percent of the land surface of the earth.⁵

Although the history of the Hudson’s Bay Company is known to many Canadians and the Company is recognized for the important role it played in the early post-contact history of western Canada, we know very little about the role played by the Company in law-making and as an instrument of European colonization. During the early years following 1670, the Board of Governors of the Company based in London established the legal foundation for a self-governing chartered trading company complete with its own private justice system and complex arrangement of related mechanisms of social control. The arrival of the Hudson’s Bay Company in western Canada also marked the beginning of European economic and cultural intrusion into a territory that had for many centuries been populated by Aboriginal people who had their own complex set of cultural and social institutions, including customary laws and traditional methods of dispute resolution and social control. The early servants of the Company, sent to establish the first fur trade posts along the coast of Hudson Bay, brought with them orders from the London Committee on how they were to carry out the fur trade and conduct their relations with the different bands of Indians with whom they hoped to do business. Over the next 200 years, to 1870, the Hudson’s Bay Company remained a dominant presence in western Canada. Throughout this period, its employees remained key actors in determining the outcome of the initial contact between European and Aboriginal peoples in the Canadian west.

In other papers we have completed as part of our research program, we have looked at the early development of Hudson’s Bay Company law and the way it was

Printing Bureau, 1914) at 135–53. According to the *Charter of 1670*, the territory of Rupertsland included all of the land drained by rivers flowing into Hudson Bay.

⁴ This license was granted in 1821 by way of provisions contained in *An Act for Regulating the Fur Trade, and establishing a Criminal and Civil Jurisdiction within parts of North America*, (1&2 Geo. 4. ch. 66, 1821). The license was renewed in 1838 for another 21 years. It was not until 1859 that the Hudson’s Bay Company gave up its law-making role and “law enforcement obligations” in the “Indian Territories.” H. Foster, “Long-Distance Justice: The Criminal Jurisdiction of Canadian Courts West of the Canadas, 1763–1859” (1990) 34 *American Journal of Legal History* 1 at 5.

⁵ R. Smandych & R. Linden, “Co-existing Forms of Native and Private Justice: An Historical Study of the Canadian West” in K.M. Hazlehurst, ed., *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia, and New Zealand* (Aldershot, UK: Avebury Press, 1995).

applied to Aboriginal peoples.⁶ We have also undertaken research on the development of the internal private justice system created by the Company to deal with disobedient Company servants.⁷ The following paper extends this research by undertaking an investigation of the events and circumstances surrounding the transition that occurred in the Canadian west from a private justice system controlled by the Hudson's Bay Company, to a more formal system of English-based criminal courts that began to appear after 1812. Particular attention is given to tracing the development of the legal system of the Red River Settlement and District of Assiniboia as it evolved in the period from 1812 to the 1860s.

⁶ Smandych & Linden, *supra* note 5; R. Smandych & G. Lee, "Resisting Company Law: Aboriginal Peoples and the Transformation of Legal Ordering and Social Control in the Canadian West to 1850" (Paper presented at the Western Association of Sociology and Anthropology Meeting, Saskatoon, 1994); R. Smandych & G. Lee, "Women, Colonization, and Resistance: Elements of an Amerindian Autohistorical Approach to the Study of Law and Colonialism" (1995) 10 *Native Studies Review* 21.

⁷ R. Smandych, "Company Discipline in the Hudson's Bay Company, 1670-1770" (Paper presented at the Canadian Law and Society Association Annual Meeting, Calgary, 1994); R. Smandych & R. Linden, "Administering Justice without the State: A Study of the Private Justice System of the Hudson's Bay Company to 1800" (1996) 11 *Can. J. Law & Soc.* 21.

The paper also includes an analysis of criminal cases that were heard before the General Quarterly Court of Assiniboia from 1844 to 1872. One of the aims of this study is to contribute to our understanding of the early legal history of western Canada, and the early development of the system of criminal law that now exists in the province of Manitoba. Another aim is to provide an empirical foundation for generating theoretical knowledge about the nature of the relationship linking different "state" and "non-state" forms of legal ordering and social control.⁸ In addition, the paper attempts to add a comparative dimension to our understanding of how English legal institutions were transplanted in the Canadian west, by comparing the western Canadian experience with that of other British colonies,⁹ and the United States.¹⁰

⁸ For a more detailed discussion of the theoretical background to the present study, see Smandych & Linden, *supra* note 5, and Smandych & Lee, *supra* note 6, "Women, Colonization, and Resistance."

⁹ See, for example, P.T. Ahire, "Re-writing the Distorted History of Policing in Colonial Nigeria" (1990) 18 *International Journal of the Sociology of Law* 45; P.J. Byrne, *Criminal Law and the Colonial Subject: New South Wales, 1810–1830* (Cambridge: Cambridge University Press, 1993); S.L. Haring, "'Please Send Six Copies of the Penal Code': British Colonial Law in Selangor, 1874–1880" (1991) 19 *International Journal of the Sociology of Law* 193; D. Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge: Cambridge University Press, 1991); J. Pratt, *Punishment in a Perfect Society: The New Zealand Penal System, 1840–1939* (Wellington, NZ: Victoria University Press, 1992).

¹⁰ See S.L. Haring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (Cambridge: Cambridge University Press, 1994).

II. THE HISTORIOGRAPHY OF LAW AND LEGAL INSTITUTIONS IN THE CANADIAN WEST

OVER THE YEARS, a number of legal historians have looked at different aspects of the development of law and legal institutions in the Canadian west.¹¹ However,

¹¹ L. Bakkan, *Frontier Justice: An Examination of Colonial and Territorial Courts in Canada and the United States During the Years 1670 to 1870* (LL.M. Thesis, University of Manitoba, 1984); L. Barkwell, "Early Law and Social Control Among the Metis" in S. Corrigan & L. Barkwell, eds., *The Struggle for Recognition: Canadian Justice and the Metis Nation* (Winnipeg: Pemmican Publications, 1991); K. Bindon, "Hudson's Bay Company Law: Adam Thom and the Institution of Order in Rupert's Land 1839-54" in D. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 1 (Toronto: University of Toronto Press, 1981); M. Brogden, "Law and Criminal Labels: The Case of the French Metis in Western Canada" (1990) 1 *Journal of Human Justice* 13; D. Brown, "Unpredictable and Uncertain: Criminal Law in the Canadian North-West before 1886" (1979) 17 *Alta. L. Rev.* 497; D. Cole & I. Chaikin, *An Iron Hand Upon the People: The Law Against the Potlatch on the Northwest Coast* (Seattle: University of Washington Press, 1990); D. Farr, "The Organization of the Judicial System of the Colonies of Vancouver Island and British Columbia, 1849-1871" 3 *U.B.C.L. Rev.* 1; H. 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: An International Annual* 23; "Long-Distance Justice: The Criminal Jurisdiction of Canadian Courts West of the Canadas, 1763-1859" (1990) 34 *American Journal of Legal History* 1; "Mutiny on the Beaver: Law and Authority in the Fur Trade Navy, 1835-1840" (1991) 20 *Man. L.J.* 15; "English Law, British Columbia: Establishing Legal Institutions West of the Rockies" in *Canadian Legal History Project Working Paper Series* (Winnipeg: University of Manitoba, Faculty of Law, 1991); "Killing Mr. John: Law and Jurisdiction at Fort Stikine, 1842-1846" in J. McLaren, H. Foster & C. Orloff, eds., *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West* (Regina: Canadian Plains Research Centre, 1992); "Conflict Resolution During the Fur Trade in the Canadian North West, 1803-1859" (1993) 51 *The Advocate* 871; "The Queen's Law is Better Than Yours': International Homicide in Early British Columbia" in S. Lewthwaite, T. Loo & J. Phillips, eds., *Essays in the History of Canadian Law: Crime and Criminal Justice in Canadian History* (Toronto: University of Toronto Press, 1994); D. Gibson & L. Gibson, *Substantial Justice: Law and Lawyers in Manitoba 1670-1970* (Winnipeg: Peguis Publishers, 1972); D. Gibson, "Privatized Justice: The Origins of Legal Institutions on the Canadian Prairies" in *Canadian Legal History Project Working Paper Series* (Winnipeg: University of Manitoba, Faculty of Law, 1993); L. Knafla, "From Oral to Written Memory: The Common Law Tradition in Western Canada" in L. Knafla, ed., *Law & Justice in a New Land: Essays in Western Canadian Legal History* (Toronto: Carswell, 1986); T. Loo, *Making Law, Order, and Authority in British Columbia, 1821-1871* (Toronto: University of Toronto Press, 1994); "The Road from Bute Inlet: Crime and Colonial Identity in British Columbia" in S. Lewthwaite, T. Loo & J. Phillips, eds., *Essays in the History of Canadian Law: Crime and Criminal Justice in Canadian History*, *supra*; R.C. MacLeod, "Law and Order on the Western-Canadian Frontier" in J. McLaren, H. Foster & C. Orloff, eds., *Law for the Elephant, Law for the Beaver*, *supra*; J.P. Reid, "Layers of Western Legal History" in J. McLaren, H. Foster & C. Orloff, eds., *Law for the Elephant, Law for the Beaver*, *supra*; "Principles of Vengeance: Fur Trappers, Indians, and Retaliation for Homicide in the Transboundary North American West" in T. Loo & L. McLean, eds., *Historical Perspectives on Law and Society in Canada* (Toronto: Copp Clark, 1994); A. Martin, "The Rise of Law in Rupert's Land" (1890) 1 *Western Law Times*, 49-59, 73-80, 93-100; R. St. G. Stubbs, *Four Recorders of Rupert's Land: A Brief Survey of the Hudson's Bay Company Courts of Rupert's Land*

with the exception of a few of these writers,¹² little attention has been given to documenting the specific circumstances and events associated with the transition toward a more formal system of English-based criminal courts in pre-1870 Manitoba. In the following section, attention is given to reviewing the relevant work completed by previous researchers. This is done to describe the current state of knowledge about the development of a formal system of criminal justice in the Red River Settlement and the District of Assiniboia in the period from 1811 to 1870, and to provide a base for assessing the extent to which the additional research findings reported in this study contribute further to our knowledge of this part of the legal history of western Canada.

In his chapter on the common law tradition in western Canada, Louis Knafla provides a summary of the accepted interpretation of the early legal history of the Red River Settlement and the District of Assiniboia from 1811-1870.¹³ Knafla notes that until 1803 the Board of Governors of the Hudson's Bay Company relied on Charter of 1670 to provide the authority they needed to enact laws for Rupertsland and the "Indian Territories." While not discussing the point in any detail, Knafla implies that the law-making powers of the London Committee extended only to Company employees and not First Nations peoples. Specifically, he maintains that later interpretations of the Charter held that "[t]he law of the Prairie West ... was the law of England insofar as it applied to those people in Rupert's Land who did not live under the authority of other previously established nations in the region."¹⁴ This view of the relative immunity of First Nations peoples from laws created by Hudson's Bay Company is also reflected in the work of other legal historians,

(Winnipeg: Peguis Publishers, 1967); J. Taylor, *Law and Order and the Military Problem in Assiniboia 1821-69* (M.A. thesis, Carleton University, 1967); R. Willie, "These Legal Gentlemen": *Lawyers in Manitoba, 1839-1900* (Winnipeg: Legal Research Institute of the University of Manitoba, 1994).

¹² Bakkan, *supra* note 11; Bindon, *supra* note 11; Brown, *supra* note 11; Foster, "Sins Against the Great Spirit" and "Long Distance Justice," *supra* note 11; Gibson & Gibson, *supra* note 11; Gibson, *supra* note 11; Knafla, *supra* note 11; McLeod, *supra* note 11; Stubbs, *supra* note 11; Willie, *supra* note 11.

¹³ Knafla, *supra* note 11 at 35-42.

¹⁴ *Ibid.* at 35. In his standard reference work on the early laws of the Canadian North-West, Oliver, *supra* note 3 at 22, provides the following more detailed description of the law-making powers granted to the Board of Governors of the Hudson's Bay Company in the *Charter of 1670*: "... the Governor and Company might assemble and make laws and ordinances for the good government of the Company and its colonies and forts, and for the advancement of trade. They might impose penalties and punishments, provided these were reasonable and not repugnant to the laws of England. None of the Kings' subjects were permitted to trade within the Company's territories without leave from the Company under penalty of forfeiting their goods, one half to the Company, the other half to the King. The Company was given the right to appoint Governors and other officers, to try civil and criminal cases and to employ an armed force for the protection of its trade and territory."

including Stubbs,¹⁵ Gibson and Gibson,¹⁶ McLeod,¹⁷ and Foster.¹⁸ For example, Gibson and Gibson maintain that owing to the manner in which the Charter and other legislation was interpreted and applied, Indians were by and large “allowed to remain outside the scope of the legal system” that developed in western Canada.¹⁹ Although this may have been the way in which the Charter of 1670 and later enabling legislation worked in theory, evidence suggests that even in the early decades following the arrival of Hudson’s Bay Company employees in the Canadian west, they had already begun imposing their own European-based private justice system on Aboriginal people.²⁰

Knafla also summarizes much of what other legal historians have concluded about changes that occurred after the onset of the nineteenth century. Until 1803, the Board of Governors of the Hudson’s Bay Company was left on its own to enact laws for maintaining order and carrying out trade with the Indians. However, after 1803, both the British government began enacting legislation concerning the administration of justice in the Canadian west, and the London Committee began delegating its law-making authority to the Governor of the Company in Rupertsland and his Council. With the founding of the Red River Settlement in 1811, part of the responsibility for the administration of justice also devolved to the Governor and Council of the District of Assiniboia.

The most significant legislation that affected the direction taken by development of the legal system of the Red River Settlement in the early nineteenth century were the statutes of 1803 and 1821. The Act of 1803, entitled “An Act for extending the Jurisdiction of the Courts of Justice in the Provinces of Lower and Upper Canada, to the Trial and Punishment of Persons guilty of Crimes, and Offences within certain Parts of North America adjoining said Provinces” was enacted for the legal purpose of clarifying who had the jurisdiction to try crimes that occurred in Rupertsland and the Indian territories.²¹ Before 1803, several offenders who committed serious criminal offences in what is now western Canada were taken to Quebec for trial and tried under special commissions issued pursuant

¹⁵ *Supra* note 11 at 2.

¹⁶ *Supra* note 11 at 21.

¹⁷ *Supra* note 11 at 94–95.

¹⁸ *Supra* note 4; “Sins Against the Great Spirit,” *supra* note 11.

¹⁹ Gibson & Gibson, *supra* note 11 at 21.

²⁰ Smandych & Linden, *supra* note 5. Also, as we shall see later in this paper, there is considerable evidence to suggest that Aboriginal people soon came to be caught up in more formal English-based legal systems, like the one put into place in the Red River Settlement after 1811.

²¹ *Statutes of Great Britain* (1803) 43 Geo. 3, c. 138.

to the *Quebec Act* of 1774. However, by the late 1700s, the legality of this procedure was successfully challenged in Quebec courts, and colonial authorities had to clarify the law.²² According to Foster, a more immediate reason for the Act of 1803 was the growing fur trade rivalry between employees of two competing Quebec-based fur trade companies, the short-lived “XY Company” and the Hudson’s Bay Company’s more lasting competitor, the North West Company. With the intensifying competition for furs, employees of the two companies resorted to both private and state-sponsored justice. The former involved violent confrontations, and the latter included bringing criminal charges against their rivals in the criminal courts of Quebec. In a pivotal legal case that occurred in 1802, an employee of the XY Company was supposed to be tried in Montreal for the murder of an employee of the North West Company in an Indian camp where the rivals were competing with each other for the Indians’ furs. Although the employee of the XY Company was extremely remorseful for the death he caused and willingly travelled back to Montreal by himself to be placed on trial, a trial was never held because of the confusion over whether Quebec courts had the jurisdiction to try criminal cases from Rupertsland and the Indian Territories.²³ As a result, the British Parliament passed the Act of 1803, which provided that:

All offences committed within any of the Indian Territories or parts of America, not within the limits of either of the said Provinces of Upper or Lower Canada or of any civil government of the United States of America ... shall be tried in the same manner and subject to the same punishment as if [they] had been committed within the Province of Lower or Upper Canada.

Although the origin of the *Canada Jurisdiction Act* of 1803 had nothing to do with the Hudson’s Bay Company, it was very relevant to developments that were of interest to the Company. In 1804, the two rival Quebec companies merged to form the North West Company, which became the Hudson’s Bay Company’s major competitor. This bitter rivalry — with many of the Aboriginal peoples of western Canada caught in between — lasted until 1821, when the two companies merged under an agreement which stated that the new company would continue to use the Hudson’s Bay Company name.²⁴ In the period from 1803 to 1821 the *Canada*

²² Foster, *supra* note 4 at 4.

²³ Foster, *supra* note 4 at 6–11; A.S. Morton, *A History of The Canadian West to 1870–71* (Toronto: University of Toronto Press, 1973) at 513–14.

²⁴ Throughout the period to the end of the “competitive fur trade era” in 1821, Aboriginal peoples involved in the fur trade were able to play off one rival group of fur traders against another. However, after 1821 they had to contend with a more powerful fur trade monopoly which involved the Hudson’s Bay Company taking steps to try and eliminate the remaining competition that came from “free traders.” See P. Thistle, *Indian-European Trade Relations in the Lower Saskatchewan River Region to 1840* (Winnipeg: University of Manitoba Press, 1986).

Jurisdiction Act was used several times by both companies to have rival company employees prosecuted in courts of Upper and Lower Canada for “crimes” they committed in Rupertsland and the Indian Territories. The most famous examples of this are the criminal trials held in Upper Canada to prosecute the accused involved in the famous Seven Oaks Massacre of 1816. In 1816, 21 of the Scottish settlers brought to the Red River Settlement by Lord Selkirk were killed by Métis connected with the North West Company. In response to these killings, Lord Selkirk ordered that the North West Company inland headquarters at Fort William be seized, and that the Nor’Westers responsible for the killings be arrested and sent back to Upper Canada for trial. Although this led to a remarkable series of trials that lasted for most of the next year, only one conviction resulted from the approximately 150 charges that were laid, including a total of 42 murder charges.²⁵ More than anything else, the cases illustrated that the wording of the *Canada Jurisdiction Act* of 1803 was so vague that it was almost impossible to bring a successful prosecution in Upper Canada against persons charged with committing criminal offences in Rupertsland.²⁶

The Board of Governors of the Hudson’s Bay Company remained the primary lawmaking institution in the Canadian west until 1811. However, on 12 June 1811, the Company ceded a large territory along the Red and Assiniboine Rivers to Thomas, Earl of Selkirk.²⁷ This marked the beginning of the Red River Settlement and the creation of the District of Assiniboia. In 1811, the London Committee delegated its legislative and judicial powers in the newly-created District of Assiniboia to a new body called the Council of Assiniboia.²⁸ From 1811 to 1835 the Council of Assiniboia included the local Governor of the Hudson’s Bay Company and five to seven councillors who were appointed directly by the London Committee. In 1835, during the period in which George Simpson was Governor of Rupertsland, the Council of Assiniboia was reorganized and enlarged to 15 members and

²⁵ Foster, *supra* note 4; Macleod, *supra* note 11 at 92–93; P. Brode, *Sir John Beverley Robinson: Bone and Sinew of the Compact* (Toronto: University of Toronto Press, 1983) at 43–52; G.M. Gressley, “Lord Selkirk and the Canadian Courts” in J.M. Bumstead, ed., *Canadian History before Confederation: Essays and Interpretations* (Georgetown, On.: Dorsey Press, 1979).

²⁶ Foster, “Sins Against the Great Spirit” *supra* note 11; Macleod, *supra* note 11; Gibson & Gibson, *supra* note 11.

²⁷ Oliver, *supra* note 3 at 31.

²⁸ According to Oliver, *supra* note 3 at 32, after 1811: “... the supreme legislative and judicial functions within the community were vested in a Governor and Council with commissions duly empowered by the Hudson’s Bay Company. The importance of the work of the Governor and Council of Assiniboia consists in the circumstance that they were pioneers. As pioneers they laid the foundations of prairie legislation. They were the first to frame general measures for the public welfare of what is now Western Canada.”

a form of representative government was introduced. In addition, at this time the Red River Settlement was divided into four districts, and a more formal legal system began to be put into place.²⁹ In his discussion of the changes introduced in 1835, Oliver points out that:

In 1835 the [Red River] Settlement was divided into four districts...For each district was appointed a magistrate or justice of the peace to hear cases of petty offence, and debts under 40 shillings. A general court of the Governor and Council was held at the Governor's residence on the last Thursday of every quarter. At this the magistrates attended, and cases of a more serious nature and all appeals were examined...No attempt was made to separate the legislative, executive and judicial offices.³⁰

The period from 1835 to 1839 represented an important juncture in the development of the legal system of the Red River Settlement. In particular, the creation of a more formal General Quarterly Court of Assiniboia was important. Although Knafla points out that the court never sat in the years immediately following its creation,³¹ from 1839 on the court played an important legislative and judicial role in both the District of Assiniboia and in the rest of western Canada. From an historian's standpoint, the Court is also especially significant because it left an extensive documentary record of its proceedings. From 1844 to 1872, detailed minutes of the proceedings of the Court were kept.³²

Another change that occurred in 1839 involved the appointment of Adam Thom as the first legally-trained recorder of Rupertsland. In March, 1839, Thom was appointed as the "Councillor and Recorder of Rupert's Land" and as a Councillor of District of Assiniboia, which made him "the active head of legal affairs" in the District.³³ As we will see later in this paper, although one of the reasons Thom was appointed was to ensure that the Hudson's Bay Company's judicial system

²⁹ The specific changes introduced in 1835 are documented in "Minutes of a Council held at Fort Garry for Red River Settlement, District of Assiniboia, Rupert's Land, on Thursday the 12th day of February, 1835" in Oliver, *supra* note 3 at 266-74. Additional changes to the local by-laws of the District of Assiniboia were made at the Council meeting held on 13 June 1836: *ibid.* at 275-78.

³⁰ Oliver, *supra* note 3 at 87.

³¹ Knafla, *supra* note 11 at 37.

³² Provincial Archives of Manitoba [PAM], District of Assiniboia, General Quarterly Court Records [hereinafter "General Quarterly Court of Assiniboia Records"]. However, for average residents of the Red River Settlement, it may have been perceived that the district "petty courts" were more important to their everyday lives and concerns. Although the General Quarterly Court was assigned to hear civil and criminal cases of a more serious nature, most of the "legal issues" of concern to residents of the colony likely fell under the jurisdiction of the petty courts. In light of this, it is surprising that very little attention has been given to the history of petty courts in pre-1870 Manitoba.

³³ Oliver, *supra* note 3 at 63 and 87; Stubbs, *supra* note 11; Bindon, *supra* note 11.

operated in conformity with existing English law, including the Company's Charter and the statute of 1821, Thom ignored such legislation whenever it did not conform to his idea of how English law should be applied. However, before turning to a more detailed look at Adam Thom's role in legal developments that occurred after 1839, it is important to look at the specific local laws and methods of criminal procedure followed in the Red River Settlement prior to Thom's appointment.

Legal historians have given considerable attention to describing the local laws and methods of criminal procedure that were put into place by the London Committee and succeeding governors of the District of Assiniboia after 1811.³⁴ In the following pages, we relate what historians have said about the development of the legal system of the Red River Settlement in the period from 1811 to the mid-1830s. In addition to examining relevant secondary literature, we make reference to primary historical documents that help place these legal developments in a broader historical context. Most significantly, this examination reveals that while a great deal of attention has been given to describing local laws and procedures put into place for the administration of criminal justice, few efforts have been made at attempting to determine how criminal justice was administered in practice, or on a day-to-day basis by the Governor of Assiniboia and his Council. Similarly, although for the most part providing adequate descriptions of legal developments that occurred, little effort has been given to attempting to explain why the legal system of the Red River Settlement developed in the manner it did during the period. Finally, it is clear that previous researchers have not addressed important theoretical questions that need to be addressed in order to explain legal developments that occurred in the District of Assiniboia and elsewhere in the Canadian west during the period, such as the question of how different formal and informal (or "state" and "non-state") justice systems worked together to produce social order.

Although Knafla claims that "the first formal legal system" in the Canadian west not established until 1835 when courts were reorganized in the District of Assiniboia,³⁵ there is evidence that steps were undertaken to establish such a system even before 1811. Indeed, it is clear that Lord Selkirk wanted to make sure that the Red River Settlement was established on a solid legal footing. Between 1805 and 1809, Selkirk sought the advice of a group of prominent British lawyers, headed by Sir

³⁴ Bindon, *supra* note 11; Gibson, *supra* note 11; Stubbs, *supra* note 11. Much less attention has been given to tracing the development of Hudson's Bay Company law prior to 1811. However, see Smandych & Linden, *supra* note 5, and Smandych & Lee, "Resisting Company Law," *supra* note 6, for an initial attempt at documenting earlier by-laws and policies affecting the administration of justice passed by the London Committee.

³⁵ Knafla, *supra* note 11 at 37.

Samuel Romilly.³⁶ The group of lawyers advised him that the Hudson's Bay Company possessed, under its Charter, exclusive legislative, executive and judicial powers of government over Rupertsland and everyone within the territory.³⁷ The original letter Selkirk received from Romilly and his four colleagues also more specifically spelled out their view of the jurisdiction the Company had to establish and operate a formal criminal justice system.³⁸ Selkirk was advised that while the grant of civil and criminal jurisdiction provided in the Charter was valid, "it is not granted to the Company, but to the Governor-in-Council at their respective establishments." He was also advised that "the Governor in Hudson's Bay might, under the authority of the Company, appoint constables and other officers for the preservation of the peace, and that the officers so appointed would have the same duties and privileges as similar officers in England, so far as their duties and privileges may be applicable to their situation in the territories of the Company." While Selkirk was also told that the Governor and his Council had the power to serve "as judges" to hear criminal cases "according to the laws of England," and that all persons who resided, or were found, within the territories controlled by the Company would "be subject to the jurisdiction of the Court," his lawyers stated that they did not recommend that this power "be exercised so as to affect the lives or limbs of criminals." In 1811, Selkirk received another similar legal opinion from the same lawyers, which included a long preamble which explained why it was necessary to confirm the validity of the Charter of 1670 and establish a more formal system for administering criminal justice in the Canadian west.³⁹ This preamble stated:

The establishments of the Hudson's Bay Company have been till within these few years calculated only for the purpose of the fur trade. Of late the Company have turned their attention to other objects connected with the cultivation of the land which they wish to encourage. With this view they have disposed of a large tract in fee simple and they are desirous to increase the population of their territories by the formation of permanent settlements. For this purpose officers must be appointed with sufficient authority for preserving order among the settlers and the administration of justice must be regularly provided for. Hitherto the officers of the Company have found very little difficulty in preserving order among the servants in their immediate pay as a pecuniary fine deducted from their wages in addition to the dismissal of the offenders is the severest punishment which they have had occasion to inflict. But there is no probability that a mixed and independent population of settlers can be restrained without higher exertions of authority and it becomes necessary to ascertain distinctly the powers of jurisdiction

³⁶ Stubbs, *supra* note 11 at 3, states that this legal opinion was obtained in 1805, while Gibson, *supra* note 11 at 19, and Brown, *supra* note 11 at 501, maintain it was 1809.

³⁷ Gibson, *supra* note 11 at 19.

³⁸ National Archives of Canada [NAC], *Bulger Papers*, MG 19 E 5, at 41–42, Copy of legal opinion signed by Samuel Romilly, G.S. Holroyd, Wm. Cruise, J. Scarlett, and John Bell.

³⁹ Provincial Archives of Manitoba [PAM], *Selkirk Papers*, Series 1, MG 2, D 311, fo. 4, "Case of Opinion" (1811) [abbreviated version of legal opinion given to Selkirk that the council and systems of justice to be established would bear the stamp of legality].

conferred upon the Company by their Charter as well as the extent and validity of their Territorial Grant.⁴⁰

Gibson provides a good overview of the early laws of the District of Assiniboia.⁴¹ In particular, he cites most of the relevant documents bearing on the decisions made by Lord Selkirk, the London Committee, and Miles Macdonell,⁴² that provided the legal foundation for the administration of criminal justice in the District. According to Gibson, both Macdonell and Selkirk appreciated “the importance of establishing a satisfactory system of justice for the new settlement.”⁴³ In May 1812, before he had left York Factory to begin travelling to Red River with “the first small band of immigrants,” Macdonell wrote Selkirk a letter in which he stated that “some kind of judicature in the Colony” was needed immediately, and he suggested that martial law should be imposed, backed by the “coercive power” of fifty mounted troops.⁴⁴ It was not until over a year later, on 13 June 1813, that Selkirk responded to Macdonell’s letter, explaining how he felt criminal justice should be administered in the colony.⁴⁵

Selkirk explained this delay in responding to Macdonell’s letter, noting that although he concurred in the urgent “necessity of an efficient Judicature for the Colony,” the subject was very complicated and it had occupied a great deal of his attention since he had last written to him. Although not totally ruling out the possibility, Selkirk indicated that he didn’t think Macdonell’s idea of establishing a military government was advisable in the near future. One of the reasons for this was that the Company had before it the more pressing task of confirming the legal authority of the Company promised in the Charter of 1670. Selkirk told Macdonell

⁴⁰ *Ibid.* at 7.

⁴¹ *Supra* note 11.

⁴² The first Governor of the District of Assiniboia appointed by Selkirk and the London Committee.

⁴³ Gibson, *supra* note 11 at 20.

⁴⁴ Macdonell to Selkirk, 31 May 1812. In his paper, Gibson quotes from a short extract of this letter contained in Oliver, *supra* note 3 at 177. The original full-text is contained in both the *Selkirk Papers* held in the National Archives of Canada, NAC, *Selkirk Papers*, MG 19 E 1, vol. 1, and in the letterbook containing correspondence of Miles Macdonell’s written in 1811–1812. NAC, “Selkirk Settlement: Letterbook of Captain Miles Macdonell, 1811–1812” in *Report on the Canadian Archives for 1886* (Ottawa: MacLean, Roger & Co., 1887) at clxxxvii–ccxxvi. Later in this paper, we show how Gibson’s reliance on this short two paragraph extract, rather than on the much longer original letter, prevents him from understanding Macdonell’s statements within the broader context of events surrounding the founding of the Red River Settlement in 1811–1812.

⁴⁵ Selkirk to Macdonell, 13 June 1813, in Oliver, *supra* note 3 at 178–83. The following paragraph contains our own summary of the content of this letter, rather than the one offered by Gibson, *supra* note 11 at 21–22.

that since he had last written to him, “satisfactory progress” had “been made in ascertaining the rights of jurisdiction legally vested in the Company.” Selkirk also mentioned that, given their importance and complexity, it would take at least another year before the London Committee could send out full instructions on the administration of justice, and he emphasized that in the meantime, Macdonell should be “very cautious” in the way he enforced his authority, “always to remember that any violent overstretch of authority would be extremely pernicious to our cause.”⁴⁶ In turn, Selkirk went on to explain how the *Jurisdiction Act* of 1803 should be applied, and the powers that the Governor and his Council had to try criminal and civil cases in Rupertsland.

Selkirk explained to Macdonell that the Company’s territories were not subject to the *Act* of 1803, and that the Company’s Charter placed full judicial authority on the local Governor and his Council. Again mimicking the legal opinion he had earlier received from Romilly and his associates, Selkirk also gave Macdonell instructions on the appointment of judicial officials, including a sheriff and a “posse” consisting of “a few trusty men” who would assist the sheriff in his duties. Concerning the procedures to be followed in criminal and civil cases, Selkirk told Macdonell:

By the Charter, the Governor of any of the Co.’s establishments *with his Council* may try all causes, civil and criminal, and punish offences according to the law of England. You have, therefore, authority to act as a Judge; but to do this correctly, it is necessary that you have a council to sit as your assessors, and also that you try by Jury all cases which in England would be tried before a Jury.

In the present circumstances of the Colony there would be much difficulty in finding a proper Jury to be empanelled and it must be quite impracticable [sic] to follow out closely the forms used in England in the selection. But it is not to be concluded from this that nothing can be done. Many cases may occur, where it would be an absolute denial of justice not to bring the matter to trial, and where that is evidently the case subordinate difficulties must give way and may be safely over-ruled.⁴⁷

Selkirk’s belief in the legislative supremacy of the Charter was also reflected in the more specific instructions he gave to Macdonell concerning the authority he had to conduct murder trials. Specifically, Selkirk told Macdonell “that nothing is to be gained by sending home any offenders to be tried in England, except in the single case of murder.” However, he added that even

If a murder should occur, it will depend on circumstances whether it will be best to send the culprit home for trial in England, or to try him yourself and report the case for the special authority of the Crown previous to execution of the sentence.⁴⁸

⁴⁶ *Ibid.* at 178.

⁴⁷ *Ibid.* at 179–80.

⁴⁸ *Ibid.* at 181.

Since the *Canada Jurisdiction Act* required that a person accused of murder be sent to either Upper or Lower Canada for trial, it is clear that Selkirk ignored the legislation when it suited his interests.

According to Gibson, despite his “lack of professional guidance,” Selkirk’s legal advice “was generally sound.” Gibson claims that the soundness of Selkirk’s advice was confirmed by the fact that supplementary instructions — on matters such as rules of evidence, forms of punishment, and powers of arrest — sent to Macdonell the following year, contained nothing that contradicted Selkirk’s original instructions.⁴⁹ However, Gibson does not provide any detail as to the content of these supplementary instructions. Among other things, the formal “Instructions Relative to Judicial Proceedings” issued to Macdonell and his council stated the following points:

All proceedings relative to Police or Government should be done in Council, and a regular Minute or Record kept in a Book.

In judicial proceedings it may be sufficient that one Councillor should attend along with the Governor, though more would be better, especially if the cause is of some consequence...

The appointment of constables must be made in Council and the constables take an oath to do their duty faithfully.

The Councillors should also swear to do faithfully the duty of conservators of the Peace, which they hold as implied in their nomination to the Council.

In Judicial Proceedings a Record must be kept of the charges and the *substance* of the Evidence given by each Witness, and also the Judgement.⁵⁰

Macdonell was also instructed on the procedures that should be followed in trying criminal cases. Specifically, he was told that although he should not “pretend to be master of legal forms” every trial “should be conducted with proper solemnity.” This proper solemnity included: giving the accused “due notice of the time of trial” in writing; having the charges read in open court and having the prosecutor “call his witnesses to prove the facts alleged”; and requiring that all testimony be given under oath. It is clear from these and other procedural instructions given to Macdonell, that Selkirk and the London Committee wanted a formal legal system to be put into operation as soon as possible.⁵¹ This evidence also contradicts the

⁴⁹ Gibson, *supra* note 11 at 22–23.

⁵⁰ *Selkirk Papers*, “Instructions Relative to Judicial Proceedings issued to Miles Macdonell and Council, 1814” in Oliver, *supra* note 3 at 186–88.

⁵¹ This fact is also reflected in the resolutions passed by the London Committee at its meeting of 19 May 1815, and published in the *London Gazette*, concerning the administration of justice in the territories of the Hudson’s Bay Company, which read: “First, that there shall be appointed a Governor-in-chief and Council, who shall have paramount authority over the whole of the Company’s territories in Hudson’s Bay. Secondly, that the Governor, with any two of his Council, shall be competent to form a council for the administration of justice, and the exercise of the power

claim made by Bindon that the Company's legislative and judicial powers were intended to "only be exercised when required by commercial priorities."⁵²

Despite Selkirk's (and the London Committee's) claim that the *Canada Jurisdiction Act* did not apply, even before the first settlers arrived at Red River in the summer of 1812, steps had already been taken to ensure that the Company had a number of officers appointed as justices of the peace, according to the rules set out in the Act. In the fall of 1811, Miles Macdonell and nine others were formally appointed by the Governor of Quebec to serve as "Civil Magistrates and Justices of the Peace for any of the Indian Territories or parts of America not within the limits of either of the Provinces of Upper or Lower Canada."⁵³ Selkirk also had himself appointed as a magistrate by way of the *Canada Jurisdiction Act* before he set out on his journey to Fort William and the Red River Settlement following the Seven Oaks massacre in 1816.

Gibson claims that before 1813 Miles Macdonell, at Red River, and William Auld, the Superintendent of the Northern Department, were the "only available magistrates appointed under the Act" to try cases at Red River.⁵⁴ However, this

vested in them by charter. Thirdly, that the Governor of Assinibouia and the Governor of Moose, with their respective districts and with any two of their respective Councils, shall have the same power; but their power shall be suspended, while the Governor-in-chief is actually present, for judicial purposes. Fourthly, that a Sheriff shall be appointed for each of the districts of Assinibouia and Moose, and one for the remainder of the Company's territories, for the execution of all such processes as shall be directed to them according to law. Fifthly, that, in the case of death or absence of any councillor or sheriff, the Governor-in-chief shall appoint a person to do the duty of the office until the pleasure of the Company be known": "Resolutions passed at a General court of the Hudson's Bay Company, 19 May 1815" (extracted from the Minute Book of the Company), in Oliver, *supra* note 3 at 193–94.

⁵² Bindon, *supra* note 11 at 45. Bindon bases this claim on her reading of the Hudson's Bay Company's first "Code of Penal Laws" issued at Moose Factory in the fall of 1815 by Thomas Vincent, the Governor of the Southern Territories of Rupertsland (cited in E.H. Oliver, ed., *The Canadian Northwest: Early Development and Legislative Records, Volume 2* (Ottawa: Government Printing Bureau, 1915) at 1285–87. Although the "Leading Offences" dealt with in this "Code" were offences against the commercial interests of the Company (including "mutiny and desertion," "combination," "disobedience, insolence or disrespect," "assaulting an officer," and being "considered as accessories"), this did not represent the full extent of the Company's interest in developing a formal legal system in the Red River Settlement and Rupertsland.

⁵³ "Notice Published in the Quebec Gazette, 12 December 1811" in Oliver, *supra* note 3 at 176–77. In addition to Macdonell, the justices appointed in 1811 included: William Auld; Thomas Thomas; William Hillier; Thomas Vincent; John Thomas; George Gladman; William Hemmings Cook; Thomas Topping; and Abel Edwards. According to Oliver, *supra* note 3 at 177, these justices were appointed by the Governor of Quebec following provisions spelled out in 43 George III, and their names appeared in the *Quebec Gazette*, since this was the usual way in which judicial appointments made by the Governor were announced.

⁵⁴ Gibson, *supra* note 11 at 23.

does not seem to be an accurate statement, since William Hillier, who accompanied Macdonell to Red River in 1811–12, was also appointed under the Act of 1803, along with William Hemmings Cook, the Chief Factor of York Factory,⁵⁵ and Thomas Thomas, another Company officer who was later appointed to the Council of Assiniboia.⁵⁶ Also, Macdonell and Hillier used the power conferred upon them by the Act of 1803 on several occasions prior to 1813.⁵⁷

In the letter he wrote to Selkirk on 31 May 1812, Macdonell describes how he and Hillier launched formal legal proceedings to deal with “insurgents” at the Nelson Encampment.⁵⁸ The “insurgents” Macdonell and Hillier had to deal with were a group of Glasgow and Orkney recruits brought over in the summer of 1811 who refused to fulfill the labour contracts they had signed with the Company. Later in this paper we will look in more detail at Macdonell and Hillier’s experience of trying to conduct the first formal criminal investigation undertaken on the eve of the establishment of the Red River Settlement. This episode in the early legal history of Manitoba is particularly important to look at, given the lack of attention it has received from previous investigators.

A great deal of attention has also been given to chronicling the events and circumstances that led to the Seven Oaks Massacre and Selkirk’s westward trip in 1816, and the consequences these had for subsequent changes that were introduced to the legal system of the Red River Settlement.⁵⁹ The general conclusion arrived

⁵⁵ I.M. Spry, “William Hemmings Cook” *Canadian Dictionary of Biography*, vol. 7 at 206–7.

⁵⁶ Oliver, *supra* note 3 at 56.

⁵⁷ Although most of the information Gibson provides in his account is correct, he does offer a number of statements, such as those noted above, which are not supported by primary historical documents. One reason for this may be that he did not have access to the full range of relevant primary sources. It is also possible that part of the problem may reside in the fact that Gibson does not attempt to relate his findings to the findings of previous investigators. For example, out of 188 footnotes in his paper, only 13 refer to secondary works and most of them were written in the nineteenth century or early twentieth century. No reference is made to Bindon’s, *supra* note 11, important work on the career of Adam Thom, or Knafla’s, *supra* note 11, overview of the legal history of Assiniboia, and the only up-to-date reference cited is Foster’s work on the *Canada Jurisdiction Act*, in “Long Distance Justice”, *supra* note 11. It is unfortunate that Gibson did not take advantage of the extensive literature on this period of Red River Settlement history instead of merely summarizing the extensive chronology of primary sources he found mainly in Oliver, *supra* note 3, and the *Selkirk Papers*. Furthermore, it appears that this article is very preliminary, since he does not provide a theoretical framework or present a clear argument based on an assessment of secondary literature.

⁵⁸ “Letterbook of Miles Macdonnell, 1811–1812,” *supra* note 44 at ccxviii–ccxxii, Macdonnell to Selkirk, 31 May 1812. This incident is not discussed in the short extract from the letter used by Gibson, from Oliver, *supra* note 3 at 176.

⁵⁹ Brown, *supra* note 11 at 501–7; Gibson, *supra* note 11 at 27–33; Foster, *supra* note 4 at 27–34; Brode, *supra* note 27; Gressley, *supra* note 27.

at by earlier researchers is that between 1817 and 1821 the colony's legal system was plagued by chaos and uncertainty owing to the prolonged criminal trials in Upper Canada involving employees of the Hudson's Bay and North West companies. This uncertainty began to recede in 1820, with Lord Selkirk's death, and the negotiations undertaken to bring about a merger of the two companies. However, according to Desmond Brown,⁶⁰ even after 1821, the criminal law that existed in the Canadian west continued to remain "unpredictable and uncertain."

The local laws of the Red River Settlement put into place after 1821 certainly reveal a great deal of vagueness and uncertainty. At the same time, however, changes in the law also reflect a great deal about the evolution of political, legal, and social institutions in the colony as it developed in the period from 1821 to the 1860s.⁶¹ In the period immediately following the merger of 1821, steps were taken to place the Red River Settlement, along with the rest of the Canadian west, on a more clearly defined legal footing. Although the Act of 1821 never managed to clarify precisely whether the *Canada Jurisdiction Act* of 1803 did or did not apply in Rupertsland,⁶² it did provide more specific instructions. Of the fourteen sections of the Act, ten dealt specifically with the administration of justice.⁶³ With respect to the attempt made in the Act to clarify the jurisdiction held respectively by the British Crown and the Hudson's Bay Company for the administration of justice, Brown points out that:

In particular, the responsibility of the Hudson's Bay Company for the execution of all civil and criminal procedures in Rupert's Land and in any future land grant is spelled out. Moreover, to ensure compliance with this provision, both the Company and any other future recipient of a grant to trade were required to produce for trial any employee or person acting under company authority who was charged with a criminal offence. Thus, the responsibility for the administrative procedure associated with law enforcement was shifted to the grantee.⁶⁴

⁶⁰ *Supra* note 11.

⁶¹ Owing to the ongoing conflict of the rival fur trade companies and other setbacks, like crop failures, that stood in the way of the colony's growth, in 1821 the population of the Red River Settlement was only about 400. However, afterward the population is estimated to have grown to 2500 by 1831, and to over 5000 by 1850. By the 1840s, a large majority of people living in the Red River Settlement were either French-speaking or English-speaking Métis. These population estimates come from, G. Friesen, *The Canadian Prairies: A History* (Toronto: University of Toronto Press, 1987) at 89–90; E.E. Rich, ed., *London Correspondence Inward From Eden Colville, 1849–1852* (London: Hudson's Bay Record Society, 1956) at xiii–xxi; and Oliver, *supra* note 3 at 78.

⁶² Brown, *supra* note 11 at 503; Foster, *supra* note 4 at 35.

⁶³ Foster, *supra* note 4 at 34.

⁶⁴ Brown, *supra* note 11 at 503.

Brown further points out that “in a completely new departure,” under the Act of 1821, “the Crown assumed the direct right to appoint justices of the peace, who would act for Upper Canadian courts and whose jurisdiction would extend ‘as well within any territories heretofore granted to the Company of Adventurers of England trading to Hudson’s Bay, as within the Indian Territories of such other parts of America as aforesaid.’”⁶⁵ The Act of 1821 also stipulated that courts established in Rupertsland and the Indian Territories “could not try any accused upon any charge for a felony made the subject of capital punishment, or deal with any civil action in which the cause of such action exceeded in value the sum of two hundred pounds,”⁶⁶ and to ensure that this provision was followed, the Hudson’s Bay Company was required to post a bond set at £5,000.⁶⁷ However, as Foster found in his research, the policy that such cases be sent to Upper Canada “was acted upon only once” after 1821, and it “seems to have slipped quickly into desuetude.”⁶⁸

Andrew H. Bulger was the first Governor of Assiniboia appointed after the merger of 1821. Prior to this appointment, Bulger had a distinguished military career with the Royal Newfoundland Regiment, which included serving as a lieutenant under the command of Major-General Isaac Brock during the War of 1812–14.⁶⁹ Although Bulger served as Governor for just over a year, he played a significant role in putting subsequent orders passed by the London Committee into practice.⁷⁰

The enactment of the *Act to Regulate the Fur Trade* in 1821 was accompanied by several other orders from the London Committee concerning the local administration of justice. On 29 May 1822, the General Court of the Company in London passed an ordinance which provided for a system of summary courts in the District of Assiniboia, and authorized the governor and council to serve as a higher court.⁷¹

⁶⁵ *Ibid.*

⁶⁶ “Act for Regulating the Fur Trade,” *supra* note 3.

⁶⁷ Foster, *supra* note 4 at 35.

⁶⁸ *Ibid.*

⁶⁹ During this period, Bulger also served as the commandant, with the local rank of captain, of Fort McKay, at Prairie du Chein on the upper Mississippi River, where he became known for this fair treatment of Indian allies and the strict military authority he used to quell a near mutiny of “Michigan Fencibles” (or militiamen). R.S. Allen & C.M. Judd, “Andrew H. Bulger” *Dictionary of Canadian Biography*, vol. 8 at 111–13.

⁷⁰ A valuable source of primary historical data on Bulger’s tenure as Governor of Assiniboia is the 8 volume collection of Bulger’s personal correspondence and papers held in the National Archives of Canada. NAC, *Bulger Papers*, MG 19 E 5.

⁷¹ Brown, *supra* note 11 at 505; “Copy of Resolutions passed at a General Court of the Hudson’s Bay Company the 29th May 1822,” NAC, *Bulger Papers*, vol. 2 at 111–13; also in Oliver, *supra* note 3

Lord Bathurst, the Secretary of the British Colonial Office, expressed his approval of this action by the London Committee, in a letter he wrote in which he stated that since “the Resolutions of the 29th instant appear well calculated to preserve the peace and good government of that part of North America, under the jurisdiction of the Hudson’s Bay Company,” the British government would not at the time take steps to have magistrates appointed under the provisions of the Act of 1821.⁷² Specifically, this enabling legislation stated that, similar to the power given to the two senior Governors in charge of “the whole of the Company’s Territories of Rupert’s Land in North America,” the Governor of Assiniboia together with any two members of the Council of Assiniboia “shall be competent to form a Council for the administration of justice and the exercise of the powers vested in them by the Charter.”⁷³ In addition to announcing the Company officers who were appointed to the larger Council of Governors in charge of the whole of “the Company’s Territories,” the London Committee announced that Thomas Thomas, James Bird, Alexander Macdonnell, Frederick Matthey, William Hemmings Cook, and John Pritchard, were appointed as Councillors of the Governor of Assiniboia.

Bulger also received supplementary follow-up instructions from the London Committee on how justice was to be administered in the District. On 31 May 1822, Andrew Colville, the executor and trustee of Lord Selkirk’s estate, wrote Bulger stating that while in light of Lord Bathurst’s endorsement there was no doubt that he had the jurisdiction to administer criminal justice, “I should hope you will not have many occasions of acting, but if you should, the punishments should not be severe. Solitary confinement for *short* periods is perhaps the best and cheapest.”⁷⁴ The following day, Bulger was issued a more detailed set of instructions on the administration of justice signed by four members of the London Committee.⁷⁵ Specifically, Bulger was instructed that:

Having understood that His Majesty’s Government did not intend at present to exercise the Power given to them by the Act of last session of appointing Courts of Record and Justices of the Peace for Rupert’s Land, we have thought it proper to take the necessary steps to enable the Governors and their Councils to administer justice under the provisions of the Charter and accordingly the Governor and Company

at 219–21.

⁷² Lord Bathurst to Joseph Berens, 31 May 1822, NAC, *Bulger Papers*, vol. 2 at 114; also in Oliver, *supra* note 3 at 221.

⁷³ Oliver, *supra* note 3 at 219–20.

⁷⁴ A. Colville to A. Bulger, 31 May 1822, in Oliver, *supra* note 3 at 222.

⁷⁵ Letter from J.H. Pelly, Thomas Langley, A. Colville and N. Garry to Andrew Bulger, 1 June 1822, in Oliver, *supra* note 3 at 222–23.

at a General Meeting held on the 29th ulto., came to certain Resolutions of which a copy is inclosed [sic].⁷⁶

The London Committee went on to state that although Bulger had the power “to enrol and arm” men to help “support civil power” in the Red River Settlement whenever he felt this was necessary, any militia appointments he made had to be forwarded to London for approval. With regard to dealing with capital crimes, the Committee, somewhat optimistically, stated that although “[w]e trust no offences calling for a capital punishment will be committed,” should any such cases occur “it will be better to transmit the parties with the necessary witnesses for the defence as well as the prosecution to Upper Canada for trial.” Bulger was told that:

... in trying other offences a Jury should be summoned; but where from the thinness of the population it is not practicable to get 12 impartial men a smaller number may compose the Jury, and when their verdict of Guilty is given, moderate and reasonable punishment should be awarded by the Court composed of the Governor and his Council.

As Andrew Colville had suggested before, Bulger was further told that “[p]erhaps solitary imprisonment for short periods will be the most proper and effectual” punishment for crime, and that “[i]n civil or pecuniary disputes, it will be best to endeavour to induce the parties to settle them by arbitration, but if this does not succeed, the point should be settled by a Jury.”⁷⁷ As we will see later in this paper, like Miles Macdonell before him, there is evidence which suggests that Andrew Bulger also participated actively in the day-to-day administration of criminal justice in the Red River Settlement during his short tenure as Governor.

Although experiencing a substantial increase in population, the decade of the 1820s in the Red River Settlement was one of relative calmness and stability.⁷⁸ In his introduction to the correspondence of Eden Colville, W.L. Morton captures a sense of the type of community that began to evolve at Red River in the 1820s, in his statement:

If its population was diverse and divided by race, religion and rank, Red River none the less possessed a definite character and was held together by a common framework. The Settlement was one community, united by its isolation, the interdependence of fur trade, plains hunt and river front agriculture, and the common substratum of Indian blood relationships.⁷⁹

⁷⁶ *Ibid.* at 222.

⁷⁷ *Ibid.* at 223.

⁷⁸ Friesen, *supra* note 61 at 89–90.

⁷⁹ Rich, *supra* note 61 at xxi–xxii. This view of the character of the Red River Settlement is also accepted in general by other historians. For an overview of secondary literature on the Red River Settlement to the mid-1970s, see F. Pannekoek, “The Historiography of the Red River Settlement,

During this period of relative calm, the legal system of the Red River Settlement began to be put into place by Andrew Bulger, and later Governors Robert Parker Pelly,⁸⁰ and Donald McKenzie.⁸¹ Although these succeeding governors, none of whom were trained as lawyers, did go about attempting to administer justice according to “the laws of England” and the Charter, it was not until the mid-1830s that local laws of the District of Assiniboia began to be organized and consolidated. The first effort at compiling a set of by-laws for the District occurred on 4 May 1832, at a Council meeting presided over by George Simpson, and attended by the Governor of Assiniboia, Donald McKenzie, and Councillors James Sutherland, John Pritchard, and Robert Logan.⁸² These by-laws dealt with a number of local concerns, such as allowing pigs to run loose, failing to look after open fires, and “the felonious practice of taking horses,” and penalties were attached to these offences. The first major attempt at a consolidation of local by-laws occurred in the Council meetings presided over by Simpson in 1835 and 1836.⁸³ In addition to including the regulations passed in 1832, a number of new by-laws were introduced along with changes to the structure of the court system, the “Police Establishment,” and the militia. One of the new regulations introduced in 1836 prohibited “the sale and

1830–1868” (1981) 6 *Prairie Forum* at 75–85. See also: A.J. Ray, “Reflections on Fur Trade Social History and Métis History in Canada” (1982) *American Indian Culture and Research Journal* at 91–107; H. Sprenger, “The Métis Nation: Buffalo Hunting versus Agriculture in the Red River Settlement, 1810–1870” in B. Cox, ed., *Native People, Native Lands: Canadian Indians, Inuit and Métis* (Ottawa: Carleton University Press, 1987); D.F.K. Madill, “Riel, Red River, and Beyond: New Developments in Métis History” in C. Calloway, ed., *New Directions in American Indian History* (Norman and London: University of Oklahoma Press, 1988); G. Ens, “Dispossession or Adaptation? Migration and Persistence of the Red River Métis, 1835–1890” (1988) *Canadian Historical Association: Historical Papers* 120–44.

⁸⁰ Robert Parker Pelly served as the Governor of Assiniboia from 1823 to 1825. He was a first cousin of Sir John Henry Pelly, the Governor of the Hudson’s Bay Company from 1822 to 1852. Prior to his appointment, Pelly served as a captain in the East Indian Civil Service. Provincial Archives of Manitoba [PAM]: Search file, “Robert Parker Pelly”.

⁸¹ Donald McKenzie was employed at York Factory for one year before being sent by George Simpson to the Red River Settlement in 1823 to assist William Kempt, who had taken over as interim Governor after Bulger resigned. In June 1825, he became Governor of Assiniboia, a post he held for eight years, until the Governorship was assumed by Alexander Christie in 1833. Oliver, *supra* note 3 at 45–48.

⁸² “Proceedings of a Council held at Fort Garry on Friday the 4th day of May, 1832” in Oliver, *supra* note 3 at 263–65.

⁸³ Oliver, *supra* note 3 at 266–74 and 275–78.

traffic of beer to Indians.”⁸⁴ This by-law was added to in 1837, when the Council ordered that “all persons who given information of sale and traffic of beer with Indians, shall, upon conviction of the offender, receive one half of the penalty levied.” In order to enable Indians who were sold alcohol to testify in court, at the same Council meeting it was resolved “[t]hat the evidence of an Indian be considered valid, and be admitted as such in all Courts of this Settlement.”⁸⁵

The by-laws passed in the District of Assiniboia were consistent with the more general “Standing Rules and Regulations” of the Hudson’s Bay Company. In June 1837, a revised series of “Standing Rules and Regulations” to be followed by all Company officers and servants was passed at a meeting of the Governor and Council for the whole of Rupertsland and the Indian Territories held at Norway House.⁸⁶ One of the general orders announced stated:

That Liquor be not made an article of trade or medium of barter with Indians for furs in any part of the Country and that not more than 2 Gallons of spirituous Liquor and 4 Gallons Wine be sold at the Depots to any individual in the Company’s service of what rank soever he may be.⁸⁷

At the same council meeting, a number of other resolutions aimed at “Promoting Moral and Religious Improvement” were added to the Company’s list of “Standing Rules and Regulations” introduced the year before.⁸⁸ These had to do mainly with steps that all Company officers and servants having women or children were required to take to ensure they were provided for if the employee decided to leave the colony when he retired. However, Simpson and his Council also ordered:

That for the moral and religious improvement of the Servants, and more effectual civilization and instruction of the families attached to the different Establishments, and of the Indians, that every Sunday divine service be publicly read with becoming solemnity once or twice a day, to be regulated by the number of people and other circumstances, at which every man, women and child resident will

⁸⁴ Specifically, the Council minutes stated that: “It being found that the public tranquillity of the Settlement is greatly endangered, by the sale and traffic of beer to Indians. It is resolved ... That such sales or traffic be prohibited from and after the 1st of July of the current year, and that any one who may sell to or traffic beer with Indians, after that date be liable in a penalty of twenty shillings, for every such offence, all such fines and penalties to be made applicable to Public Work.” Oliver, *supra* note 3 at 277.

⁸⁵ Council minutes, 2 February 1837, in Oliver, *supra* note 3 at 278–79; Gibson, *supra* note 11 at 50–51.

⁸⁶ Minutes of Council of the Northern Department of Rupert’s Land, 27 June 1837, in Oliver, *supra* note 52 at 757–73.

⁸⁷ *Ibid.* at 772.

⁸⁸ *Ibid.* at 755.

be required to attend together, with any of the Indians who may be at hand and whom it may be proper to invite.⁸⁹

Other changes introduced by George Simpson in the period from 1837 to 1839 had an effect on the formal legal system of the Red River Settlement. In 1837, further changes were made to the court system, which included reducing the number of districts of the Settlement from four to three, and increasing the number of magistrates in each district to two. It was also ordered that in future all petty sessions hearings were required to take place before at least three magistrates, one of whom was from outside the district.⁹⁰ In 1837, Simpson also approved the restructuring of the courts into the two-tiered system of courts of summary jurisdiction, and the court of the Governor and Council of Assiniboia. At one of the first Council of Assiniboia meetings attended by Adam Thom in 1839, a more detailed set of resolutions were announced concerning the operation of courts of summary jurisdiction and the "Supreme Court" of the District of Assiniboia.⁹¹

Legal historians have written a great deal about the role played by Adam Thom as the first legally-trained Recorder of Rupertsland. In general, previous investigators have portrayed Adam Thom as the single most important person who affected the development of legal system of the Red River Settlement after 1839. In his pioneering study, Stubbs notes that "[a]s the first Recorder of Rupert's Land, Adam Thom must be accorded the distinction of being 'the father of the Bench and Bar of Western Canada.'"⁹² Like other historians who have looked at Thom's career,⁹³ Stubbs points out that Thom played a major role in consolidating and codifying "The Local Laws of the District of Assiniboia."⁹⁴ These laws were consolidated and codified on three occasions after 1839: in 1841 and 1852, during the period of Adam Thom's term of office, and in 1862. In 1841, Thom prepared a consolidation of the laws of Assiniboia, which, when passed by the Council, brought all of the regulations of the colony together in one document of fifty-eight sections.⁹⁵ Thom was also responsible for the consolidation of 1851, in which the body of existing

⁸⁹ *Ibid.*

⁹⁰ Council minutes, 16 June 1837, in Oliver, *supra* note 3 at 279–81; Gibson, *supra* note 3 at 49.

⁹¹ Council minutes, 4 July 1839, in Oliver, *supra* note 3 at 287–92.

⁹² Stubbs, *supra* note 11 at 1.

⁹³ Bindon, *supra* note 11; Brown, *supra* note 11; Gibson & Gibson, *supra* note 11.

⁹⁴ Stubbs, *supra* note 11 at 15.

⁹⁵ Gibson & Gibson, *supra* note 11 at 30; Council minutes, 1 June 1841, in Oliver, *supra* note 3 at 295–306.

local laws was reduced to forty-six resolutions.⁹⁶ The 65 sections contained in the consolidation approved in 1862 also bear the imprint of Thom's influence.⁹⁷ Soon after he arrived at Red River, Thom also took the initiative to draft his own "Temporary Penal and Civil Code for Rupertsland,"⁹⁸ and write a long treatise entitled his "Observations on the Law and Judicature of Rupertsland."⁹⁹

Historians' assessments of the qualities Thom brought to the job have varied over time. While admitting that Thom was employed by the Hudson's Bay Company to make judicial decisions that worked to protect the Company's legal authority and fur trade monopoly in the Canadian west, Stubbs concludes that Thom "was a man whose positive qualities — intelligence, courage, honesty — out-measured his defects."¹⁰⁰ While providing a less complimentary assessment of Thom's personal character, and noting that he actually had "very limited experience" in the practice of law, Gibson and Gibson maintain that "his decisions were generally sound, and the procedures that he introduced were in accord with accepted legal practice elsewhere."¹⁰¹

One exception to this noted by Gibson and Gibson was the decision Thom made, soon after he arrived at Red River, concerning "the applicability of legal sanctions to the conduct of the native population." In the fall of 1839, Thom summoned the first grand jury in the colony's history, to determine whether a charge of murder should be brought against an Indian boy who had killed one of his friends with an arrow. According to Gibson and Gibson, this type of incident "in the past would have been overlooked, or treated very leniently, but Thom insisted on invoking the same legal procedures that would have been applied if members of the white community had been involved."¹⁰² In 1845, Thom again displayed his insistence on treating Indians the same as whites, by bringing forward two cases that involved Indians killing other Indians. In the first case, heard in February 1845, an Indian accused of killing his wife was acquitted by a grand jury

⁹⁶ Stubbs, *supra* note 11 at 40; Report of Adam Thom to the Governor and Council of Assiniboia on the State of the Law of the District, in Oliver, *supra* note 3 at 369–79.

⁹⁷ Council minutes, 8 and 11 April 1862, in Oliver, *supra* note 11 at 485–502.

⁹⁸ Hudson's Bay Company Archives [HBCA], E 16/1 fos. 1-78, Council of Assiniboia: Proposed Penal and Civil Code for Rupertsland, July 1840.

⁹⁹ HBCA, E 16/1 fos. 79-141, Adam Thom, "Observations on the Law and Judicature of Rupertsland", May 1840.

¹⁰⁰ *Ibid.* at 44.

¹⁰¹ Gibson & Gibson, *supra* note 11 at 30.

¹⁰² *Ibid.* at 30. Although the grand jury indicted the accused, he was subsequently acquitted at trial by reason of being under the age of fourteen, and therefore immune from criminal liability.

of murder, but found guilty of the lesser charge of assault. In the second case, a Saulteaux Indian named Capinnesweet was convicted of murder for killing a rival Sioux, and, accidentally with the same bullet, killing another member of his own tribe. Thom subsequently sentenced Capinnesweet to be hanged, and the sentence was carried out.¹⁰³

Gibson and Gibson highlight the fact that Thom also brought Indians into the criminal justice system that was developing in the Red River Settlement by urging the Council of Assiniboia to pass a decree ordering the imprisonment of Indians who were found to be intoxicated. While previous laws had been directed solely against those who supplied Indians with liquor, the new law passed in 1845 stipulated "that any Indian found intoxicated should, in default of providing two sureties, be imprisoned until he prosecuted the person who furnished him with liquor."¹⁰⁴ Although clearly documenting the role Adam Thom played in pulling Indians into the criminal justice system that evolved in pre-1870 Manitoba, neither Gibson and Gibson,¹⁰⁵ or more recently Gibson,¹⁰⁶ make an effort at explaining why Adam Thom decided on this course of action. Other more recent biographers and critics of Adam Thom, like Bindon,¹⁰⁷ and Knafla,¹⁰⁸ also fail to adequately contextualize, and explain why, he acted the way he did. In essence, Bindon attributes Thom's severe treatment of Indians to pragmatic factors, including "the difficulties involved in transporting [capital] cases" to Upper Canada, and the fact that Thom was bent on imposing "the Company's judicial authority."¹⁰⁹ More pointedly, Knafla provides a stinging indictment of Adam Thom's performance on the bench, not only in his treatment of Indians, but also in the way he treated the French Métis population of the Red River Settlement. According to Knafla's assessment of Adam Thom:

He exceeded his judicial authority in hearing causes over which he had no jurisdiction, expressed a dislike for English common law, and allowed Company officials to use illegal means in dealing with others. He lectured parties and juries ad nauseam, gave improper directions to jurors, and used personal

¹⁰³ *Ibid.* at 30–31.

¹⁰⁴ *Ibid.* at 30.

¹⁰⁵ *Ibid.*

¹⁰⁶ Gibson, "Privatized Justice", *supra* note 11.

¹⁰⁷ *Supra* note 11 at 59–63.

¹⁰⁸ *Supra* note 11 at 37–38.

¹⁰⁹ *Supra* note 11 at 61.

favours in giving judgments. Equally, he had little regard for the Métis or for the French language, often giving arbitrary judgments and excessive sentences against them. Thom was in fact a racist.¹¹⁰

Although Oliver, among others, has noted that during the early years of the Red River Settlement responsibility for the administration of justice “devolved upon the Governor and his Council”,¹¹¹ few efforts have been made at determining how the Governor of Assiniboia and his Council actually went about attempting to administer criminal justice prior to the mid-1830s. Similarly, except for the attention that has been given to Adam Thom’s role as the first Recorder of Rupertsland, little work has yet been undertaken on the administration of criminal justice in the District of Assiniboia from 1839 to the 1860s. In addition to the need for this type of research, an investigator interested in adding to our knowledge of the circumstances that affected the development of laws and legal institutions in the Red River Settlement must ask the question: was Adam Thom simply a racist? Or, on the other hand, were his judicial decisions similar to those made by the colonial judges who were put in charge of the legal systems that were being put into place in other British colonies during the same period? In the following parts of this paper, an attempt is made to introduce and reexamine primary historical evidence that provides a more detailed picture of the evolution of criminal justice institutions in the District of Assiniboia from 1811 to the 1860s.

III. GOVERNORS’ COURTS AND JUSTICES OF THE PEACE IN THE RED RIVER SETTLEMENT, 1811–1835

HOW DID MILES MACDONELL, Andrew Bulger, and other later governors of the District of Assiniboia go about the practical task of attempting to administer criminal justice? In order to find an answer to this question we need to undertake a more in-depth examination of the official and personal correspondence of Lord Selkirk and succeeding governors of the District of Assiniboia.¹¹² Research is also needed which looks in more detail at the official and personal roles assumed by councillors of the governor of Assiniboia and appointed justices of the peace.¹¹³

¹¹⁰ Knafla, *supra* note 11 at 38.

¹¹¹ Oliver, *supra* note 3 at 86.

¹¹² NAC, *Selkirk Papers*, MG 19 E 1, vols. 1–54, on reels C1–C20 and A27; NAC, *Miles Macdonell Papers*, MG 19 E4; NAC, “Letterbook of Miles Macdonell” *supra* note 44; NAC, *Alexander McDonell Papers*, MG 19 E 11; NAC, *Bulger Papers*, MG 19 E 5; Provincial Archives of Manitoba [PAM], *Pelly Documents*, MG2 A5.

¹¹³ Short biographies of the councillors of Assiniboia are contained in Oliver, *supra* note 3 at 51–73. However, we have been unable to find a similar list for Justices of the Peace.

It is important to situate this evidence within a broader understanding of circumstances and events that shaped the early history of the District of Assiniboia and the Canadian west. In the following section, we present preliminary evidence from our research on the administration of criminal justice under different governors of Assiniboia in the period from 1811 to 1835. Although more archival research is required in order to paint a more complete picture of how different governors approached the practical task of administering criminal justice, the following evidence shows that early governors and justices of the peace were active participants.

In 1810, Miles Macdonell was hired by Selkirk to take charge of establishing a settlement at Red River.¹¹⁴ Macdonell's first task was to lead a contingent of Hudson's Bay Company employees to Red River in order to make preparations for the settlers who were expected to come the following year. He was also appointed by the London Committee to become the first Governor of Assiniboia.¹¹⁵

On his trip across the Atlantic, Macdonell carried a copy of Selkirk's official land grant,¹¹⁶ along with a set of formal instructions he received from Selkirk on how he was to proceed to Red River and establish the colony.¹¹⁷ Macdonell was told by Selkirk that, before leaving Scotland, he was to stop first at Orkney and then at Stornoway in the Island of Lewis to take on recruits that he and William Hillier were to lead to Hudson Bay.¹¹⁸ Arriving at Stornoway on 17 July 1811, Macdonell

¹¹⁴ NAC, *Miles Macdonell Papers*, MG 19 E4, folder 1. Selkirk to Macdonell, 10 February 1810. On 13 June 1811, Selkirk wrote Macdonell telling him that for his services he would "receive a grant of fifty thousand acres, to yourself, & your heirs" subject to "the general conditions imposed by the Company in their grant to me, & also to any general regulations, which may be adopted, for the purpose of preventing one proprietor from alluring away settlers brought to the country by another". *Miles Macdonell Papers*, MG 19 E4, folder 2, Selkirk to Macdonell, 13 June 1811, also in Oliver, *supra* note 3 at 175.

¹¹⁵ In recounting the decision made to hire Macdonell, Selkirk later noted that: "It was determined that Mr. Miles Macdonell should take with him from 20 to 30 men, all engaged as servants at yearly wages, in the same manner as those in the Hudson's Bay service, and to encourage the undertaking the Directors agreed that this number should be selected by Mr. Macdonell from among those who should be engaged for the Company. It was also agreed that these should be followed the ensuing year by a larger number, including a few families, and it was expected that the men first sent out would be easily able, in the course of a year to raise a sufficient crop for those that were to follow. In pursuance of these views, Mr. Macdonell sailed from the Thames. He had been appointed by the Hudson's Bay Company Governor of Ossiniboime [*sic*] including all that part of their territory which was within the grant to Lord Selkirk, to whom he was also appointed agent with the fullest powers": NAC, *Selkirk Papers*, vol. 1 at 20.

¹¹⁶ "Grant of the District of Assiniboia by the Hudson's Bay Company to Lord Selkirk [1811]" in Oliver, *supra* note 3 at 154–67.

¹¹⁷ "Instructions to Miles Macdonell, 1811" in Oliver, *supra* note 3 at 168–74.

¹¹⁸ *Ibid.*; H.J. Mays, "Miles Macdonell" *Canadian Dictionary of Biography*, vol. 6 at 440–44.

and Hillier took on board more than 100 men recruited by the company's agents who had been waiting for a ship to leave for Hudson Bay since early June. According to Macdonell's biographer, while waiting at Stornoway, the recruits, who happened to be a mixed group of Irish and Scottish Catholics and Protestants, had "little to occupy their time but drinking and grumbling about inadequate facilities and the prospects of the voyage that lay ahead."¹¹⁹ Moreover, while at Stornoway, the recruits were treated to an editorial written in the *Inverness Journal* by Simon McGillivray¹²⁰ "which warned about the arduous voyage, extremes of climate, lack of food, and hostile Indians that awaited them."¹²¹ This did not help make Macdonell's job any easier, since he was told by Selkirk that he would be in charge of trying to maintain discipline among the recruits.¹²²

Although apparently showing only some mild discontent while crossing the Atlantic,¹²³ within a short time of having arrived at York Factory on Hudson Bay, the Irish and Orkneymen were engaged in bitter sectarian squabbles, while many of the Orkneymen mutined and refused to fulfil the labour contracts they had signed with the HBC. According to Macdonell's account, this mutiny occurred because of the letter Simon McGillivray published in the *Inverness Journal* in which he "misrepresented the service of the Hudson's Bay Company and the proposed settlement at Red River."¹²⁴

¹¹⁹ *Ibid.* at 441-42.

¹²⁰ One of the principle shareholders of the North-West Company.

¹²¹ Mays, *supra* note 118 at 442. A number of recruits deserted even before the ships left Stornoway. See J.M. Bumsted, "The affair at Stornoway, 1811" (Spring 1982) *The Beaver* at 53-58.

¹²² Specifically, in the instructions he received from Lord Selkirk in 1811, Macdonell was told that: "It is of great importance to introduce and keep up from the first habits of exact subordination, and implicit obedience to command, but in doing this it is necessary to avoid exciting the jealousy of the people who might think they were kidnapped if the forms of military service were prematurely introduced. On the passage the practice of keeping watch and watch, and the various observances which the regulation of a ship requires, afford sufficient opportunities for enforcing the essential principles of obedience and discipline": "Instructions to Miles Macdonell, 1811" in Oliver, *supra* note 3 at 169.

¹²³ The voyage was plagued by head winds and lasted 61 days, which was the longest Atlantic crossing on record. May, *supra* note 118 at 442. In the first detailed letter he wrote Selkirk following the ship's arrival at York Factory, Macdonell mentioned that "[t]he Irish band were not more troublesome than the others — the people from Glasgow were at first the most turbulent & dissatisfied. The Orkney men being accustomed to it think nothing of a voyage to Hudson Bay, but as they formerly when going out fared the same as the ship's Company, they were displeased on account of the provisions & served to increase the discontent of the others." "Letterbook of Miles Macdonell, 1811-1812", *supra* note 44 at cxcii, Macdonell to Selkirk, 1 October 1811.

¹²⁴ NAC, *Selkirk Papers*, series 2, Red River Correspondence, on reel A27 at 21.

The story of how Macdonell and Hillier tried to deal with “the Insurgents” at the Nelson Encampment is an important part of the early legal history of the Red River Settlement. What is most revealing about this incident is the way in which Macdonell and Hillier tried to use the power they were granted as justices of peace under the Act of 1803 to restore order and maintain discipline. At the same time, however, the incident reveals the difficult time Macdonell had from the outset in attempting to impose his authority on the men who were nominally placed under his command.

On 25 December 1811, Macdonell wrote to William Auld, Superintendent of the Northern Department, complaining about the lack of discipline among Orkney-men who were recruited by the Company.

With regard to settling a Colony, people from other parts would I think with you serve the purpose better than these from Orkney, particularly such of them as have already been in this Country, whose habits of insubordination, idleness, & inactivity will be very difficult to eradicate. One or two old hands is enough to poison any party — they tell the others that they ought to have this thing & that other thing, — make the whole discontented & keep themselves in the background. Wm Finlay has already occasioned a little difficulty, laying down *Factory Law* (as he explained it) & disobedience; in consequence of which I removed him from my party on the South side [of] the Nelson. Any farther misconduct will occasion stronger steps to be taken with him.¹²⁵

On 14 February 1812, Macdonell wrote a follow-up letter to William Cook, the Governor of York Factory, informing him of disciplinary problems at the Nelson Encampment and the process that he and William Hillier set into motion to deal with them.

A Combination has been formed by a part of the men against the authority of the officers set over them. Mr. Hillier & myself were taking evidence as Magistrates of their burning a Hut built for the accommodation of Mr. Finlay, in the most audacious manner. Thirteen of them besides Finlay are implicated, who all to a man he set us at defiance. There are some others of the old hands that are private advisers & abettors.¹²⁶

The next day, Macdonell wrote Cook another letter, informing him that he was now sending him a party of men to get provisions, three of whom:

... are of the mutineers; altho' struck off duty and under the denomination of prisoners, they must drag provisions for themselves from the Factory, which will be issued to them here, and a separate account kept of it, and I may be debited as usual with all issues at Factory to my order. I should wish to know,

¹²⁵ “Letterbook of Miles Macdonell, 1811–1812”, *supra* note 44 at cci, Macdonell to Auld, 25 December 1811.

¹²⁶ *Ibid.* at ccvi, Macdonell to Cook, 14 February 1812.

for my guidance, what ration is customarily allowed to men struck off duty for misconduct, as these are?¹²⁷

Before the end of February, Macdonell wrote Auld a more detailed letter in which he explained the underlying causes of the disciplinary problems at the Nelson Encampment and the steps that he and Hillier had taken to deal with them.¹²⁸ Macdonell's account is worth quoting at length, since it provides a description of the first recorded "criminal investigation" undertaken during the Selkirk period.

The Irish displayed their native propensity & prowess on the first night of the year, by unmercifully beating some Orkneymen of Mr. Hillier's party. Too much liquor was the only incitement. The perpetrators of this unwarrantable act, were as much as could be done, debarred from a repetition of such conduct, by obliging them to give security for their future peaceable deportment. The effect will not however be so readily removed, & will consequently serve to strengthen the prejudices already existing against them.

We have lately had another affair which may be attended with consequences more serious than the first, & of which William Finlay engaged by me in October last at YF, is the primary mover & cause.

At a time when our people were every day getting down in the Scurvy (16 in my party & 17 in Mr. Hillier's were already seized with it) regulations were established for the health of the people; to which Finlay refused to conform. On this account he was struck off work for two or three days, & not intending to go further lengths with him, he was ordered to resume work; but this he refused, saying that, he would work no more. As he persisted in this determination altho' frequently ordered to work, after a week had passed I had him brought before Mr. Hillier as a Magistrate, where different misdemeanours were proved against him, for which he was sentenced to confinement as a refractory servant.

Macdonell went on to tell Auld that since Finlay thought nothing of a punishment that simply required him to "sleep & sit idle in the same house with the other men," he had a hut build for his solitary confinement. However, this strategy failed, since on the first evening of his confinement Finlay was joined by 13 men who "burnt the Hut to the ground, triumphantly shouting in the most audacious manner when they had got it in flames." Macdonell explained to Auld that in response to this outrageous act he and Hillier had all of the men brought before them and began "investigating the matter as Magistrates," but "they refused to submit to [their] authority and walked away." While admitting to Auld that nothing much else could be done with Finlay and his party except send some of them home "to be tried by the laws of their country," he tried to paint a less dismal picture of the affair by adding that "None of the Highlanders were concerned in this affair; & you will be surprised to learn that even none of the Irish had a hand in it, they are all men from Glasgow & Orkney."

A good part of the correspondence Macdonell wrote over the next few months was taken up with discussions around the continuing insubordination of the Nelson

¹²⁷ *Ibid.* at ccvii, Macdonell to Cook, 15 February 1812.

¹²⁸ *Ibid.* at ccviii, Macdonell to Auld, 27 February 1812.

Encampment insurgents, and the steps that should be followed in transporting both them, and the “Irish assailants” [from New Year’s eve], back to London to face criminal trials.¹²⁹ Contrary to the impression left by Gibson,¹³⁰ when Macdonell wrote to Selkirk about the need for “some kind of judicature in the Colony” backed by the coercive power of mounted troops,¹³¹ he was most likely venting over the frustrating winter he spent trying to enforce his authority as a justice of the peace. Indeed, in both his letter of 31 May 1812, and in the one he wrote to Selkirk two days earlier not cited by Gibson,¹³² Macdonell described his frustrations at length, at one point noting:

There cannot be much improvement made in the country while Orkneymen form the majority of labourers. They are lazy, spiritless and ill-disposed, wedded to old habits, and strongly prejudiced against any change however beneficial. It is with the utmost reluctance they could be prevailed on to drink the spruce juice to cure themselves of the scurvy. They think nothing of the scurvy as they are then idle and their wages run on. The Company’s provisions are of excellent quality. I have not seen better issued from His Majesty’s stores, and these people are as well fed as servants need be in any country. Yet these men, who at home live in the utmost poverty, grumble here for being deprived of superfluous and costly articles of luxury formerly lavished on them. It is not uncommon for an Orkneyman to consume 6 or 8 lbs of meat in a day, and some have eaten as much at a meal. This gluttonous appetite they say is occasioned by the cold. I entirely discredit the assertion, and think it rather to be natural to themselves.¹³³

The fact that Macdonell tried to the best of his ability to follow proper legal procedures in dealing with the various “crimes” committed at the Nelson Encampment is most clearly revealed in his letter to Selkirk of 31 May 1812, and the various legal forms and documents he enclosed with the letter.¹³⁴ This attention to proper legal procedures is also reflected in the first known “criminal investigation” Macdonell completed after he arrived at Red River. The case he dealt with

¹²⁹ *Ibid.* Macdonell to Auld, 18 April 1812, 4 May 1812, 12 May 1812, 15 May 1812, 24 May 1812; Macdonell and Hillier to Auld, 15 May 1812.

¹³⁰ *Supra* note 11 at 20–21, citing Oliver, *supra* note 3 at 177, extract from Macdonell to Selkirk, 31 May 1812.

¹³¹ “The Letterbook of Miles Macdonell, 1811–1812”, *supra* note 44 ccxviii–ccxxiii, Macdonell to Selkirk, 31 May 1812.

¹³² *Ibid.* at ccxvi–ccxvii, Macdonell to Selkirk, 29 May 1812. It should also be noted that the transcribed copy of this letter in Miles Macdonell’s letterbook is incomplete. However, a more complete copy of the letter, cited hereinafter, exists in NAC, *Selkirk Papers*, Red River Correspondence, vol. 1, on reel A27 at 62.

¹³³ NAC, *Selkirk Papers*, Red River Correspondence, vol. 1, Macdonell to Selkirk, 29 May 1812.

¹³⁴ NAC, *Selkirk Papers*, series 1, “Documents concerning Patrick Quinn, 13 June 1812” on reel C-1 at 184–85; “Document No 1. Felonious Assault, 1 January 1812, Nelson Encampment,” on reel C-1 at 260–77.

concerned the alleged theft of a silver teaspoon by someone who belonged to the family of John MacLean. John MacLean was much wealthier than most of the other Selkirk settlers who travelled to Red River from York Factory in the summer of 1813, and along with his family he brought a maid and household goods including crates of fancy dishes and silverware. When, at some point on their journey a silver teaspoon belonging to someone else turned up among the MacLean's possessions, the family was accused of theft.¹³⁵ Although, in the end, William Auld, who received the complaint at York Factory, and Macdonell, who was responsible for prosecuting the case at Red River, disagreed on whether there was enough evidence to convict MacLean, the case nonetheless illustrates how a legal system started to be put into place in the early days of the Red River Settlement.

Since within a few decades the legal system at Red River would begin to take in an increasing number of Aboriginal people, it is significant to note what Miles Macdonell had to say about Indians. In his letter of May 29th, Macdonell described the insolence of the "Home Guard" Indians who lived close to York Factory, and the not much better behaviour of senior Company officers, including Auld and Cook. Specifically, Macdonell informed Selkirk that:

Mr. Auld and Mr. Cook are both very unpopular with the Indians here, who have likewise caught the spirit of dissatisfaction to a very great degree. These people who in 1782 offered to defend the Factory against the French, refuse now to come in to the Goose Hunt, and feel indifferent on all occasions to obey the orders of the Company's officers. There are no chiefs among them save in the utmost state of individual debasement and depravity that can be conceived. It is a melancholy reflection that during their long intercourse with the Whites, they have not acquired one moral virtue, nor is there the faintest idea of the true Deity to be found among them. So far as I have learnt the general conduct of the traders and their irregular practices, and the toleration of the most licentious libertinism, has tended much to the corruption of the natives.¹³⁶

In Macdonell's view, native women also played a large role in corrupting the Company's servants, since:

They have almost uniformly taken up with Indian women, some have a plurality of wives, and even to these their cupidity is not always confined. The present chief of York has three wives by whom he has a numerous issue. One he has discarded for being old, the other two are younger and live with him at the Factory. It is not surprising that young subordinate officers should follow the example set by their more elderly superiors. These connections I am told form no bond of friendship with the natives, and

¹³⁵ Gibson, *supra* note 11 at 23–24; NAC, *Selkirk Papers*, series 1, Information and Complaint of M. Macdonell, 23 April 1813, on reel C-1 at 603–4, MacLean to Macdonell, 11 May 1813, on reel A27 at 618–20; NAC, *Selkirk Papers*, Red River Correspondence, vol. 1, Auld to Macdonell, July 1813 (accusations against MacLean family) on reel A27 at 171–72, Macdonell to Auld, 1 December 1813 (including "Depositions of Mr. MacLean's family) on reel A27 at 173–77.

¹³⁶ *Supra* note 132.

are hurtful to the Company's interests. The women acquire great ascendancy over their keepers, whose attention is so much engrossed by their domestic concerns that the trade is neglected.¹³⁷

Macdonell argued that the insolence of Indians was due at least in part to the harsh and unfair manner in which they were treated by senior Company officers. Indicatively, Macdonell mentioned the case of two Indians who were used as a source of cheap labour by Company officers, who then threatened to hang them for failing to carry out orders.

I should like to see the condition of the natives ameliorated as much as would be consistent with the Company's interest. In the manner now practised in trading with them, they are not so well encouraged as might be, and appear to be rigidly dealt with on all occasions. An Indian that brings meat from a great distance, gets not more for it than if he had killed the animal close to the factory, nor in a time of scarcity more than in plenty. Two Indians were sent last winter express from York to Churchill, when they returned got nothing for the journey, or at least what an Indian calls nothing, the whole service was put to the credit of their debt. Mr. Cook was for sending them back again immediately to Churchill to bring Mr. Auld, forced the packet upon them and sent them off against their will, the packet they gave to a person they met going to the factory, and went home themselves to their families. A trifling consideration in hand would have induced them to go again the second time. It was given out that these fellows would be hanged for disobedience, but they have since been at the Factory, and laugh at the threat.¹³⁸

Macdonell's comments reveal a great deal about both the way in which European colonizers treated Aboriginal people, and the way in which Aboriginal people in turn resisted having European values and institutions imposed upon them.¹³⁹ It is a rather ironic coincidence that within a month of having written his clearly Eurocentric racist comments about Indian women, Miles Macdonell received a letter from his brother, John Macdonell, a long-time employee of the North West Company, who spent 18 years raising a family with his Indian wife.¹⁴⁰ In addition to describing his relationship with his wife and children, John Macdonell was quite candid about his thoughts on Indians, the fur trade, and the likely success of the Red River Settlement. In light of the long association many of Macdonell's friends and family had with the North West Company,¹⁴¹ John was also somewhat surprised

¹³⁷ *Ibid.* at 62–63.

¹³⁸ *Ibid.* at 63.

¹³⁹ Further evidence of this is provided in Smandych & Lee, *supra* note 6, "Resisting Company Law" and "Women, Colonization, and Resistance."

¹⁴⁰ NAC, *Miles Macdonell Papers*, MG 19 E4, folder 2, John Macdonell to Miles Macdonell, 27 June 1812.

¹⁴¹ May, *supra* note 118 at 441.

that Miles had taken on the job of Governor of Assiniboia. Writing from one of the North West Company's inland trading posts, John Macdonell told his brother:

I arrived here from my wintering ground (at Upper Slave Lake) this morning in very good health. Your letter upon landing at York Factory was immediately handed to me. My surprise was diminished from having heard in [the] course of winter that you...[were] in [an] H.B. Report. Having announced your views I did not for a moment harbour the Idea of your coming in opposition to us. I much fear your followers will curse the day they entered the HB. Ships...The country you intend settling is what I allude to. It is thinly inhabited or rather overrun by some rascally Savages chiefly of the Chippaway race mixd' with a few Ottawas from Michilmackinac and some Canadian free men & half breeds. The Savages [are] in general great villians & most of the free men not to be trusted & in general outcasts from our employ. Besides it is in the vicinity of the powerful nation of the Naudawepies or Sioux as the french call them, who make frequent hostile innroads upon their natural enemies the Chippaway. Murdering every man woman & child that comes in their way of whatever color or nation: every person acquainted with the quarter will corroborate these facts.¹⁴²

Macdonell's brother went on to express his concern over the future of the Red River settlement, stating:

In short I fear this colony of yours will meet with the fate of some of this Lordship's former undertakings of a similar nature. Take care your followers in their disappointment will not wreck their vengeance on you. After all your trouble and loss of time & vexation I fear you will have little cause to be satisfied as to his Lordship's munificence. The great are often ungrateful, I sincerely wish you may find his Lordship an exception.¹⁴³

In many ways John Macdonell's initial warning proved close to the truth. During the first two years he spent at Red River, Miles Macdonell would have the vengeance of the Nor'Westers and Métis wrecked upon him for imposing his infamous "pemmican proclamation" of January 1814, which prohibited the export of food supplies of any kind from within the limits of the Red River Settlement,¹⁴⁴ and he appears to have left many enemies behind in the colony due to "his obstinacy, his arrogance" and "his unaccommodating temper."¹⁴⁵ In addition, the Red River Settlement was plagued by turmoil and uncertainty until after 1821.

When Andrew Bulger took over as Governor of Assiniboia in 1822 the population of the colony was still well under a thousand. Consequently, looking at how

¹⁴² This letter has been edited slightly to correct spelling and add necessary punctuation marks.

¹⁴³ By the following year, Macdonell's brother had apparently reconsidered his views on the likely success of Selkirk's venture, and wrote his brother saying he was considering coming back to Red River as a settler. *Selkirk Papers*, vol. 1, 107–30 at 129, on reel A27, Miles Macdonell to Lord Selkirk, 17 July 1813.

¹⁴⁴ May, *supra* note 113 at 443; "Proclamation Issued by Miles Macdonell, Jan. 8, 1814" in Oliver, *supra* note 3 at 184–85.

¹⁴⁵ *Ibid.* at 444.

Bulger went about attempting to administer criminal justice provides us with another glimpse at how the legal system of the Red River Settlement worked in the period before the arrival of Adam Thom.

Like Miles Macdonell, Bulger knew the benefits of imposing a system of military justice. When he was in command of Fort McKay on the upper Mississippi river in 1814, Bulger signed a martial law proclamation,¹⁴⁶ and later he authorized convening a military court to place a Sioux Indian on trial for the murder of two Frenchmen.¹⁴⁷ Bulger also signed the order to have the Indian executed by a firing squad the next day.¹⁴⁸

As much as he may have liked to use it, when Bulger took over as the Governor of Assiniboia he could not impose military law. Like Miles Macdonell, whether grudgingly or not, Bulger attempted to follow the orders he received from the London Committee. The extent to which Bulger went about attempting the administration of criminal justice following English law and the Charter is reflected in several cases that he dealt with in 1822 and 1823. It is significant that few of these cases have ever been discussed in the work of earlier legal historians of pre-1870 Manitoba.

Ironically, one of the first criminal cases dealt with by Bulger involved the mixed-blood son of John Pritchard, a Councillor of Assiniboia. In December 1822, Bulger convened a formal inquiry to examine witnesses in the case of William Pritchard, who was accused of stealing money from the home of Rodolph Wyss. The written minutes of the inquiry show that on 19 December, Rodolph Wyss appeared before Bulger to lay a formal complaint, which "stated that a certain sum of Money in Gold and Silver had been stolen out of this House, and that he had reason to suspect that the same had been taken by William, the half breed son of J. Pritchard Esq."¹⁴⁹ On 21 December, a formal "examination" of witnesses was undertaken, with Bulger and Alexander McDonell taking testimony from Rodolph Wyss and two other witnesses. The examination resumed on 23 December, and five more witnesses were heard, along with the testimony given by William Pritchard, who claimed that rather than stealing the gold and silver, he simply found it near the home of Rodolph Wyss. It is not known whether William Pritchard was convicted

¹⁴⁶ NAC, *Bulger Papers*, MG 19 E5, vol. 7 at 3, Proclamation signed by A. Bulger, Captain, commanding on the Mississippi, 31 December 1814.

¹⁴⁷ *Ibid.* at 6, A. Bulger, Captain Commanding Fort McKay on the Mississippi to Robert Dickson Esq. Agent and Superintendent of the Western Nations, 6 January 1815.

¹⁴⁸ *Ibid.* at 8–10, "Proceedings of a General Court Martial held on the 7th January 1815, at Fort McKay, in the conquered countries, pursuant to an order from Captain A. Bulger of the Royal Newfoundland Regiment Commanding on the Mississippi."

¹⁴⁹ *Ibid.* vol. 2 at 425–27, examination respecting William Pritchard taken before Andrew Bulger and Alexander McDonell, 19, 21 and 23 December 1822.

of the offence. However, there is a letter which shows that his father wrote to Bulger on his behalf, although he stressed that he did not want to interfere in the proper course of justice.¹⁵⁰

Another case dealt with by Bulger occurred in January 1823. On 27 January 1823, Bulger wrote to John Allez, informing him of a sworn information he had received from Pierre Perronne of Pembina, that he had reason to believe that certain articles from the estate of Lord Selkirk were unlawfully obtained by Xavier Dugal and Alexis Trempe on 20 October last, and that they were now concealed in the house of a man named "Paye" in Pembina. Bulger's letter also served as a warrant which ordered Allez, as sheriff of the district, "to proceed, with proper assistants, to the home of the said 'Paye' and there ... make [a] strict search for the said property." Bulger also added the general order: "[h]ereby commanding all His Majesty's subjects to be aiding and assisting in the execution of this Warrant as they shall answer for the contrary at their peril."¹⁵¹

It is clear that while Bulger used his judicial authority, it did not go unchallenged. One of the problems that irritated Bulger throughout most of his tenure, was the refusal of John Clarke, the Chief Factor at Fort Douglas, to submit to his authority. As early as October 1822, Bulger began receiving complaints from settlers that Clarke was acting illegally by ordering Company servants to break into homes to seize furs and other property they suspected the person had acquired by violating the Company's fur trade monopoly.¹⁵² In December 1822, Bulger wrote Andrew Colvile three connected letters, in the form of a journal, in which he outlined several other examples of how Clarke defied his authority and used force and violence against settlers at Red River.¹⁵³ The conflict between Clarke and Bulger came to a head in May 1823, following another violent incident involving one of Clarke's employees.

¹⁵⁰ *Ibid.* at 428–29. Specifically, on 21 December 1822, John Pritchard wrote Bulger the following note: "My dear Bulger, Your kind note of yesterday I have this moment received. My boy was already prepared to meet his accusers. Parental feelings on this occasion are unbecoming of me to express. I send my son to trial. Justice I am convinced he will receive at your hands. All I ask is, that the affair may be fully investigated, and that on the clearest testimony that can be obtained a verdict of guilty or not guilty will be awarded. God Bless you. I am always most sincerely yours, John Pritchard. ps. My ink is frozen."

¹⁵¹ *Ibid.* vol. 3 at 20, A. Bulger to John Allez, Esq., 27 January 1823; *ibid.* at 14, Information sworn by Pierre Perronne before A. Bulger at Pembina on 27 January 1823, witnessed by Wm. Kempt and John Allez.

¹⁵² *Ibid.* vol. 2 at 368–70. Donald Livingston to A. Bulger, 9 October 1822.

¹⁵³ *Ibid.* at 401–23, Bulger to Colvile, 7 December 1822, 9 December 1822, 14 December 1822, published as *Papers Referring to Red River Settlement, Hudson's Bay Territories* (Bangalore: Printed at the Regimental Press, 2nd Battalion 10th Regiment, 1866).

On 2 May 1823, Bulger wrote Clarke a private letter relating the facts of the case that he had decided to call a meeting of the Council of Assiniboia to deal with the next day. Although not relevant directly to the case, Bulger's letter also reveals something about the busy day he had catering to the needs of the settlers at Red River. As Bulger relates:

Pestered, as I have been all this evening by the Settlers, some demanding seed, etc, etc, I have not had time to sit down, to address you upon the unpleasant subject of this letter. A man, whose name, I believe, is Risk, appeared before me this day his head was bound up, and marks of violence were upon him: he was accompanied by some others, whom I do not know. They preferred a complaint of violence having been committed by W. Personant one of your clerks upon the man I have above named, and demanded Justice. Being much occupied at the time, I desired that they would attend at 11 o'clock tomorrow morning. In the mean time, I have thought it necessary to Summon the Council of Assiniboia to hear the merits of the case.¹⁵⁴

The next morning Clarke wrote Bulger a note stating that he would not be attending the meeting, but that instead he would be "sending down Mr. Hargrave, who has my entire confidence, and [he] will explain my sentiments to you respecting the affair in question."¹⁵⁵ When the Council of Assiniboia met later in the day to hear the case,¹⁵⁶ Hargrave showed up with a letter from Clarke in which he declared that in his opinion "the Governor and Council of Ossiniboia [sic] are not authorized to interfere in the internal affairs of the Honourable Hudson's Bay Company, whether in civil or criminal matters, without the presence and assistance of the Company's representative in the said District."¹⁵⁷ Although Clarke's manoeuvre allowed him to avoid being taken before the Council of Assiniboia in person, the Council used its meeting of 3 May to frame a resolution that pointed out the error of Clarke's argument and the rightful authority of the Council of Assiniboia to deal with criminal and civil cases involving Company servants. This resolution is important to quote in detail, because it offers a clear sense of how the Councillors of Assiniboia perceived the role they should play in administering criminal justice. The resolution, which they knew would be read with interest by the London Committee, stated:

The Governor and Council met this day under the authority of the General Court of the Hudson's Bay Company with powers sanctioned by His Majesty's Government, and the object of their meeting was, — precisely that for which they were constituted, — to administer justice according to the Law of England, by which they have been assured from high authority, they are to be governed. They conceived

¹⁵⁴ NAC, *Bulger Papers*, vol. 3 at 180, A. Bulger to John Clarke, Esq., 2 May 1823 (marked private).

¹⁵⁵ *Ibid.* at 181, Clarke to Bulger, 3 May 1823.

¹⁵⁶ Council minutes, 3 May 1823, *ibid.* at 184–88, also in Oliver, *supra* note 3 at 235–39.

¹⁵⁷ *Ibid.* at 238, in Oliver.

that no one was above those Law; that all were equally amenable to them and liable for any infraction thereof within the District of Ossiniboia [sic] to be proceeded against in the mode pointed out by the Honourable Committee of the Hudson's Bay Company in their letter of 1st June last, addressed to the Governor of the said District; above all they never imagined that any person, much less a gentlemen holding high rank in the service of the Hudson's Bay Company, would for a moment think of setting himself above those Laws, or of denying the authority of the Court constituted by that Honourable Company sanctioned by His Majesty's Government.¹⁵⁸

Bulger clearly had the full support of his Councillors for this statement. On 11 May, John Pritchard wrote Bulger a letter in which he stated that: "The Minutes of Council are in every respect such as I could wish them. They are perfectly in accordance with the sentiments and wishes of our friends Cook and Thomas ... and we were decidedly [of] the opinion that you ought not to give up the high ground on which you stand." Pritchard also predicted that in the end Clarke would be dealt with appropriately by the London Committee, noting that:

The power of redressing the insult offered to your authority rests with those only, who invested you with it and who undoubtedly will feel themselves highly indignant, that any person in their employ should have the effrontery to trample under foot in the most public manner, their Chartered Rights, sanctioned by his Majesty's Government.¹⁵⁹

As it turned out, even before it received the Council's formal complaint against Clarke, the London Committee had written a strong letter to George Simpson in response to earlier complaints, in which it pointed out that Clarke's harassment of settlers was illegal, and that in future he and his employees must respect the judicial authority of the Governor and Council of Assiniboia.¹⁶⁰

While professing to the London Committee that he was concerned with applying the law in the same manner to everyone, Bulger did not treat Indians in the same way he said he wanted to treat Company servants. In the letter he wrote to Andrew Colville on 7 December 1822,¹⁶¹ Bulger also mentioned the experience he had in dealing with Chief Peguis and other Indians who came to him in the fall of 1822 to complain about how little they got for their land.

On 15 September 1822 Bulger met with Chief Peguis after he had "intimated a desire to hold a council" with him.¹⁶² According to Bulger's account:

¹⁵⁸ *Ibid.* at 239.

¹⁵⁹ *Ibid.* at 194–96, Pritchard to Bulger, 11 May 1823.

¹⁶⁰ Gibson, *supra* note 11 at 42, London Committee to George Simpson, 21 May 1823, in Oliver, *supra* note 3 at 240–44.

¹⁶¹ *Supra* note 153.

¹⁶² Bulger spelled his name as "Pigowis." We have substituted the more common spelling.

He spoke a great deal of what they had done for the Colony, and of what the Earl of Selkirk had promised them — complained that we had got their land too cheap, and that we even diminished their presents every year...To stop this mouth at once, I told him that among us white men, a bargain such as he had made, was considered sacred, but, if he wished to break it, he had but to say so, and I would write to His Lordship's family to take away the settlers. As I had expected, he was staggered at this, and, for some minutes, knew not what answer to give.¹⁶³

This was only the beginning of what Bulger said was his “trouble with these Indians.”¹⁶⁴ Bulger went on to relate that on 17 September 1822:

... it was reported to me that Peguis' people were extremely troublesome among the Scotch families, in the lower part of the Settlement, and I was about to proceed thither with a few men, when two Indians, one of who was Peguis' aide de camp, rushed in a violent manner into my room. Not approving of such freedom, I took the aide de camp by the arm, and was walking him very gently to the door, when he made a sudden spring, turned upon me, and seized hold of the collar of my coat, while, with his left hand, he tried to draw his knife. I gave him a blow between the eyes, under which he reeled almost to the other end of the passage. His companion immediately set up the war-whoop, and was advancing with his drawn knife towards me, when he also was laid sprawling on the ground, by a blow from one of our men, who, just at that moment, had accidentally entered by the other end of the passage. They were both soon disarmed, and I ordered them to be put in irons, intending to inflict upon them such a punishment as would have the effect of making others behave correctly when they visited the Colony Fort.¹⁶⁵

Having decided that Peguis should witness the punishment of these men, Bulger sent a messenger to get him, and Peguis returned on his own late in the evening. Bulger related that, upon his arrival:

I informed him how his men had misbehaved, and of my intention to punish them in his presence. I told him, that having been among Indians before, I knew well what was the duty of a chief, and that, if he could not keep his young men in proper order, and prevent them from giving trouble, and doing mischief, when they visited the settlement, he was unfit to be a chief, and I would take that coat (the grand scarlet coat) from his back, and give it to some one more able to perform the duty of chief.¹⁶⁶

Bulger subsequently reported that:

... when at daylight in the *morning*, the drummer, a Swiss boy, began to beat the reveille, so great was the old man's terror, that I took pity on him, and desired him not to be alarmed, as we were still good friends, and I only meant to punish his men who had misbehaved. At eight o'clock that morning, namely the 18th September, the aide de camp was brought forth, tied to a gun, and punished with twenty-five lashes, Peguis having, previously, in a very sensible address, told the fellow that he deserved the

¹⁶³ *Supra* note 153 at 406.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.* at 407.

¹⁶⁶ *Ibid.*

punishment which he was then going to receive. When the other Indian was brought out, upon Peguis saying he was a very quite young man, and that he would be sorry to see him punished for the first offence, I forgave him, which pleased Peguis amazingly. In a second address, he thanked me, and exhorted the pardoned man to do the same, and to avoid doing anything in future which might make [Peguis], repent having interceded for him.¹⁶⁷

Perhaps not simply by coincidence, while Bulger was no doubt disliked by many Indians, he is reported to have been quite well-liked by many settlers. Bulger was apparently in very poor health and planned to retire by the end of the summer of 1823, even though he was petitioned by many residents of the colony to stay on, and he thanked them publicly for their support.¹⁶⁸ Despite this, however, in the final months of his appointment, Bulger was kept busy dealing with other criminal cases. In June 1823, Bulger used the judicial powers he was granted as Governor to pursue three HBC employees who were alleged to have deserted the Company, and tried to leave Red River. Bulger appointed Charles Bruce in charge of leading a posse to capture the deserters, and on 10 June, he issued an open order to the residents of Red River, which read:

Whereas William McLeod, Kenneth McKenzie, and James Murdoch, contracted servants of the Hudson's Bay Company, have absconded from their Service: All His Majesty's Subjects are hereby required to be aiding & assisting to the bearer hereof, Charles Gaspard Bruce, in apprehending and bringing before me the said three Deserters.¹⁶⁹

On 7 July 1823, Bulger presided over another criminal investigation, in which he heard four witnesses and received a sworn statement from Martin Gralick in which he confessed that on 29 June last "he bartered to Mr. John Bourke the Company Clerk in Fort Garry one bushel and a half of wheat for one quart of spirits and a pound and a half of tobacco."¹⁷⁰ While the above case reveals that, at least on occasion, the Hudson's Bay Company was victimized by crimes committed by its servants, there is also evidence that Company officers, even including Bulger himself, were at times victimized more directly. On 8 July 1823, Thomas Thomas, William Cook, and John Pritchard took down a sworn statement from James Mitchell that, on or about the 25 November 1822, he had witnessed Hugh Monro

¹⁶⁷ *Ibid.* at 409.

¹⁶⁸ *Ibid.* at 123–24, Address of the Inhabitants of the Red River Settlement to A. Bulger (with 66 signatures), 3 April 1823; *ibid.* at 134, A. Bulger to Thomas Thomas Esq., Thomas Bunn Esq. and the Inhabitants of Red River Settlement, 9 April 1823; Allen and Judd, *supra* note 69 at 113.

¹⁶⁹ *Ibid.*, vol. 7 at 736, Bulger to residents of the District of Assiniboia, 10 June 1823, also in Oliver, *supra* note 3 at 246.

¹⁷⁰ NAC, *Bulger Papers*, vol. 3 at 392, sworn statement of Martin Gralick, given at Fort Douglas, Forks of the Red River, 7 July 1823.

bring port wine and other spirits into the home of David Tully which he had reason to believe “had been clandestinely taken, by the said Hugh Monro from the private apartments of the said Captain A. Bulger.”¹⁷¹ It is not known how this case was disposed of. Nevertheless, it again reflects the fact the Councillors appointed during Bulger’s tenure participated actively in attempting to administer criminal justice.

More research is required into the kinds of criminal cases succeeding governors of Assiniboia dealt with in the years from 1824 to 1835. However, it should be noted that, even though a great deal more research needs to be done, we already know that some of the recorded cases for this period, in both Red River and elsewhere in the Canadian west, involved Indians as either the victims or the ones accused of homicide and other crimes.¹⁷² In the remaining parts of this paper, we look at how Adam Thom contributed further to this process.

IV. PROPOSALS FOR THE REFORM OF CRIMINAL LAW AND PROCEDURE IN THE RED RIVER SETTLEMENT, 1839–1845: ADAM THOM’S VIEWS ON THE LAW AND JUDICATURE OF RUPERTSLAND

HOW DIFFERENT WAS ADAM THOM from colonial judges who began to apply their individual interpretations of English law in other British colonies? In order to begin to answer this question, we first need to look in more detail at Thom’s views of English law and the manner in which it should be applied in the Canadian west. It is also revealing to look at the work Thom did at writing at what he hoped would be a new penal code for the District of Assiniboia,¹⁷³ and the way in which he applied his interpretation of relevant law in the General Quarterly Court of Assiniboia. Finally, we must broaden the scope of our research, at least in a preliminary way, to compare Thom to other colonial judges of the period. Although far from definitive, the research we have completed to date suggests that Thom should be looked at more for what he reflects about similarities in the way English law began to be applied in British colonies in the nineteenth century. A short answer to the question of whether Thom was a racist, would have to be that he was likely no more

¹⁷¹ *Ibid.* at 393–94, sworn statement of James Mitchell, given at Fort Douglas, Red River Settlement, before Thomas Thomas, W.H. Cook, and John Pritchard, 8 July 1823, also in Oliver, *supra* note 3 at 246–47.

¹⁷² Gibson & Gibson, *supra* note 11 at 21; Foster, *supra* note 11, “Sins of the Great Spirit” and “Long Distance Justice”; Reid, *supra* note 11, “Principles of Vengeance”.

¹⁷³ Thom’s proposals for the reform of criminal law are important to look at, even though, as Robert Baker has shown in his recent study, Thom’s penal code was ultimately rejected by the London Committee because portions of it were “obscurely expressed.” See H.R. Baker II, *Law Transplanted, Justice Invented: Sources of Law for the Hudson’s Bay Company in Rupert’s Land, 1670–1870* (M.A. Thesis, University of Manitoba, 1996) at 96–106.

of a racist than other colonial judges of the period. At the same time, however, as we saw earlier in the views and behaviour of early governors of Assiniboia like Miles Macdonell and Andrew Bulger, racism was a given reality during the period. The more interesting and useful question to address (instead of the question of whether Thom was a racist), is the question of how law was used as a tool of colonialism, and how, in turn, Aboriginal people worked to resist the process.

Thom expressed his views about the applicability of English law to Aboriginal peoples on several occasions. According to Bindon, Thom believed in "the inviolability of the Company's rights in every element of the community's life," and this affected all of his legal decisions and judgments.¹⁷⁴ In a judgment he wrote following a case he presided over in the Quarterly Court of Assiniboia in 1845, Thom rationalized the approach that guided the way he dealt with Indians suspected of committing serious crimes, noting that:

Every community possesses the acknowledged right of avenging the wrongs, which its members may have sustained at the hands of any other community, either by public war or by private reprisals — a right, by-the-bye, which is expressly vested in the Hudson's Bay Company by its Charter. Now such a right obviously comprises, what is far more consistent both with humanity and with justice, the lesser right of demanding, or, if necessary, of seizing, for the purposes of trial, any Indian, who may have injured us even within the territory of his tribe.¹⁷⁵

Five years earlier, in May 1840, Thom had already written a detailed account of his personal *Observations on the Law and Judicature of Rupert's Land*,¹⁷⁶ which provided a more detailed rationale for his view on why Indians in western Canada should be subject to English law. One of Thom's major concerns in writing this document, was to justify the fur trade monopoly of the Hudson's Bay Company in Rupertsland and the Indian territories. Thom tied this to his view on why Indians should be subject to English law. After reviewing the fate of monopolies granted by the English crown to trading companies that existed elsewhere, Thom stated:

But, if one turns from law to policy, the Monopoly of The Hudson's Bay Company stood on peculiarly strong grounds. With respect to India and the Baltic, monopoly was not necessary at home, nor would competition have been mischievous abroad; but with respect to this country, occupied by ignorant savage tribes 'few and far between' and cut off from the rest of the world by almost inaccessible seas and almost impossible wilderness, competition could not have failed to involve England in expense and inconvenience and Rupert's Land in dissension and misery.¹⁷⁷

¹⁷⁴ Bindon, *supra* note 11 at 56.

¹⁷⁵ Adam Thom, *A Charge delivered to The Grand Jury of Assiniboia, 20th February, 1845; by Adam Thom, Esq., Recorder of Rupert's Land* (London: Couchman, 1845) at 22.

¹⁷⁶ *Supra* note 99.

¹⁷⁷ *Ibid.* at folio 82d.

In a later section in which he discussed the “legal principles of colonization,” which he considered to be a further justification for the Company’s monopoly, Thom cited Blackstone’s reasoning about the distinction that had to be made between colonies “where the lands are claimed by right of occupancy only, by finding them desert and uncultivated” and others “where, when already cultivated, they have been either gained by conquest or ceded ... by treaties.” Thom argued that Blackstone’s rule for classifying different types of British colonies “is utterly inapplicable to the hunting-grounds of wandering and dis-united savages, and were the rule perfectly applicable, the exception would effectively neutralize it.” However, Thom reasoned that if one had to decide on which of these classifications more accurately described the situation that existed in Rupertsland, one would have to conclude that Rupertsland seemed “rather to resemble the first class.”¹⁷⁸ According to Adam Thom’s reasoning, while the Aboriginal peoples of western Canada had no legitimate claim to the land that currently fell under the Company’s monopoly, they were nevertheless fully subject to the penal laws that the Company decided to enforce. While Thom as probably no more racist than other colonial judges of the period, he clearly saw that criminalizing Indians might be of some economic advantage to the Hudson’s Bay Company. However, it would also be misleading to leave the impression that Thom as simply a “Company judge” who choose to either ignore or twist the law to suit the interests his employers, while totally ignoring relevant English law and precedent.

Although more research is needed to determine how far this point can be generalized, it would appear that the changes Thom introduced at Red River in the 1840s were not inconsistent with legal thought that existed elsewhere on how English criminal law should be applied to Indigenous peoples in the colonies. In 1837, a House of Commons Select Committee on the state of Aboriginals in the British colonies around the world recommended that steps should be taken to gradually move in the direction of applying English law to Indigenous peoples.¹⁷⁹ It is also significant that while previous investigators have looked at the execution of Capinewesweet at Red River in 1845 as a significant precedent and turning point, it appears that in this case Adam Thom acted in a way that was quite consistent

¹⁷⁸ *Ibid.* at folios 86d and 87.

¹⁷⁹ Great Britain, Parliament, House of Commons, *Report from the Select Committee on Aborigines (British Settlements); with minutes of evidence, appendix and index*. Ordered by the House of Commons to be printed, 26 June 1837, at 79–80.

with what was happening both in other British North American colonies¹⁸⁰ and elsewhere.¹⁸¹

More than anything else, it was Thom's belief in the supremacy of the Charter and the vagueness of existing English criminal law that led him to draft a new penal code for the District of Assiniboia in 1840. In a letter he wrote to George Simpson explaining why he drafted the code, Thom stated:

Nothing can be more vague than the criminal law of England, as it exists, whether in theory or in practice, among us. I take my version of it from 1670 in theory; but in practice reason and equity compel me sometimes to admit modern ameliorations...In theory we all agree that the criminal law of England is, in many respects, inapplicable to the condition of Red River; but in practice one may wish to strick out what another may wish to retain and vice versa. This seems to be the reign of discretion to an indiscreet degree.¹⁸²

According to Thom, the purpose of his proposals for the reform of criminal law was to "reconcile fundamental principles of Laws of England with peculiar circumstances of Rupert's Land."¹⁸³ Thom proposed to abolish the distinction between felonies and misdemeanours, and introduce a classification of "substantial" or primary and "incidental" crimes. He also included a list of those who could not be tried for criminal offences, which included husbands and wives under influence, children under seven and idiots. In Thom's view, the primary object of his code was to customize the criminal law of England, which was created to control a "country, which crowds into universal and perpetual collision the extremes of wealth and poverty," to fit "the scanty and sparse population of a writely plentiful region." Thom claimed that his secondary objective was "to abolish some of the technical distinctions between felonies and misdemeanours," and to "simplify ... definitions

¹⁸⁰ In the chapter of his book on *Natives, Society and the Law*, Brendan O'Brien documents a case that occurred in 1823, which set a precedent that in Upper Canada an Indian could be tried and executed for the murder of another Indian. B. O'Brien, *Speedy Justice: The Tragic Last Voyage of His Majesty's Vessel Speedy* (Toronto: Osgoode Society, 1992) at 39–41. This case is also discussed in J. Pratt, "Aboriginal Justice and the Good Citizen: An Essay on Population Management" in K.M. Hazlehurst, ed., *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia, and New Zealand* (Aldershot, UK: Avebury Press, 1995). In his essay, Pratt also argues that by 1839 in Upper Canada, "the earlier uncertainties about the extent of British jurisdiction" over Indians charged with crimes "had been forgotten." For a more detailed discussion of the legal status of Indians in nineteenth century Ontario, see S.L. Haring, "'The Liberal Treatment of Indians': Native People in Nineteenth Century Ontario Law" (1992) 56 Sask. L. Rev. 297–371.

¹⁸¹ Pratt, *supra* note 9 at 39, shows that by the early 1840s Maori people in New Zealand living near main population settlements were also starting to be made subject to English criminal law, while Haring, *supra* note 9, points out that a similar process began in the United States in the 1820s.

¹⁸² Thom to Simpson, 27 July 1840; cited in Bindon, *supra* note 11 at 56.

¹⁸³ *Supra* note 98, folios 27–44.

and the separation between statute and common law.” Ironically, in light of the hanging at Capinnesweet at Red River years later, on the use of the death penalty for felony offences, Thom observed:

The punishment of death is almost impracticable in this country. Nor do I know, that it is necessary for the mere purpose of preventing any crime, for in a land, where neither business nor fashion nor sickness imposes any sensible restraint on the natural freedom of either sex, imprisonment presents terror both positive and negative, which are altogether unknown at home. Nor is it liable to the objection of being expensive, inasmuch as the annual cost of wholesome and sufficient food for one prisoner does not exceed three pounds, a sum inadequate to procure the services of a flogger for one occasion.

Although Thom’s “Penal and Temporary Civil Code” were never approved by the London Committee, his work at revising and consolidating the local laws of the District of Assiniboia in 1841 and 1852 provided the statutory foundation for the operation of criminal and civil courts in the district.¹⁸⁴ Thom’s legacy can be seen in the manner in which criminal cases were disposed of in the General Quarterly Court of Assiniboia after 1844.

V. THE PROSECUTION OF OFFENCES INVOLVING INDIANS IN THE GENERAL QUARTERLY COURT OF ASSINIBOIA, 1844–1872: THE COLONIAL LEGACY AND ADAM THOM

A DETAILED ANALYSIS OF THE CASES dealt with by the General Quarterly Court of Assiniboia from 1844 to 1872 is not possible in this paper. Alternatively, in the following section, we focus on describing the cases that came before the court that involved Aboriginal people. Although we are aware that likely very few (of the no doubt many more) cases involving Aboriginal people, as either offenders or victims, ever came before the General Quarterly Court, the cases that have found their way into the record nevertheless provide an indication of how Aboriginal people began to be caught up in the formal legal system of the Red River Settlement.

The trial of Capinnesweet for murder in 1845 was one incident of a broader pattern. First, Thom’s passing of a death sentence on Capinnesweet was far from unprecedented, even in the territory controlled by the Hudson’s Bay Company.¹⁸⁵ Second, the records of the General Quarterly Court of Assiniboia for the period after 1844 reflect the increased criminalization of Aboriginal peoples in nineteenth century western Canada (see Tables 1 to 3).

¹⁸⁴ Baker, *supra* note 173.

¹⁸⁵ In 1755, three Indians were hanged at Albany Fort on Hudson Bay after being placed on trial for the murder of Company servants. For more detail on this case, see Smandych & Linden, *supra* note 5.

Of 161 criminal cases dealt with in the Court over its 28 year history, 59 (or 37 percent) involved people who were identified as Indians.¹⁸⁶ Of these 59 cases, 35 (or 59 percent) involved the selling and/or giving of alcohol to Indians. In all cases of this type, it is necessary to view Aboriginal people as both victims and accomplices to the crime, in that the laws of Assiniboia passed in 1841 stated that in addition to paying a fine, all persons convicted of selling alcohol to Indians were required to make restitution to the Indian “the full original value in money” of any payment that he or an accomplice received.¹⁸⁷ Although these cases did not involve Aboriginal people themselves being prosecuted, they nonetheless reflect the fact that they were being drawn into the system.

The increasing participation of Aboriginal people is also reflected in the number of times they were asked to appear in court as witnesses. The Quarterly Court records show that, during its 28 year history, 32 Indians appeared in court to testify in criminal trials. Although, in a small number of cases, the testimony of the witness was not allowed because he or she did not understand the meaning of taking an oath, most of the time the testimony of Indian witnesses was accepted.

The number of cases in which Indians appeared as accused is also revealing, but this number needs to be interpreted with care. There were 28 Indians accused in a total of 20 criminal cases.¹⁸⁸ Although this number may appear small, amounting to only 12 percent of all criminal cases, we need to keep in mind that this still provides evidence of a pattern of increased involvement of Aboriginal people as accused. Moreover, it is possible that actually only a very small percentage of Aboriginal people charged with crimes ever came before the General Quarterly Court. This is suggested, most openly, in a case heard by the General Quarterly Court in 1869 which involved an appeal from a person who was convicted before the Midland District Petty Court for selling intoxicating liquor to Indians (see Table 3, 19/8/69). Because of the paucity of research on the development and operation of petty courts in pre-1870 Manitoba, we can only speculate on how many Aboriginal people ended getting caught up in the new state justice system that was brought in to replace the private justice system of the Hudson’s Bay Company. Although

¹⁸⁶ As part of our method of coding the data, we defined cases as involving “Indians” only if an Aboriginal name was referred to in the case, or if it was clear from the court records that the case involved one or more people of Amerindian ancestry. This excluded people identified in the court records as having English or French names, many of whom may have been Métis.

¹⁸⁷ Council minutes, 1 June 1844, in Oliver, *supra* note 3 at 300.

¹⁸⁸ Included among these are four private prosecutions brought against accused for forced entry, killing a cow, breach of HBC labour contract, and failure to repay a debt to the HBC. Although the “prosecutions” brought by the HBC could have been classed as civil cases, we chose not to do this because of the criminal punishments that were attached to the offences, which included fines and imprisonment.

he may not have been able to introduce the penal code he had hoped for, Adam Thom, in a manner consistent with colonial judges in other parts of the British colonial empire, contributed to formally applying the criminal law to Aboriginal peoples in western Canada.

V. CONCLUSIONS

HISTORICAL CASE STUDIES OFFER THE POSSIBILITY of providing data that can help investigators unravel the complex character of the relationship linking state and non-state forms of governance. In particular, such studies can help explain the transition from more private and informal systems of justice, to more clearly defined state-run legal systems, complete with a system of written laws and civil and criminal courts. Historical cases studies are also needed in order for us to begin to develop a better understanding of how both the private and state-run justice systems brought by European colonizers worked to undermine and replace the traditional methods of dispute resolution and social control of Indigenous peoples.

In recent years, a number of studies have looked at the manner in which different forms of English law and legal institutions were imposed on Indigenous peoples in different countries that fell under British colonial rule.¹⁸⁹ In spite of this important work, many questions remain unanswered about how law was used as a tool of colonialism, and about the impact it had on those who lived to witness English law being imposed in specific colonial settings. The present study reflects part of the effort we have made in recent years to learn about how the transition to a more formal state-run legal system occurred in western Canada, and about the effect this had on Aboriginal peoples.¹⁹⁰ However, as we have shown in this paper, many questions still remain to be addressed about how an English legal system and criminal law courts came into being in western Canada. In particular, as of yet we know very little about the work of petty courts or about how succeeding governors of Assiniboia went about administering justice in the period from the early 1820s to the late-1830s. Although we now have data, like the records of the General Quarterly Court of Assiniboia, which tell us something about how Aboriginal people were affected by the creation of criminal law courts in the Canadian west, more research is needed on this key facet of the history of law and colonialism in western Canada. However, it is imperative that we also try to learn more about the people who brought English-based private and state-run justice systems to western Canada — such as Andrew Bulger and Robert Parker Pelly — and the effect their

¹⁸⁹ *Supra* note 6, *supra* note 9, *supra* note 10. See also L. Knafla & S. Binnie, eds., *Law, State and Society: Essays in Modern Legal History* (Toronto: University of Toronto Press, 1995).

¹⁹⁰ See notes 5, 6, and 7, *supra*.

participation in the British colonial project had on their own thinking about Indigenous peoples and the law. As Sally Merry points out in her recent review of the law and colonialism literature, it is also important to ask questions like: “who were the people who brought and imposed new conceptions of law and what were their concepts of law?”; “what effects did their earlier experiences have on the way they treated colonized peoples?”; and “how did their encounter with the legal system of an Indigenous people affect their ideas of their own law, their own identities, and their sense of entitlement and cultural supremacy?”¹⁹¹ Indeed, a great deal remains to be learned about the “intertwined and overlapping histories” of both European colonizers and of those they attempted to colonize.¹⁹²

¹⁹¹ Sally Merry, “Law and Colonialism” (1991) 25 *Law and Society Review* 55.

¹⁹² Edward Said, *Culture and Imperialism* (New York: Vintage Books, 1993) at 18.

TABLE 1
OPERATION OF THE GENERAL QUARTERLY COURT, 1844-72

A. ALL CASES	
Total Number of Cases	505
Total Civil Cases	344 (68%)
Total Criminal Cases	161 (32%)
Total Criminal Cases Involving Indians	59 (37% of all Criminal)
B. CASES INVOLVING INDIANS	
OFFENCE	NUMBER OF CASES
Selling and/or Giving Alcohol to Indians	35
Murder	3
Murder of	1
Manslaughter of	1
Theft	4
Theft and Escape	1
Larceny	2
Petty Larceny	1
Forced Entry	1
Burglary	1
Killing an Ox	1
Killing a Cow	1
Assault and Battery	2
Assault with Intent to Maim	1
Disturbance of Peace	1
Breach of HBC Contract	1
Failure to Repay HBC Debt	1
Felony	1
TOTAL	59

TABLE 2
 PROPORTION OF CRIMINAL INDIAN CASES
 (GENERAL QUARTERLY COURT OF ASSINIBOIA, 1844–1872)

YEAR	CRIMINAL CASES	CIVIL CASES	PERCENTAGE OF CRIMINAL CASES	CRIMINAL CASES INVOLVING INDIANS
1844	0	2	0%	—
1845	5	2	60%	5 (100%)
1846	17	7	59%	14 (82%)
1847	6	4	33%	0
1848	1	8	12.5%	0
1849	6	17	35%	1 (17%)
1850	1	1	50%	0
1851	10	3	70%	7 (70%)
1852	7	4	43%	3 (43%)
1853	6	7	86%	1 (2%)
1854	5	3	40%	2 (40%)
1855	7	4	15%	5 (71%)
1856	2	0	100%	1 (50%)
1857	0	5	0%	—
1858	2	13	15%	0
1859	10	13	77%	4 (40%)
1860	5	16	31%	3 (60%)
1861	5	10	50%	3 (60%)
1862	3	18	17%	3 (100%)
1863	4	8	50%	0
1864	3	16	19%	1 (33%)
1865	1	31	3%	0

Continued on next page

TABLE 2 — *Continued*

YEAR	CRIMINAL CASES	CIVIL CASES	PERCENTAGE OF CRIMINAL CASES	CRIMINAL CASES INVOLVING INDIANS
1866	5	43	12%	1 (20%)
1867	2	48	4%	1 (50%)
1868	4	23	17%	1 (25%)
1869	5	30	17%	1 (20%)
1870	3	1	66%	0
1871	23	7	70%	1 (4%)
1872	13	0	100%	1 (8%)
TOTAL	161	344	—	59 (37% of all Criminal)

TABLE 3*
NATURE OF INDIAN INVOLVEMENT
(GENERAL QUARTERLY COURT OF ASSINIBOIA, 1844-72)

DATE	OFFENCE	ACCUSED	WITNESS	VICTIM	ASSISTED IN CRIME	VERDICT	SENTENCE
20 Feb 1845	theft and escape	1				guilty	1 month
	1. murder 2. injury with intent	1		1		1. not guilty 2. guilty	6 months solitary
4 Aug 1845	murder	1		2		guilty	death
20 Nov 1845	1. murder 2. man- slaughter	1		1		1. not guilty 2. guilty	12 months solitary

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* "x" = number unknown; "rest." = restitution; "p.p." = private prosecution.

TABLE 3 — Continued

DATE	OFFENCE	ACCUSED	WITNESS	VICTIM	ASSISTED IN CRIME	VERDICT	SEN- TENCE
20 Nov 1845	selling beer			x	x	guilty	fine £2
18 Feb 1846	selling beer		1	x	x	not guilty	
	selling whiskey			x	x	guilty	fine £3 rest (n.s.)
	selling beer			x	x	guilty	fine £5 rest. (n.s.)
	forced entry (p-p)	2				guilty	1 month
21 May 1846	selling whiskey			x	x	guilty	fine £2
	selling whiskey			x	x	guilty	fine £10
	selling beer			x	x	guilty	fine £5 rest. 2s
	selling beer			x	x	guilty	fine £5 rest. 6s
	giving beer to Indians			x	x	guilty	fine £5
	selling beer			x	x	guilty	fine £5
	selling beer			x	x	guilty	fine £5 rest. (n.s.)

Continued on next page

TABLE 3 — *Continued*

DATE	OFFENCE	ACCUSED	WITNESS	VICTIM	ASSISTED IN CRIME	VERDICT	SEN- TENCE
21 May 1846	selling beer			x	x	guilty	fine £5 rest. £5 5s
	selling beer			x	x	guilty	fine £5 rest. 6s
	selling beer			x	x	guilty	fine £5 rest. £1.9
17 May 1849	selling beer		1	x	x	not guilty	
20 Feb 1851	selling beer			x	x	not guilty	
	selling beer			x	x	not guilty	
	selling beer			x	x	not guilty	
	selling beer			x	x	not guilty	
15 May 1851	theft of malt	1			2	not guilty	
	killing an ox	1	1			guilty	20 lashes & 2 months
	selling beer			x	x	not guilty	
19 Feb 1852	theft	1				not guilty	
19 Aug 1852	selling beer		1	x	x	guilty	fine £5 rest. 3s

Continued on next page

TABLE 3 — Continued

DATE	OFFENCE	ACCUSED	WITNESS	VICTIM	ASSISTED IN CRIME	VERDICT	SEN- TENCE
19 Aug 1852	selling beer			x	x	stayed	
17 Nov 1853	burglary	2				guilty	7 mo. & 2 yrs banish- ment
16 Feb 1854	selling beer		3	x	x	guilty	fine £10 rest. £1.12.8
	selling beer		2	x	x	guilty	fine £5 rest. 16s
15 Feb 1855	assault & battery	3				guilty	15 days each
	assault & battery	3				guilty	15 days con.
16 Feb 1855	selling beer		3	x	x	guilty	fine £5
	selling beer		3	x	x	not guilty	
	selling beer		2	x	x	guilty	fine (£2.10)
20 Nov 1856	larceny		1			not guilty	
16 June 1859	selling beer			x	x	guilty	fine £10
	killing a cow (p.p)	1				guilty	4 months
15 Sept 1859	selling spirits on Sunday			x	x	guilty	fine £10

Continued on next page

TABLE 3 — *Continued*

DATE	OFFENCE	ACCUSED	WITNESS	VICTIM	ASSISTED IN CRIME	VERDICT	SEN- TENCE
15 Sept 1859	theft of alcohol	1	2			guilty	1 month
20 Dec 1860	petty larceny		2			guilty	2 weeks
	man- slaughter of Indian			1		not guilty	
21 Dec 1860	breach of HBC labour contract (p.p)	2				guilty	fines £11.7 & £13.1 & 1 month
21 May 1861	failure to repay debt to HBC (p.p)	1					placed in prison
21 Nov 1861	distur- bance of peace	2				guilty	2 weeks, & 1 month
	selling beer		1	x	x	not guilty	
20 May 1862	selling liquor		2	x	x	guilty	fine £20 mul. counts
	giving rum to Indians		1	x	x	guilty	fine £10
20 Nov 1862	breach of liquor law to Indians		3	x	x	guilty	fine £10

Continued on next page

TABLE 3 — Continued

DATE	OFFENCE	ACCUSED	WITNESS	VICTIM	ASSISTED IN CRIME	VERDICT	SEN- TENCE
18 Feb 1864	giving liquor to Indians		2	x	x	guilty	fine £5
17 Aug 1866	murder of an Indian		1	1		guilty	death
21 May 1867	felony (charge n.s.)	1				guilty	1 month
25 May 1868	theft	1				guilty	1 year
19 Aug 1869	appeal on convic- tion for selling liquor to Indians					held over to Nov.	
18 Nov 1869	hearing of appeal from 8 Aug.					appel. failed to appear	default judgmt £22.4 & forf. of dep. for costs of app.
16 May 1871	assault with intent to maim	1		1		guilty	2 years hard labour
23 May 72	larceny	1				guilty	8 days jail & hard labour
TOTAL		28	32	7		44 guilty 15 not guilty 1 stay	

