

# They Do Not Submit Themselves To The King's Law: Amerindians and Criminal Justice During the French Regime

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WHEN MONARCHS OF THE RENAISSANCE appointed captains-general of colonies-to-be overseas, their commissions gave their appointees ample powers to govern the new jurisdictions. Typical of the genre was the document issued by Frances I to Jean-François de la Roque 9 March 1540, for the governance of New France.<sup>1</sup> La Roque was given authority to journey to Canada, Hochelaga, Saguenay and, *inter alia*,

put them in our hand, as much by way of amity or friendly agreements, if that may be done, as by force of arms, strong hand, and all other hostile means, to create ... captains [and] justices ... in our name, and [do] whatever shall seem necessary to him for the maintenance, conquest and protection of the said countries and to attract the peoples of them ... to settle and hold these in our obedience, to make laws, edicts, statutes, and ordinances, ... to cause [all persons] to keep, observe, and maintain [them] by all ways and means seemly and reasonable, or other exemplary punishment, [and] to remit and pardon misdeeds to those who require it ...<sup>2</sup>

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<sup>1</sup> Giovanni da Verrazzano, a Florentine navigator and explorer in the service of France, apparently coined the name "New France" (*Novo Gallia*) for use on a map made c. 1527, now lost. W.A. Morley, "Giovanni da Verrazzano" in *Dictionary of Canadian Biography* (Toronto: University of Toronto Press, 1966–1994) vol. I at 657 [hereinafter DCB].

<sup>2</sup> J.P. Baxter, *A Memoir of Jacques Cartier* (New York: Dodd, Mead, 1906) at 317–318. See also the similar commissions issued by King Emmanuel of Portugal to Gaspar Corte Real in 1500, by Henry VII of England to Richard Warde and his companions in 1501, and by Queen Juana of Castile to Juan de Agramonte in 1511; H.P. Biggar ed., *The Precursors of Jacques Cartier* (Ottawa: Government Printing Bureau, 1911) at 35–37, 41–59, 113–115.

La Roque's successors in the first successful French settlements in the early years of the seventeenth century were given the same powers, often in similar words and phrases. Thus, in Samuel de Champlain's commission of 1612 as lieutenant of the viceroy of New France, he was instructed to "establish, extend, and make known the name, power, and authority of His Majesty, and thereto to subject, submit and put in obedience all the people of the said land and all those adjacent to it ... ." He was "likewise to commission officers for the administration of justice and maintenance of police authority, regulations and ordinances ... ." And if that authority was challenged, "to make open war upon [the people] and bring them to such reason as he shall judge needful."<sup>3</sup>

In accordance with these instructions, Champlain published ordinances pertaining to the Amerindian peoples in 1621 and later that have not been found, but which are referred to in numerous instances.<sup>4</sup> Champlain's successors, Governors Montmagny and d'Ailleboust, followed in his footsteps, but their edicts have not come to light either, although one of d'Ailleboust's decrees of 1649 was said by Father Jerome Lalemant, the Jesuit Superior in Quebec, to be "the most important public act of jurisdiction that has ever been performed among the Savages since I have been in this new World. It is good to bring them gradually under control of those whom God has chosen to command them."<sup>5</sup> This "control" was apparently made more manifest in 1664 by the decree (*arrêt*) of the Sovereign Council of Quebec, which laid down that Amerindians were to "submit to the penalties carried by the laws and ordinances of France concerning murder and rape."<sup>6</sup> And it would appear that complete sovereignty over the Native population—the authority to enact and enforce law<sup>7</sup>—had been established by 1676, when Police Regulations

<sup>3</sup> S. de Champlain, *The Works of Samuel de Champlain*, 6 vols., ed. and trans. by H.H. Langdon & W.F. Ganong (Toronto: Champlain Society, 1922) vol. IV at 211–212.

<sup>4</sup> M. Trudel, *The Beginnings of New France 1524-1663* (Toronto: McClelland & Stewart, 1973) at 309; R.J. Thwaites ed., *Jesuit Relations and Allied Documents* (Cleveland, Ohio: 1896–1901) vol. V at 231, vol. VI at 253, vol. IX at 203–205 [hereinafter JR].

<sup>5</sup> JR, *supra* note 4 vol. XXIV at 143, vol. XXXIII at 49–51.

<sup>6</sup> *Arrêts et règlements du Conseil Supérieur de Québec et ordonnances et jugements des Intendants du Canada*. [Quebec: Fréchette, 1855] at 6–7 [hereinafter *Arrêts et règlements du Conseil Supérieur*].

<sup>7</sup> The authority to enact and enforce law in new possessions was the fundamental right of the concept of sovereignty developed by European legalists of the 16th and 17th centuries. From this flowed the authority to enforce other subsidiary rights such as the assessment and collection of taxes, the conscription of males for military service and the enforcement of eminent domain. O.P. Dickason, "Concepts of Sovereignty at the Time of First Contacts" in L.C. Green & O.P. Dickason, *The Law of Nations and the New World* (Edmonton: University of Alberta Press, 1989). See also W. Holdsworth, *A History of English Law* (London: Methuen, 1924–1972) vol. IV at 190–199, vol. VI at 84–87 for a discussion of the writings of the 16th century French legal philosopher Jean Bodin and his contemporary, Sir William Coke, on the subject. For a succinct statement of the concept at the time of publication,

lished by 1676, when Police Regulations proclaimed in Quebec that year decreed that "All Natives are subject to the punishments laid down by the laws and ordinances of France for theft, murder, rape, drunkenness and other offences."<sup>8</sup>

At first sight, it would seem that over a period of seventy years, the French crown had gradually come to exercise complete authority over the Amerindian population of New France in much the same way as had the English on the Atlantic seaboard during same period.<sup>9</sup> But it was one thing to decree that Amerindians were subject to French law. It was quite another to enforce that decree. The French never did enforce it because New France was developed into an empire of trade, as opposed to an empire of settlement, as was the English plantation to the south.

To begin with, when the first French explorers and traders established permanent settlements in northeastern North America the lands they chose were either of no value to Amerindians as hunting grounds, such as the tidewater lands on the Bay of Fundy, or were not occupied by them, such as the site of Jacques Cartier's abandoned settlement at Quebec, from which the St. Lawrence Iroquois had disappeared.<sup>10</sup> Thus, the French avoided the conflicts that the English precipitated with the Amerindian population of the area when they began to occupy Virginia and the eastern seaboard.<sup>11</sup> The French settlements were, however, conveniently located both for Native fur convoys to reach from the *pays d'en haut*, and to receive supplies from France and acquire and export the putative products and produce of New France.<sup>12</sup> Again unlike the Aboriginal experience with the English, from the point of view of the Natives of the northeastern woodlands, the French were a welcome presence as the suppliers of valued trade goods and allies in the wars with the Iroquois.<sup>13</sup>

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see W. Blackstone, *Commentaries on the Laws of England*. 1<sup>st</sup> ed. (Chicago: University of Chicago Press, 1979) vol. I at 49.

<sup>8</sup> *Arrêts et règlements du Conseil Supérieur*, *supra* note 6 Règlements Generaux pour la Police, art. XXX at 70.

<sup>9</sup> W.M. Billings, *The Old Dominion in the Seventeenth Century* (Chapel Hill: University of North Carolina Press, 1975) at 207–213.

<sup>10</sup> Trudel, *supra* note 4 at 71–73; L.F.S. Upton, *Mikmaks and Colonists* (Vancouver: University of British Columbia Press, 1979) at 26.

<sup>11</sup> R.A. Williams, *The American Indian in Western Legal Thought* (New York: Oxford University Press, 1990) at 212–221.

<sup>12</sup> de Champlain, *supra* note 3 vol. II at 339–345; M. Lescarbot, *The History of New France*, ed. and trans. by W.L. Grant (Toronto: Champlain Society, 1907) III at 254–262; N. Denys, *The Description and Natural History of the Coasts of North America (Acadia)*, ed. and trans. by W.F. Ganong (Toronto: Champlain Society, 1908) at 107–110, 377–381.

<sup>13</sup> Lescarbot, *supra* note 12 vol. II at 323–324; W.J. Eccles, *Essays on New France* (Toronto: Oxford University Press, 1987) at 159–160; B.G. Trigger, *Children of the Aataentsic* (Mont-

During this early period, each society kept its own law and offences were punished accordingly. For example, during the construction of the fortification at Quebec in 1608, a locksmith named Jean Duval organized a conspiracy to murder Champlain and to deliver the settlement to Basques or Spaniards who were down-river. The plot was discovered and the perpetrators arrested. After an investigation using the full apparatus of French law: depositions, interrogations, and cross-examinations, they were tried by the senior officers of the settlement, found guilty, and sentenced to be hanged. In one of the first European-style executions in New France, Duval was hanged forthwith. His head was severed from his body, mounted on a pike, and displayed at the highest point of the fortification.<sup>14</sup> From the Native perspective, Mark Lescarbot relates a case of betrayal that occurred among the Mi'kmaq during the time he spent among them in 1606–07. It was the practice of the Amerindians of the northeastern woodlands to put pelts among the possessions of the deceased at the burial site to help provide them with the means of support in the other world.<sup>15</sup> Early French traders learnt of this practice and suborned a member of a band to discover the location of the tribal burial ground, which they despoiled of the pelts and other valuable artifacts. Members of the band subsequently discovered the identity of the informer who was then executed summarily.<sup>16</sup> This practice whereby French law governed French subjects in French settlements, while offences committed by and against Amerindians were subject only to Native law, as were, increasingly, offences committed by Natives against the French or vice versa, remained in force until the end of the French regime.<sup>17</sup> These developments were, in large part, the outcome of the development of the fur trade.

When the first French colonising expedition to North America was dispatched in 1541 one of its prime objectives was to exploit the “many good commodities” said to be found there.<sup>18</sup> The expedition was abortive, and its members found little of value after the “gold” and “diamonds” mined by Jacques

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real: McGill-Queen's University Press, 1987) at 559–565; Trudel, *supra* note 4 at 16; Upton, *supra* note 10 at 16–17; Williams, *supra* note 11 at 205–221.

<sup>14</sup> de Champlain, *supra* note 3 vol. II at 25–34. The first such executions were probably those carried out during de Robeval's abortive colonising expedition to the Saguenay in 1541; R. La Rouque de Roquebrune, “Jean-François La Roque de Roberval” DCB, *supra* note 1 vol. I at 423.

<sup>15</sup> Lescarbot, *supra* note 12 vol. III at 285; Denys, *supra* note 12 at 439–440; JR, *supra* note 4 vol. X at 295–297.

<sup>16</sup> Lescarbot, *supra* note 12 vol. II at 352. For other instances of intra-tribal justice see Lescarbot, *supra* note 12 vol. III at 216; JR, *supra* note 4 vol. XIII at 13.

<sup>17</sup> Trudel, *supra* note 4 at 54–69; Upton, *supra* note 10 at 26.

<sup>18</sup> Baxter, *supra* note 2 at 315.

Cartier were found to be iron pyrites and quartz.<sup>19</sup> However, French fishermen who had for decades been taking full cargoes of the apparently inexhaustible cod off the coast of North America also worked up a trade in furs with the Native inhabitants of the area. These private transactions interested merchants in the fishing ports of western France and vessels were sent out in ever increasing numbers to engage in the fur trade alone, until pelts became by a wide margin the major item of trade.<sup>20</sup> Thus, when in the early decades of the 17<sup>th</sup> century the first permanent French settlements were constructed as outposts of a succession of companies that were granted monopolistic rights to trade in New France, their primary purpose was to facilitate commerce in pelts for French subjects and consequently to deny the trade to foreigners.<sup>21</sup> The French Crown based its right to erect such fortifications, and the larger question of its sovereignty in New France, on the findings made during the voyages of Giovanni da Verrazzano and Jacques Cartier in the early decades of the 16<sup>th</sup> century. In contemporary European legal parlance this was "discovery," and it was confirmed by symbolic acts to denote sovereignty, such as the erection of huge crosses complete with inscriptions and the French coat of arms, and possession by occupation.<sup>22</sup> These acts and assertions were contested by other European nations, particularly the English who based their claim on the landfall made by John Cabot in 1497, and the patent issued to the Virginia Company in 1606.<sup>23</sup> "Sovereignty over this part of the world, however, [would] rest less on the claims and charters of European monarchs than on the ability to seize, occupy, and hold the territory, by force if need be."<sup>24</sup> On the face of it, the French were ill prepared to do this.

During the existence of New France, the attention of successive French sovereigns was focused primarily on the European scene. Front and centre was the endemic warfare of the period on the Continent and the consequent requirements for money, men, and *matériel*. Hence New France got short shrift in these respects, so that the number of French settlers was never more than six percent of the European population in North America who were competing for

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<sup>19</sup> Trudel, *supra* note 4 at 48.

<sup>20</sup> J. Axtell, *Beyond 1492* (New York: Oxford University Press, 1992) at 130–134; W.J. Eccles, *The Canadian Frontier* (Toronto: Holt, Rinehart & Winston, 1969) at 18–20.

<sup>21</sup> Trudel, *supra* note 4 at 56–61, 84–85, 93.

<sup>22</sup> A.J. Keller et. al., *Creation of Rights of Sovereignty through Symbolic Acts 1400–1800* (New York: AMS Press, 1967) at 101–131; Trudel, *supra* note 4 at 38.

<sup>23</sup> Trudel, *supra* note 4 at 115, 172–175; W.J. Eccles, *France in America* (Vancouver: Fitzhenry & Whiteside, 1972) at 17; H.S. Commager, *Documents in American History*, 5<sup>th</sup> ed. (New York: Appleton-Century-Crofts, 1949) at 5, 8–10.

<sup>24</sup> Eccles, *supra* note 23 at 18.

the trade in furs and, latterly, for sovereignty.<sup>25</sup> Among the French themselves, there were differences of opinion. The Church, on the one hand, saw its role as the propagation of Christianity and the transformation of the Amerindians from pagans to French subjects when converted to the faith, as provided for in the charter of the *Compagnie des Cent-Acacias*.<sup>26</sup> It was caustic in its criticism of the corruption of its charges by alcohol, which was often traded for furs, and of the fundamental changes in the economy of the tribes caused by this trade. It was also bitterly critical of the secular authority when it gave sanction to the sale of liquor to the Amerindians.<sup>27</sup> On the other hand, traders were displeased by ecclesiastical meddling in economic affairs and often by governmental regulation of the fur trade.<sup>28</sup> In Quebec, there was frequent disagreement between the governor, the intendant and the senior cleric about precedence and the implementation of policy and at a higher level, between Quebec and Paris, about policy concerning immigration, exploration, and military and economic affairs.<sup>29</sup>

There were, however, mitigating circumstances that enabled the French to hold their own in North America for 150 years. As we have seen, French monarchs issued commissions to early governors that instructed them to claim new discoveries for the Crown, to subdue the Natives, and to organize and control the administration of justice. It soon became apparent that the French did not have the military capability to subdue the Amerindians and thus assert sovereignty over them and their land. More importantly, it would not be in their in-

<sup>25</sup> In 1627 there were 2717 Europeans in North America; of this number 107, or four percent of the total, were in New France. The French increased to five percent of the total by 1641, to six percent by 1681, but declined again to 5 percent by 1720. This percentage was never again exceeded during the French regime. Trudel, *supra* note 4 at 165, 257; W.W. McVey & W.E. Kalbach, eds., *Canadian Population* (Toronto: Nelson Canada, 1995) at 34; *The Statistical History of the United States from Colonial Times to the Present* (Washington: Department of Commerce, 1976) at 1168.

<sup>26</sup> *Edits, Ordonnances Royaux, Déclarations et Arrêts du Conseil d'Etat concernant le Canada* (Quebec: Frechette, 1854) at 5–11, Acte pour l'établissement de la Compagnie des Cent Associés . . . , art. XVII.

<sup>27</sup> See, for example, the account of the "violent sermon" of Abbé de Queylus, acting in his capacity of Grand Vicar of New France, who proclaimed in 1658 that it was a mortal sin to sell brandy to Natives. JR, *supra* note 4 vol. XLIV at 93. His successor, Bishop Laval, published a *mandemat* in 1660 that forbid the sale of alcohol to Natives on pain of excommunication and the following year he excommunicated one "Pierre" for this offence. H. Tetu & C.O. Gagnon, *Mandements, lettres pastorales et circulaires des évêques de Québec* (Québec: Côté, 1887) vol. I at 14, 30.

<sup>28</sup> Trudel, *supra* note 4 at 277.

<sup>29</sup> This account is based on Trudel, *supra* note 4; Eccles, *supra* note 23; Eccles, *supra* note 20; W.J. Eccles, *Canada Under Louis XIV, 1663–1701* (Toronto: McClelland & Stewart, 1987) at 13, 29; D. Miquelon, *New France 1701–1744* (Toronto: McClelland & Stewart, 1964); and G.G.F. Stanley, *New France: the Last Phase 1744–1760* (Toronto: McClelland & Stewart, 1968).

terest to try, because the Natives were essential to the successful conduct of the fur trade. It was they who both produced the furs in the *pays d'en haut* and transported them to French *entrepôts*. On the contrary, it was apparent to Champlain and his successors at Quebec as well as to the governors of Acadia that, to ensure success in the fur trade and to maintain the façade of sovereignty the French claimed against the counterclaims and actions of other European nations, the neighbouring tribes, whose menfolk were fierce and able warriors, must be drawn into military alliance with the French. Furthermore, the tribes must be maintained in alliance by assisting them in their military campaigns against the Iroquois—the Five Nations—by learning and conforming to their customs and by offering trade goods that met their needs.<sup>30</sup> Hence, in their dealings with Natives, the French could not presume to exercise the sovereignty they asserted in the face of claims made by English colonies to the south.<sup>31</sup> In particular, the French were not able to exercise criminal jurisdiction over Amerindians when, inevitably, there were conflicts between individuals from the two societies and offensive acts were committed. The first recorded cases are instructive in this respect and were portents for the future.

Sometime in 1616 or 1617, in the settlement at Quebec, a Montagnais named Cherououney and a French locksmith had words. The locksmith “beat the savage so soundly that he gave him reason to remember it; and not content with having beaten and insulted him, he incited his companions to do the like.”<sup>32</sup> Given the Amerindian conditioning to avoid verbal altercation and his inability to defend himself against the European style of physical assault,<sup>33</sup> there is no doubt that Cherououney felt humiliated and vengeful, and that he communicated this feeling to his fellow band members. In the event, the locksmith and a seaman named Charles Pillet went on a hunting trip to Cap Tourmente. Cherououney and a fellow band member followed them and killed them early

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<sup>30</sup> de Champlain, *supra* note 3 vol. II at 68–71, 276, vol. III at 44; JR, *supra* note 4 vol. VI at 297–299, Denys, *supra* note 12 at 440–441. See also Axtell, *supra* note 20 at 133–142; Trudel, *supra* note 4 at 56–59, 141–149; and H.A. Innis, *The Fur Trade in Canada* (Toronto: University of Toronto Press, 1956) at 15–21.

<sup>31</sup> Eccles, *supra* note 23 at 18–20, 66–67; B.G. Trigger, “Champlain Judged by his Indian Policy” (1971) 13 *Anthropologica* 87–88.

<sup>32</sup> de Champlain, *supra* note 3 vol. III at 183; the sources are in disagreement about the year: Champlain opts for 1616, *supra* note 3 vol. III at 181 n. 1; G. Sagard for 1617, *Histoire du Canada* (Paris: Tross, 1886) vol. I at 54.

<sup>33</sup> Father Biard gives us a graphic picture of this inability when he tells us that, if the natives “are more skillful in wrestling and nimble running, they do not understand boxing at all. I have seen one of our little boys make a Savage, a foot taller than himself, fly before him; placing himself in the posture of a noble warrior, he placed his thumb over his fingers and said ‘Come on!’” JR, *supra* note 4 vol. III at 93. For a discussion of the phenomenon see A.I. Hallowell, “Some Psychological Characteristics of the Northeastern Indians” in F. Johnson, ed., *Man in Northeastern North America* (Andover: Phillips Academy, 1946) at 209–214.

one morning just as they were making ready to begin the hunt. The killers tied the bodies together, weighted them with stones and threw them in the river. In the spring of 1618 the bindings broke and the bodies were cast upon the shore, where they were discovered by a search party from the settlement. It was evident that there had been foul play. Some of the bindings remained and the skull of one of the bodies had been smashed. This was confirmed by a Montagnais informer who had a grudge against Cherououney. He told the French the whole story which, the informer said, was common knowledge among the band.<sup>34</sup>

At that time, Champlain was in France organizing ships and supplies for the settlement. It was therefore decided to keep the cadavers in the fortification pending the arrival of the ships and senior personnel, who would decide what action to take.<sup>35</sup> In the meantime, the French took added security precautions and, seeing this, Cherououney and the Montagnais withdrew to Three Rivers, where their number was estimated to be about 800.<sup>36</sup> They then sent an emissary to Quebec to plead that the case be settled conclusively and expeditiously by the French accepting the gifts customary in Amerindian law to make reparation for an offence. The majority in the settlement would have accepted this solution. The Récollet priests Joseph le Caron and Paul Huet opposed the majority and carried the day on the grounds that "the lives of Christians must not be sold for merchandise."<sup>37</sup> On the contrary, the emissary was told that the Montagnais should surrender the accused to the French for the routine investigation of the crime in accordance with French law. This is the first recorded confrontation between the advocates of the Amerindian and the French criminal justice systems in a serious case. It illustrates the deep gulf of incomprehension between them.

In the short term good relations were re-established by the action of the band. In accordance with the imperatives of law and life in the northeastern woodlands, that is to say, the maintenance of peace and harmony among members of the group and with powerful and valued trading partners,<sup>38</sup> the leaders of the Montagnais at Three Rivers discussed the French demand with Cherououney. They prevailed on him to surrender, on the understanding that after the investigation he would be released. This was done. Cherououney did surrender and he was eventually pardoned. However, it is clear that French justice as dispensed by Champlain would have prevailed, but

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<sup>34</sup> de Champlain, *supra* note 3 vol. III at 181–185.

<sup>35</sup> *Ibid.* at 201–202.

<sup>36</sup> Sagard, *supra* note 32 vol. I at 55.

<sup>37</sup> *Ibid.* at 55–56; de Champlain, *supra* note 3 vol. III at 188–192.

<sup>38</sup> For discussions of this subject see Hallowell, *supra* note 33; A.S. Diamond, *Primitive Law Past and Present* (London: Methuen, 1971) at 170, 190–91.



for the moment this was neither suitable nor proper for many reasons. First we were weak, considering the numbers of the savages outside and inside our factory, who, vindictive and revengeful as they are, might have fired it everywhere and put us to route. The second reason was that there would be no more security in intercourse with them, and we should live in perpetual mistrust. Thirdly, trade might be injured and the king's service impeded.<sup>39</sup>

In the meantime, Cherououney was set free after the Montagnais had given two children to the French as hostages for his return to custody after the arrival of Champlain and other senior officers on the supply ships.

The ships arrived in June 1618 and Champlain was confronted with a situation that successive governors faced right to the end of the French regime. On the one hand, he knew by this time that the Natives found the French "procedure and mode of justice very strange and difficult" in comparison with their system of "vengeance or compensation by gifts."<sup>40</sup> On the other hand, he wanted to impose the French law—in this case, personal responsibility and retribution—on the Natives. In the end, to avoid loss of face, he compromised. He agreed to leave Cherououney at large, but banned him from the settlement at Quebec. In 1622 Cherououney violated the ban but left after Champlain threatened to shoot him if he did not. Champlain further humiliated Cherououney by pointedly ignoring him at an important meeting at Three Rivers to conclude a peace treaty with the Iroquois.<sup>41</sup>

Champlain was treading on dangerous ground. In the meantime, Cherououney had become chief of his band and there was fear among the French that he was gathering forces to attack them. This threat was negated by the intercession of Emery de Caen, a senior partner of the trading company with the monopoly of the fur trade in New France. During a visit to France de Caen had discussed the problem with the king, Louis XIII, who ordered that Cherououney and his accomplice be pardoned.<sup>42</sup> The pardon was announced in July 1623, during a ceremonial gathering of the many Natives who had come to trade at Quebec. The ceremony culminated when de Caen threw his sword into the St. Lawrence to wash away the crime, a symbolic act not lost on the Amerindians.<sup>43</sup> Champlain was not pleased that the French had been forced to compromise and he acceded to this course of action with very bad grace.<sup>44</sup> That he learned noth-

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<sup>39</sup> de Champlain, *supra* note 3 vol. III at 199; Sagard, *supra* note 32 vol. I at 57.

<sup>40</sup> de Champlain, *ibid.* at 191.

<sup>41</sup> *Ibid.* vol. V at 66–67, 76.

<sup>42</sup> *Ibid.* vol. V at 103.

<sup>43</sup> Sagard, *supra* note 32 vol. I at 225–226. For similar symbolic acts made by the Huron and other tribes in the northeast, see the reparation ceremony described in 1636 by Father Jean de Brébeuf, JR, *supra* note 4 vol. X at 215–223.

<sup>44</sup> de Champlain, *supra* note 3 vol. V at 103.

ing from the experience is demonstrated by his actions in a second similar case in 1627.

In October of that year two Frenchmen, known as Dumoulin and Henry, driving a herd of cows to Quebec from summer pasturage at Cape Tourmente, were killed in their sleep. They were brained with hatchets.<sup>45</sup> Suspicion fell on Alec Ouche, a Montagnais. According to the Récollet, Brother Gabriel Sagard, a short time before the killings Ouche had asked the baker of Quebec for some bread and when refused, engaged in an altercation with the baker and his companions, who then assaulted and beat Ouche.<sup>46</sup> When the bodies of Dumoulin and Henry were discovered there were a number of bands camped outside the settlement to partake in the annual eel fishery. Champlain called the chiefs to a meeting, showed them the bodies and demanded they produce Ouche. He came to the settlement the next day with other band members and was questioned. He told his interrogators that when he had been very hungry he had asked the baker for a piece of bread. It was refused; heated words ensued and he was beaten. Ouche denied that he had taken revenge for the beating by killing Dumoulin and Henry. The band chiefs evidently believed him because there was no offer of restitution, and they asked for time to investigate the killings. But Champlain was convinced of Ouche's guilt and arrested him. He released him a few days later, after an arrangement had been made to replace him temporarily with three young hostages, one of whom was Ouche's own son.<sup>47</sup>

During the winter and spring various individuals pointed the finger at another culprit: it was Athabaskans who had killed the two men, they said, but Champlain was not persuaded. Finally, in April 1628, Erouachy, chief of the Montagnais from Tadoussac, arrived at the settlement with Ouche to plead for the freedom of Ouche's son.<sup>48</sup> He rehearsed the arguments that had already been made, including the marauding Athabaskans. Again, Champlain was not persuaded. He "answered [Erouachy] point by point, dealing with all his feeble and unsound reasons ..." but Champlain "was determined not to temporize any longer, nor suffer them to defy us, while we stood with folded arms showing no resentment at their having again within a short time murdered two of our men in their sleep."<sup>49</sup> "For that reason we purposed to keep him [Ouche] in confinement until the information we had received was sufficiently confirmed. If he deserved death he must die; if not, he would be set at liberty ... in the mean-

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<sup>45</sup> *Ibid.* vol. V at 240-241.

<sup>46</sup> Sagard, *supra* note 32 vol. III at 813-820.

<sup>47</sup> de Champlain, *supra* note 3 vol. V at 242-248.

<sup>48</sup> Erouachy was known to Champlain as "La Fourière;" "Erouachy" DCB, *supra* note 1 vol. I at 302.

<sup>49</sup> de Champlain, *supra* note 3 vol. V at 257-260.

time we should treat him as we had treated his son. The latter I then liberated."<sup>50</sup>

Little or nothing was heard of the murders during the next year, but Ouche deteriorated physically while in confinement, as Champlain could have predicted. As he said: "to these people, who are accustomed to great freedom of movement, imprisonment ... is a very distressing mode of punishment, and they would as soon be put to death at once."<sup>51</sup> By June 1629, Ouche was in visible decline and could not walk. His condition was aggravated not only by the change of diet, but also because the French had little food to feed him or, indeed, themselves. Supply ships sent out from France in 1628 had been captured by the English. Food had been in short supply for several months, and Champlain was anxiously awaiting the arrival of the 1629 flotilla. Faced with the possibility that Ouche might die while in prison before the ships arrived, and the consequent hostile reaction of the several bands who had come to Quebec to trade furs, Champlain determined to free him. He set a number of conditions for his release. These were agreed to, and after the requisite ceremony band members "took him and, wrapping him in a blanket, four of them together carried him away; for he could not support himself on his own legs, being in a very weak and run-down condition."<sup>52</sup> Champlain had been forced to compromise once again.

The third and last recorded case that Champlain was involved with was also a case of murder. In July 1632 a Frenchman washing his clothes in a creek near the settlement at Quebec was attacked and beaten so badly that he died two days later. Initially, it was assumed that he had been killed by a marauding Iroquois war party. Some days later two Montagnais informers accused an Algonquin of the crime. According to Father Paul le Jeune, the Superior of the Jesuits at Quebec, the Algonquin was arrested and interrogated. He confessed, and was imprisoned. Le Jeune went on to say that the accused had set out to kill one of his own band. When he found this impossible, he killed the first person he saw who was vulnerable: the preoccupied Frenchman. Fellow band members of the accused evidently did not agree with le Jeune's version of the affair because, again, no restitution was offered, and they demanded his release, which was refused.<sup>53</sup>

The continued imprisonment of the Algonquin caused a serious hiatus in Champlain's plans to Christianize the Hurons, and so make them French subjects. Father Jean de Brébeuf and other Jesuits had made arrangements to travel to the Huron country on 4 August 1633, in the canoes of Hurons who were re-

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<sup>50</sup> *Ibid.* at 262.

<sup>51</sup> *Ibid.* vol. VI at 25.

<sup>52</sup> *Ibid.* at 24.

<sup>53</sup> JR, *supra* note 4 vol. V at 223-225.

turning there after trading their furs at Quebec. Late the previous night a member of a band allied to that of the accused went among the sleeping Hurons shouting that they should not take the clerics with them. He said that the Huron convoy would be subject to attack by Algonquins upstream for transporting the people who had imprisoned a member of the tribe. The next morning Champlain and the clerics met the Hurons. They said they would like to accommodate the French, but they could not run the risk of an Algonquin attack, which could quickly degenerate into war between the tribes. Champlain tried to browbeat the Hurons. They would not budge. Then, in a previously planned maneuver to influence the Hurons if all else failed, Father le Jeune asked Champlain to pardon the accused. Champlain refused, but made a grudging concession: he said that he would inform the king of the situation and await the monarch's reply before he took any further action. All to no avail; the Jesuits were forced to abandon their plans. There is no direct mention of what then happened to the accused, but it is probable that he was released or escaped, since the following summer Brébeuf and his party embarked at Three Rivers and arrived in Huronia safely. There is no mention of an Algonquin attack on them.<sup>54</sup>

In these three cases Champlain himself identified the problems Amerindians had in coming to grips with French criminal law. To them, it was an incomprehensible, ponderous, time-consuming and humiliating process, and while it was in process an accused person was imprisoned, with disastrous results for his health. Furthermore, he was well aware that transgressions among band members were governed by an expeditious conflict resolution system that worked well for them. For their part, Amerindians could not comprehend why Champlain could not or would not accommodate himself to a system in which others were beginning to see merit.

There was, for instance, the case concerning Father le Caron, the Récollet priest who had persuaded the French at Quebec to refuse restitution for the killing of Charles Pillet and the locksmith in 1617. While working in a Huron village in 1623 a band member had attempted to assault him with a club. A colleague, Brother Gabriel Sagard, laid a complaint with the band chief, who convened a meeting of the band council. Sagard was invited to address the council and to "make your own claim and state openly ... what your wrongs are and wherein and in what manner you have been injured, and upon that I will base the speech that I shall make, and then we shall do you justice." We were not a little surprised at first at the caution and wisdom of the captain and how judiciously he went about it all, right up to the end of his final conclusion, which was entirely satisfactory and encouraging to us.<sup>55</sup>

<sup>54</sup> *Ibid.* vol. VI at 7–15, 41, vol. VIII at 69–89.

<sup>55</sup> G. Sagard, *The Long Journey to the Country of the Hurons*, trans. H.H. Langton (Toronto: Champlain Society, 1939) at 164–166.

Sagard informed the council about the assault, after which the chief summed up in favour of the Récollets, and explained the Huron system of settling such incidents by restitution. In a concrete example of this, the band supplied several bags of corn to the Récollets, the award being made by the council.

In a later encounter, in 1633, between the Nippising and the French the shoe was on the other foot. The Natives had come down to Quebec to trade their furs. While engaged in barter they saw a French boy beating a drum. One of the Nippising, fascinated by the spectacle and the sound, came too close to the youth for comfort, so he hit the Native on the head with a drumstick, causing a wound that began to bleed profusely. "Immediately all the people of his tribe who were looking at the drummer, seeing this blow took offence at it." They said: "Behold, one of thy people has wounded one of ours; thou knowest our custom well; give us presents for this wound."<sup>56</sup> In reply, they were told that when a French person committed an offence he was punished. In this case the drummer boy would be whipped. When it was apparent that the French were preparing to carry out the punishment, the Nippising protested that he was only a child and thus not responsible for his actions. Their protests appearing to be of no avail, one of the Nippising threw a blanket over the boy and said: "Strike me if thou wilt, but thou shall not strike him." Father le Jeune, who related the incident, explained the Nippising's action by remarking that Amerindians "cannot chastise a child nor see one chastised," and continued, ruefully: "How much trouble this will give us in carrying out our plans of teaching the young!"<sup>57</sup> The incident was settled in the Native manner and the youth escaped punishment.

In 1648, a third case demonstrates that the Jesuits, too, had come to terms with Amerindian justice. In that year the Iroquois onslaught against Huronia was in full force. The Huron were also being decimated by the pestilence. Several Huron bands that had resisted the evangelical efforts of the Jesuits blamed the French for the ensuing death and destruction.<sup>58</sup> One result of their enmity was the murder of Jacques Douart. A *donné*—a servant—working for the Jesuits, Douart was killed with a hatchet near their mission at Sainte-Marie in the Huron country on 28 April, by agents of the unconverted who were never identified. Christian Hurons reported the crime to the Jesuits the next day, and told the clerics that Douart had been murdered to terrify them and drive them out of the country. To prevent this, the chiefs of the Christian bands held council with the unconverted during the next several days, during which they no doubt argued that the French had been allies in the war with the Iroquois and that they were the source of trade goods which all Hurons had come to depend on. Whatever they were, the Christians' arguments prevailed, and "it was publicly

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<sup>56</sup> JR, *supra* note 4 vol. V at 219.

<sup>57</sup> *Ibid.* at 221; de Champlain, *supra* note 3 vol. III at 142.

<sup>58</sup> Eccles, *supra* note 23 at 46.

decided that reparation should be made to [the Jesuits] in the name of the whole country for the murder."<sup>59</sup> This decision was accepted without question by the Jesuits.

In his report of this incident, Father Paul Ragueneau made it clear that he understood and approved of Amerindian justice in the North American setting. He was so impressed with the dignity and eloquence of the orators during the two-day ceremony of reparation before the assembled bands, that he reported the proceedings in the most detailed description of such an event in the *Relations*.<sup>60</sup> The whole matter was concluded on 11 May, just thirteen days after Douart's death had been reported. This includes the lengthy negotiations between the Christians and the unconverted. About one hundred separate gifts were given to the Jesuits and they, coached by their converts, made several gifts to the bands, each preceded with a speech couched in the appropriate oratorical style. There could be no better example to illustrate the expeditious manner in which such affairs were settled in Amerindian society.

It is instructive to compare this incident with those in which Champlain attempted to force French justice on the Amerindians. Where the European way was dilatory and deleterious to the health of a suspect in custody, Amerindian justice was expeditious. Where Champlain singled out an individual for retribution, severe economic punishment was visited on a whole community, and while neither Champlain nor band members were satisfied with the resolution of the incidents he was involved with, the cathartic effect of the reparation ceremony on the Jesuits, at least, is epitomized by Ragueneau's remark that "this matter ... as far as we were concerned, succeeded beyond our hopes; and in it we observed God's most loving care for us ..."<sup>61</sup>

Most of the incidents enumerated above took place outside the perimeters of French settlements. But conditions along the St. Lawrence were changing. By 1653, the French population had increased to over 2000, from 107 in 1627 when the *Compagnie des Cent-Associés* was chartered. With this increase came the need for permanent institutions to administer justice to these people.<sup>62</sup> Instead of the governor and one or more of his officers holding *ad hoc* courts as necessary, the trading company erected seigneurial courts staffed with tenured judges and court officials in Montreal in 1648 and in Quebec and Three Rivers in 1651. The governor in council acted as a court of appeal.<sup>63</sup> The seigneurial tribunals at Quebec and Three Rivers were raised to royal courts in 1663, after

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<sup>59</sup> JR, *supra* note 4 vol. XXXIII at 233.

<sup>60</sup> *Ibid.* at 229–249.

<sup>61</sup> *Ibid.* vol. XXXIII at 240; vol. XXXVIII at 271–287.

<sup>62</sup> McVey, *supra* note 25 at 34.

<sup>63</sup> A. Vachon, "The Administration of New France" in DCB, *supra* note 1 vol. II at xvi.

New France ceased to be the fief of a commercial company and became a royal province. Montreal remained under the jurisdiction of the *bailliage de Montreal*, the court of the Sulpicians, the seigneurs of Montreal. But there was no change in personnel in any of these tribunals.<sup>64</sup> Appeals from these courts and many cases of first instance were heard by the Sovereign Council—*Conseil Sovereign*. This was an omnicompetent body with legislative, administrative and judicial functions; when it sat as a court, the intendant, the head of the legal system in New France, was in the chair.<sup>65</sup> During the existence of the French regime these courts administered the law of the *Coutume de Paris* in civil actions. Criminal law was a different matter. In early days, criminal law consisted of a few ordinances that defined certain offences, criminal procedure, and the common law as laid down by the judiciary, a situation not unlike that which existed in England at the time.<sup>66</sup> A major change took place with the promulgation of the *Criminal Ordinance* of 1670, which codified existing criminal procedure in a standard form to be followed in all criminal investigations and trials, and laid down a scale of punishments.<sup>67</sup> This was supplemented by police regulations that were promulgated by the Sovereign Council in Quebec in 1676—a code of municipal law that included crimes and punishments.<sup>68</sup> As we have seen, with few exceptions, this system applied to the French population alone, regardless of provisions that purported to subject the Amerindian population to French criminal law. If Amerindians became involved with the law the governor, whose

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<sup>64</sup> *Ibid.* at xv–xxiv. There was a hiatus in this progression from 1663 to 1667 because of the change from administration by the *Compagnie des Cent-Associés* to the crown and the change from the crown to administration by the *Compagnie des Indes Occidentales*, and back again: *Ibid.* at xvii–xix.

<sup>65</sup> The Sovereign Council was the governing body of New France and also, from 1663 to 1666, a court of first instance in civil and criminal causes for Quebec City and an appeal court for the whole jurisdiction. In 1667 the Council divested itself of the junior jurisdiction when a seigneurial court of first instance for Quebec City was erected by the *Compagnie des Indes Occidentales*. When the *Compagnie* was dissolved in 1674 and the colony again became a royal province, the seigneurial court of Quebec was abolished and Sovereign Council again became both a court of first instance and appeal. But the potential for injustice of the Council hearing an appeal against its own judgement in matters concerning seizures of property and related issues must have soon become apparent, because in 1677 it reverted to being an appeal court only in these matters, and the seigneurial court of Quebec was re-erected as a crown court of first instance to adjudicate such issues. In 1703 the *Conseil Souverain* was re-designated *Conseil Supérieur*. *Ibid.* at xvii–xix; A. Vachon, “Louis-Theandre de Lotbinière” DCB, *supra* note 1 vol. I at 202; R. Cahall, *The Sovereign Council of New France* (New York: Longmans Green, 1915) at 208–210.

<sup>66</sup> C.L. von Bar, *History of Continental Criminal Law* (New York: Kelly, 1968) at 262–263.

<sup>67</sup> *Ibid.* at 266.

<sup>68</sup> *Arrêts et règlements du Conseil Supérieur*, *Règlements Généraux pour la Police*, *supra* note 8 at 65–73.

duties included conducting diplomatic relations with the several tribes in New France, laid down the policy to deal with such matters. He frequently intervened in person to remove an accused band member from the process of the French criminal justice system.

Subsequent to Douart's Case in 1648 the civil authorities demonstrated that they, like the church, had come to terms with Amerindian justice. Eager to carry on peaceful commerce and to bring the Iroquois into an alliance, the French concluded a peace treaty with the Five Nations in 1653, and the Jesuits founded Sainte-Marie des Iroquois in Onondaga country.<sup>69</sup> Late in August 1656, near Montreal, a war party of Mohawks ambushed a convoy of Algonquins returning to their country after trading furs at Quebec. They wounded a Jesuit priest, Father Leonard Garreau, who was traveling with the convoy to establish a mission in Algonquin country. The Mohawks then transported Garreau to Montreal, where he died four days after the ambush. At that time the Mohawks presented two gifts to the French authorities. The first "was to show their regret at the accident"; the second "to dry the tears [of the French] and assuage [their] grief."<sup>70</sup> This is a far cry from the 100 presents for Douart, which may be explained by the fact that the Mohawks were travelling light and were a long way from home.

By 1657 conditions that had caused the Iroquois to make peace in 1653 had altered radically, and they again began to display hostility to the French.<sup>71</sup> In what may have been a spontaneous act of violence that upset the Iroquois' plan to resume war with the French, a party alleged to be Oneidas shot and killed three Frenchmen near Montreal on 25 October 1657. In response Sieur de Maisonneuve, the Governor of the settlement, ordered the arrest and chaining of an Onondaga who was hunting nearby, and sent word of the killings to Three Rivers and Quebec. Five days later, 29 October, a delegation of Oneidas arrived at Montreal and were received by Maisonneuve. The spokesman protested the innocence of the Onedias, regretted the outrage perpetrated on the French, and offered seven gifts of wampum to "wipe away the bloodshed" and to preserve the peace, each proffered with appropriate words, during which speech he accused the Cayugas of the crime.<sup>72</sup> Maisonneuve accepted the gifts. But as he was

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<sup>69</sup> Near Onondaga Lake, south of Syracuse, New York State .

<sup>70</sup> JR, *supra* note 4 vol. XLII at 237.

<sup>71</sup> Trudel, *supra* note 4 at 225–227.

<sup>72</sup> In North American prehistory, wampum consisted of white beads made from shaped and polished seashells, and could be used as a form of currency or, strung together on animal sinew, worn as an article of adornment. At the turn of the 17<sup>th</sup> century the functions of wampum were augmented by white and other coloured beads strung in various combinations and made into belts that were used as mnemonic devices to record such things as messages of condolence or the articles of a treaty. F.E. Hoxie, *Encyclopedia of North American Indians* (Boston: Houghton Mifflin, 1996) at 662–64. For illustrations of Native fash-



not certain of the facts of the case and had no wish for the resumption of open warfare, he asked the Oneidas to remain near the settlement until the incident could be investigated. However, after having seen the Onondaga prisoner in fetters, the delegation left the settlement that night.<sup>73</sup>

Word of the killings arrived at Quebec on 1 November, whereupon the Governor of New France, Louis d'Ailleboust, ordered the arrest and incarceration of all members of the Five Nations in the jurisdiction. Within a week over a dozen men from various tribes had been taken into custody. There was now a delicate balance between the French and the Iroquois: while there was a large number of imprisoned tribesmen, there was an even larger number of Frenchmen—over fifty—at Sainte-Marie des Iroquois in the middle of Onondaga country. Each group was, in effect, a hostage for the well-being of the other.<sup>74</sup> In the months following, until open warfare was resumed in the spring of 1658, there were sporadic killings and the capture of prisoners by both sides, and deputations of the Five Nations came to the French to make reparations and plead for the release of prisoners. The French did likewise, in the fashion of the country. There was no mention of French justice. Gifts were presented by members of an embassy, with appropriate speeches, and the recipients responded in like manner.<sup>75</sup> However, most or all of the hostages secured their freedom by self-help. In March 1658 the French escaped from Sainte-Marie by a daring subterfuge. In the following October eleven of the Iroquois broke out of prison and escaped. Since there is no later mention of any execution of Native prisoners, it may be that those still in custody also escaped or were released.<sup>76</sup>

Some years later, in 1662, a Frenchman, one Desjardins, was murdered in Montreal by intoxicated Natives. No further reference to this incident has been found, and it is assumed that the killing went unpunished.<sup>77</sup> While the details of the case are obscure because of a mutilated manuscript, it is an important event because it is the first case of record in which alcohol was mentioned.

Thus a prediction made in 1636 by Father le Jeune came true: because of the brandy traffic with the Natives, and their violent reaction to alcohol, he said, "they will finally murder some Frenchman in their drunkenness, and the

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ions and the use of wampum belts see de Champlain, *supra* note 3 vol. III at 134–38; J.F. Lafitau, *Customs of the American Indians Compared with the Customs of Primitive Times*, trans. W.N. Fenton & E.L. Moore (Toronto: Champlain Society, 1974) vol. II at 25, 184.

<sup>73</sup> JR, *supra* note 4 vol. XLIV at 193–197.

<sup>74</sup> *Ibid.* at 157.

<sup>75</sup> *Ibid.* at 111, 117, 121–129.

<sup>76</sup> *Ibid.* at 119, 175–183.

<sup>77</sup> J. Grabowski, *The Common Ground: Settled Natives and French in Montréal, 1667–1760* (Dissertation, Université de Montréal, 1993) at 146.

Frenchmen, in defending themselves, will kill some savages ... .<sup>78</sup> It was by no means the first mention in the sources of the liquor traffic and its deleterious effects on the Amerindian population in the northeastern woodlands, to whom intoxicating beverages were unknown before the Europeans arrived.<sup>79</sup> The pages of the *Jesuit Relations* are replete with descriptions of uncharacteristically violent and sometimes murderous behaviour of Amerindians under the influence of alcohol.<sup>80</sup> This was no secret to the French authorities. From the earliest days they attempted to prohibit or control the traffic. In 1633, or even earlier, Champlain promulgated the first decree or ordinance to make trafficking in alcohol by the French subject to corporal punishment or fine, and in 1636 there is record of an inhabitant of Quebec who was fined 50 livres "for having made some savages drunk."<sup>81</sup> This was a stiff penalty when the wage of an *engagé*, a working man, ranged from 50 to 100 livres per annum, a pound of tobacco cost six livres, and a small house sold for 600 livres.<sup>82</sup>

As we have seen, Governors Montmagny and d'Ailleboust promulgated similar ordinances during their tours of duty, and the *arrêt* of Louis XIV's Council of State of 1657 that prohibited the sale of alcohol to Amerindians was promulgated in Montreal in 1659 by Governor Maisonneuve.<sup>83</sup> Their successors elaborated these prohibitions right to the end of the French regime, although enforcement of the regulations was uneven.<sup>84</sup> The courts marched in step with the administration, and when the regulations were enforced the bench imposed ever increasing fines that on occasion were as high as 1000 livres, but which

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<sup>78</sup> JR, *supra* note 4 vol. IX at 203.

<sup>79</sup> On the absence of alcohol among the northeastern Natives at first contact see Lescarbot, *supra* note 12 vol. III at 176–177; Denys, *supra* note 12 at 251–256; C. le Clercq, *New Relation of Gaspesia* (Toronto: Champlain Society, 1910) at 109, 253–256.

<sup>80</sup> JR, *supra* note 4 vol. V at 49–51. For discussions of this topic see R.C. Dailey, "The Role of Alcohol among North American Indian Tribes as reported in the Jesuit Relations" (1968, No. 1) 10 *Anthropologica* 46–59; A. Vachon "L'eau de vie dans la société indienne" *Canadian Historical Association Report* (1960) at 22–33; G.F.G. Stanley, "The Indians and the Brandy Trade During the Ancien Régime" (1952–53) 6 *Revue d'histoire de l'Amérique Française* 489–505. For the situation in Montreal during the French regime see Grabowski, *supra* note 77 at 224–227.

<sup>81</sup> JR, *supra* note 4 vol. V at 231, vol. VI at 253, 328, n. 19, vol. IX at 145.

<sup>82</sup> *Ibid.* vol. VI at 330, n. 25, vol. XX at 127, vol. XXIV at 159, vol. XXVIII at 227–229.

<sup>83</sup> E.Z. Masseur, ed., *Répertoire des arrêts, édits, mandements, ordonnances et règlements 1640–1760*, (Montreal: Ducharme, 1919) at 1.

<sup>84</sup> *Edits, Ordonnances Royaux*, 235 (24 May 1679); *Arrêts et règlements du Conseil Supérieur de Québec*, 6 (28 September 1663); 70, art. XXIX (11 May 1676); 111 (21 January 1686); 152 (24 October 1707).

usually ranged from five to 500 livres in the 1700s.<sup>85</sup> During these years, the fines were often in addition to public degradation, corporal punishment or banishment from the colony. All such measures were to no avail. Not only did the liquor traffic increase but the large majority of offences that Natives committed against French subjects were committed when they were drunk.<sup>86</sup> From the time of the Desjardins murder, or even earlier, such offences were on the rise.

In large measure, this development was caused by the migration and settlement of large numbers of Amerindians adjacent to French population centers, with the consequent opportunity for the Natives to acquire liquor. During the early days of French colonisation, missionaries had great difficulty in their efforts to Christianize the Amerindians, particularly nomadic tribes such as the Montagnais and Algonquin. To provide a Christian environment for Amerindian catechumens—Christian converts under instruction before baptism—and to accustom them to sedentary life, plans were conceived to build missions adjacent to French settlements to house them. Thus, Sillery, south of Quebec City, was founded in 1636, the mission near Trois-Rivières in 1634, and La Prairie, south of Montreal, in 1668.<sup>87</sup> Other missions were established in following years. By the end of the century the tribal population adjacent to Montreal outnumbered the European. There was an even greater disparity between the number of tribal warriors and French soldiers.<sup>88</sup> By this time however, the original Christianizing mission had been relegated to a distant second place; preeminently, the tribal missions had become, in effect, military outposts of the French garrisons and the Native warriors valued allies of the regime and essential to its continuance.<sup>89</sup> As such, the taverns of French settlements were ready and willing to do business with Natives, often with disastrous results for the drinkers who frequently bartered the garments they were wearing for alcohol, and who, on occasion, fought any and all comers while lost in a drunken fury. That relatively few serious injuries resulted from these brawls is undoubtedly due to the

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<sup>85</sup> *Complément des ordonnances et jugements des Gouverneurs et Intendants du Canada ...* (Quebec, Fréchette, 1856) at 439, (26 May 1721); 190–191 (30 July 1722); 199 (19 June 1723).

<sup>86</sup> Grabowski, *supra* note 77 at 145–191. It was also true that the majority of offences committed by Amerindians against their own people were committed when the assailants were drunk. See Stanley, *supra* note 81 at 490–492; Dailey, *supra* note 80 at 47.

<sup>87</sup> L. Campeau, “Roman Catholic Missions in New France” in *Handbook of North American Indians* (Washington: Smithsonian Institution, 1978) vol. IV at 464–471. There is a good map specifying the locations of all missions at 466.

<sup>88</sup> Grabowski, *supra* note 77 at 59–81.

<sup>89</sup> Campeau, *supra* note 87 at 468.

fact that the garrison soldiers discouraged tribesmen from bringing firearms and other weapons into the settlements.<sup>90</sup>

It was evidently the circumstances of the Desjardins murder and other offences caused by intoxicated Natives that caused the Sovereign Council, as one of its first orders of business, to promulgate yet another ordinance against the brandy trade. This edict prohibited French subjects from supplying intoxicating liquors to Amerindians under pain of a 300 livre fine, and corporal punishment and banishment for repeat offenders.<sup>91</sup> The need for the legislation was demonstrated the following year when French policy with respect to Amerindians alleged to have committed crimes against French subjects began to be defined.

The case concerned an Algonquin known as Robert Hache, "most likely drunk," who was accused early in 1664 of raping Marthe Hubert, a resident of the Ile d'Orléans. He was arrested, but escaped custody before an investigation could be completed.<sup>92</sup> The attorney general was unsure of his jurisdiction and convened a committee of Jesuit missionaries from the neighbouring tribes and various *habitants* to look into the matter. Their advice was to explain the French law to the chiefs of the neighbouring tribes, who knew only that murder was a capital crime, according to French law. This was done. Chiefs of six tribes, "our allies," attended the Sovereign Council on 21 April 1664, where French criminal law was explained to them. They were told that a French subject convicted of rape would be executed, as the accused should be, if proven guilty. But, because of the long-standing friendship between the French and the tribes, and because the latter had no prior knowledge of French law, charges would not be pressed against the accused. However, to prevent crimes of this nature in the future, and with the consent of the chiefs, Natives convicted of rape and murder of French subjects in future would be required to submit to the penalties laid down by French law.<sup>93</sup> As W.J. Eccles points out, it is clear that the tribes in question were party to an agreement with the Council that French law would govern future cases of rape or murder when the complainant was French and the accused a Native, "but that was all."<sup>94</sup> It follows also that the Council was well aware that there was a split jurisdiction—French and Amerindian—and that French law did not run in New France, but only in French enclaves.

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<sup>90</sup> Grabowski, *supra* note 77 at 169–170. The mayhem that could result from the consumption of alcohol in missions or in the *pays d'en haut* is graphically described by le Clercq, *supra* note 79 at 255–256.

<sup>91</sup> *Jugements et deliberations du Conseil Souverain* (Québec, 1885) vol. I at 8 (28 September 1663) [hereinafter *Jugements et délibérations*].

<sup>92</sup> *Ibid.* vol. I at 174 (21 April 1664).

<sup>93</sup> *Ibid.* at 175 (21 April 1664).

<sup>94</sup> Eccles, *supra* note 20 at 78.

Four days after Hache's case, and evidently after some reflection about the danger from drunken Natives in French settlements and previous informal practice, the Sovereign Council promulgated an addendum to the ordinance of 1663 respecting the brandy trade.<sup>95</sup> As is evident from the preamble of the addendum, the problem with enforcement of the ordinance was that few intoxicated Amerindians would voluntarily inform on their French bootlegger. As a remedy, the new edict gave authority to any and all French subjects to apprehend and arrest any drunken Native in order to discover who had supplied the liquor. If assistance was required to make an arrest, the individual making the arrest was authorized to request aid from any bystander. Persons who refused such aid were liable to a fine of ten livres.

Three weeks later in Quebec two drunks, Ta8iskaron and Anaka8abemat, were arrested and interrogated by two members of the Sovereign Council sitting as a court of first instance. They refused to reveal the name of their bootlegger. After two nights in jail, and after recovering from what must have been monumental hangovers, they were more forthcoming, and accused one Rouvray, a soldier, of being their supplier.<sup>96</sup> After their statements they were released. This set the pattern for the future.

Even before Louis XIV's Criminal Ordinance of 1670 came into force French criminal actions followed a standard procedure: accusation, investigation, arrest, interrogation, conclusion (a motion by the prosecutor that a particular punishment be imposed on the accused), sentencing, and punishment.<sup>97</sup> Each step was fully documented, and cases often took an inordinate time to complete. This was the prime reason that Amerindians objected to the procedure. Of course, if the accused was a French subject or other European, the procedure was followed to the letter. But in the case of Ta8iskaron and Anaka8abemat only the first four steps were taken: once they had accused Rouvray during the interrogation phase they were released. The focus then shifted to Rouvray, and the French authorities went immediately to the second step of a criminal action against him, the investigation of the accusation by the tribesmen. This truncated procedure became the norm for the remainder of the French regime. Only very rarely was the statutory criminal procedure followed to its conclusion—punishment—in cases involving intoxicated Natives, regard-

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<sup>95</sup> *Jugements et délibérations*, *supra* note 91 vol. I at 186 (25 April 1664).

<sup>96</sup> *Ibid.* at 188 (11 May 1664).

<sup>97</sup> A. Esmein, *A History of Continental Criminal Procedure With Special Reference to France*, trans. J. Simpson (New York: Kelly, 1968) at 145–178. For an account of the French criminal procedure laid down in the Criminal Ordinance of 1670 see A. Lachance, *La Justice criminelle du roi au Canada au XVIIIe siècle* (Québec: Les Presses de l'Université Laval, 1978) at 61–103.

less of the penalties laid down for public drunkenness, and even when they were accused of committing serious crimes against French subjects.<sup>98</sup>

In an important case in 1667, the Sovereign Council sat as a court of first instance and demonstrated its determination to put a stop to illegal liquor trafficking.<sup>99</sup> The case report is most interesting because it is much longer than most such accounts, which dispose of a case in half a dozen lines or so. This report documents in full the painstaking process of a French criminal investigation. It is self evident that it took an interminable time to complete. It is thus in startling contrast to the expeditious manner in which Natives conducted their affairs. A large bootlegging operation involving twelve Frenchmen and, possibly, twelve Natives, was discovered in the vicinity of Three Rivers sometime in the summer of 1666. An investigation lasting nine months or more was made by Royal Judge Michel Leneuf du Hérisson from Three Rivers and the clerk of his court, Séverin Ameau. Their report was laid before Attorney General Jean Bourdon at Quebec. At the trial before the Sovereign Council on 20 June 1667, Bourdon's conclusion—recommendation for the disposal of the case—was that fines ranging from 50 to 200 livres be imposed on six of the French, and imprisonment for one month and degradation for those who were insolvent. It was so ordered by the Council. Similar punishment was to be levied on the Natives, if any were found guilty. There do not seem to have been any of the accused Natives at the trial, because Pierre de Gorribon, a member of the Council, was deputed to proceed to Three Rivers to investigate the Amerindian involvement; in all probability, to ascertain if they were simply consumers, or traffickers. Since there is no further mention of this case in the record, it may well be that Gorribon found no evidence to support a charge of trafficking against the suspects, or that, in yet another case which involved band members, the Council let the matter drop.<sup>100</sup>

A more typical case involving alcohol was that of Teounyagné and his wife Tekaseriaga, Mohawks from the La Montagne mission close to Montreal. They were arrested and charged with disorderly conduct in the summer of 1688. When interrogated by the examining judge, the couple testified that René Le Fezeret had supplied them with liquor. After the record was forwarded to the prosecutor of the *Bailliage de Montréal*, the court of the jurisdiction, he did not proceed to conclusion against the Mohawks, but rather instituted proceedings against Fezeret. The court handed down a 100 livres fine to Fezeret even though he was absent and had not made a statement or been interrogated. The

<sup>98</sup> Grabowski, *supra* note 77 at 99–116.

<sup>99</sup> *Jugements et délibération*, *supra* note 91 vol. I at 406–408 (20 June 1667).

<sup>100</sup> About a month later two similar cases came before the Sovereign Council sitting as a court of first instance in Quebec. *Jugements et délibération*, *supra* note 91 vol. I at 422–424 (18 July 1667).

Mohawk couple were freed unharmed in spite of the fact that the Police Regulations of 1676 laid down corporal punishment—whipping—for the offence the Mohawks were accused of.<sup>101</sup>

Nicholas Tonabl8an, a Huron also from La Montagne, was charged with attempted murder in a more serious case in 1684. Evidence was adduced that when Tonabl8an met Father Joseph Mariet on the path to the mission he shouted that the priest was “a dog that had to die,” and was about to split Mariet’s head with an axe when he was restrained by fellow band members.<sup>102</sup> Tonabl8an was arrested and interrogated. He told the examining judge that he had been drunk at the material time and, in accordance with Native custom, he disclaimed any responsibility for the crime and blamed it on the alcohol. The judge was not persuaded and continued the investigation. He called a halt after he received a letter from concerned clergy who told him that he should free Tonabl8an immediately or face “very dangerous consequences for the whole colony.” Afterwards he learned that two band chiefs had convinced Governor-General la Barre that the action should be terminated.<sup>103</sup> The judge complied, and Tonabl8an was freed but banished from Montreal. If this was meant to be punishment, it was an ineffectual gesture. If he did actually leave the mission, he soon returned and was in trouble again with the French for engaging in a drunken brawl.

One of the most serious alcohol related offences committed in New France was the rape and murder of sixteen year-old Jeanne Dasny at Montreal on 12 July 1689. Etienne Tehagara8eron, a Mohawk from the Sault-St.-Louis mission, was accused of the offence. He was taken into custody and the French justice system went into action.<sup>104</sup> Although witnesses identified Tehagara8eron as the culprit, he denied the charge of rape. He testified that he had been drunk at the material time and was therefore not responsible for the murder. He evidently was known as a trouble-maker to his fellows, and got little or no support from them at first. However, when the investigation dragged on for several weeks with Tehagara8eron in prison, tribal patience ran out and pressure was applied to free him. His fellow tribesmen made it clear to the administration that they were ready to leave the mission and to join France’s enemies, if he were not released. In response to this threat, Governor General Denonville and Intendant Champigny stated on 4 August that the investigation had “lasted too long,” and

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<sup>101</sup> *Arrêts et règlements du Conseil Supérieur*, *supra* note 6 *Règlements Generaux pour la Police*, art. XXIX at 70; Grabowski, *supra* note 77 at 101–102.

<sup>102</sup> Grabowski, *ibid.* at 150.

<sup>103</sup> *Ibid.* at 151.

<sup>104</sup> *Ibid.* at 153–157.

that Tehagara8eron should never have been imprisoned during the investigation. Denonville ordered that he be released forthwith.<sup>105</sup>

In an event that was probably unique in New France, a similar decision was made in a similar case concerning the Dasny family a generation later. The alleged killer of Jeanne Dasny's father was not only released, but pardoned before a verdict of guilty was pronounced. The father, Honoré Dasny, was killed and his son-in-law was wounded in Montreal by several intoxicated Iroquois from the Sault-St.-Louis mission in August 1722. The French arrested "Jean," one of the Iroquois, and Judge Francois-Marie Bouat of the Montreal court began an investigation. However, after meeting with a delegation from the Iroquois Council, Governor General Vaudreuil took over the case personally. He accepted wampum and the offer of further reparations for the family of Honoré, in accordance with Amerindian law, and pardoned the accused. This before "Jean" was tried or convicted! In discussing the incident with the law officers, Vaudreuil stated that the Iroquois Council would protect the suspects and that any attempt to bring them to justice would result in rebellion. Attention was then directed to discovering the source of the alcohol. The purveyors were identified and fined 500 livres.<sup>106</sup>

Even when the French presence in New France had grown to 50,000 or more in 1750, band councils and chiefs made no bones about their pre-eminent right to the territory of New France and their right of jurisdiction over the Amerindian inhabitants, to the evident chagrin of the French.<sup>107</sup> In that year, two intoxicated Iroquois from the Sault-St.-Louis mission attempted to steal the canoe of Jean-Baptiste Rapin, and seriously wounded him when he attempted to prevent the theft. Governor General Jonquière requested that the chiefs and the accused meet him, in the hope that the accused would be surrendered to the French. All those summoned came to the meeting, but the chiefs said that they "would never surrender the suspects, that the French should consider the Iroquois their fathers, that they were the first owners of the lands of the colony, and that the French could settle down [here] only because the Iroquois were kind enough to give them their permission."<sup>108</sup> However, this bitter medicine was made somewhat more palatable when the offer was made to pay for Rapin's medical treatment. Needless to say, Jonquière was not pleased with the message

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<sup>105</sup> *Ibid.* at 155; see *supra* note 24 for an account of the deleterious effect of imprisonment on Amerindians.

<sup>106</sup> *Ibid.* at 163–166.

<sup>107</sup> McVey, *supra* note 25 at 34.

<sup>108</sup> J. Grabowski, "French Criminal Justice" (1996) 43:3 *Ethnohistory* 417; see also Grabowski, *supra* note 77 at 167.



nor with the messengers. But the truth of their assertion is proven by the fact that after the offer to pay medical costs had been made, the case was closed.<sup>109</sup>

Even when alcohol was not a factor, actions brought against Natives rarely followed the path laid down by French law. In an early instance, four Sokokis, three men and a woman, allies of the French and probably resident at the François Xavier mission south of Montreal, broke into and ransacked Pierre Dupas's house on the Richelieu River in July 1669. They were surprised by two of Dupas's servants; two of the Sokokis were killed by the Frenchmen in self defence, and the woman was killed accidentally by her fellow housebreakers. The third male was arrested and imprisoned at Fort Richelieu, where a criminal investigation was begun. Early in August, after hearing an appeal by the Sokokis Council that the death of their two fellows should atone for the crime, and that reparation would be made to Pierre Dupas, the Sovereign Council adjourned the investigation *sine die*, on the grounds of the public good and the peace of the country, and the prisoner was released.<sup>110</sup>

Some years later, in another case of violence, Charles Marie, a Native, also called Carak8a, was accused by the Captain of the ship *La Grande Espérance* of throwing a passenger overboard. This was Guillaume la Meuze, a senior official in the administration. As a result of the investigation made by the Provost Court of Quebec in October 1677, there was a difference of opinion about the disposal of the case, and it was appealed to the Sovereign Council. On 3 November that tribunal directed that Marie be put to the question—tortured—and interrogated by one of its members.<sup>111</sup> However, in a full hearing on 8 November the Council reversed its decision, stating that there was insufficient reason to put Marie to the question, and ordered his release on condition that he present himself for any further necessary questioning.<sup>112</sup>

Nocturnal housebreaking was a capital offence in French law. But three Abenakis accused of the crime escaped both trial and execution through the direct intercession of the governor general. One night in the summer of 1713, the Abenakis entered the house of Isaac Nafréchoux, a Montreal merchant, and assaulted and injured him severely. They were arrested and jailed on the order of the Governor of Montreal, Claude de Ramezay. A criminal investigation was begun, and the days of the prisoner's incarceration lengthened into weeks. Governor General Vaudreuil then took a hand. The investigation was halted, the Abenakis agreed to make reparation of 30 beaver skins<sup>113</sup> and to pay

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<sup>109</sup> Grabowski, *ibid.* at 168.

<sup>110</sup> *Jugements et délibérations*, *supra* note 91 vol. I at 571 (6 August 1669).

<sup>111</sup> On torture in the French regime see Lachance, *supra* note 97 at 79–85, 122–124.

<sup>112</sup> *Jugements et délibération*, *supra* note 91 vol. II at 170 (3–8 November 1677).

<sup>113</sup> In 1750, a beaver skin was worth 1 livre at the company warehouse (JR, *supra* note 5 vol. LXIX at 127); in the mid-17th Century, the same skin would have been worth 4–5 livres

the fee of the surgeon who had attended Nafréchoux. Three weeks after their arrest, they were released.<sup>114</sup> At that time, as Grabowski makes clear, there were about 400 warriors in the missions near Montreal, and only about 300 French soldiers in garrison, so there was good reason for Vaudreuil's intervention.<sup>115</sup>

Regardless of who had the preponderance of military force at any given time, the French or the Amerindians, justice officials rarely began an investigation when a criminal offence involved only Natives. If they did, it was only to ascertain who supplied the liquor, if alcohol was a factor. This policy was forced on the French because band councils insisted on settling their own affairs in accordance with Native justice. A prominent example will illustrate. An unidentified and apparently drunken Mohawk wounded a woman of his band in the French settlement at Montreal. When called to account for his assault by the Mohawk chief, Onnontaguelté, a brawl ensued and the chief killed the accused. At a subsequent meeting with Governor General Frontenac, who was visiting Montreal, Onnontaguelté explained the circumstances, and apologized for having done the deed on the Governor's land, but said that "he had no regret as to the death of the said indian, being the Master and having the right to punish [such] behaviour" by a band member.<sup>116</sup> Frontenac was displeased that Onnontaguelté had administered summary justice for a crime that had occurred in a French settlement, and that the chief could not control the consumption of alcohol in his band. Frontenac made his displeasure known. He demanded to know who had supplied the liquor. But he "did not pretend to have the authority or the power to impose his will on the Mohawk chief." A subsequent investigation identified the bootlegger, and he was fined.<sup>117</sup>

The only report yet discovered of an exception to the rule that the tribes settled their own affairs, is that of a case heard by the Sovereign Council on 16 February 1668. It may have been an appeal, but there is no evidence to indicate this in the proceedings. It was unusual in that it is the only known instance in New France where a Native accused another Native of an offence before a French judge, and where the action was conducted wholly according to French criminal procedure, including sentencing and punishment.<sup>118</sup> Marie Tereza Onaratzes accused Simon T8herasa, a Huron, of raping her. She was supported

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(JR, *supra* note 5 vol. XXXII at 61), so 30 skins in 1713 would have sold for 30 livres or more.

<sup>114</sup> Grabowski, *supra* note 77 at 158–160.

<sup>115</sup> *Ibid.* at 65, 80.

<sup>116</sup> *Ibid.* at 180–183.

<sup>117</sup> *Ibid.* at 182; see *ibid.* at 178–189 for accounts of several other cases of native against native that came to the attention of the authorities, but which were investigated only if liquor was involved and then only to identify and punish French traffickers.

<sup>118</sup> *Jugements et délibération*, *supra* note 91 vol. I at 544 (16 February 1669).

by the evidence of Mathieu Ourakouy and Marie Magdelaine Ganhouentak. Given the European Christian names, it is probable that all four were from the small Huron band living on the Sillery mission near Quebec, that they were Christians who had been integrated into French society, and were thus recognized by the court as French subjects and hence amenable to French justice.<sup>119</sup> T8herasa protested his innocence and made a counter accusation. An investigation was ordered by Intendant Claude de Boutroue. The conclusion of the acting attorney general was that T8herasa had been falsely accused and that Onaratzes and her witnesses should be punished, and it was so ordered by the Council. Onaratzes was ordered to confess on her knees to T8herasa and other band members that she had falsely accused him and to beg his forgiveness. Thereinafter she was exposed publicly in the *carcan* (an iron collar) for an hour, with a placard across her stomach stating that she had falsely accused T8herasa of raping her. Lesser fines and punishments were levied on her accomplices.

Such punishments were the norm for French subjects who were convicted of crimes against Amerindians. Comparison with similar cases where accuser and accused were French reveal that the governor and the bench appeared to be impartial in their judgments. A French malefactor did not receive special treatment if his victim was an Amerindian. An early example of this policy occurred in Montreal in 1669.<sup>120</sup> Three French soldiers plied a Seneca chief with brandy, murdered him, concealed his body, and stole his numerous pelts. The crime was discovered and, after a preliminary investigation, the soldiers were identified and imprisoned. Relations with the local bands were not good at the time, and this incident made the situation much worse. Therefore Governor General Courcelles went to Montreal and dealt with the matter personally. He called an assembly of visiting and local Nations and, after it was explained to them that French law demanded that two of the soldiers be "put to death for justice and one for the man that had been killed," the condemned men were executed by firing squad, and the stolen pelts were returned to the widow. But this action did not meet with the approbation Courcelles might have expected. He was made to understand that the Seneca would rather have seen restitution made to the widow in accordance with Amerindian law than retribution by execution.<sup>121</sup>

A decade later, a measure of restitution was included in the punishment for another murder. A French soldier, one Desrosiers of the Chateau St. Louis Garrison at Quebec, was accused in 1678 of murdering the wife of Matthew 8rak8i, a Huron, during a brawl, after the three had spent the night drinking together

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<sup>119</sup> Campeau, *supra* note 87 at 467–468.

<sup>120</sup> J. Marshall, ed. and trans., *Word from New France: The Selected Letters of Marie de l'Incarnation* (Toronto: University of Toronto Press, 1967) at 355–358.

<sup>121</sup> *Ibid.* at 358.

in a tavern. The case was investigated by the Provost Court of Quebec, but Desrosiers claimed that it should be heard before a military tribunal, and he appealed to the Sovereign Council. The Council allowed the appeal, but dealt with the case itself. In an unusual departure from regular procedure, they heard Desrosiers and 8rak8i in each other's presence. Desrosiers was found guilty, but as the killing was judged to be unpremeditated he escaped the death penalty. He was sentenced to an hour in the *carcan* on the main street, to pay 60 livres to the children of 8rak8i and ten livres to the crown, and to be banished from Quebec for five years.<sup>122</sup>

It is thus evident that accepting or making restitution for offences committed by or against Amerindians in French settlements along the St. Lawrence was becoming customary in the mid-seventeenth century. This practice also came to be followed at French military posts in the *pays d'en haut* later in the regime. It became the rule after two Natives—a Chippewa and a Menominee—were executed at Michilimackinac in 1684 for killing two Frenchmen. The incident is analyzed in detail by R. White who follows the lengthy and tortuous negotiations between the French and the tribal councils. He makes clear the failure of the French to comprehend the imperatives of Amerindian justice and the purpose of restitution on the one hand and, on the other, the incredulity of the tribesmen when they were made to understand that French justice demanded a life for a life, even if the accused was an ally in an ongoing war. In short, the affair came close to sundering friendly relations between the French and the Natives of the area, even after the French made liberal restitution to the tribes when the consequences of their action became clear.<sup>123</sup> After this, and surrounded by the Native presence, post commanders who dispensed justice to their fellow subjects were not eager to observe the letter of French law in their dealings with the Natives. As White then goes on to demonstrate, French authority in the area subsequently worked to find some middle ground to settle incidents of this kind. Nevertheless, whatever compromises were negotiated invariably conformed to the Amerindian pattern of conflict resolution: restitution rather than retribution. Thus, after a Récollet priest was killed by Ottawas near Detroit in 1706 an arrangement was negotiated whereby an Ottawa chief gave himself up to the French as a slave to restore the Récollet to life by providing himself as a substitute in the priest's place—"to raise up the dead"—according to local practice. But this came about only on the understanding that the chief would be allowed to escape on the night he surrendered.<sup>124</sup> Again, because the victim was a priest, the negotiations were protracted and tortuous; some bands

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<sup>122</sup> *Jugemens et délibération*, *supra* note 91 vol. II at 186–198, 205–209 (22 March 1678).

<sup>123</sup> R. White, *The Middle Ground* (Cambridge: Cambridge University Press, 1991) at 77–82.

<sup>124</sup> *Ibid.* at 82–90; see *ibid.* 77–78 for a discussion of "raising the dead," an alternative to, or in addition to providing restitution, a practice of the tribes of the middle west.

became alienated from the French, and this incident was the cause of subsequent killings. In the only reported case that has been discovered to date where a tribesman was the victim, Amerindian justice prevailed. The incident occurred in 1740 at Fort St. Joseph, west of Lake Michigan, where one Carignan killed a drunken Potawatomi chief who was berating him. Carignan was required to make restitution to the victim's band as well as to give them a slave to raise up the dead.<sup>125</sup>

It has been demonstrated that it was usual for Amerindians who committed offences against the French to avoid the rigour of a full criminal investigation, and to escape retributive punishment, even in cases of homicide. But this was not invariable. The few exceptions prove the rule. In the summer of 1720 an Iroquois from the Sault-St.-Louis mission was accused of murdering a Chateauguay woman, probably Michelle Garnier.<sup>126</sup> Although the Iroquois escaped arrest, his tribal council surrendered him to the French, an indication that he was known to be a bad actor by his fellows. Instead of the usual investigation by judicial officials, the Iroquois was immediately arraigned before the War Council of New France sitting as a court-martial with Governor General Vaudreuil in the chair. The prisoner was tried, found guilty, and sentenced to death. He was executed the next day in accordance with Amerindian practice; his head was broken with a hatchet in the presence of band members from the mission, "who expressed to [the French] their gratitude."<sup>127</sup> It must be emphasized however, that this expeditious and unusual procedure was made possible only by the active cooperation and the evident approval of the tribal council.

Another unusual case occurred in 1735. Pierre 8aononasquesche, an Attekemek from Temiscamingue (north of present-day Ottawa), who was then living at the Lac-des-Deux-Montagnes mission, killed a French soldier who was on duty and working on Montreal's fortifications. He was arrested on the spot by the military and interrogated. He admitted his guilt. Two days later he was tried by the War Council with Governor General Beauharnois in the chair, found guilty, and executed by firing squad. This was similar to the action taken in Garnier's case, except that there was no tribal input. But it must be pointed out that 8aononasquesche was from a distant tribe and thus had no council to come to his aid.<sup>128</sup>

The fact that no band council argued her case may also have been the reason that Marianne, a Montagnais, was hanged in 1756. A short report sets out the facts: Marianne was a maidservant in Sieur Douvill's home in Three Rivers. Since her tribal name is not given, she was probably a Christian and had be-

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<sup>125</sup> Grabowski, *supra* note 77 at 158, n. 29; see this citation for similar cases.

<sup>126</sup> *Ibid.* at 133 n. 97, for his identification of the probable victim.

<sup>127</sup> *Ibid.* at 134, n. 98.

<sup>128</sup> *Ibid.* at 137-139.

come integrated into French society. She was convicted of stealing property from the house at night. Nocturnal theft being a capital crime, the royal court at Montreal sentenced her to death. Marianne appealed her conviction to the Superior Council in Quebec, alleging that she was pregnant. The Council upheld the sentence, but stayed the execution until she could be examined by the surgeon-major and a mid-wife. They found that she was not pregnant and Marianne was hanged forthwith.<sup>129</sup> An even briefer report recounts the fate of Marie, an Amerindian, in December 1759. She was sentenced by the royal court at Three Rivers to be whipped, branded and banished. There is no mention in the record of the offence with which she was charged or of intervention on her part by a band council. On appeal, the Superior Council, sitting at Montreal (the British had captured Quebec), increased the punishment, and she was hanged.<sup>130</sup>

It will have been observed that often long periods of time, many years in some cases, separate the commission of crimes by Amerindians. This was not because the writer has made selections from the record to illustrate particular types of crime but because, excepting drunkenness, there was little crime in the settlements of New France that involved Amerindians and French subjects. Although they lived in missions close to French enclaves, and there was frequent contact between the two groups for military, commercial, and other purposes, few Amerindians were integrated into French society to the degree that they lived among the French or imitated their behaviour. On the contrary, each group lived a life culturally separate and different from the other. In particular, according to early commentators, Amerindians were impassive and unresponsive when provoked.<sup>131</sup> Except when in liquor, and whatever anti-social behav-

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<sup>129</sup> *Inventaire des jugements et délibérations du Conseil Supérieur de la Nouvelle-France de 1717 à 1760* (Beauceville: l'Eclaireur, 1935) at 202–203 (20 November 1756).

<sup>130</sup> *Ibid.* at 213 (29 December 1759).

<sup>131</sup> Writing in 1612 of the interpersonal relations of Mi'kmaq in Acadia, Lescarbot said that "they have few quarrels," a view that was reiterated in 1691 about the same people by the Récollet, Father Chrestien le Clercq, who observed that they were "sweet tempered, peaceable, and tractable, having much charity, affection and tenderness for one another"; Lescarbot, *supra* note 12 vol. III at 215; le Clercq, *supra* note 79 at 250. The Jesuits were of the same opinion: of the Huron in 1636, Father le Jeune said "they have a gentleness and affability almost incredible for Savages. They are not easily annoyed, and, moreover, if they have received wrong from any one they often conceal the resentment they feel—at least one finds here very few who make a public display of anger and vengeance"; Father Jacques Bruyas, commenting on the Iroquois the 1670s observed, "I have never seen them become angry, even on occasions when our frenchmen (sic) would have uttered a hundred oaths." JR, *supra* note 4 vol. X at 211; LI at 129. The historian, Father Jouveney, commenting on the Natives of the northeastern woodlands in general, wrote that "they know nothing of anger"; JR, *supra* note 4 vol. I at 275. Many more examples of such behaviour are recorded by observers of tribes throughout the northeast, and A.I. Hallowell argues that the Amerindian's impassive demeanour was achieved only with great effort by the individual, in or-

our may have occurred and been adjudicated among themselves, it was a rare occurrence indeed to see an Aboriginal name in any context in the criminal records of New France. It was different with the French. They behaved as they would have in France and their crimes ran the gamut of the criminal lexicon, as examination of any court records will show. Some idea of the difference between the two societies in this respect is given by the statistics of the civil and criminal cases heard by the Sovereign Council at Quebec between 1663 and 1760. During that time over 17,000 actions were adjudicated by the Council. Of this total only thirteen involved Amerindians. Of these, three were civil actions,<sup>132</sup> so that the Council adjudicated in only ten criminal cases that involved Natives in all that time.<sup>133</sup> The situation was similar in the court of first instance in Montreal,<sup>134</sup> where the Native presence was always much greater than at Quebec. In over 2500 criminal cases reviewed for his study, "The Common Ground," J. Grabowski found mention of two hundred and twenty-seven Amerindians in various contexts, as accused, victims, witnesses, etc., of whom only 76 were accused of offences and interrogated during the same 97 year period.<sup>135</sup>

If there is scant mention of Amerindians in the criminal records of the French along the St. Lawrence and to the west, there is even less in the records of Acadia. This is not surprising. There were always far fewer French in Acadia, in proportion to the Natives, than there were along the St. Lawrence. Estimates of the Mi'kmaq population in the early 1600s range from 6,000 through 35,000, to a high of 100,000,<sup>136</sup> while the French did not number more than twenty in 1627.<sup>137</sup> When the treaty of Utrecht was signed in 1713, there were no more than 1,773.<sup>138</sup> With so few French inhabitants, there were no large population

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der to promote interpersonal harmony and keep the peace; Hallowell, *supra* note 33 at 207–212.

<sup>132</sup> The first involved damage to a canoe: Ondakeha, a Huron was implicated but was not cited as a defendant in the suit. The second was a petition for the annulment of a marriage between a French minor, Nicolas la Montagne, and Marie Magdelaine Tetesigaqoy, a Montagnais. In the third case a Frenchwoman, Jeanne Pelletier, brought suit against a Montagnais woman, Marie Magdelaine Telessissag8y; the petitioner did not appear at the hearing and the suit was dismissed. *Jugements et délibérations*, *supra* note 91 vol. I at 224 (26 July 1664); vol. III at 819 ff. (11 January 1694); vol. IV at 113 (29 May 1698).

<sup>133</sup> Statistics were generated from *Jugements et Deliberations du Conseil Souverain*, *supra* note 91, which cover the years 1663 to 1716, and *Inventaire des jugements*, *supra* note 129, from 1717 to 1760.

<sup>134</sup> The *Bailliege de Montréal* until 1693 and then the Royal Court of Justice until 1760; DCB, *supra* note 1 vol. II at xxiii.

<sup>135</sup> Grabowski, *supra* note 77 at 100.

<sup>136</sup> Upton, *supra* note 10 at 2, n.2.

<sup>137</sup> Eccles, *supra* note 23 at 28.

<sup>138</sup> *Censuses of Canada 1665–1871* (Ottawa: Taylor, 1876) vol. IV at 49.

centres and, unlike New France on the St. Lawrence, there were no permanent missions for Native catechumens adjacent to what settlements there were.<sup>139</sup> Furthermore, much of the material band members offered for barter—their pelts and possessions—they exchanged for liquor, food and artifacts with the mariners who manned the fishing fleets that had been sailing to the Grand Banks for two centuries or more.<sup>140</sup> Thus, while Natives undoubtedly visited Acadian settlements from time to time, they were not a prominent presence in everyday life, as they were in Montreal and Quebec. This, of course, created fewer opportunities for altercation and aggressive behaviour on either side. On the contrary, L.F.S. Upton tells us that the tidewater settlements of the Acadians posed no threat to traditional hunting grounds, and that the Acadians “tended to acculturate to the Micmacs, adopting their habits of dress and transportation.”<sup>141</sup> Thus, it should occasion no surprise to learn that, to date, no evidence has come to light to suggest that the French ever legislated or otherwise claimed to exercise criminal jurisdiction over the Natives of the area: the Mi’kmaq, the Malecite, and the Abenaki. Each community kept its own law, and if criminal incidents occurred that involved Europeans and Amerindians, and remedial action was taken, it went unrecorded. There is indirect evidence to support this assertion.

After their expulsion from the mainland of Acadia in 1713, the French began to construct the fortress of Louisbourg on the east coast of *Ile Royale*, and it eventually came to rival settlements along the St. Lawrence in population. By 1737 there were about 2,100 inhabitants.<sup>142</sup> After its capture by the British in 1745 and its subsequent return to France in 1749, the number increased to well over 4,000 by 1752.<sup>143</sup> As such, the port was the largest French *entrepôt* west of mainland France, with four times the commerce of Quebec and it must have attracted the local Natives to its cornucopia of alcohol, foods, and goods.<sup>144</sup> Hence, with increasing intercourse between town dwellers and Natives, offences must have been committed. But in the absence of any official record, inter-group offences must have been dealt with, or ignored, much as they were in French settlements along the St. Lawrence.<sup>145</sup> The rationale for this hypothesis

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<sup>139</sup> Campeau, *supra* note 87 at 464, 471.

<sup>140</sup> Upton, *supra* note 10 at 18.

<sup>141</sup> *Ibid.* at 26.

<sup>142</sup> Miquelon, *supra* note 29 at 116–117.

<sup>143</sup> Eccles, *supra* note 23 at 138.

<sup>144</sup> Miquelon, *supra* note 29 at 138–144.

<sup>145</sup> We can catch a glimpse of a series of such otherwise unreported incidents in a long report by the Governor General of New France, Marquis de Beauharnois to Minister of Marine Maurepas in Paris, which detailed the aftermath of the capture of Louisbourg by the British in 1745. Beauharnois made it clear that the French must retain the support of the Natives.



is the fact that, until 1751, the governors of Louisbourg were army or naval officers who, prior to their appointment, had spent much or all of their service in North America. They were thus familiar with *de facto* French policy respecting the Natives, and implemented it after they became governors. On the contrary, Major-General Jean-Louis Raymond took up his appointment as governor 3 August 1751, having spent his entire service, thirty years or more, in Europe. According to his biographer, Raymond was an able, if vain man, who wanted to make a name for himself as a colonial administrator. He bombarded the Ministry of Marine with memoranda advocating changes to the trade regulations, the religious establishment, justice, and much else.<sup>146</sup> In particular, he "recommended that *haute, moyenne, and basse* justice be imposed on the Indians of the North."<sup>147</sup> His recommendation was ignored, and Governor General Duquesne, "declared that the man was clearly out of his mind to have made such a preposterous suggestion."<sup>148</sup> Clearly, if Raymond, who had expert assistance to research and draft his memoranda,<sup>149</sup> could have made such a suggestion, there could have been no ordinance or regulation to that effect before his tenure at *Ile Royale* or, indeed, in Acadia, or reference would have been made to it.<sup>150</sup> Moreover, the absence of implementing action argues that there was no such regulation thereafter.<sup>151</sup> Hence there is little doubt that Amerindians in the

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of Acadia if the British were to be prevented from establishing permanent settlements there. To do that, it would be necessary for the French inhabitants "whose cattle they from time to time even publicly carry off for their support," to continue to submit to such depredations. E.B. O'Callaghan, ed., *Documents Relative to the Colonial History of the State of New York* (Albany, 1853–58) vol. X at 14. For the extended argument see O.P. Dickason, *Louisbourg and the Indians: A Study in Imperial Race Relations, 1713–1760* (Ottawa: Parks Canada, 1976).

<sup>146</sup> Crowley, "Raymond" DCB, *supra* note 1 vol. IV at 655–657.

<sup>147</sup> Eccles, *supra* note 13 at 165–166.

<sup>148</sup> *Ibid.* at 166.

<sup>149</sup> Colonel Michel le Courtois de Surlaville, Raymond's deputy and amanuensis was, says his biographer, "an officer who possessed a critical intelligence and a literary ability far beyond most of his contemporaries," Crowley, "Le Courtois" in DCB, *supra* note 1 vol. IV at 443.

<sup>150</sup> *Ibid.* at 443. In fact, after the cession of Acadia to the British in 1713, the French explicitly disclaimed sovereignty over the Aboriginal peoples. They were allies, said the French, not subjects. Although such statements were self-serving and enabled the French to distance themselves from the depredations the Natives made on the British, the French authorities were unlikely to have made such statements if there had been evidence to show that the French had indeed claimed sovereignty over the Natives previous to the cession, or had exercised jurisdiction over them. P.A. Cumming & N.H. Mickenberg, eds., *Native Rights in Canada*, 2<sup>nd</sup> ed. (Toronto: General Publishing, 1972) at 67, 97.

<sup>151</sup> In 1739 François le Coultre de Bourville, acting governor of Louisbourg, did draft a rudimentary list of what Europeans would consider to be criminal offences and punishments, but this document concerned only offences committed by band members against their fel-

Acadia of the French regime lived by their own law, a fact that was so evident and unusual in contemporary colonial development that it caused comment by George Juan and Antonio de Ulloa. These men were scientists with the rank of captain in the Spanish navy sent by Madrid in 1736 to study the inhabitants and the flora and fauna in Spanish dominions in the Americas. During the voyage back to Spain in 1745, their ship was captured by the British and taken as prize to Louisbourg, and its personnel were interned for a time. As officers the two men would have been allowed to give their parole and thus be set at liberty to continue their study. Concerning the Amerindian inhabitants of Acadia they had this to say:

The natives, whom the French term savages, were not absolutely subjects of the king of France, nor entirely independent of him. They acknowledged him lord of the country, but without any alteration in their way of living; or submitting themselves to his laws; and so far were they from paying any tribute, that they received annually from France a quantity of apparel, gunpowder, and muskets, brandy, and several kind of tools, in order to keep them quiet and attached to the French interest; and this has also been the politic practice of that crown with regard to the savages of Canada.<sup>152</sup>

While Juan and Ulloa could have had no first-hand knowledge of the “savages of Canada”; that is, the Natives who inhabited New France on the St. Lawrence, they were retailing accurate information when they said that the Amerindians of the eastern woodlands did not submit to French law, a situation brought about by the peculiar development of the colony. The early progression from participation in the North Atlantic fishery to monopoly in the fur trade and its subsequent rapid and lucrative expansion, caused French dominion in North America to evolve into an empire of trade. But it was an empire that needed few French subjects to function. The bulk of the work was done by the Aboriginal peoples. It was they who gathered the pelts and transported them to the French *entrepôts*, and who also became valued military allies. This was fortunate for successive trading companies who founded and administered the first settlements, as well as for later royal governments, because the attention of

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laws. The draft was not enacted by French authority, but was approved as tribal law by three band chiefs who said they would implement the regulation and would review it annually. A copy of the regulation was given to the band chiefs during their annual meeting with the French authority and the chiefs at which gifts were distributed to the bands. Since the annual reviews would be made at subsequent similar meetings, and the band authority did not mete out the prescribed penalty on the only recorded occasion the regulation was enforced, it would appear that the chiefs were making noises the French wanted to hear. D.L. Schmidt & B.A. Balcon, “The Reglements of 1739: A Note on Micmac Law and Literacy” (1993) 23 *Acadiensis* 110–127.

<sup>152</sup> G. Juan & A. de Ulloa, *A Voyage to South America*, trans. J. Adams, 1807 (Boston: Longwood Press, 1978) vol. I at 376–377. See Williams, *supra* note 11 at 67–93, and Dickason, *supra* note 7 at 187, 191–192 for discussions of the legal status of Aborigines in other European colonies.

French monarchs was focused on Europe and the endemic Continental warfare of the time. The French were always thin on the ground. They never had the military muscle to overawe the Amerindians and force them to submit to French sovereignty nor, in particular, to French criminal justice. Nor were they able to convince them to comply with it by argument or example. As a result, there was no change in the legal status of Amerindians during the French regime. They continued to be governed by their own law in all intra-tribal offences and, with the rare exceptions that proved the rule, in crimes that involved Amerindians and French subjects, with restitution as the means for settlement.

