UNPREDICTABLE AND UNCERTAIN: CRIMINAL LAW IN THE CANADIAN NORTH WEST BEFORE 1886

DESMOND H. BROWN*

The development of the Canadian west and the transition from trading territory to settled territory produced a number of jurisdictional and administrative problems. Focusing his attention on the subject of criminal law the author traces the process whereby a welter of jurisdictions had, by 1876, become "a coherent body of criminal law".

When Queen Victoria set her hand to the Order admitting Rupert's Land and the North-Western Territory to the Canadian Union on June 23, 1870, the criminal law in those parts of her domain was confused and indeterminate even though some of the lands in question had been under the British flag for centuries. To begin with, the number of jurisdictions within the specified area was a question which frequently engaged the attention of legislators and lawyers both before and after Union. For example, in debate with Sir John A. MacDonald, David Mills, a future Minister of Justice, argued that there were three separate jurisdictions before Union: namely, the District of Assiniboia; Rupert's Land, excluding the District of Assiniboia; and the "Indian Territory."[1] On the other hand, C. C. McCaul, a lawyer of some prominence in the North-West Territories,[2] asserted that Rupert's Land, including the District of Assiniboia, and the "Indian Territory" together formed one large jurisdiction.[3] But there was greater disagreement concerning the specific body of criminal law which was in effect in a given jurisdiction at Union. Opinions were even more widely divergent on this issue, and ranged from McCaul's assertion that the law throughout the entire region was that of Ontario of 1870,[4] to a judgement of Mr. Justice Killam, which laid it down that the almost medieval law of 1670 England was in force in Rupert's Land, including the District of Assiniboia.[5] In short, the criminal law of the North-West was the very antithesis of what good law should be; that is to say, it was not predictable and it was not certain.

Sixteen years after Union, the situation had changed completely. While arguments still continued on the questions of former jurisdictions, and what the law had been, there was now no doubt that it was the criminal law of Canada, supplemented by the law in force in England in 1870, and it was enforced throughout the North-West Territories, as then constituted. It is the purpose of this paper to detail the process by which this change was brought about.

The events which caused the confused situation evident in 1870 and, to

---

* B.A. (York); Ph.D. candidate, Department of History, University of Alberta.

1. Canada, House of Commons, *Debates*, March 24, 1879, at 679. Mills was appointed Minister of Justice in the first Laurier administration, was elevated to the bench of the Supreme Court of Canada in 1901.
2. A.D. Ridge, "C.C. McCaul, Pioneer Lawyer," *Alberta Historical Review*, XXI (No. 1, 1973), 21-25.
3. C.C. McCaul, "The Constitutional Status of the North-West Territories of Canada," 4 *Canadian Law Times* 15 (1884).
4. *Id.*
5. *Sinclair* v. *Mulligan*, 3 Manitoba Law Report 485 (1886). A the time of the judgement Mr. Justice Killam was a judge of the Manitoba Court of Queen's Bench. He later (1899) became Chief Justice of Manitoba and was elevated to the bench of the Supreme Court of Canada.

some extent, the extraterritorial jurisdictional problems which came to plague the British in North America appear to have been a result of their initial pattern of settlement. Typically, British subjects would set up a colony on the coast, which later settlers would extend along the seaboard, rather than penetrate the hinterland, as was the French practice. In most cases, the colonists were considered to have taken peaceful possession of virgin land,[6] the approximate and vague extent of which was specified in a royal charter of incorporation. English law in force on the date the charter became operative became the law of the colony explicitly, by the terms of the charter, or implicitly.[7] Thereafter, the colonists, their governors, or both, would make law to suit the colonial conditions, since English statutes, passed after the charter was proclaimed to be in force, would not bind the colony unless it was named in the legislation.[8] Very evidently, this system of government suited the settlers, because they grew in numbers and wealth, and then began to penetrate the hinterland in search of new land for settlement. Apart from trouble with the Indian tribes, who were understandably disturbed by being forced to give up their ancestral hunting grounds, there was no opposition to the westward expansion of British settlement until the last years of the seventeenth century, when it came into abrasive contact with outposts of the French Empire in North America. After years of friction over this, and other contentious issues, during which time speculators and land hungry colonists put great pressure on the western borders, war ensued in 1756. Seven years later, the Treaty of Paris extinguished French dominion in North America.

However, if there was any rejoicing over this settlement among those waiting to move west, it was short-lived because a few months later a royal proclamation[9] caused a definite boundary to be drawn on the western reaches of the Atlantic colonies. Beyond this "proclamation line" to the north, there was the new colony of Quebec, while to the west and southwest an immense area of land designated "Indian Territory" had been set aside as tribal hunting grounds, and was thus outside the jurisdiction of any European system of law. Entry into this territory was prohibited absolutely to settlers and could only be gained by other persons for the purpose of trading with the Indians, and then only if they were licenced to do so by the government.[10] That this prohibition was not wholly effective is evidenced by the fact that within two years it was found necessary to enact legislation for the apprehension of persons suspected of having committed offences in the Indian Territory and for their transport to, and trial in the nearest British colony,[11] according to the law of that place. It is obvious that these provisions

6. "Peaceful possession," as opposed to settlement after conquest as occurred, for example, in Nova Scotia after 1713. See *Campbell* v. *Hall*, 98 English Reports 1045 - 1050 (1774) for a full discussion of the question of how British possessions were perceived to have received English law.
   For a recent analysis of this case and the two cases quoted in notes 7 and 8 see R.M. Dawson, *The Government of Canada*, 4th ed. (Toronto: 1963) at 5, 6.
7. *Blankard* v. *Goldy*, 91 English Reports 356 (1694).
8. *Case 15 — Anonymous*, 24 English Reports 646 (1722). The relevant passage reads as follows: "if there be a new and uninhabited country found out by *English* subjects, as the law is the birthright of every subject, so, wherever they go, they carry their laws with them, and therefore such new found country is to be governed by the laws of *England;* though, after such country is inhabited by the *English*, acts of parliament made in *England*, without naming the foreign plantations, will not bind them."
9. R.S.C. 1970, appendices, at 123-129.
10. *Id.*
11. 6 Geo. 3, c. 18 (1765).

did not bring the problem under control, since it was found necessary to amplify and re-enact the legislation on three separate occasions within the next ten years, with the final statement in 1775 being the most ample and definitive. In part, it was laid down that:[12]

> if any Person or Persons, not being a Soldier or Soldiers, do or shall commit any Crime or Crimes, or Offence or Offences, in any of the said Forts, Garrisons, or Places, within his Majesty's Dominions in *America*, which are not within the Limits or Jurisdiction of any Civil Government hitherto established, it shall and may be lawful for any Person or Persons to apprehend such Offender or Offenders, and to carry him, her, or them, before the Commanding Officer for the Time being of his Majesty's Forces there [who shall] safely keep every such Offender, and shall convey and deliver ... with all convenient Speed, every such Offender to the Civil Magistrate of the next adjoining Province, together with the Cause of his or her Detainer, [where] it shall and may be lawful to prosecute and try every such Offender in the Court of such Province or Colony where Crimes and Offences of the like Nature are usually tried, and where the same would be properly tried, in case such Crime or Offence had been committed within the Jurisdiction of such Court; ... and such Court shall and may proceed therein to Trial, Judgement, and Execution, in the same Manner as if such Crime or Offence had been really committed within the Jurisdiction of such Court.

This Act was due to expire on March 24, 1777. But by this time events had been overtaken by war and the legislation lapsed. However, some twenty-five years later, similar legislation[13] was enacted to correct a similar problem, with similar antecedents, in the newly defined British North America.

Apart from the fact that it did not encourage immigration, and that it did not front on the Atlantic, the origin and development of Rupert's Land, the territory granted to the Hudson's Bay Company, followed the same course as its sister colonies on the eastern seaboard. The Company was brought into existence by a royal charter which gave vague definition to its territorial limits, empowered the Governor and Company to enact laws "for the good government of the said Company,"[14] and laid it down that the Governor and Council had the power to judge company personnel "in all causes whether civil or criminal, according to the laws of this Kingdom."[15] Therefore, in accordance with the later decision of the Privy Council,[16] unless specifically amended by Parliament or by the Governor-in -Council, the law of Rupert's Land was the English law of 1670. Again, as in the Atlantic colonies, the British presence spread along the shoreline of the Bay, establishing posts where factor and servant waited for Indian trade, and only very slowly penetrated the hinterland. But here the similarity to development on the Atlantic seaboard ended, because it was not land hunger which caused the establishment of Company posts in the interior: it was, rather, a matter of economic survival. The Company had to meet the competition of "pedlars" from the Saint Lawrence who carried their trade goods to the Indian peoples of the interior.

The defeat of the French in 1760 ended rivalry on the national level but, ushered in a period of even more intense competition, as British capital backed new and aggressive Montreal fur traders who took over the old French routes and tactics. As the Company established new and ever more remote outposts to meet the changing situation, friction increased, and the problem of law enforcement among the personnel of the several companies

12. 16 Geo. 3, c. 15, s. 29 (1775).
13. *Infra* n. 18.
14. E.H. Oliver, *The Canadian West: Its Early Development and Legislative Records* (Ottawa: Government Printing Bureau, 1914), I, 145.
15. *Id.*, at 150.
16. See note 8.

engaged in the trade became acute. Moreover, since much of the fur trade was now carried on in western territory which was clearly outside the vague boundary of Rupert's Land, crimes committed there, such as the killing of James Ross on the Athabaska,[17] were clearly outside the jurisdiction of whatever primitive law enforcement machinery the company possessed. In fact, the situation was analogous to that which had prevailed in the "Indian Territory" set up by the Royal Proclamation of 1763. Evidently, the British Parliament drew this parallel too, because it attempted to solve the problem by passing the Canada Jurisdiction Act in 1803.[18]

In effect, this Act combined aspects of both the Royal Proclamation of 1763, and the legislation of 1775. On the one hand, it defined a new territorial entity — the "Indian Territories" — while on the other it set up a competent jurisdiction for that entity. But, in attempting to combine a relatively complex definition with an administrative procedure in a short piece of legal writing, the draftsmen of the Act did neither task well, and so provided the material for a controversy which is not yet settled,[19] and which has generated some fat legal fees. The preamble to the Act, which defines the Indian Territories only by implication, is as follows:[20]

> Whereas Crimes and Offences have been committed in the *Indian* Territories, and other Parts of *America*, not within the Limits of the Provinces of *Lower* or *Upper Canada*, or either of them, or of the Jurisdiction of any of the Courts established in those Provinces, or within the Limits of any Civil Government of the United States of *America*, and are therefore not cognizable by any Jurisdiction whatever.

Nowhere, it will be noted, is there mention of Rupert's Land, nor is it alluded to in the remainder of the text. Therefore, it would seem that it is included in "the *Indian* Territories and other parts of *America*." On the other hand, it is stated that "Crimes and Offences" in those parts "are therefore not cognizable by any jurisdiction whatever." However, it is an undeniable fact that the Charter of the Hudson's Bay Company gave it jurisdiction in Rupert's Land and that it had managed its affairs there tolerably well for over a hundred years. Therefore, Rupert's Land could not be included in the "*Indian* Territories and other parts of *America*." If a lay reader can arrive at these two mutually exclusive propositions before the end of the first clause of the preamble, it is not difficult to imagine what a skilled legal mind could do with these words in court. One of the main provisions of the Act vested authority in the Governor of Lower Canada to appoint

> Civil Magistrates and Justices of the Peace for any of the Indian Territories . . . for the purpose only of hearing crimes and offences, and committing any person or persons guilty[21] of any Crime or Offence to safe Custody, in order to (sic) his or their being conveyed to the said Province of Lower Canada to be dealt with according to law.[22]

---

17. H.R. Wagner, *Peter Pond* (Cambridge, Mass.: Harvard University 1955), at 15.
18. 43 at Geo. 3, c. 138 (1803).
19. Opinion on this question is still divided. For example, E.E. Rich makes the flat assertion that Rupert's Land was included in the Indian Territories and thus would have come under the law of the Province of Canada, as specified in the Canada Jurisdiction Act [*Hudson's Bay Company 1670-1870* (London, 1959), II, 230], while an authoritative legal writer, J.E. Cote, argues strongly that the law of Rupert's Land was always the English law of 1670. "The Introduction of English Law into Alberta," *3 Alberta Law Review,* 263 (1964).
20. 43 Geo. 3, c. 138 (1803).
21. This drafting slip drew a tart comment from Adam Thom: "Guilty [is a] slovenly substitute for accused." 2 Western Law Times 10 (1891).
22. Under special circumstances, the governor of Lower Canada could authorize the trial of the accused in Upper Canada. 43 Geo. 3, c. 138, s. 3.

Much of this is reminiscent of the 1775 legislation, but the situation in 1803 was quite different. Whereas the committing authorities in former years were military commanders who would have been relatively impartial where civil offenders were concerned, the only men of the necessary stature and authority to be appointed justices of the peace in the Indian Territories would of necessity have to be employees of the competing fur-trading companies. In view of the events of the past years, the impartiality of such men would at least be questionable. Moreover, the Act contained another clause, which was almost a direct quote from the previous legislation, to the effect that any "person or persons" were authorized to apprehend a suspected lawbreaker and hand him over to a justice of the peace, or to take him directly to Lower Canada. Thus, the possibilities of removing a rival from circulation for anywhere from a year to eighteen months would be almost limitless.

Legal opposition to the Canada Jurisdiction Act took some time to develop, and came about in a curious way. In the first years of the century, Thomas Douglas, Lord Selkirk, became interested in encouraging emigration from the British Isles, and came to favour the Red River area in the south of Rupert's Land as a suitable location for a colony.[23] Evidently, he was made aware of the conflict between the Canada Jurisdiction Act and the Charter of the Hudson's Bay Company, because in 1809 he sought advice as to whether or not the Charter gave the Company sound title to the territory and governance of Rupert's Land. The five eminent Chancery lawyers who signed a formal legal opinion considered the Company's title to be well founded and, in part, stated that[24]

> We do not think the Canada Jurisdiction Act (43. Geo. III.) gives jurisdiction within the territories of the Hudson's Bay Company, the same being within the jurisdiction of their own governors and councils.

This opinion gathers added weight from the fact that seven years later, in 1815, the Company published a code of penal laws applicable to employees in the Southern Department, which laid it down that "all Crimes, Offences or misdemeanours, which are cognizable by the Laws of England, will in future be punished according to the said Laws".[25]

Predictably, the justices of the peace who committed persons for trial in Lower Canada were major figures in either the Hudson's Bay or the North West Company,[26] which were at their most aggressive and combatative during the first two decades of the century. Just as predictably, committals were often made as a matter of company policy, such as in 1814, when the Sheriff of Red River, John Spencer, was arrested on the order of the magistrate, who was also a high official of the North West Company, for impounding North West Company pemmican, and was sent to Montreal for trial on a charge of larceny.[27] If all committals had been over incidents such as this, the situa-

---

23. Rich, *supra* n. 19, II, 297.
24. G. Bryce, *'Mackenzie, Selkirk, Simpson,' Vol. IX of The Makers of Canada Series*, ed. by W.L. Grant (12 vols.; London: Oxford University Press, 1926), at 191. See also Oliver, *supra* n. 14, I, 178-183, for an enlightening discussion on this topic by Selkirk himself.
25. Oliver, *supra*, II, 1285.
26. Two such men were Lord Selkirk himself, and William McGillivray, a senior official of the North West Company. Great Britain, House of Commons, Papers Relating to the Red River Settlement, 12 July, 1819. *Report of the Commissioners*, at 198, 239. Hereafter referred to as Red River Commissioners Report.
27. *Id.*, at 340-1. See also at 390 and 416 for details of wholesale arrests by justices of the peace employed by both companies.

tion, although irritating, might have continued indefinitely, but they were not. Murder was often committed, and the situation was brought to a head at Seven Oaks in 1816 when Governor Semple and twenty men of the Red River Colony were killed by North West Company employees, some of whom were apprehended later and sent east for trial.[28]

This event caused a lengthy and voluminous correspondence between the Governor-General of Canada, Sir John Sherbrooke, and the Colonial Secretary in London, Lord Bathurst, which led to some positive results. While the correspondence reflects many concerns, from anxiety over the perversion of the Statute of 1803 to fear that the United States might interest itself in the North West,[29] it is clear that the focus of their attention was on the continuing rivalry between the fur traders, and on measures to bring it to an end.[30] The outcome was the striking by Sherbrooke of a Special Commission of Enquiry in October 1816, the appointment of its members as justices of the peace, and the revocation of the commissions of all magistrates appointed under the authority of the Canada Jurisdiction Act before that time. In his instructions to the Commissioners, Sherbrooke specified that when reporting on recent events they were to "communicate the fullest information that [they could] obtain as to the circumstances there and of the persons implicated in them",[31] but, strangely, he did not ask them to make recommendations for the prevention of further troubles. He was taken at his word, because the Commissioner's Report, which is ninety-eight pages long, confines itself to a comprehensive and factual review of the conflict between the two companies from 1810 on, and to the part played by the partisan magistrates. It was tabled in Parliament July 12, 1819.

Since the Report was largely a recital of the conflict in the North West, it comes as no surprise to learn that Parliament's response, two years later, was a bill entitled "An Act for Regulating the Fur Trade, and Establishing a Criminal and Civil Jurisdiction within certain Parts of North America."[32] The future regulation of the fur trade was settled clearly and unequivocally in the first two sections of this rather long Act. These reserve to the Crown the right to grant monopolistic trading rights in any area of North America outside the territories of Britain, the United States, or the Hudson's Bay Company, to a single individual or company, for a period not to exceed twenty-one years.

The same clarity extends to several of the sections concerned with amplifying the provisions of the Canada Jurisdiction Act,[33] in respect of criminal

28. *Id.*, at 369 ff, 390. Even this case was used to advance Company policy, for although Lord Selkirk laid charges against the North West Company personnel, "he delayed the prosecution for nearly two years, the accused being all the time in prison." David Read, *Lives of the Judges* (Toronto: Rowell and Hutchinson, 1888), at 88-91.

29. Red River Commissioners Report, *supra* n. 26. Letter, Sherbrooke to Bathurst, November 11, 1816, at 247.

30. *Id.* Letter, Bathurst to Sherbrooke, February 6, 1817, at 255.

31. *Id.*, at 248.

32. 1 and 2 Geo. 4, c. 66 (1821).

33. *Supra* n. 18.

34. Such magistrates would be in addition to those appointed by the Governor of Lower Canada under 43 Geo. 3, c. 138, whose jurisdiction was limited to the Indian Territories.

and civil jurisdiction. In particular, the responsibility of the Hudson's Bay Company for the execution of all civil and criminal procedures in Rupert's Land and in any future land grant is spelled out. Moreover, to ensure compliance with this provision, both the Company and any other future recipient of a grant to trade were required to produce for trial any employee or person acting under company authority who was charged with a criminal offence. Thus, the responsibility for the administrative procedure associated with law enforcement was shifted to the grantee. Furthermore, in a completely new departure, the Crown assumed the direct right to appoint justices of the peace,[34] who would act for Upper Canadian courts and whose jurisdiction would extend "as well within any territories heretofore granted to the Company of Adventurers of *England* trading to *Hudson's Bay*, as within the *Indian* Territories of such other parts of *America* as aforesaid".[35] In passing, it is to be noted that the latter provision makes a clear distinction between Rupert's Land and the Indian Territories. But, as with the Act of 1803, it is a distinction by implication because, again, the Indian Territories are not defined. In addition, such magistrates could be authorized to hold courts of record within their jurisdictions, but they could not try criminal actions which could result in punishments of death, life imprisonment, or transportation, or civil suits which involved property worth more than £200.[36]

While all these provisions are clear and straight forward, the parts of the Act which deal with the question of whether the Canada Jurisdiction Act is in force in Rupert's Land are not. Section 5 lays it down that:

> the said Act passed in the Forty third Year of the Reign of His late Majesty, intituled *An Act for extending the Jurisdiction of the Courts of Justices in the Provinces of* Lower *and* Upper Canada, *to the Trial and Punishment of Persons guilty of Crimes and Offences within certain Parts of* North America *adjoining to the said Provinces*, and all the Clauses and Provisoes therein contained, shall be deemed and construed, and it is and are hereby respectively declared, to extend to and over, and to be in full force in and through all the Territories heretofore granted to the Company of Adventurers of *England* trading to *Hudson's Bay*; anything in any Act or Acts of Parliament, or this Act, or in any Grant or Charter to the Company, to the contrary notwithstanding.

There is no doubt what this means, or is there? For Section 14 reads as follows:

> And be it further enacted, That nothing in this Act contained shall be taken or construed to affect any Right, Privilege, Authority or Jurisdiction which the Governor and Company of Adventurers trading to *Hudson's Bay* are by Law entitled to claim and exercise under their Charter; but that all such Rights, Privileges, Authorities and Jurisdictions shall remain in as full force, virtue and effect, as if this Act had never been made; anything in this Act to the contrary notwithstanding.

Obviously, there is a contradiction here and, if the Crown did not choose to exercise the right to appoint justices of the peace (and it never did), the question of what law runs in Rupert's Land is as obscure as ever. The question is, who was responsible for the obscurity?

Apparently, it was a man named Edward Ellice, a senior partner in Ellice, Inglis and Company, the London agents of the North West Company, and later, a senior official of the North West Company in his own right and who

35. 1 and 2 Geo. 4, c. 66, s. 10.

36. *Id.*, s. 12.

was the *eminence grise* of the British Government in this affair.[37]

After the Red River Commissioner's Report had been tabled in Parliament in 1819, Bathurst had exerted great pressure on the fur-trading companies to cause them to settle their differences and to bring about a union or amalgamation which would eliminate the intense competition. As an inducement, Government sources let it be known that such an arrangement would meet with official approbation and concessions, whereas continued friction would probably result in drastic governmental action.[38] Negotiations toward this end, in which Ellice acted for the North West Company, began in the winter of 1819 and were successfully concluded in March, 1821, when the North West Company was merged in the Hudson's Bay Company and all interested parties did business thereafter in the name of the latter.[39] All of this is the kind of factual evidence which can easily be proved or disproved. What is not so easily proved is Ellice's own account of the background to these events. According to his testimony before the Select Committee on the Hudson's Bay Company in 1857, Ellice, who was an M.P. in the Imperial Parliament in 1820, claimed that some time during that year, Bathurst sent for him and asked him to promote a union between the two companies, which he did.[40] Furthermore, Ellice asserted that, at this time, he[41]

> suggested to Lord Bathurst to propose a Bill to Parliament, which should enable the Crown to grant a licence of exclusive trade (saving the right of the Hudson's Bay Company over their territory), as well over the country to the east as over that beyond the Rocky Mountains, and extending to the Pacific Ocean, so that any competition which was likely to be injurious to the peace of the country should be thereafter prevented.

This, of course, became the Act of 1821 which, Ellice said, did not extend Canadian jurisdiction over Rupert's Land.[42] He stuck to his interpretation under further questioning during which he suggested or implied that he had been instrumental in drafting the bill, or large portions of it.[43] However, when he discussed the clauses which provided for the appointment of justices of the peace, he was quite explicit.[44]

---

37. D.E.T. Long, "The Elusive Mr. Ellice," *The Canadian Historical Review,* XXIII (No. 1, 1942), at 52.
Ellice, whose influence on Canadian history is little known, came from a family which had been long connected with the fur trade. He worked in both the London and Montreal offices of the family company which, in the early years of the nineteenth century had become the agents for both the North West and the XY companies. Ellice became head of the firm on his father's death in 1805, at which time the gross worth of his North American inheritance was well over £125,000. He became richer and more influential and, in 1809, was elected M.P. in the Imperial Parliament, where he remained a member for forty years. His interests were wide ranging: he was Secretary of the Treasury in Lord Grey's Reform Government of 1830, Secretary of War in 1833, and he was influential in getting Lord Durham appointed as Commissioner and Governor-General of Canada in 1838. Above all, Ellice was regarded as the parliamentary expert on Canada, which is why Bathurst turned to him in 1821. *id.*
38. Rich, *supra* n. 19., II, 385, 389-93.
39. *Id.*, at 385 ff.
40. Great Britain, Parliament, *Report of the Select Committee on the Hudson's Bay Company* (1857), at 324.
41. *Id.*
42. *Id.*, at 338.
43. For example, in answer to a question about the rights of the Crown under the Act of 1821, Ellice said: "Yes; in fact the Crown would have the power, but that is a very limited power, because I took especial care in the Act to guard all the privileges of the Hudson's Bay Company. The Crown has no power by that Act to override the rights of the Hudson's Bay Company within their own territories." *Id.* at 324.
44. *Id.*, at 338.

> I put in those clauses myself, in order that the Crown or Canada might have the power of appointing justices under it; but it has never appointed any, therefore the clause is inoperative.

These assertions may or may not have been entirely true, but the available evidence suggests that there was at least an element of truth in them. Certainly, John Richardson, an old friend of Ellice and a partner in the firm which contracted for the North West Company in Montreal, was convinced that he was the moving force behind the legislation as the following passage from a letter to Ellice makes clear:[45]

> In respect to the negotiation and arrangements with the H. B. Co. none can be more disposed than I to give you full credit for your zeal and ability therein, and particularly in getting the Act of Parliament passed.

Moreover, it is a fact that an exclusive grant to trade in the Indian Territories was made to the new version of the Hudson's Bay Company in December, 1821. But perhaps the best evidence of Ellice's veracity is the Company's almost immediate move to reform the administration of justice in Rupert's Land. In May, 1822 the General Court of the Company in London passed an Ordinance which provided for a system of summary courts in "Ossiniboia" and for a governor and council which would, in addition to its administrative functions, act as a higher court.[46] Bathurst gave his blessing to this enactment in a letter in which he also said that the Crown would not at that time appoint magistrates under the provisions of the Act of 1821, and until the Crown moved,[47]

> the Resolutions of the 29th instant appear well calculated to preserve the peace and good government of that part of North America, under the jurisdiction of the Hudson's Bay Company.

And, there was no doubt about what law was to run in that jurisdiction, at least not in the minds of the governor's committee of the Company, because in the instructions to Andrew Bulger, the newly appointed Governor of Assiniboia, it was directed that he "administer justice according to the law of England under the provisions of the Charter."[48]

After a lapse of thirty years, this opinion was again confirmed by the Law Amendment Committee of the Council of Assiniboia in 1850. While deploring the fact that the law was outdated, the Committee nevertheless confirmed that it was the law of England of 1670.[49] This opinion must have raised some doubts in the governor's mind because he wrote to London questioning his competency to try cases where the judgement would involve sums exceeding £200. In answer he was informed that the[50]

> court being held under the authority of the charter within the Limits of Rupert's Land, its powers are not restricted as to the amount upon which the adjudication may be made, the rights held under the charter being reserved by the last clause of the Act Geo. 4, c. 66(sic).

The last legislation concerned with criminal jurisdiction in British North America enacted by the Imperial Parliament did not alter the position of the Company in any way, since Rupert's Land was specifically excluded from its provisions.[51] It was passed to fill the gap left when the Company's exclusive licence to trade in the Indian Territories expired in 1859 and with it, the

45. Quoted in Long, *supra* n. 37 at 53. Letter, Richardson to Ellice, October 25, 1821.
46. Oliver, *supra* n. 14, I, 219-221.
47. *Id.* Letter, Lord Bathurst to Joseph Berens. May 31, 1822, at 221.
48. *Id.* Letter, A. Colville to A. Bulger, May 31, 1822, at 222.
49. *Id.*, at 369.
50. *Id.*, II, 1309. Letter, W.G. Smith (Secretary) to Governor Caldwell. April 5, 1854.
51. 22 and 23 Vic. c. 26, s. 4 (1859).

responsibility of the Company to apprehend and produce law breakers for trial. The Act enlarged the powers of justices of the peace in the Indian Territories by authorizing them to set up courts of record wherein could be tried any criminal charge, excepting those for which the penalty was death. Persons accused of such crimes were still required to be sent to Upper Canada or, if the magistrate saw fit, to British Columbia, where the offender would be dealt with according to the law of that colony.[52] Thus, by the time the Hudson's Bay Company surrendered title of its lands and grants to the Crown in 1869, the jurisdictional tangle caused by Imperial enactments was acute. But this was only one of three elements which made up the law in the North-West at that time.

It will be recalled that, under the Charter, the Company was enabled to make laws for the governance of its personnel, and that such laws had been enacted by the Governor and Council in the Southern Department in 1815. Undoubtedly, legislative activity occurred in the Red River settlement about the same time, but the record does not appear to have survived, and the earliest account of such activity is in the minutes of the Council in Assiniboia for May 4, 1832. Naturally, the Council concerned itself with offences peculiar to the place and time, and, among other things, took notice of rooting pigs on the loose, and provided that the owners of such animals were to be fined two shillings. On the other hand, punitive fines of £10, or banishment from the settlement were laid down for persons who set fires in the open, while a similar fine, or two months' hard labour were specified for persons who committed "the felonious practice of taking horses away from their grazing without the consent of the owners, and riding or driving them in harness to a distance."[53]

As the population increased — it was 2751 in 1832; by 1838 it had reached 3972 — so the Council (whose jurisdiction extended over a circular area one hundred miles in diameter, centred on the forks of the the Red and Assiniboine Rivers)[54] increased its legislative activity. In 1839, it produced not only a revised code of criminal and civil law, but also set up a larger and improved system for the administration of justice, including a Supreme Court, which was to sit at specified terms.[55] Under the influence of Adam Thom, who was appointed to the judicial position of Recorder of Rupert's Land the same year, and who was thus the first person trained in the law[56] to hold legal office in Assiniboia, successive Councils gave a great deal of attention to unsatisfactory local conduct, and enacted longer and more comprehensive codes to encompass such behavior and to provide appropriate punishments. Hence, in 1841[57] and 1852[58] revised codes, which were largely Thom's work, came into force. The last revision by the Council of Assiniboia — that of 1862[59] — while not compiled by Thom, was based on his general plan.

52. *Id.*, s. 1.
53. Oliver, *supra* n. 14, I, 265.
54. *Id.*, at 296.
55. *Id.*, at 290.
56. Roy St. George Stubbs, *Four Recorders of Rupert's Land* (Winnipeg: Peguis Publishers, 1967), at 1.
57. *Id.*, at 15.
58. Oliver, *supra* n. 14, II, 1317.
59. Consolidated Statutes of Manitoba, 1880 and 1881, 44 Vic., at LIV-LXXX.

Thom did not only influence the Council members to vote for new codes of local law, he also made them aware that the basis of the law in Assiniboia was, in his opinion,[60] the English law of 1670, and that such law was inadequate.[61] Accordingly, the Council expressed its dissatisfaction with the existing law at length in the preamble to the 1851 Code[62] and, following this line of reasoning in 1862, enacted that[63]

> In place of the laws of England of the date of the Hudson's Bay Company's Charter, the Laws of England of the date of Her Majesty's accession so far as they may be applicable to the condition of this Colony shall regulate the proceedings of the General Court.

Thus, the law of 1837 was substituted for that of 1670. However, this, too, must have been found inadequate since an Ordinance of the Council in 1864 provided that[64]

> the proceedings of the General court shall be regulated by the laws of England, not only of the date of her present Majesty's accession so far as they may apply to the condition of the Colony, but also by all such laws of England of subsequent date as may be applicable to the same.

Hence, if a person had been charged with a criminal offence in Assiniboia in 1870, in all probability, he would have been tried under the criminal law then in force in England.

The third element of the criminal law was a number of Imperial statutes in force in all British colonial possessions. These covered a broad spectrum from homicide on the high seas,[65] to the validity of Imperial writs of *habeas corpus* in the colonies. While many of these statutes were inapplicable in the North-West by reason of being offences committed on the high seas, several could have been enforced there, particularly those relating to coinage offences.

From the foregoing, it is clear that at this time no definitive answer can be given to the question: "What system of criminal law was in force in the North-West when it was admitted to the Canadian Union?". Moreover, since it has been shown that a diverse group of learned men which has included judges, lawyers, and historians, have disagreed in answering the question, it is equally apparent that the question is unlikely ever to receive a definitive answer. In line with this reasoning, the sole purpose of the following summary is to demonstrate that reasonable men, arguing from a basis of authoritative documentary evidence, could arrive at contradictory conclusions as to what system of criminal law was in force.

First, however, a distinction must be made between theory and practice. For example, if a person was accused of committing some offence in the North-West in 1870, there probably would have been a difference between the law he was tried under, as opposed to the law some later theorist or judicial official said that he should have been tried under. Furthermore, the location of the trial would have had a bearing on the system of law enforced.

---

60. The opinion, which was delivered during the trial of James Calder for murder on the Peace River in 1848, is reproduced in 2 Western Law Times 24 (1891). Thus, in trying a man for murder, the court was practising what Thom preached, because it will be recalled that under the Acts of 1803 and 1821, judicial officers in the Indian Territories were required to send to Canada any person charged with a capital offence.
61. Oliver, *supra* n. 14, I, 369.
62. *Id.*, at 369-375.
63. *Id.*, at 500.
64. Consolidated Statutes of Manitoba, 1880-1881. 44 Vic., at LXXIX.
65. F.T. Piggott, *Imperial Statutes Applicable to the Colonies* (London: William Clowes, 1902), I, 102-123.

In practical terms, a person charged with an offence in Assiniboia at Union, would have been tried in accordance with the current criminal law of England, as provided for by the Ordinance of 1864. Within Rupert's Land, but outside Assiniboia, the same person would have been charged under the English law of 1670, as modified by enactments of the Governor and Council, such as the Penal Codes of 1815, in accordance with the Company's interpretation of its Charter. In the Indian Territories, such a person could have been dealt with on the spot by a court of record which enforced the current Canadian criminal law or, if his were a capital offence, he could have been sent to Ontario or British Columbia for trial, and would have been tried under the same law.

From the theoretical viewpoint, the lawyer C. C. McCaul argued that Assiniboia, the remainder of Rupert's Land, and the Indian Territories comprised one large jurisdiction which was subject to the law of Upper Canada, and based his argument on an interpretation of the Acts of 1803 and 1821. It was the opinion of Edward Ellice that there were two jurisdictions in the North-West; i.e. Rupert's Land and the Indian Territories, and that the English law of 1670 governed the former, and the law of Upper Canada the latter. The statutes of 1803 and 1821 are also the basis for this interpretation, which is also the way Mr. Justice Killam viewed the situation, although his judgement was based on the provisions of the Charter. Finally, David Mills argued that there were three jurisdictions: the two recognized by Ellice and Killam, plus the District of Assiniboia. However, he did not specify what law was in force there and, since his remarks were paraphrased in the *Debates*, it is difficult to follow his argument, but there is no doubt that it is based on constitutional stepping stones. This then was the state of the criminal law when the North-West became part of Canada on July 15, 1870.

If this situation was known in Ottawa, it is a fair question to ask why the Dominion Government took sixteen years to fully rectify the situation and why Parliament did not at once proclaim the criminal law of Canada to extend throughout the North-West Territories.[66] No evidence has been found yet to answer this question directly, but there appear to be several reasons why the government proceeded with caution. Perhaps the first, although not the most obvious, is that it may have been thought that parts of the relatively sophisticated system of criminal law which had emerged from the process of amendment and consolidation[67] of the criminal law of the former colonies would have been inappropriate in a western setting. To introduce Canadian Law without first determining what the western situation was, might have been extremely foolhardy and might even have been the cause of stirring up a hornet's nest, as the unfortunate William McDougall had done the previous summer at Red River, when he had attempted to enforce Canadian legislation for the temporary government of Rupert's Land.[68] Moreover, at that

66. Since the Province of Manitoba was separated from the North-West Territories on the date of their proclamation, and since Manitoba followed a separate constitutional development thereafter, it will not be treated in the following discussion.

67. This had been done by committees struck for the purpose during the early days of the first session of Parliament. By midsummer 1869, the process was virtually complete: 93 colonial statutes had been repealed and 30 enacted by the Dominion Parliament to replace them. Canada, 32-33 Vic. c. 36, schedules A and B.

68. William McDougall was appointed Lieutenant Governor of Rupert's Land in 1869, prior to its cession by the British Crown to Canada. It was his attempt to enter Rupert's Land from the south which, in large part, caused the insurrection at Red River in 1869-70.

time, Ottawa had no means of enforcing criminal law in the North-West, for there was neither a police force to bring offenders to book, nor a judiciary competent to administer the new law. In any case, whatever the cause, the Dominion Government chose to move slowly.

In fact, in its first legislation concerning the Territories, Parliament did not appear to move at all, because it stipulated that all laws in force in the North-West at Union were to remain in force, and all judicial personnel were to remain in office.[69] Thus, on the one hand, magistrates appointed during the regime of the Company continued to dispense the local law, while on the other, that law was frozen in the form it had held on Union, until amended or repealed by Dominion statutes. This was so because the Imperial act[70] which brought in the Territories, gave Ottawa the exclusive right to legislate for the Territories in all matters, without reservation.

Since Ottawa did not choose to exercise its powers and continued to maintain the *status quo*,[71] the move which began the resolution of the legal tangle in the Territories had the curious effect of confirming the position always held by the Hudson's Bay Company; that is to say, that there were two jurisdictions in the North-West. This move was made by the Imperial statute of 1872[72] which repealed the Canada Jurisdiction Act. Thus, until Ottawa made a move, there was no doubt that the criminal law of 1670, supplemented by local ordinances, ran in Rupert's Land because this measure also invalidated the fifth clause of the 1821 Act which had laid it down that the Canada Jurisdiction Act was to be enforced within the Company's boundaries. That British legislators recognized this, there is no doubt because two years later they repealed clause five of 1 and 2 Geo.4, c.66, and that clause alone.[73] The remainder of the Territories did not thereby lose its law, which by now was current Canadian law,[74] since the 1859 Act providing for the administration of justice in those parts remained in force. However, this state of affairs did not last long, for in 1873 the Canadian Parliament passed amending legislation to the Territories' Government Act which completely changed the situation in the North-West. In effect, this short, two-page statute created a single jurisdiction by enacting that almost the whole body of Canadian criminal law[75] — twenty separate acts, covering 270 pages — was to apply and be enforced in the North-West Territories. That it completely superceded the English law of 1670, there can be no doubt, because a section-by-section comparison of Lord Chief Justice Hale's *Pleas of the Crown*, which lays down the criminal law of England ca. 1670,[76] and the Dominion legislation reveals that the

69. Canada, 32-33 Vic. c. 3, ss. 5 and 6 (1869). This act was extended and continued in force until 1871 by 33 Vic. c. 3, s. 36 (1870).
70. Great Britian, 31-32 Vic. c. 105 (1868).
71. Canada, 34 Vic. c. 16 (1871).
72. Great Britian, 35 and 36 Vic. c. 63 (1872).
73. Great Britian, 37 and 38 Vic. c.35 (1874). For the discussion of 1 and 2 Geo. 4 c. 66, *supra* n. 32.
74. It will be recalled that justices of the peace appointed under the Act of 1859 had been required to enforce the law of Upper Canada or British Columbia. By this time the colonies had become provinces, and the criminal law of the Dominion was enforced in both jurisdictions. Thus, it would also have been the law in the Indian Territory.
75. Canada, 36 Vic. c. 34 (1873).
76. Matthew Hale, *History of the Pleas of the Crown* (London, 1736), I, XV ff.

latter is far more comprehensive and detailed than the former. For example, when a prisoner stood mute when asked to plead in Hale's day, he was subjected to *peine fort et dure*; that is to say, to having weights piled on his body until he either entered a plea, or died.[77] In a specific sub-section, the Canadian legislation lays it down that, for a prisoner who refuses to plead, a plea of "not guilty"[78] must be entered on the record. Again, Hale discusses benefit of clergy at great length; who may claim it and under what circumstances.[79] In one line, the Dominion enactment stipulates that benefit of clergy is abolished.[80] In addition, the Act of 1873 also superceded the few English statutes in force in the colonies relating to coinage offences.

Furthermore, if by any chance some part of the boundaries of the old District of Assiniboia projected beyond the borders of Manitoba (David Mills maintained that there was such a projection[81]) and thus extended the reach of the pre-1870 criminal ordinances into a part of the Territories, the Canadian statutes would have superceded all of these. In short, the effect of the Dominion legislation of 1873 would have been to cause a person accused of a criminal offence in the North-West Territories to be charged and sentenced in accordance with the provisions of Canadian legislation, provided that the offence was comprehended in the statutes. If it was not, then it would go unpunished, or the offender would be dealt with according to local custom. This anomaly was caused by the fact that a small number of criminal statutes had not been extended to the North-West.

These were of three types: legislation which, at that time, had no application in the Territories, such as an act which laid down penalties for attempting to persuade soldiers and sailors to desert; measures which were framed for only one province; and statutes which were drafted for enforcement in a social milieu different from that which prevailed in the West, such as the act respecting vagrancy.[82] Enforcing such a law in the conditions then prevailing could have been extremely dangerous since, by definition,[83] many Indians would have qualified as vagrants. Moreover, the cost of enforcement would have been high in both money and the manpower of the magistrates and police officers also provided for by legislation in 1873.

It was these latter provisions and the promptitude with which they were acted on, which made the eventual Canadian response so much superior to

77. *Id.*, II, 314 ff.

78. Canada, 32-33 Vic. c. 29, s. 34 (1869).

79. Hale, *supra* n. 76, II, 323-382.

80. Canada, 32-33 Vic. c. 29, s. 16. It may seem curious that the Canadian parliament should concern itself with legislation which the British had abolished several years before [26 and 27 Vic. c. 125 (1863)]. The explanation is that English law which came to a colony with the first settlers became the law of that colony, and was not affected by repeal or amendment of the legislation in Britain. If the colony wanted to follow the English lead, or to otherwise alter the law, such change had to be effected in the colonial legislature. This was one of the several ramifications of the case decided by the Privy Council in 1722 (see Note 8).

81. Canada, House of Commons, *Debates*, March 24, 1879, at 678.

82. Canada, 32-33 Vic. c. 28 (1869). Laws concerning vagrancy were on the statute books in 1670 [39 Eliz. I, c.4 (1597); 1 Jas. 1, c. 7 (1604)]. However, Hale does not discuss them in *Pleas of the Crown* because they were not looked upon as criminal statutes, as such, but rather as legislation to keep labourers at their place of work. Moreover, they were inapplicable both in the colonies which formed the Dominion and the Territories, because of the differences in the social conditions in Elizabethan England, and those which obtained in the northern part of North America.

83. Canada, 32-33 Vic. c. 28 (1869).

any which had been made before. Whereas all previous legislation had only provided for the appointment of magistrates, and had laid the onus of police work on local initiative or a private company, Ottawa's enactment had not only provided for the appointment of stipendary magistrates but it also authorized the raising of a federal police force.[84] Moreover, the force was formed and on its way west in little more than a year, by which time further legislation had made its Commissioner a stipendary magistrate and all his officers justices of the peace, *ex officio*.[85] In a very real sense, the law and its enforcers went west together in 1874.

During the next decade, statute law in the Territories kept pace with the rest of Canada, as Ottawa put in force new statutes and amending legislation to old ones, by means of acts applicable only to the Territories. These also continually enlarged the powers of stipendary magistrates who, by 1876, included not only the Commissioners of the North-West Mounted Police,[86] but also two civilian appointees. With these additions, the Territories had, by comparison with anything which had gone before, a coherent body of criminal law, which had supplemented all local and Imperial laws, and an efficient and practical system to administer it. However, there was a theoretical fly in the ointment. Only Statute law had been extended to the Territories. Nothing had been said about the case law in which statutes are enmeshed.

It will be recalled that the Canadian criminal statutes were a consolidation of all the similar enactments of the several colonies which confederated. Each of these colonies had, in one way or another, received English law as of a certain date. From that point on, colonial legislators had abolished, changed, or otherwise amended this basic body of law as required by conditions in North America. In the courts, judges had interpreted this law as necesary for the administration of justice, during which process they had drawn on case law sources from other common law[87] jurisdictions. Their decisions became precedents for the future, and in this way a body of case law was generated. Thus, after Confederation, a judge in any of the provinces could rest his decision on a coherent and unbroken line of precedents dating back through the reception of English law to the earliest English decisions. In theory,[88] much of this body of case law was denied to the Territorial magistrates, because it did not form part of the legal development of the North-West. Moreover, although the desirability of extending the common law to the Territories by statutory enactment had been the subject of debate in the Canadian Parliament in 1879,[89] no substantive legislation had resulted. Nevertheless, case law was used to arrive at decisions by the bench in the North-West.[90]

84. Canada, 36 Vic. c. 35, ss. 10, 15 (1873).
85. Canada, 37 Vic. c. 22, s. 15 (1874).
86. The force was so designated by 42 Vic. c. 36, s. 3 (1879).
87. "Common Law" is here defined as being that law which had its source in England, as opposed to the "code" countries such as France and Germany.
88. This theory must not be pushed too far. It has never been the subject of a definitive legal decision, but it is the subject of a long and on-going legal debate which has filled many pages of legal journals. See J.E. Cote, "The Reception of English Law," 15 *Alberta Law Review*, 62-70 (1977), for a recent interpretation.
89. Canada, House of Commons, *Debates*, March 24, 1879, at 676.
90. For example, see the several references to *M'Naghten's Case*, tried in 1843, in *R.* v. *Riel*, 1885, prior to the passage of legislation which allowed for the use of the common law. D. Morton, *The Queen* v. *Louis Riel* (Toronto: University of Toronto Press, 1974), at 305-6, 343.

However, the bench received retroactive sanction for its use of case law in a statute passed in 1886. In part, this measure had been introduced to Parliament by the Minister of Justice, the Hon. John Thompson, himself a lawyer and former judge of the Supreme Court of Nova Scotia, "to bring in force there the common law at any rate."[91] His objective was attained when it was enacted that:[92]

> the laws of England relating to civil and criminal matters, as the same existed on the fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy, shall be in force in the Territories, in so far as the same are applicable to the Territories.

Now, in matters which Ottawa had not legislated on, English statutes could be resorted to, and the whole body of case law, which subsumed that of the Canadian Union would be at the disposal of the magistrates. A further provision of the Act put the Territories on the same footing as the rest of the Dominion, in terms of the applicability of statute law, by enacting that all general statutes then in force, and all those to be proclaimed henceforth, were to apply to the North-West Territories. When this legislation came into effect, the criminal law in the Territories became the most comprehensive and up to date in Canada. Finally, the administration of justice was made to keep pace with the enlarged body of law by providing for the creation of a supreme court for the North-West Territories. With the passage of this Act, Canadian legislators put the finishing touches to a process which had been completed for all practical purposes in 1873. All the doubts and uncertainties which had been caused by the enactment of the Canada Jurisdiction Act in 1803, and which had been compounded in 1821 by the machinations of Edward Ellice, were at an end. The law was now as certain and as predictable as statutes and a growing case law could make it.

91. Canada, House of Commons, *Debates*, May 19, 1886, at 1382.
92. Canada, 49 Vic. c. 25, s. 3 (1886).