Criminal Law on the Aboriginal Plains: The First Nations and the First Criminal Court in the North-West Territories, 1870 - 1903

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CRIMINAL LAW ON THE ABORIGINAL PLAINS:
THE FIRST NATIONS AND THE FIRST CRIMINAL COURT
IN THE NORTH-WEST TERRITORIES, 1870 – 1903

by

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A thesis submitted in conformity with the requirements
for the degree of Doctor of Juridical Science (S.J.D.)

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Abstract

This study undertakes an in-depth analysis of the relationship between the First Nations and the criminal law in the ‘Saskatchewan’ region of the North-West Territories, taking as its temporal point of departure the creation of the Territories in 1870. Through data derived from criminal court records from Hugh Richardson’s tenure on the territorial bench (1876 – 1903), this study analyses the role of Canadian criminal law in a watershed period of social and legal transformation in and for the lives of the First Nations.

The dissertation critically engages with discourses of criminalization in the historiography and calls for greater precision in the use of ‘criminalization’, where distinctions between criminal law and other forms of law are recognized. Specifically, it argues that offences under the Indian Act offences did not criminalize but rather ‘Indianized’ the First Nations. They were prosecuted as “Indians” - not as criminals - for not conforming to the behaviour required of Indians by the Indian Act.

The dissertation departs from a conventional approach to criminal law, as forms of Aboriginal participation, rather than legal categories, were used to identify themes. Through
an analysis of the criminal cases where Aboriginal people were prosecuted for criminal offences, as opposed to offences under the *Indian Act*, and in cases where the relationship between Government Indian policy and the administration of criminal justice can be discerned, the dissertation demonstrates the importance of attention to the specificity of different legal forms and actors and the relationship between them.

The study has also found that Richardson’s court could be a site of resistance to government policy by different actors, including Aboriginal people and even Richardson himself, as he did not always acquiesce to the entreaties of government officials, even as he admonished the Aboriginal people before him. Aboriginal participation in the criminal court is also analysed through court records in which Aboriginal persons were informants, victims or witnesses in criminal prosecutions.

The dissertation re-situates criminal law within the law-state relation and concludes that criminal law operated in complex and contradictory ways that included the mediation as well as enforcement of relations of inequality.
Acknowledgements

In the course of the research and writing of this dissertation I reflected more than once upon the coincidental fact that I was called to the Saskatchewan Bar in July 1976, one hundred years to the month after Hugh Richardson was appointed a Stipendiary Magistrate for the North-West Territories. I had articled in a community legal clinic that provided legal representation to low income people of the Qu’Appelle Region in south - east Saskatchewan, and after my call to the Bar, I practised criminal law for a few eventful years in Saskatchewan community legal clinics. As a law student, articling student and later as a lawyer, I represented accused persons in criminal courts in the Battleford and Qu’Appelle regions, and in the cities of Regina and Saskatoon. Most of my clients were members of First Nations and Métis communities, reflecting even then the over-policing and over-representation of Aboriginal youth and adults in the Canadian criminal justice system.

My doctoral research returned me to the people and the issues I encountered as a law student and young lawyer, and to the formidable challenges that my clients encountered within and without the criminal justice system. This research is located in the records of the same level of court, derived from some of the same communities in which one hundred years later I appeared as counsel, replete with Aboriginal accused persons in custody, Mounted Police officers as prosecutors and witnesses, one lay magistrate who was a retired RCMP officer, and local spectators expressing their own forms of judgment.

In the course of the writing, I have thought often of my clients and their struggles, of their dignity, humour and grace in the face of impossible odds, of my colleagues who did and
continue to do this work in Saskatchewan, of myriad lessons it took me long to learn and
longer to absorb. I am mindful that but for that experience I would not have found my way
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Since 1986, Osgoode Hall Law School of York University has been my intellectual
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When I returned to graduate studies after many years in the legal academy, including chunks of time in academic administration, I encountered a wonderful cohort of fellow graduate students who welcomed me without question as a fellow traveller. Many colleagues gave generously of their time and opened their classes to me. I especially thank Professors Carolyn Strange, Allan Greer and Douglas Hay for allowing me to audit their graduate seminars in criminology, historiography and legal history respectively.

The staff and librarians of the Law Library of Osgoode Hall Law School and of Frost Library at York University provided invaluable support and assistance for which I am most grateful. One never learns to love reading microfilm, but Hari Saugh and Wayne Mah in the Osgoode Library made it possible, and chats about sports with John Thomas made it bearable.

I owe an enormous debt to the archivists and the staff of the Saskatchewan Archives Board, especially the people in the Regina office. The Regina staff, and their sun-lit Reading Room, made the research process a great pleasure. Catherine Holmes and Janet Harvey were incredibly generous and helpful, and I thank them very much. I would be remiss if I did not acknowledge the work of the late Saskatchewan archivist, Stanley D. Hanson. His careful catalogue of the early Richardson court records prepared for the Saskatchewan Archives in 1966 ("Guide to the Records of the Department of the Attorney General, Regina Judicial Centre Court Records, First Series, Files 1 – 282, 1876-1886") was an absolutely invaluable
aid to my research. I also acknowledge with thanks the archivists and staff of Library and Archives Canada in Ottawa.

I had the privilege of presenting portions of this work to colleagues and students in different academic settings, including the Annual Meeting of the Canadian Law and Society Association, the Legal History Group at the University of Toronto, seminar series at Osgoode Hall Law School, the Institute of Feminist Legal Studies of the Faculty of Law, University of British Columbia, the Department of Sociology and Anthropology, Simon Fraser University, Monash Law School in Melbourne, and the National Law School of India University in Bangalore. I thank all for their audience, comments, and advice.

Many friends, colleagues and members of my family were kind enough to read earlier pieces including, for the most heroic, full drafts, and for this I thank Norma J. Sim of Saskatchewan Legal Aid, E. Ann McRae of Rexdale Community Legal Clinic, Amy G.S. Deverell, and Renée M. Gavigan. I also acknowledge with thanks the sustaining support of my longtime colleagues and friends, Dorothy Chunn and Janice Gingell. No one was called upon to stretch herself more in the reading (many versions from the most primitive to the final draft) than was Karen E. Andrews of Rexdale Community Legal Clinic, who also endured many monologues at the dinner table and elsewhere, mostly without complaint but never in silence, never without insight.

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I received an equally precious gift, that of space and peace, from friends who made their beautiful cottage available to me during the autumn of 2006. From deep in the heart of Muskoka, I was able to write about criminal law on the nineteenth-century Aboriginal Plains, and words can scarcely express the depth of my gratitude to the extended Burns clan, Beverley, Thomas and Lorraine, and their children, for this generosity and hospitality.

Historical research is inevitably about the past, and my own has been with me in this work. My life has been blessed by people who think I can do anything, even when I have had my doubts. I thank my mother, Edith Gavigan, for her lifelong encouragement and support of my academic endeavours. Judy Deverell and my father, Keith Gavigan, can no longer be thanked in person but their love and support in life are with me in cherished memory in all that I do. I also remember with affection and appreciation the wisdom of the late Professor Emeritus Otto Weininger.

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Introduction

1. One Person’s Watershed: Peaychew’s (legal) history

On October 5, 1885 in Battleford, North-West Territories, Peaychew, a signatory to Treaty Six and head man to Pee-yan-kah-nik-oo-sit (Red Pheasant), was sentenced by Stipendiary Magistrate Charles Borromée Rouleau to two years in the penitentiary.

Peaychew had pleaded guilty to a charge of treason-felony for his involvement in what for many years was known as the Riel Rebellion, and later the North-West Rebellion. A fuller

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1 *Saskatchewan Herald* (12 October 1885) 2, col. 3 & 4. See also Report of the Commissioner of the North-West Mounted Police, 1885, Appendix “O; Sandra Elizabeth Bingaman, *The North-West Rebellion Trials, 1885* (M.A. University of Saskatchewan, Regina Campus, 1971) [unpublished] at 209 [Bingaman, *Rebellion Trials*]; Blair Stonechild & Bill Waiser, *Loyal Till Death: Indians and the North-West Rebellion* (Saskatoon: Fifth House, 1997) at 263. As with many First Nations persons whose names are found in the court records, other spellings of his name appear in other court records and publications: Peachew, Peachew, Peeyachow (in the *Saskatchewan Herald*), Pee-yah-sew, Pe-a-chu, and Pee-ah-chew in files #103 & #152, Peaychew in Stonechild & Waiser at 133, 139. His name is spelled three different ways in the seven page file #103 concerning his brother-in-law, Robert Saunders, found in the Records of the Department of the Attorney General, Regina Judicial Centre: Court Records First Series, 1876 – 1886, Saskatchewan Archives Board (SAB), GR 11.1 (and currently located on holding shelf H – 1198.5.4) (hereinafter cited as SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886). I have elected to use the spelling used by Stonechild & Waiser. I also understand the family name of his descendents is Peyachew.

In recent years, there has been a movement to rename the 1885 North-West Rebellion as the “North-West Resistance;” the Library of the University of Saskatchewan maintains a web-site database devoted to the NorthWest Resistance [http://library2.usask.ca/northwest/contents.html, accessed 08 January 2007]. Neal McLeod, “Rethinking Treaty Six in the Spirit of Mistahi Maskwa (Big Bear)” (1999) 19 Can. J. Native Studies 69 at 85 [McLeod, “Rethinking Treaty Six”] writes that the Cree word for the North-West Rebellion is “é-mayi-kamikahk” (“where it went wrong”). The Cree phrase captures quite well the nature of the events of 1885, and while I am drawn to it I have elected, as non-Cree speaker, to use most often the phrase “the events of 1885” which captures for me all the fighting that was related as well as unrelated to Riel, as well as the legal aftermath. Histories of the events of 1885 include G.F.G. Stanley, *The Birth of Western Canada: A History of the Riel Rebellions* (Toronto: University of Toronto Press, 1970); Bob Beal & Rod Macleod, *Prairie Fire: The 1885 North-West Rebellion* (Edmonton: Hurtig Publishers, 1984); Stonechild & Waiser, *ibid*. I am mindful that these authors all employ the discourse of “rebellion.”

Many Aboriginal leaders prosecuted in the aftermath of the events of 1885, other than Louis Riel, were charged with the offence of treason-felony. This offence, created by the *Treason Felony Act of 1848* (Eng.), provided that conduct that was otherwise treason could be treated as a felony. While the 1848 Act did not prevent recourse to the 1351 *Statute of Treasons*, a prosecution under the 1848 Act avoided the procedural requirements
and more complex picture of Peaychew’s experiences with Canadian criminal law is found in the court records of Rouleau’s colleague, Hugh Richardson. Richardson had preceded Rouleau as the first stipendiary magistrate before whom the First Nations peoples of the Saskatchewan region would appear and it is to his court records -- which suggest that criminalization alone neither captures nor expresses the whole of Peaychew’s relationship to the criminal law -- that I have turned in this research.

This is the first study that attempts an in-depth analysis of the relationship between the First Nations and the criminal law in the ‘Saskatchewan’ region of the North-West Territories (NWT). The court records I have studied span the last three decades of the nineteenth century and the first three years of the first. They chart the twenty-seven judicial career of Hugh Richardson whose tenure on the NWT bench coincides with a period that witnessed a profound social, legal and economic transformation in and for the lives of the peoples of the First Nations of the Plains region and of which his courts were a part. This dissertation analyzes the role of Canadian criminal law in this watershed period. I begin with the Plains Cree warrior Peaychew and his personal watershed.

In early June 1880 his twelve year old daughter, Ma-chies-squien, went missing in the Eagle Hills near Battleford. The girl had been living with her paternal aunt and her aunt’s husband, Robert Saunders, since their marriage approximately three years earlier. Peaychew told the court that he had given his daughter to his sister and her husband because they asked to have her with them and he agreed so long as they remained in the area. He explained that

he was always satisfied with their treatment of the child. However, she had not returned from an egg hunting trip with Saunders and two other men and, perhaps surprisingly, Saunders had not informed her father of this on his return. Instead, Peaychew only learned that the child was missing when another man, Tobacco Juice, indirectly alerted him by asking him if she had returned. Tobacco Juice then directly informed him that she had been lost on the hunting trip. Peaychew later told the court that he went through the camp asking after the girl, and when he could not find her, he set out for Saunders’ place. There he found Saunders and his wife, and two other men, Joseph Gouin and Louis Le Toup. The men were working on a house. Peaychew asked Saunders what had become of the child, which Saunders deflected with his own question: “Didn’t she get to your place?” Peaychew told Saunders what he likely already knew, that the little girl had not turned up at his camp, and he warned, “if my child is lost there’ll be some trouble.” Peaychew enlisted Saunders and Gouin in a search of the area where she was last seen, but the child was not found.

Peaychew may have feared the worst, but he did not take matters into his own hands.

The trouble that Peaychew promised his brother-in-law came in the form of North West Robert Saunders, Joseph Gouin, Louis Le Toup (1880), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #103.

3 The case of the Lost Child is somewhat suggestive, though not in result, of a British Columbia case discussed by Hamar Foster, that of Haatq, the Kit-au-max man who killed a man who had been with his son when the young man had drowned. According to the custom of the Kit-au-max people, the man Haatq killed ought to have gone to the drowned man’s people “to make known ...what has taken place. If this is not done, it is taken as evidence of that there has been foul play.” Without suggesting that the same customary practice prevailed among the people of Red Pheasant’s Band, it does seem that Peaychew, the girl’s father, was not pleased that he had learned not from Saunders himself (into whose custody he had given the child) but from another man that she had left the hunting party and had not returned. See Hamar Foster, “‘The Queen’s Law is Better Than Yours’: International Homicide in Early British Columbia” in Jim Philips, Tina Loo & Susan Lewthwaite, eds. Essays in the History of Criminal Law Volume V: Crime and Criminal Justice (Toronto: The Osgoode Society for Canadian Legal History & University of Toronto Press, 1994) 41; see also Tina Loo, “Savage Mercy: Native Culture and the Modification of Capital Punishment in Nineteenth-Century British Columbia” in Carolyn Strange, ed. Qualities of Mercy: Justice, Punishment and Discretion (Vancouver: UBC Press, 1996) 104.

4 Supra note 2.
Mounted Police (NWMP) Constables Chassi and Prongua, who were dispatched by their Sergeant to see after the missing child. It is clear from the court file that both Peaychew and Chief Red Pheasant spoke to Chassi about the circumstances of how the child had gone missing from Saunders’ camp, and certainly one of them had to have alerted Chassi’s superior. Chassi deposed that he dispatched some Indians to request Saunders, Gouin and Le Toup to come to see him at the Mission the next day, and then he went out to search for the child himself. Saunders presented himself at the Mission the next morning, and gave Chassi a statement, explaining how the child had become separated from the hunting party. Saunders also gave Chassi a stocking that he said he had found, and which the child had been wearing the previous Sunday while out on the trip.

Saunders, Le Toup and Gouin were arrested on suspicion, brought directly before Magistrate Richardson in Battleford on 12 June 1880, and charged with the elaborate offence, surely difficult to prove and dubious on these facts: that they “unlawfully by fraud detained an Indian child under the age of fourteen years with intent to deprive her father of the possession of such child.” The proceedings were interpreted into Cree by Peter

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5 The Offences Against the Person Act, 32-33 Vict. (1869) c. 20, s. 57 provided:

Whosoever unlawfully, either by force or fraud, leads or takes away or decoys or entices or detains any child under the age of fourteen years, with intent to deprive any parent, guardian or other person having the lawful charge of such child, of the possession of such child ... is guilty of felony, and shall be liable to be imprisoned in the penitentiary for any term not exceeding seven years and not less than two years.

6 Supra note 2. Richardson had some personal experience with this sort of creativity. In 1878 he had charged a young NWMP constable, Henry Elliott, who had married Richardson’s daughter against her parents’ wishes, with an offence under s. 54 of the Offences Against Persons Act, ibid., which prohibited the abduction of an heiress against the will of her father. See W.F. Bowker’s discussion of this case: “Stipendiary Magistrates and Supreme Court of the North-West Territories, 1868 – 1907” (1988) 26 Alta.L. Rev. 245 at 263-265. Elliott was also charged with theft of NWMP horses (used in an attempt to retrieve his wife from her parents’ home and then to flee); he was acquitted by a jury, following a trial over which Richardson and his fellow Stipendiary Magistrate, James F. Macleod, presided together: Henry R. Elliott (1878), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file # 26.
Ballendine for the three prisoners ("all of whom understand that language") and into French by Cst. Chassi for LeToup and Gouin.

Richardson received Chassi's description of how he had come to the Eagle Hills Mission, of the search that had been undertaken, and of the statement that he had obtained from Saunders. The matter was adjourned at the request of the police to the following week. The record reveals that Saunders and LeToup were released on their own recognizance, and that Gouin was remanded in custody. At the next appearance, Peaychew's statement was taken; Richardson's apparent ambivalence about the case he described as "Case of the Lost or Stolen Child of Pee-Yah-Sew" was resolved in favour of the accused men: "the charge as laid, dismissed."

The case of this missing child attracted the attention of the Saskatchewan Herald, and was reported upon in considerable detail on the front page of each of the June 21 and July 5 issues. The Herald reported that Gouin had been detained in custody as it appeared that he had been the last of the three men to see the girl. The Herald also reported the warning given by Richardson to the three men when he set the matter over to the 17th:

... the magistrate spoke in severe terms of the heartlessness of these three men in not following the child and making sure she was safe, and in not promptly notifying her father and instituting a search for her. He further explained that if she were found dead but without marks of violence they might be found guilty of manslaughter for their negligence; while if the body were found bearing such marks they might be put on their

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7 Supra note 2.

8 Gouin might have been known to the NWMP; it is possible he was the same Joseph Gouin who had been convicted in the previous year of theft a horse belonging to the head Chief of the Sarcee, Stamistocotar (Bull Head): see Joseph Gouin (1879), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #69; see also the discussion of that case in R.C. Macleod & Heather Rollason, "Restrain the Lawless Savages": Native Defendants in the Criminal Courts of the North-West Territories, 1878 - 1885(1997) 10 J. Hist. Sociology 157 at 176 – 77. He could have been the same man who was charged earlier in 1880 with theft of three fence rails: Joseph Gouin (1886), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #93.
trial for the graver charge of murder. He also pointed out to them that it was their duty to conduct a vigorous search, and to aid by every means in their power the police and those engaged in the endeavor to clear up the mystery surrounding the case.\footnote{9}

Following the adjournment, according to The Herald, an extensive search was undertaken by the NWMP commanding officer, two constables, and possibly even the prisoner Gouin, together with the people of the Eagle Hills reserve, all to no avail. Upon the re-opening of court on the following Thursday, the statements of a number of Indians were taken (although only that of “Pee-Yah-Chew” is recorded in the court file), but the paper reported that they threw no new light on the case. The Herald indicated, although the court file did not, that when Richardson dismissed the case, he bound the three men “in their own recognizance to appear if called upon.”

On July 5, the Herald reported that on June 20\textsuperscript{th} the missing girl had “walked into her father’s house as unexpectedly as she had mysteriously disappeared, much to the surprise and joy of her family.”\footnote{10} According to the Herald’s informant, the girl said that while she had been unhitching the horse from the cart she saw two men on a hill whom she did not recognize, and so she ran and hid. She later saw the Indians who were searching for her and others on the plain, but she was afraid, continued to hide, eating only roots, buds and grass, and the occasional egg, for the fourteen day period, before finally making her way to her father’s house. The Herald reported that a great feeling of relief was experienced throughout Battleford when word of the child’s safe return was received. Most especially, the paper added, the three men who had been under suspicion were relieved to learn of her safe return.

\footnote{9}{“A Very Mysterious Case: Disappearance of an Indian Child,” Saskatchewan Herald (21 June 1880) 1, col. 4.}

\footnote{10}{“Return of the Lost Indian Girl: She Ran Away in Fright, A Fortnight on a Diet of Grass,” Saskatchewan Herald (5 July 1880) 1, col. 3.}
In 1882, Peaychew (on this occasion described as “Pee-Ah-Chew”) was again before Richardson in Battleford, involuntarily, on an Information sworn by Indian Agent Hayter Reed. Reed alleged that Peaychew, by false pretences and with intent to defraud, had obtained fifteen dollars in treaty annuities to which he was not entitled. Reed deposed that when asked at treaty payment time for the numbers he had claimed as belonging to his family, the prisoner had named, among others, “a certain woman and two children,” for whom Reed had paid him fifteen dollars. Reed claimed that he had subsequently learned that “for the last two or three years he had discarded the woman and had refused to support her or the children, and that he claimed their pay last year.” When Peaychew refused to return the money, Reed had him arrested. A short deposition from the Chief, Red Pheasant (“not a Christian”), was taken; no interpreter is indicated. Red Pheasant indicated that he had been present when Reed paid the treaty annuities:

I heard Mr. Reed say through Quinn the interpreter that Pee-ah-chew had drawn pay for a woman and two children that he had no right to. I know that Pee-ah-chew had drawn money for a woman and two children and that he had no right to the money. I promised Mr. Reed that I would try and get the money back.

In his “Statement of the Accused” taken before the NWMP J.P., Peaychew denied the statements made against him and indicated that he had intended to pay the money to the woman.

His committal for trial was reported in the Saskatchewan Herald in almost precisely the same language of Reed’s deposition: that the prisoner had discarded one of his wives,

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11Pee-ah-chew (1882), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file # 152.

12Ibid.

13Ibid.
drew the annuities for her and her two children, refused to deliver up the money when ordered to do so, and was arrested. He was held in custody until November 9, 1882 when the back of court record indicates simply: "debt discharged." In its account of the disposition of the case, the Herald took the opportunity to educate its readers on the subject of Indian customary practices:

One of the customs of the Indians is to take as many wives as they please, and to discard them when it suits their humour. Prisoner had, in pursuance of this custom, "thrown away" a wife and two of her children, and when payment was made he drew their annuities as of old. ... The Judge laid great stress on the enormity of the offence of trying to rob the Government and explained to the Prisoner the danger he ran. Not being anxious to proceed to extremities for the first offence, and the agent being willing to withdraw the complaint if the money were returned, the court gave the prisoner the option of doing that or having sentence passed upon him. The money was paid over and the case dropped.

Hayter Reed and the Saskatchewan Herald might have characterized Peaychew as having "discarded" his daughter Ma-chies-squien, but the facts of Saunders, et al do not indicate a disengaged, disinterested father. Red Pheasant's deposition provided a less than ringing endorsement, and certainly not evidence beyond a reasonable doubt, of the charge against the Councillor with whom he had stood in 1876 at Treaty Six and in 1880 when the child was missing; nor is there any compelling reason to suppose that the woman in question actually received the fifteen dollars from Hayter Reed, the man known to the Battleford Cree and Assiniboine peoples as Iron Heart.

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14 Saskatchewan Herald (14 October 1882) 1, col. 3.
15 Supra note 11.
16 Saskatchewan Herald (11 November 1882) 1, col. 4 & 2, col. 1.
17 Sarah Carter, Lost Harvests: Prairie Indian Reserve Farmers and Government Policy (Montreal & Kingston:
In the spring of 1885, ‘Pee-Yay-Chew’ was one of five signatories to a letter to Louis Riel asking for ammunition and his support, evidence of which facilitated Poundmaker’s own conviction for treason-felony. Described by one of Stonechild and Waiser’s informants as a “hardliner” in Red Pheasant’s Band (his Chief had rebuffed Riel’s emissaries), Peaychew is reported to have goaded some of Little Pine’s men into joining the Resistance: “You are cowards if you do not fight. ...Anyone one of you who refuses can don and wear his wife’s dress.” For his role in the events of 1885, Rouleau S.M. convicted Peaychew of treason-felony and sentenced him to two years in the penitentiary – a man who nine eventful years earlier had been one of the Cree leaders whose “X” had graced Treaty Six. Over the course of those nine years he had ‘made trouble’ for a man to whom he had entrusted his daughter, who had abandoned her when she was lost on the plain and who had treated him with discourtesy by not informing him directly, or at all; he had been harassed and prosecuted by the Indian Agent, publicly ridiculed by the Saskatchewan Herald (for whom ridicule of the
Battleford Cree and Stonies was sport), moralized, but not convicted, by Richardson, and finally – and for the first time – convicted as a result of his participation in the events of 1885. Perhaps he was released, as others were, in the spring of 1886, dying no doubt with that one solitary conviction to his name.

I have begun with the relationship between Cree warrior Peaychew and Canadian criminal law between 1876 and 1886 to lay the groundwork for my analysis of the relationship between Aboriginal peoples and the criminal law. Peaychew’s experience with the criminal law personifies the transformation of the period: as a signatory to Treaty Six, Peaychew had a personal experience and understanding of what the representatives of the Crown had promised and expected of the First Nations who had accepted the Treaty. As headman (or councillor) to Chief Red Pheasant, he would have had occasion to consider matters in council, when he and Poundmaker were both councillors to Red Pheasant, although it appears that he stayed with Red Pheasant when Poundmaker established his own band (and reserve not far from Red Pheasant’s reserve). He was a man who knew his rights, who made good on a promise or threat, who was not easily intimidated, who stood his ground. He was prepared to make use of the law and when first taken as a prisoner to court in 1880, he did not simply nod his head. He did not share his Chief’s distrust of Louis Riel.

22 Between February and July 1886, thirty-one of the ‘rebels’ convicted in 1885 were pardoned under a general amnesty authorized by Prime Minister John A. Macdonald: Dempsey, supra note 20 at 195. Dempsey reports at 195 – 196 that Big Bear’s release was approved by cabinet on January 27, 1887; too ill to travel he was actually released in the following week. See also J.R. Miller, Big Bear [Mistahimusqua]: A Biography (Toronto: ECW Press, 1996) at 126 [Miller, Big Bear]. Poundmaker was released in March 1886 after having served seven months of his three year sentence: Norma Sluman, Poundmaker (Toronto: Ryerson Press, 1967) at 280.

23 Dempsey, ibid. at 100, says this happened in 1881. Sluman’s account, ibid. at 73, suggests that Poundmaker left Red Pheasant’s band in 1877.

24 As I will discuss more fully in Chapter Four, there is no word in Cree for “guilty;” however, many accused Aboriginal persons then as now entered pleas of guilty in court. In a 1990 research paper prepared for the Manitoba Aboriginal Justice Inquiry, Freda Ahenakew and her colleagues reported that the Cree in the Battleford region had devised a word for “guilty” that translates, “Are you going to nod your head?” Freda
and his objection to the tyrannies of white men led him to fight in 1885.

Peaychew’s little known guilty plea and conviction for treason-felony invites a reflection upon the trials and convictions of more well known Cree leaders for the same offence in the aftermath of the events of 1885. The stoic images of Poundmaker and Big Bear grace books on their role in the North-West Resistance and their fate at the hands of Canadian justice. Big Bear’s and Poundmaker’s experience of the wrath of Canadian justice, relegated by many to the shadow of Riel, casts its own shadow over others, and does not epitomize their peoples’ relationship with Canadian criminal law— one that was as complex and contradictory as it could be oppressive.

2. Long Distance, Low Law on the Plains

The title of this section expresses indebtedness to Canadian legal historians Hamar Foster and Douglas Hay for their scholarship on “long distance justice” and “low law” respectively. By “the fiction of long distance justice,” Foster means the practice by which serious criminal offences that occurred in the Indian Territories in the eighteenth and early nineteenth centuries were adjudicated, which authorized trials in England or in the nearest

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25 Or, even his own in Poundmaker’s case. I will discuss this further in Chapter Six.


British colony.\textsuperscript{28} Trials could take place as far away as England or as near as the colonies of British North America. I argue here, and demonstrate in more detail in succeeding chapters, that “long distance justice” is an equally apt characterization of the expression and experience of criminal justice in the NWT, although admittedly the distances were not as extreme as Foster’s “long distances.”

Douglas Hay’s work elaborates upon the distinction between “high law” and “low law.” By “high law” Hay means “the law of appellate courts, most law professors, and most opinion makers. It celebrates jury trial, due process, and suit or defense by counsel. It is the world of law.”\textsuperscript{29} “Low law” refers to the “most common daily manifestation” of “Law”: summary proceedings, before a magistrate without a jury, without counsel.\textsuperscript{30} The socio-legal and political implications of “high law” are important: high law, “rare and expensive,” the “most loudly articulated account of law”\textsuperscript{31} becomes the only form of law; high justice is celebrated as if low justice is not law and as if it does not exist.\textsuperscript{32} In this dissertation, I draw on both themes: the long distance, low justice of the nineteenth-century criminal courts in the NWT where few had counsel, and fewer had appeals to higher courts.

\textsuperscript{28} Supra note 26 at 2.

\textsuperscript{29} Hay, “Law’s Violence,” supra note 27 at 168.

\textsuperscript{30} Ibid. at 167-168.

\textsuperscript{31} Ibid. at 167.

\textsuperscript{32} Ibid. at 168:

...this is the received account of law endemic in class-or status-driven societies, where the most privileged public discourse is insistent that there should be one reading of law’s texts, including its rituals... What is not so privileged is silenced... The celebration of high justice as if low justice did not exist...

In this dissertation, I work with a broader definition of “low law” – while Hay refers to the justice dispensed by lay justices, Hugh Richardson, the judge whose court records I have read, was legally trained – in other words, a professional magistrate. The legislation required that in some matters he was to preside with a justice of the peace and a jury of six. But, in every other respect his trial court in the early period was a low law court.
(i) *Long Distance* ...

In many ways, the space, terrain, and territory are easier to discern than the experiences of the participants. The context in which these cases were presented to the Court defies capture by contemporary concepts of rural or urban – for it was neither. A way of life based on a different relation to land, family and work is described in many of these files, together with the intersection of newer relations and influences. In particular, the plain is omnipresent in the files. It is space, place and location; it is also refuge and sanctuary; it offers an almost complete answer to a summons that will never be delivered or a sentence that will not be served; and it readily delivers up others.

People met each other on the plain; assaults took place on the plain; people sent word to the judge telling him of their inability to come to court because they were on the plain, and those who were thought to be evading justice took refuge on the plain; hungry people on the plain approached freighters' wagons filled with flour, sugar and pemmican.

The land, and people's relation to it, shapes and drives the unfolding of the cases. We learn of the chilling discovery of the bones and charred remains of a mother and her children buried in the snow in the bush following their murder by her husband, their father.

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33 I am assisted by Bill Waiser who has said in another context that “a distinct sense of place shapes and informs” recent Western Canadian historical scholarship: “Introduction” Place, Process and the New Prairie Realities” (2005) 84 Can. Hist. Rev. 509 at 515.

34 Baptiste Flammand (1877), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file # 11.

35 Ka-ki-si-kut-chin, the Swift Runner (1879), SAB A-G (GR11-1) CR-Regina, 1st series, 1876 – 1886, file # 65. This case will be discussed in Chapter Four.
pond in the spring which promised ducks but brought death to an elderly hunter at the hands of his son-in-law;\textsuperscript{36} another pond in another season which gave rise to the murder of another family by two brothers who claimed that their hunting territory was being encroached upon;\textsuperscript{37} the lost child left behind on a hunting trip;\textsuperscript{38} the bank of the lake where the newborn infant was buried by its young mother;\textsuperscript{39} the swampy place where a young girl was found crying whilst trying to wash herself, having been sexually interfered with by her mother’s husband;\textsuperscript{40} the place on the river where the hapless Mountie moored his canoe, perhaps not appreciating the invitation it represented;\textsuperscript{41} the river again, where a Cree man was told he should fetch his water, rather than from the ‘water hole’;\textsuperscript{42} the distance of a mile – measured by telegraph poles – for a horse race outside Battleford.\textsuperscript{43}

The records also reveal the newcomers’ different but no less significant relation to land, disputes over it giving rise to criminal prosecutions: houses that were “taken down” by an aggrieved husband\textsuperscript{44} or thrown into the river by those who argued a prior claim,\textsuperscript{45} homes and

\begin{footnotes}
\item[36] Charles Cardinal (1877), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file # 6 (1877). This case will be discussed in Chapter Four.

\item[37] Kee-Che-Qua-Pie-Ka-wa (1877), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file # 7. This case will be discussed in Chapter Four.

\item[38] Robert Saunders, Charles Gouin, Louis Le Toup, supra note 2 This case will be revisited in Chapter Six.

\item[39] Scholastique Cardinal (1882), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #145. This case will be discussed in Chapter Six.

\item[40] Ka-Nah-Pic-Nah-Hew, the Snake Indian (1882), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file # 171. This case will be discussed in Chapter Six.

\item[41] John Saunders & Thomas Horsefall (1877), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #10.

\item[42] William Turner (1877), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file # 5. This case will be discussed in Chapter Six.

\item[43] John Ballendine (1878), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file # 29. This case will be discussed in Chapter Six.

\item[44] George Finlay (1882), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #156. Finlay was
\end{footnotes}
school houses left unoccupied for a season or year;\textsuperscript{46} piles of firewood intended only for the private use of owners.\textsuperscript{47} The land, the distance, the space, the weather, the terrain, the seasons, the location – all assume pride of place in the early court files.

(ii) \textit{... Low Law on the Plains}

The dominant image of the First Nations’ relationship with the criminal law in nineteenth-century western Canada - to the extent that one exists at all – is surely that of the Plains Chiefs Poundmaker and Big Bear in police custody in Regina at the time of their trial in the summer of 1885. One legal historian describes their trials as “the most famous Indian criminal trials in Canadian history.”\textsuperscript{48} This not unreasonable claim warrants consideration, and a brief analysis of the implications of those trials and how they have been interpreted by legal historians. The names and histories of other Cree, Assiniboine, and Sioux leaders also prosecuted for treason-felony in the aftermath of the violent spring of 1885 are less well known – White Cap, One Arrow, Lean Man, Yellow Mud Blanket, Peaychew - to name but a few. Poundmaker’s charisma (and his good looks, which made

\begin{footnotesize}
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\item \textsuperscript{45} Francis Oliver (1882), Matthew McCauley et al (1882), Donald R. Fraser (1882) and Joseph Lake (1882), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #s 148, 168, 169, and 170 respectively; see also Bowker, \textit{supra} note 6, who discusses these cases at 713.
\item \textsuperscript{46} Margaret Favel (1892), SAB Coll. R1286, file #40; Antoine Langé (1893), SAB Coll. R1286, file # 63.
\item \textsuperscript{47} George Tyler & Edward Hanley (1883), SAB A-G (GR111-1) CR-Regina, file #s 186 & 187.
\end{itemize}
\end{footnotesize}
him the darling of some of the press, if not the law and Big Bear’s stature as a political and spiritual leader no doubt contribute to the attention. Other writers who have examined this issue have paid particular attention to the Rebellion trials as demonstrative evidence of the subordination of the Plains Aboriginal peoples by the Canadian state and its criminal law. Sidney Harring’s reading of the historiography, but apparently not the transcripts, of the trials leads him to conclude that they were “show trials.”

Echoing a fair assessment made elsewhere by Blair Stonechild and Bill Waiser, Haring observes that “Indians drew the brunt of the legal repression of the North-West Rebellion;” and, he quickly concludes that the “quality of justice rendered was a travesty.” While my primary focus in this dissertation is not on the 1885 trials, I do take a somewhat different view on both the specific and general case Harring makes (to the extent that he is also advancing a more general point). The picture is more complex.

There is no doubt that Magistrate Rouleau oversaw the most perfunctory legal process in the cases involving the eleven Cree and Assiniboine warriors charged with murder, none of whom were represented by counsel, some of whom spared the government the trouble of a

49 Sandra Bingaman quotes the Regina Leader’s coverage of Poundmaker’s trial, including its bizarrely besotted description of him as “noble – nay kingly looking.” See Bingaman, “Poundmaker and Big Bear” supra note 18 at 81. The Saskatchewan Herald was less enthralled with Poundmaker. In the midst of the events of 1885, the Herald described him as a “petted and feted Indian” (Saskatchewan Herald (23 April 1885) 2, col. 2). Blair Stonechild, “The Indian View of the 1885 Uprising” in R. Laurie Barron & James B. Waldram, eds. 1885 and After: Native Society in Transition (Regina: Canadian Plains Research Center, University of Regina, 1986) 155 at 166 also quotes this passage at greater length. In the following September, after he had been sentenced to three years, the Herald offered this assessment of the sentence: “Nominally Poundmaker was sentenced to three year term in the Penitentiary; in reality he is provided with what it is the Indian’s highest ambition to attain – plenty to eat and nothing to do.” Saskatchewan Herald (14 September 1885) 2, col. 4.

50 See, e.g., Harring, supra note 48 at 97 - 102 for his most recent foray into the secondary sources.

51 Ibid. at 98.

52 See, e.g., Stonechild & Waiser, supra note 1 at 213. See also, Stonechild, supra note 49 at 167 – 68.

53 Supra note 48 at 99.
trial by pleading guilty, and that his attitude toward the Accused prisoners before him, and to
Aboriginal People more generally following the events in Battleford, Frog Lake and so on,
was less than charitable.\textsuperscript{54} It is also the case that the eight men who were hanged in the
largest mass execution in Canadian history had been convicted of murdering unarmed
civilians, and that theirs was less a show trial than a ‘show execution’ intended to break the
spirits of the Aboriginal people who were required to assemble to witness it. The grandson
of Dressyman, one of the reprieved men, recalled his grandfather’s response: “...the law
overdone it.”\textsuperscript{55}

Sandra Bingaman concludes that it is “difficult to find fault with the guilty verdict
and three year sentence given to Poundmaker,”\textsuperscript{56} but she argues with force that the Crown’s
case against Big Bear reasonably attracts more criticism: the legal (and social\textsuperscript{57}) evidence
was clear that he had attempted throughout to save lives. Here again, the reasonable doubt
the jury might have had was reflected not in their verdict, but in the recommendation of

\textsuperscript{54} Rouleau expressed his views in a letter to Lieutenant-Governor Dewdney prior to the trials:

\begin{quote}
It is high time that those indians [sic] should be taught a lesson. I think that General Middleton
was altogether too kind to them. My impression is that a milk and water policy is a very wrong
one. If the indians can commit all the crimes of the Statute with impunity, we may expect a
renewal of the same scene in a short period.
\end{quote}

Quoted by Bingaman, \textit{Rebellion Trials, supra} note 1 at 115. Bingaman notes that Rouleau suffered losses to
both his property (his house in Battleford was burned to the ground during the hostilities) and his reputation
during the events of 1885, giving rise to the hostility expressed in his letter. See also Bowker, \textit{supra} note 6 at
272 -273; and, Beal and McLeod, \textit{supra} note 1 at 331, who quote from a letter written by the Oblate priest,
Father Andr{\`e}, to his superior. Fr. Andr{\`e}, who had observed the trials in Regina and Battleford, described
Richardson as fair and impartial but condemned as Rouleau as a “vindictive man and a servile instrument in the
hands of the government.”

\textsuperscript{55} Joe Dressyman, quoted by Stonechild & Waiser, \textit{supra} note 1 at 227.

\textsuperscript{56} Bingaman, “Poundmaker and Big Bear,” \textit{supra} note 18 at 92.

\textsuperscript{57} See, e.g., Dempsey, \textit{supra} note 20 at 159 - 160; Miller, \textit{Big Bear, supra} note 22 at 103 - 106; Stonechild &
Waiser, \textit{supra} note 1 at 171; Beal & Macleod, \textit{supra} note 1 at 198, 321 – 324.
mercy that they made – neither the first nor last time in a prairie court where reasonable doubt went to sentence. Bingaman appears to chide Poundmaker’s defence counsel for not calling Poundmaker as a witness to explain or refute the letter which implicated him (one which he, Peaychew, and three others were said to have sent to Riel, asking for ammunition and support) – but under the rules of evidence of the period, an accused person could not testify in his own trial.

I share the view of the critics with respect to the penitentiary terms imposed upon One Arrow, Poundmaker and Big Bear; they essentially amounted to slow death sentences for all three. Although many of those convicted, including Poundmaker and One Arrow, were released by mid-1886, it was clearly within the power of the trial judge to suspend their sentence, as he had done so often in his time on the bench, or for the Executive to authorize their immediate release, as was done in the cases of the Assiniboine Chief, Lean Man, and Poundmaker’s brother, Yellow Mud Blanket.

It would be an error to dismiss, or even to minimize, the significance of the 1885 Trials, and I do not intend to do this. But the fact remains that we know more about the

58 Bingaman, “Poundmaker and Big Bear,” supra note 18 at 93.

59 Subject to a statutory exception concerning assault prosecutions, later written into Canada’s Criminal Procedure Act R.S.C. 1886, c. 174, s. 216, an accused person was neither a competent nor compellable witness until the Canada Evidence Act, 1893, S.C. 1893, c. 31, s. 3 was introduced to permit an accused to testify in his own case. See Peter K. McWilliams, Canadian Criminal Evidence, 2nd ed. (Aurora: Canada Law Books, 1984) at 900-01.

60 All three would die before three years would pass. Poundmaker was released in March 1886, having served six months of his sentence; he died a few months later at the age of 44: Sluman, supra note 22 at 280 & 301. One Arrow was released at around the same time, although he was so ill that he died in St. Boniface en route to the NWT. Big Bear was released, also in declining health, in January 1887. He died on Little Pine Reserve on January 17, 1887: Dempsey, supra note 20 at 194-198.

61 Bingaman, Rebellion Trials, supra note 1 at 206.

62 Indeed, Harring, supra note 48 does not suggest that the 1885 trials tell the whole story of the Plains First Nations’ experience of Canadian law. He draws heavily, arguably exclusively, on the evidence marshalled by others, in his recent essay to include the Treaties, the Indian Act, including the restrictions on religious dances,
1885 trial of Louis Riel\textsuperscript{63} than we do of the companion trials of Poundmaker and Big Bear;\textsuperscript{64} we know about the trials of Poundmaker and Big Bear than we do of the Willow Chief One Arrow\textsuperscript{65} and the Dakota Chief White Cap;\textsuperscript{66} we know more about their trials than we do of the eighty-one First Nations and forty-six Métis prisoners also tried\textsuperscript{67} or the six Cree and two Assiniboine warriors hanged for murder at Battleford following summary trials or guilty pleas in Fort Battleford on November 27, 1885: Papamahchatwayo (Wandering Spirit), Apischiskoos (Little Bear), Manichoos (Bad Arrow), Papamakesick (Round the Sky), Wahwahwitch (Man Without Blood), Kittimakeguh (Miserable Man), Napaise (Ironbody), and Itka.\textsuperscript{68} We also know more about the handful of prosecutions of the Potlatch\textsuperscript{69} in British Columbia and of religious dances.\textsuperscript{70}


\textsuperscript{64} See Bingaman, “Poundmaker and Big Bear;” \textit{supra} note 18; Stonechild & Waiser, \textit{ibid.} at 202-205 and 206 – 209.

\textsuperscript{65} Beal & MacLeod, \textit{supra} note 1; Stonechild, \textit{supra} note 49 at 66; Stonechild and Waiser, \textit{supra} note 1 at 199-202.


\textsuperscript{67} \textit{Ibid.} Appendix 5, at 261-263 for a list of Indian prisoners tried and convicted following the events of 1885.

\textsuperscript{68} For thorough and careful analyses of the Frog Lake incident and the subsequent prosecution and execution of the Cree and Assiniboine warriors, see, e.g., Hildebrandt, \textit{supra} note 17; Stonechild & Waiser, \textit{ibid.} at 211-212 and 223-225.


\textsuperscript{70} Katherine Pettipas, \textit{Severing the Ties That Bind: Government Repression of Indigenous Religious Ceremonies}
I want to suggest a further dimension to Hay’s notion of “high law” and the role of legal academics therein. In particular, I am concerned about the extent to which legal scholars contribute to the construction of high law in our selection and focus upon reported cases, famous cases, unusual cases, “noteworthy cases.”71 In a sense, irrespective of the court level at which their cases were prosecuted, Louis Riel, Don Cranmer and Wanduta (Red Arrow) have become forms of high law – high profile trials that have caught the eye and interest of researchers. Indeed, I argue that these cases, which were high profile in their time or have become better known as a result of academic publication, are forms of high law: legal counsel on all sides, appeals, press coverage, producing thick and rich archival records.

The cases I have studied derive from a territorial criminal trial court, a magistrate’s court until 1886; they represent what Louis Knafla once characterized as the grist of the law.72 The records of most proceedings are thin, and I do not and cannot say that they represent all the criminal matters over which Hugh Richardson presided. Very few of these criminal proceedings, especially in the early period, involved lawyers on either side, legal arguments or the trappings associated with justice in Central Canada: no grand juries, no court houses, and certainly no prairie version of Osgoode Hall enclosed by elegant wrought iron to keep out cattle and riff raff.

In the NWT, “law” for most people, including most Aboriginal people, meant law

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without counsel, without legal arguments, without formal courthouses, without the trappings of majesty. It meant confinement in the police barracks before trial, if indeed there was a trial, and it meant serving a gaol sentence in the same police barracks. For some it involved a summary trial before an HBC Factor, a police officer or an Indian agent sitting as a justice of the peace. For many, then as now, it involved no trial and, for almost all, no appeals to a higher court. For the people of the NWT, criminal justice was a form of long-distance low law.

This dissertation is concerned with the operation of this lower criminal court, with the Aboriginal people who appeared as deponents, witnesses, informants, accused persons, and with the kinds of cases that were prosecuted, whether or not there was a trial or conviction. To the extent that they were involved in these proceedings, I am interested to see how they participated: cases in which Aboriginal Informants charged (apparently) white men with different forms of assault, and for which convictions were entered, followed by the imposition of a modest penalty; cases in which Aboriginal men appear to have been more at risk of conviction than white men for forms of sexual assault; cases in which Aboriginal

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74 See, e.g., Jennifer Pereira & Craig Grimes, “Case Processing in Criminal Courts, 1999/00” Juristat (Statistics Canada Catalogue #85-002, Volume 22, No. 1) at 11, Figure 5: in 1999/00, 54% of all criminal case in Canada involved a plea change and only 15% of adult criminal cases in Canada in 1999-2000 went to trial.

75 E.g., William Turner (1877), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file # 5; John Smith (1878), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file # 24; James Ford (1889), SAB Coll. R 1286, file # 4.

76 See, e.g. Gopher Tom (1889), SAB Coll. R 1286, file # 6; Pierre Bourassa (1894), SAB Coll. R1286, file #39; Ka-nah-pi-a-nah-hew or the Snake Indian (1882) SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file # 171. I discuss these cases in Chapter Six.
accused were charged with stealing small things: a tea kettle from an empty house,77 a silver spoon from an empty schoolhouse,78 a pound of bacon from an employer.79 Cases from communities so small, everyone clearly knew who was referred do when the accused person described in the warrant for arrest only as “The Youngest Son of the Netmaker,”80 or whose extended family is revealed by the description of the complainant, as in the case of Hoh-pie-sah-pah, otherwise Blacknest, the husband of “The Little Girl, a Saulteaux Indian woman, wife of a Stony Indian Right & Left’s Eldest Son.81

These are cases that did not, could not, wend their way to the higher courts, even if appeals had been permitted. The accused people in these cases, other than a few traders and merchants, were not represented by counsel. Frequently their words were recorded by a justice of the peace, through an interpreter (who was sometimes sworn in), and their depositions are marked with an “X. They are Plains First Nations People of low law, and I hope that my dissertation, which seeks to be attentive to complexity and contradiction, will add to our understanding of their relationship to and engagement with the criminal law in the NWT.

In Chapter One, I undertake a thematic and critical review of the historiography of

77 Antoine Langé (1893), SAB Coll. R1286, file # 63. As Peter Hourie was sworn as a Cree interpreter in this case, I infer that Langé was an Aboriginal person.

78 Margaret Favel (1892), SAB Coll. R1285, file # 40. She was charged with theft of four silver spoons and forks and other small items from the empty school house on Poor Man’s reserve in the Touchwood Hills; pleaded guilty to stealing one spoon; suspended sentence. I refer to this case in Chapter Four.

79 Thomas, A Stony Indian (1883), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file # 188. I discuss this case in Chapter Four.


81 Hoh-pie-sah-pah, otherwise Blacknest (1882), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file # 155. I refer to this case in Chapter Six.
Aboriginal Peoples and Canadian Criminal Law in the nineteenth century, with an emphasis on the Western Canadian context. In my view, studies of Aboriginal homicide capital cases have assumed a prominence in the literature that is disproportionate to their occurrence in the criminal records. While I too have found cases of homicide in the court files I have read, I situate them in their relational context rather than carve them out for separate study.

My review of the historiography in relation to Aboriginal people and Canadian criminal law gave rise to a concern with what I characterize in the dissertation as the ‘discourse of criminalization’. I have found that the nature of the contribution of criminal law to legal expression of Canadian colonialism in relation to Aboriginal peoples, for instance, is assumed more often than it is demonstrated.

In Chapter Two, I introduce the legal antecedents, framework, and institutions of criminal law in the NWT, as well as Hugh Richardson himself and the two courts to which he was appointed.

In Chapter Three, I identify and discuss the methodological challenges that, given the nature of the court records I have examined, I have confronted in this research. Of particular importance are questions of agency and experience, the relationship between text and experience, and the issue of interpretation, in both the linguistic and analytical meanings of that concept. I provide an overview of Richardson’s court records from 1877 to 1903, and I introduce the data therefrom upon which I rely in this dissertation, with a focus on those files involving First Nations individuals. I also introduce other sources, other forms of court ‘records’: the court returns of the NWMP and the court reports of the Territorial Press in the period.

Chapters Four, Five, and Six, based primarily on my empirical research, form the
substantive heart of the dissertation. Rather than take the traditional legal categories of substantive criminal law as my organizing frame, I have organized these chapters on the basis of the experience and participation of Aboriginal people I found in the court files. Drawing upon a combination of historical, ethnographic and Aboriginal sources, I discuss in Chapter Four the transformation and nature of criminalization experienced by the First Peoples of the Plains. The chapter begins with a consideration of Aboriginal 'criminal' law(s) and continues my engagement with the discourse of criminalization through an examination of the kinds of cases in which Aboriginal Accused persons were prosecuted.

I found evidence to warrant an insistence upon a distinction between Richardson's criminal court and the government's Indian Policy. Chapter Five provides an overview of these complex and sometimes competing relationships. There was conflict within the state which the historiographical literature as well as the primary sources respectively suggest and demonstrate. This chapter identifies and analyzes the relationship between Government Indian policy and the administration of criminal justice, and argues that the Richardson records offer evidence of judicial resistance to the use of the criminal law to enforce Indian policy.

By using a broader approach to the study of Aboriginal people in the criminal court, I was able to identify more Aboriginal participants than one would find if one looked only at the process involving Aboriginal accused persons. Chapter Six thus looks at a different form of Aboriginal participation in the criminal court, through cases in which Aboriginal persons were informants, victims or witnesses. Engagement with the important, complex issues related to cultural and linguistic interpreters and interpretation forms a significant part of this chapter. I also analyze the extent to which the court records can be said to demonstrate that
the operation of the criminal law as a 'gendering practice' in the NWT. I look at cases involving sexual offences against children, domestic violence and expressions of patriarchal relations. The court records, especially Richardson’s magistrate’s records in the early period, reveal that Aboriginal peoples went to the criminal law for assistance and redress and attempted, along the way, to explain their customary practices and values to the court. These stories do not appear to warrant the appellation of collaboration, and some of them do offer instances of what others have characterized as ‘inter-communal’ relations.

My dissertation demonstrates the importance of attention to the specificity of different legal forms and the relationship between them. I call for a more precise definition and use of the concept of criminalization, one in which distinctions between criminal law as a legal form and other forms of law are recognized, and in which actions and practices of Aboriginal peoples were prosecuted as crimes and not simply as regulatory or other statutory offences.

The process of criminalization, I argue, occurs when people are criminally prosecuted and convicted for conduct that has been defined by the state as criminal. It may encompass the extension of criminal law over formerly non-criminal behaviour. Or, it may involve systemic targeting and over policing and criminal prosecution of particular groups and communities for particular kinds of offences. Inevitably, it is intended to express and enforce social denunciation for socially injurious conduct.

The offences and prosecutions under the early Indian Acts did not criminalize the First Nations; rather they “Indianized” the First Nations. They were prosecuted as “Indians” – not as criminals -- for violating the Indian Act, for not conforming to the behaviour required of Indians by the legislation.
The last three chapters continue the arguments introduced in this Introduction: they demonstrate the watershed, the importance of attention to low law, and the complex and contradictory role of criminal law suggested by Peaychew’s own engagement and interaction with it.
Chapter One

The Historiography of Aboriginal Peoples and Canadian Criminal Law: A Thematic Review

1. Introduction

In this chapter I review and analyze the historiography relating to Canadian criminal law and Aboriginal peoples. Criminal law is not the most important area of legal historical scholarship concerning Aboriginal peoples and Canadian law. That position is occupied, understandably, by studies which have focussed on Aboriginal rights, generally expressed through Aboriginal title\(^1\) and Treaty rights\(^2\) – the historical bases for current land claims and other litigation.\(^3\) More recently, colonialism and self government,\(^4\) and the scourge of Indian legislation and policy\(^5\) have jockeyed for position.

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3 See, e.g., Borrows, supra note 1; McNeil, supra note 1; Kent McNeil, *Defining Aboriginal Title in the 90s: Has the Supreme Court Finally Got it Right?* (Toronto: Rotbarts Centre for Canadian Studies, 1998); Darlene M. Johnston, *Litigating Identity: The Challenge of Aboriginality* (LLM Thesis, Faculty of Law, University of Toronto, 2003) [forthcoming UBC Press].


5 See, e.g., Sarah Carter, “‘Complicated and Clouded’: The Federal Administration of Marriage and Divorce...
There are of course exceptions which have contributed to our knowledge of the early operation and application of colonial criminal law to indigenous peoples in North America. One obvious, perhaps dominant, instance in which nineteenth-century Canadian criminal law has attracted the attention of legal historians concerns the legal aftermath of the events of the 1885 North-West Rebellion/Resistance. The images of the 1885 trials loom large in the historiography. Significant among them are photographs of Cree leaders in custody following the events of the spring and early summer. Among the most vivid of these reproduced images are those of Mistahimusqua (Big Bear) in shackles at Fort Carlton, of Big Bear and Pihtokahanâpiwiyin (Poundmaker) at the time of their trials in Regina, and of Big Bear in Stony Mountain Penitentiary, “shorn of his shoulder-length hair to humiliate him.” These images of the shackled, incarcerated Cree leaders have come to exemplify, for some


See Blair Stonechild & Bill Waiser, Loyal Till Death: Indians and the North-West Rebellion (Saskatoon: Fifth House, 1997) at 190; Harring, ibid. following 176.

Stonechild & Waiser, ibid.; Walter Hildebrandt, Views from Fort Battleford: Constructed Visions of an Anglo-Canadian West (Regina: Canadian Plains Research Centre, University of Regina, 1994) between 102 - 103.

Hildebrandt, ibid.
historians, the nature of the relationship between Aboriginal peoples and Canadian criminal law.

Given its rather marginal position within Aboriginal legal history more generally, one issue which concerns me is the extent to which an exclusive focus on criminal law, and perhaps especially murder, runs the risk of exaggerating its social significance in the period. As I will discuss below, many historians have focussed on homicide; less than a handful have looked at horse stealing and livestock offences and one or two have studied the case of Almighty Voice. How have legal historians identified and assessed the nature of the contribution of the criminal law, qua criminal law, and the small numbers of Aboriginal people (relative to their numbers in the population) who came before the criminal courts either as prisoners, informants or witnesses? In particular, have legal historians been able to approach the earlier period without either the influence of the self-evidence of the present


12 See, e.g., Hildebrandt, supra note 8 at 100 – 102; Harring, supra note 6 at 243-245.

or the allure of what Emma LaRocque has characterized as "a growing complex of reinvented 'traditions'" notably in relation to (criminal) justice as well as the role of women in Aboriginal societies.¹⁴

Some of the literature reviewed below reveals a certain imprecision with respect to the definition and scope of criminal law. Many scholars have adopted a wide, arguably over-inclusive, definition of criminal law, in which all legal forms which have an air of compulsion, coercion or punishment, are coloured with a criminal law brush. On the other hand, if one proceeds with criminal law too narrowly construed (thus leaving aside the coercive form of some aspects of the Indian Act, for instance), one may risk proceeding with a too narrow understanding of crime. Proceeding with a narrow approach to the question of criminal law runs against the grain of recent interdisciplinary scholarship in law and socio-legal studies which argues for a broader notion of crime – one which challenges the historical preoccupation with crimes of individual wrong-doers and the historical neglect of crimes of the powerful, including the state and corporate actors and institutions,¹⁵ as well as the historic

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¹⁴ Emma LaRocque, "Re-Examining Culturally Appropriate Models in Criminal Justice Applications," in Michael Asch, ed. Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference (Vancouver: UBC Press, 1997) 75 at 76. LaRocque is concerned with the way in which 'traditional' notions of Aboriginal justice have been characterized and juxtaposed in polar opposition to Anglo-European notions of justice. For instance, in response to one author's suggestion that Aboriginal languages have not word for crime, she insists at 82, "such a claim should be contextualized:"

Whether or not Aboriginal peoples have the Euro-originated word 'crime' in their lexicons, they definitely have recognized wrongdoing. To claim otherwise is to suggest they were bereft of notions of justice and morality. In fact, traditional societies had well-developed notions of crime and justice, with uncompromising mechanisms for controlling errant behaviour (at 82 - 83).

neglect of the experience of the environment, culture and entire communities as victims of forms of (seldom criminalized) violence.\textsuperscript{16}

I do not deny the importance of critical engagement with a self-referential notion of true "criminal law;"\textsuperscript{17} nor do I assert that the content of criminal law is self-evident, universal and transhistorical. However, to insist upon specificity in the scope and definition of criminal law need not lead one to an uncritical acceptance of the legitimacy of its norms. It is, however, important to be attentive to questions of form, as well as content, and to the diversity of legal instruments deployed by the state, many of which contain offences, but which do not involve the denunciation and sanction normally associated with criminal law. It is axiomatic to observe that in Canada the combination of prohibition and penalty do not suffice to create criminal law.\textsuperscript{18} In the literature reviewed below, I am attentive to the analytic distinction between legal and extra-legal forms of compulsion and legal coercion, between prohibition and regulation, between committal and conviction, in order to identity precisely the nature of the law under discussion.


\textsuperscript{17} See Dickson J.'s classic articulation in \textit{R v. City of Sault Ste Marie} (1978), 40 C.C.C. (2d) 353, 3 C.R. (3d) 30 (S.C.C) (online QL Lexis Nexis) at 9 (QL):

\begin{quote}
The distinction between the true criminal offence and the public welfare offence is one of prime importance. When the offence if criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction.
\end{quote}

\textsuperscript{18} Peter W. Hogg, \textit{Constitutional Law in Canada} (Toronto: Thomson Carswell, 2005) at 475 – 480.
Another important, if related, line of inquiry in this chapter analyzes the way in which legal historians have addressed, or not, the specificity of the two legal regimes of the *Indian Act* and the criminal law, and the sites of intersection between the Government's "Indian policy" and the criminal law component of its National Policy. The Indian policy of the Canadian government intensified over the last two decades of the nineteenth century, with the introduction of increasingly oppressive amendments to the *Indian Act*.19

I have identified four major themes within the historiography on the role of criminal law in relation to the Aboriginal Peoples of the Canadian Plains in the late nineteenth century. I have drawn on other historical literature relating to other parts of the country (notably the extensive socio-legal historiography relating to British Columbia in the nineteenth and early twentieth centuries) as well as, to a lesser extent, historical research which addresses other parts of North America and the legal tentacles of colonial Britain in other realms of the Empire. The remainder of this chapter is organized around these themes: first, Aboriginal homicide, including customary practices, and its reclassification as forms of murder and manslaughter; second, the role and contribution of the North-West Mounted Police and criminal law to the oppression of the Aboriginal peoples of the Plains that has preoccupied other historians, including an emerging cadre of Aboriginal scholars. A third theme is found in historical work which examines criminal law as a colonial legal form. This body of scholarship emphasizes 'criminalization' of Aboriginal peoples as a central strategy of colonial legal practice in Canada, as elsewhere. Some of these scholars call for more

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19 The fact that exclusive jurisdiction to legislate in relation to Indians and to criminal law rested with the dominion government perhaps blurred the boundaries between the two areas. Further compounding the 'blurriness' in the literature, perhaps, was the federal power in relation to the North-West Territories; notably here, the creation of the NWMP, the form of the administration of justice, and territorial governance until 1905.
emphasis on human agency and the relational nature of colonialism; for them, colonial law is never simply or successfully imposed by the ruling colonial authorities. Finally, a fourth and more recent theme in historical inquiry emerges from historical work that recasts the role of the state and its social and legislative policies. These scholars suggest that a preoccupation with the iron fist of the criminal law misses other forms of state and non-state strategies, including those of moral regulation.

In the concluding section of the chapter, I engage in my own form of recasting of the historical literature. By way of conclusion, I draw from these themes, and I engage critically with the discourse of criminalization.

2. Aboriginal Homicide: From Customary Practice to Murder Indictment

Homicide, murder trials, and capital punishment figure prominently in the Canadian legal historiographical literature.20 The prominence of studies of murder trials and capital case files, as unrepresentative as they may be of both Aboriginal crime and Canadian criminal

justice,\textsuperscript{21} is understandable. These are the sorts of cases which likely attracted the most attention in the press and for which records (such as the capital case files held at the National Archives of Canada)\textsuperscript{22} are more likely to exist. Certainly murder represents the most serious of criminal offences for which the most serious penalty was reserved, and it is not surprising that these extraordinary cases attract the attention of researchers.\textsuperscript{23}

One line of historical investigation, for instance, uses homicide to demonstrate both the recognition by colonial authorities that Indigenous peoples had their own legal values and norms, and the uncertainty, indeed doubt, of colonial authorities in Upper Canada as to their jurisdiction to prosecute Aboriginal people for offences \textit{inter-se}.\textsuperscript{24} Historians clearly

\begin{flushright}
\textsuperscript{21} Cornelia Schuh, "Justice on the Northern Frontier: Early Murder Trials of Native Accused," (1979-90) 22 Crim.L.Q. 74 acknowledges this at 75: "It should be pointed out that murder trials are by no means a representative sampling of the administration of justice among the northern native people." Jeremy Webber, on the other hand, writing of an earlier period and another place, and drawing on secondary sources, describes murder as "a common event between Aboriginal peoples and colonists." See Webber, \textit{supra} note 6 at 638.

\textsuperscript{22} National Archives of Canada [NAC], Department of Justice Capital Punishment Case Files, Archival reference no.: R188-53-2-E (Former archival reference no.: RG13-B-1). Every person convicted of a capital offence and hence sentenced to death had his or her file reviewed by the Governor in Council in order to determine whether the death sentence should be commuted. These records contain entire transcripts of the trial, the report of the trial judge, petitions, and other documents relating to the condemned person. They provide a rich source for historians of homicide: see, e.g., Carolyn Strange, "Stories of Their Lives: The Historian and the Capital Case File," in Franca Iacovetta & Wendy Mitchinson, eds. \textit{On the Case: Explorations in Social History} (Toronto: University of Toronto Press, 1998) 25; Grove, \textit{supra} note 20; Foster, "The Queen's Law, \textit{supra} note 20; Tina Loo, "Savage Mercy: Native Culture and the Modification of Capital Punishment in Nineteenth-Century British Columbia," in Carolyn Strange, ed. \textit{Qualities of Mercy: Justice, Punishment and Discretion} (Vancouver: University of British Columbia Press, 1996), 104 [Loo, "Savage Mercy"]; Jonathan Swainger, \textit{The Canadian Department of Justice and the Completion of Confederation 1867–1878} (Vancouver: UBC Press, 2000) at 56 – 78.

\textsuperscript{23} For instance, Schuh, \textit{supra} note 21 at 87-91, describes the 1916 murder trials in Edmonton of Sinnisiak and Uluksak, two Inuit men from the central Arctic. Sinnisiak was charged with the 1913 murder of a missionary, and both men were charged with the murder of two American explorers in 1913. A full account of the trial based on trial transcripts and NWMP reports was available to her. She writes:

Both trials were quite spectacular, involving the sensational evidence of several Inuit who had been brought south to testify (through an interpreter). The white participants behaved with a full sense of the symbolic significance of the proceedings.

\textsuperscript{24} See Harring, \textit{supra} note 6 at 113 - 118; Walters, \textit{supra} note 6.
struggle with how to interpret the available sources, are required to rethink, reverse
themselves, and inevitably proceed with caution.\textsuperscript{25}

Wendigo killings, the subject of a small body of legal historical research,\textsuperscript{26} are used to
illustrate the clash of values and beliefs between the two cultures, the rupture from tradition,
the inability of the Canadian legal system to accommodate the spirit world understood by the
Aboriginal accused, and the discomfort of legal authorities in prosecuting and punishing
these men. In these cases, most were charged with murder and, when convicted, were
convicted of the lesser included offence of manslaughter.\textsuperscript{27}

Studies of another form of homicide, characterized by Hamar Foster and John Phillip
Reid as “international homicide,”\textsuperscript{28} involve cases in which Aboriginal men and Anglo-
European - American trappers and traders clashed. Reid and Foster demonstrate the degree
of accommodation that existed between Aboriginal peoples and white traders and trappers,
and the extent to which Aboriginal principles and norms were observed in international

\textsuperscript{25} See Harring’s concession, \textit{ibid.} at 115, fn 28, that he had to reverse his previous position and to agree with
Mark Walters’ interpretation, \textit{ibid.}, of Shawanakiskie’s case (in which he was charged with murdering a Native
woman in 1821 in the town of Amherstburg). Shawanakiskie apparently claimed that he was justified in killing
the woman, as he was avenging the murder of a parent in accordance with the law of his people. There was
much doubt as to the jurisdiction to try the man, and his execution after conviction was stayed for a period of
time whilst opinions and advice were sought from London. Harring concedes that Walters’ analysis of the
resolution of the jurisdictional position is likely the correct one: jurisdiction ‘followed the flag’, and as the
killing had occurred in Amherstburg, it fell under Canadian jurisdiction.

\textsuperscript{26} See Schuh, \textit{supra} note 21 at 76 - 86; Harring, \textit{ibid.} at 217 - 238. Of the Wendigo killings, Schuh writes that
white authorities had little doubt that they were murder; in fact, as demonstrated by \textit{R. v. Machekeguonabe}
(1897) 28 O.R. 309 which she discusses in the same paragraph, convictions for manslaughter were more likely.
Of the handful of cases discussed by Harring and Schuh, only one man was convicted of murder, and the order
to release him came approximately six months into his sentence, although unfortunately three days after his
death. See also, Thomas Fiddler & James R. Stevens, \textit{Killing the Shamen} (Moonbeam, Ont.: Penumbra Press,
1985).

\textsuperscript{27} Harring, \textit{ibid.} at 221 - 224. In the unwritten mantra of beleaguered defence counsel: “Reasonable doubt goes
to sentence; reasonable doubt in murder goes to manslaughter.”

\textsuperscript{28} Foster, \textit{supra} note 20; Reid, \textit{supra} note 20.
homicides. Reid and Foster speak of a duty imposed on certain members of a nation, notably “kin folk of a specific lineage or of a defined degree to retaliate in kind for the killing of a member of the nation or kin group.”

Foster uses a specific murder case to demonstrate both differences between Anglo-Canadian and Gitksan law regarding homicide, and the demise of an older practice of accommodation. The case involved a Gitksan man, Haatq, who killed a man named Youmans in whose company Haatq’s son had drowned. Youmans was married to a Gitksan woman and would have been familiar with their law. But, he said nothing to Haatq upon his return to the village; indeed, he went two days and three nights saying nothing about the incident, nor did he offer Haatq a present. Haatq stabbed him within two hours of learning of his son’s death. Foster cites the Gitksan law relating to accidental deaths to explain why Youmans, because of his silence, came under suspicion:

It is expected that the survivors shall immediately, or as soon as possible, make known to the friends of the ... deceased, what has taken place. If this is not done, it is taken as evidence that there has been foul play...

The general custom ... is that if anyone calls another to hunt with him, to go canoeing, &c., and death occurs, the survivor always makes a present corresponding to his ability, to show his sympathy and good will to the friends of the deceased, and to show that there was no ill-feeling in the matter.

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30 Loo, supra note 22 also discusses this case.

31 Foster, supra note 20 at 42. Foster here is quoting from a Gitksan head chief’s letter to the provincial government, written by the local missionary.
Foster notes that while there was no liability at common law for accidental death, there was within Gitskan law. Haatq’s defence counsel relied on the customary law, but the jury rejected the premise of the defence and convicted him of murder. Thus ended, in Foster’s view, the period of accommodation in which the principles and norms of Indian law had held some sway and informed criminal processes. Thereafter, Foster argues, the Queen’s law prevailed. Foster demonstrates the significance of the ‘new era’ through two important statements made by Provincial Secretary John Robson, one of which is reproduced below. Foster notes that, in January 1885, Robson admonished the Christian Indians of Metlakatla, a Tsimshian community, that their council had no legal status and no right to make and enforce laws. He quotes Robson:

...Now, it is my duty to tell you that ‘Tsimpsean law’ is not known to nor recognized by either the Dominion or Provincial Government, and that the Indians of Metlakatla, in common with all the other Indians and whites, are under and bound to obey the Queen’s laws.

[and] ...

... to tell you plainly that the sooner you dismiss from your minds all idea of setting up what you are pleased to term your “own law,” and submit yourselves fully and loyally to the Queen’s law the better it will be for you and all concerned.  

For Foster, the story of the relationship between the Queen’s law and Aboriginal people is one in which the Queen’s law emerges triumphant and unapologetic, leaving no place or

32 Ibid. at 46.
space for compromise or for the values and norms of the Aboriginal peoples who found themselves required to be her loyal subjects.

3. Policing the Plains: The NWMP, Criminal Law and the First Nations

The most prominent, if not axiomatic, image of law and order on the nineteenth century Canadian Plains is that of the North - West Mounted Police (NWMP). The presence of the Mounted Police in the Territories represented and involved more than the enforcement of Canada’s criminal law. Their arrival in 1874 has been characterized in the historical literature in various terms; but no historian denies the monumental significance of their presence, whether it is said to represent the implementation of the National Policy in the consolidation of the Confederation of Canada, an expression of colonial domination, or the coercive and repressive arm of the young Canadian state. Scholars of all perspectives generally equate the Mounted Police with ‘The Law’ in the Territories; this equation is understandable, given the duties imposed on the force to act as police officers, prosecutors, justices of the peace, and gaolers in the Territories. 33

The historiography of the NWMP in relation to Aboriginal peoples is dominated by the scholarship of R.C. Macleod and John Jennings. Macleod expressly situates the work of the NWMP in relation to the Aboriginal Peoples within the framework of government Indian policy which he argues proceeded in three stages: the signing of treaties, persuasion to give up the hunt and settle on reserves, and the attempted to integration of Indians into the dominant economy and society.

Macleod and others identify an early period (1874 -1885) and a later period (post 1885) in Aboriginal/NWMP relations; this periodization of relations roughly corresponds with “pre - and post” Resistance/ Rebellion. For Macleod, credit for law and order in the ‘early period’ rests with the NWMP. Jennings also has characterized the 1885

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36 In Macleod’s view, in NWMP, supra note 33 at 27:

The police played a major part in the first stage, were almost entirely responsible for the second, and did what they could towards achieving the third. Their general approach to all three problems was simple but usually very effective. It consisted in giving the Indians first priority at all time. If the protection of the rights of the Indian demanded a policy that annoyed or interfered with the activities of the white settlers, that was unfortunate but it did not prevent the policy from being carried out. The police did not make promises they could not keep and they did all that they could to avoid passage of laws they could not enforce.

37Macleod, “Law and Order,” supra note 33 at 101:

The challenges they faced in the 1870s and 1880s were of an entirely
Resistance/Rebellion as “an obvious watershed both in Police and in Indian history,” but he cautions against emphasizing it as a ‘moment’ of demarcation and argues that the events of 1885 caused no dramatic change in police – Indian relations. For Jennings, the creation and enforcement of the Reserve system was a “more fundamental deep-rooted” cause of a deteriorated relationship between the First Nations and the NWMP.

Given the official or quasi-official nature of much historical work on the North-West Mounted Police, Walter Hildebrandt has argued that it is “difficult to find a balanced history of the NWMP.” Even the more scholarly account found in Macleod’s work is for Hildebrandt “as unsatisfactory as those of earlier police historians.” Hildebrandt acknowledges that there is “evidence of fair treatment of Aboriginal people by the NWMP,”

different order from those of the HBC era. Immigration was slow at first but reach tens of thousands by the end of the century. The buffalo and the whole Plains Indian economy based on the hunt disappeared with startling suddenness in the early 1880s. Through this great transformation the Mounted Police were outstandingly successful in maintaining order until the Rebellion of 1885.

38 Jennings, “NWMP and Indian Policy,” supra note 35 at 225. Macleod similarly fixes 1885 as “a natural dividing line because the Canadian Pacific Railway was completed at that time” (Macleod, NWMP, supra note 33 at 21), coinciding with both the disappearance with the buffalo and with the 1885 Rebellion which itself “was to a considerable extent a product of the coming of the railway and of the economic and social changes that it brought in its wake” (ibid.).

39 Jennings, ibid. at 226.


41 Hildebrandt, supra note 8 at 33.

42 Ibid. at 37.
and he concedes that Macleod replaced the image of the police as enforcers of law and order with an image of the National Policy and “a new society.” However, Hildebrandt argues that Macleod’s account of the failure of the National Policy and, in particular, of the failure of the Aboriginal people of the Plains to share in the profit of the new economy, reflects his own assumption about their culture and abilities.

A more complex relationship to Aboriginal peoples and the forms of law and policy they were called upon to enforce may be pieced together by a careful reading of the secondary literature. For instance, Jennings suggests that “hardening” of NWMP attitudes toward Aboriginal peoples preceded the event of 1885. Historians (including Jennings) also note the significance of shifts in Indian policy and the role the police were called upon to play in either bailing out zealous Indian farm instructors by arresting Indians who threatened or assaulted them (often as a result of provocation or inflexible adherence to government policy), or by enforcing a form of Apartheid, following the introduction of the now notorious pass system. The pursuit of this “policy of repression” says Jennings is usually thought to have been caused by the Rebellion; however, he argues that the Rebellion “merely made the policy more blatant.” But even here, historians are able to point to NWMP disagreement with the “work for rations” or “starvation policy” pursued by Indian officials, whose intransigence both caused hardship for the Aboriginal people and frequently triggered violence.

43 Ibid. at 36.

44 Jennings, “NWMP and Indian Policy,” supra note 35 at 228.

45 See, e.g. Hildebrandt’s discussion, supra note 8 at 46-47, of the arrest of Lucky Man as a result of a provocatively intransigent stance adopted by Indian Farm Instructor Craig in response to Lucky Man’s request for provisions for a sick child. The incident to which Hildebrandt refers likely involved Lucky Man’s son, Kawaechatataywaymat (Man Who Speaks Our Language) rather than Lucky Man himself: see Hugh A.
Recently, Sarah Carter, John L. Tobias, Walter Hildebrandt and Katherine Pettipas have re-engaged with the relationship between Aboriginal peoples and these law officers of the Crown. For instance, Carter has argued for a reallocation of credit for the relatively peaceful transformation the West:

The fact that the non-Aboriginal settlement of Western Canada proceeded relatively peacefully, and that ‘law and order’ was to a great extent observed, has almost entirely to do with the strategies and actions of First Nations.\(^{46}\)

In her discussion of Indian policy more generally,\(^{47}\) and specifically of the Pass system introduced after 1885, Carter notes the dubious legality of the pass system.\(^{48}\)

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\(^{46}\) Sarah Carter, *Aboriginal People and the Colonizers of Western Canada to 1900* (Toronto: University of Toronto Press, 1999) at 127 [Carter, *Aboriginal People*]. Carter re-emphasizes this point at 130:

Yet it remains the case that in Western Canada there simply was not the record of continuous violence and conquest that characterized not only the western United States but many of Britain’s imperial enterprises. This had as much to do with the strategies and actions of the Aboriginal residents as with the policies of government and the actions of a handful of police.

See, also, Hildebrandt’s critical engagement with Macleod’s characterization of the ‘benevolent despotism’ of the NWMP, *supra* note 8 at 35 – 37.

\(^{47}\) Sarah Carter’s research on government policies regarding Indian farming has challenged conventional wisdom that the First Nations were not amenable to pursue this different way of life, an interpretation Carter acknowledges she had thought would remain intact in her own research, but for which she soon found little support. She found that the First Nations peoples were amenable to learning to live and work in this new way, but were thwarted and demeaned by the bad faith of government policy and practices, implemented on the ground by farming instructors. Government policy reflected less a commitment to construction of a new mode of life than to compulsion, confinement and curtailment of the old. Carter, *Lost Harvests, supra* note 5 at ix.

Katherine Pettipas, relying on Jennings' work, also notes NWMP Commissioner (and Stipendiary Magistrate) Irvine’s position that the enforcement of the pass system was a breach of treaty rights. Carter argues:

Officials of the NWMP were never comfortable with the absence of any legal foundation for the pass system. The lack of a legal basis in this case undermined the validity of all NWMP operations: they were trying to demonstrate to the Indians that the police enforced a rational system of laws that operated to the benefit of all. In 1892 Commissioner L. Herchmer was advised by circuit court judges that the system was illegal and that the police would surely lose if their right to enforce it was challenged in the courts. The legal opinion of government law officers was sought, and they proved to be “unequivocally opposed to continuation of the practice.” In 1893, a circular letter was issued directing all police officers to refrain from ordering Indians without passes back to their reserves.

Carter observes that Assistant Indian Commission Hayter Reed “would have none of these weak-kneed legalistic concerns” and ultimately succeeded in having the NWMP reverse their position.

The historiography of the NWMP and Indian relations thus reveals tensions within the Canadian state, and challenges conventional causal explanations for the shift or hardening of the attitude of the police in relation to the First Peoples of the Plains. Indeed, further evidence supporting the minor theme of intra state discord is found in Tobias’ research,

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Carter, Lost Harvests, supra note 5 at 153 - 154.

Ibid. at 154
which demonstrates not only Indian Commissioner Edgar Dewdney's efforts in pursuit of a “policy of compulsion,” but also the limits. Dewdney was committed to legal coercion and incarceration of the Cree, but Tobias explains that he was not content to leave this to the rule of law of the regular criminal courts:

...what was needed in his opinion were trial judges who ‘understood’ Indian nature at first hand and who would take effective action to keep the Indians under control. Therefore, Dewdney wanted all Indian department officials in the West to be appointed stipendiary magistrates in order that all Indian troublemakers could be brought to ‘justice’ quickly.\footnote{Tobias, supra note 45 at 221 - 222. Historians writing of other jurisdictions demonstrate that Dewdney’s views were not unique to him, and that colonial authorities in other contexts expressed frustration at judicial refusals to enforce discriminatory legislation: see, e.g. John McLaren, “The Early British Columbia Judges, the Rule of Law and the “Chinese Question”: The California and Oregon Connection,” in John McLaren, Hamar Foster & Chet Orloff, eds. Law for the Elephant, Law for the Beaver: Essays in the Legal History of North American West (Regina & Pasadena: Canadian Plains Research Center, University of Regina, and the Ninth Judicial District Historical Society, 1992) 237; Sanjay Nigam, “Disciplining and Policing the ‘Criminal by Birth’, Part 1: The Making of a Colonial Stereotype – The Criminal Tribes and Castes of North India” (1990) 27 Indian Economic & Social Hist. Rev. 131; Sanjay Nigam, “Disciplining and Policing the ‘Criminal by Birth’, Part 2: The Development of Disciplinary System, 1871 - 1900” (1990) 27 Indian Economic & Social Hist. Rev. 257.}

Indeed, as both Jennings and Pettipas demonstrate above, and Roderick Martin confirms,\footnote{Roderick G. Martin, “Macleod at Law: A Judicial Biography of James Farquharson Macleod, 1874 - 94” in Jonathan Swainger & Constance Backhouse, eds. People and Place: Historical Influences on Legal Culture (Vancouver: UBC Press, 2003) 37.} James Macleod’s historic relationship with the NWMP and his reputation for eschewing ‘legal niceties’ neither predicted nor determined his scrupulous fairness in relation to Aboriginal accused, notably but not exclusively in his acquittal of Star Child, who had been charged with the murder of an NWMP officer. Indeed, it appears that his ‘understanding of Indian nature’ led him to insist upon fair and respectful treatment of them by officers of the Crown and Court.\footnote{cf Satzewich’s assessment, supra note 11.}
In sum, this historical work offers another explanation for the difficulty in finding good accounts of the history of the NWMP in relation to Aboriginal peoples in the prairie west. Within the overarching context of the National Policy and the enforcement of Canadian criminal law, it appears that, while Macleod’s assessment of their role as agents of government policy is sound, Canadian historians have been able to point to instances of ambivalence, if not outright resistance, to the enforcement of the larger policy and regulatory initiatives of the Canadian government, notably Indian officials’ policies.

4. **Criminal Law as a Colonial Legal Form, Criminalization as a Colonial Legal Process**

   (1) **Law and Colonialism**

   While Western Canada was long regarded (and, chafing, regarded itself) as a colony of Canada, it is rather more recent for historians to situate the relationship between Canada and the Aboriginal peoples within a colonial framework. For some scholars, colonial domination and its legacy express the nature of Canadian law’s role in the lives of the First Nations. And for some, colonialism and criminalization in particular better express the nature of criminal law’s role in the lives of the First Peoples.

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Colonialism may be understood as one form of (modern) domination, whose central feature "was a process in which one society endeavoured to rule and transform another," in which the rhetorical principle, but never the practice, was often assimilation. Others might express the pure essence of colonialism to be the denial of self determination. In his careful consideration of the 'law and colonialism' historiography at the close of his study of the West Coast Aboriginal fishery, Douglas Harris offers his own comprehensive definition of colonialism and the place of law therein:

'Colonialism' describes the processes of military, economic, and cultural domination employed by a state to bring territory and people within its sphere of control. It involves the transfer of cultural and economic institutions from one society to another, and results in the appropriation of land and resources. ... The circumstances of settler and administrative regimes differ considerably, but in both contexts the varied tactics or strategies of power used to assert control have ranged from gunboats and infantry to cultural definition. Somewhere in between, combining violence and discourse, one finds law.

The nature of the contribution of criminal law to legal expression of Canadian colonialism in relation to Aboriginal peoples in Canadian legal historiography is assumed more often than it is demonstrated. A certain self-evidence about the role of criminal law permeates some of the literature. However, the issue of the precise contribution of criminal law in the context of the NWT in the period covered by this dissertation is, arguably, a vexing one – one that is not always acknowledged or addressed in the legal historiography. In order to develop this argument, an excursion into 'socio-legal' colonial scholarship more generally is necessary.

57 Or, attempted domination: Carter, ibid. at 103.


59 Douglas C. Harris, Fish, Law, and Colonialism: The Legal Capture of Salmon in British Columbia (Toronto:
As Sally Engle Merry noted in her early influential review essay, law has been described as the “cutting edge of colonialism,” central to the “civilizing mission” of imperialism. However, Merry argued that research into colonial legal systems internationally reveals that law’s centrality is in fact “curiously ambiguous.” Studies of colonial law provide evidence that it is also the site of resistance and its processes afford opportunities for limiting imposed power. In my view, Merry’s early intervention continues to be relevant – there are ambiguities, or contradictions, in the way in which colonialism’s legal forms and processes have been expressed and experienced, processes themselves which have been “highly varied in place, time, and situation.”

For socio-legal historical and international law scholars, an appreciation of the nature of the specificity of colonial and post-colonial social forms is important. In this regard, Peter Fitzpatrick, Martin Chanock, and Francis Snyder also can be seen as having provided groundbreaking research into colonial legal forms, practices and process, notably in relation to customary law and dual legal systems. In particular, the nature of the legality

University of Toronto Press, 2001) at 186

60 Supra note 58 at 890.

61 Ibid. at 891.

62 Ibid. See also Carter, Aboriginal People, supra note 46 at 102-103, and Harris, supra note 59 at 186, who recently echoed Merry’s assessment of the contribution of law to the colonial projects, arguing that “law was at the forefront” of nineteenth century European colonialism, not only as “a vehicle” and “principal conduit” through the control of land and people was secured, but “at a basic level it justified the colonial projects.”


afforded by colonial legal processes is emphasized by Fitzpatrick: The colonized legal subject had a right to law, but not to self-determination.  

Themes of resistance and creative use of the law can be found in the socio-legal historical literature that examines colonialism. However, for Fitzpatrick it is important to highlight the extent to which forms of resistance by indigenous and subordinated native populations were relegated to the legal category of crime, and hence individualized and marginalized. Indeed, Fitzpatrick argues that “studies of resistance enable us to see the criminal law as constituted by and dependent on them and to see it, further, as the central support of colonial domination” [emphasis added]. Criminal law in the colonial context, then, is understood as a “prime mode of rule;” – “Operatively, the essence of colonialism was concentrated in the criminal law.” Fitzpatrick’s eloquence is persuasive and his argument to draw crime and resistance in from the margins in order to demonstrate how

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67 Fitzpatrick, “Crime as Resistance,” supra note 56 at 273:

...resistance was contained within the category of crime. Resistance was almost invariably, in one form or another, a crime, and crime in the Western/colonial conception was a deviation, something exceptional and occasional.

68 Ibid.

69 Ibid. at 274. See also, Harris, supra note 59 at 186.

70 Ibid., at 276.
colonial strategy effectively rendered entire native societies as deviant, with wrongdoing ubiquitous, is compelling.\footnote{In northern India, for instance, entire tribes were criminalized by nineteenth century colonial Criminal Tribes legislation. See Nigam, “The Criminal Tribes;” and “Disciplining and Policing,” \textit{supra} note 52.}

However, questions remain as to the ‘centrality’ of law within colonialism and, in particular, the centrality of criminal law. The authors reviewed above assert its centrality, but also regard its contribution as ambiguous; it is both the vehicle and conduit, but also somewhere in between. It may well be that the centrality and ambiguity of law that is identified reflects in part the centrality and ambiguity of law to legal scholars, including socio-legal scholars. The caution against uncritical determinism\footnote{See Phillips, \textit{supra} note 63 at 238.} may be extended to the location of the researcher and scope of her scholarly perspective. As I will demonstrate below, legal historical research that is attentive to legal form and the specificity of legal forms, even the legal forms of colonialism, stands the best chance of avoiding over inclusive claims of the centrality of criminal law within colonial social formations.

Canadian legal historical work is not informed uniformly by the conceptual relevance of colonialism and its legacy, perhaps (to extend a point Harris has made in another context) because of a “blindness to the persistence of North America’s colonial past.”\footnote{Harris, \textit{supra} note 59 at 199. Harris is actually attempting to explain the lack of connection made between studies of British colonialism in North America and those of Asia and Africa. Harris at 198 -199 suggests a ‘two solitudes’ quality of historical studies of law and colonialism in North America and those of Africa and Asia, noting that the research does not draw on each other. One reason, he argues is the form of colonialism - settler colonialism, in which the indigenous peoples eventually numerically outnumbered – which predominated in North America. Harris’ point may be extended to the forms of colonialism found in Australia, New Zealand, and some parts of colonial Africa (e.g. Kenya, Rhodesia, as it then was, and South Africa).} However, some recent Canadian socio-legal historical literature contains express reference to
colonialism, colonial legal experience, and colonial violence; in other work, the discourse of colonialism is not invoked expressly, but the phenomenon discussed is evocative of the forms of law associated with colonial legality. Here again, even within the limited confines of the Canadian (legal) historical experience, the ‘colony’ and ‘colonial law’ is not one but many. If Canadian legal historical scholarship is largely a regional affair so too has colonial law been expressed, experienced and analyzed along largely regional lines, as illustrated by the legal historical scholarship of Nova Scotia, Lower Canada, British Columbia, to cite the most obvious.

The specificity of the Canadian context, and in particular the fact that the First Nations peoples were not conquered militarily, has implications for the form of the

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75 I am thinking here, in particular, of Hamar Foster’s work, notably, “The Queen’s Law,” supra note 20; see also, Grove, supra note 20.


79 See, e.g., Tina Loo, Making Law, supra note 74; Hamar Foster and John McLaren, eds. Essays in the History of Criminal Law Volume VI: British Columbia and the Yukon (Toronto: The Osgoode Society for Canadian
colonialism they experienced. The historiography also makes clear that the First Nations’ experience varies by Nation, Treaty and region. John Borrows offers the following précis:

The exploitation and colonization of Aboriginal peoples occurred through, inter alia, the imposition of band councils over hereditary governments; the criminalization of their social, economic and spiritual relations through the enactment of laws against potlatch; the fragmentation of their territorial integrity through the denial and/or infringement of land rights and the creation of small inadequate reserves; the century-long denial of the right to vote in federal and provincial elections; the traumatic removal of whole generations of children through residential schools and insensitive child welfare laws; and the restricted access to their traditional food sources through the imposition of discriminatory fishing and hunting licenses.  

Borrows does not suggest that this encapsulation covers the field. Certainly, and perhaps more fundamentally, Borrows argues that the historical assertion of Crown sovereignty over land “which denies Aboriginal nations underlying title and overriding self-government is a ... blunt exercise of arbitrary power.” For Borrows, not only is the rule of law not central to this colonialism, it is observed only in its violation. But what can be said of the legal forms contained within Borrows’ list? They include the Indian Act, child welfare legislation, hunting and fishing regulations, federal and provincial election legislation. The policies governing the forced removal of Indian children to residential schools were permitted by the Indian Act. One is hard pressed to find criminal law, and yet, as I will illustrate in the next section, the discourse of criminalization has emerged within the legal historical literature

Legal History and University of Toronto Press, 1995).

80 Borrows, Recovering Canada, supra note 1 at 260, fn. 168.

81 Ibid. at 117.
and as I will argue, this discourse of criminalization embraces a multitude of other legal forms.

(2) Criminalization as a Colonial Process

In recent work examining the efforts of the Canadian state to restrict and curtail traditional forms of Aboriginal expression and activity, including dances and ceremonies, hunting and fishing, the language of criminalization has been invoked. It needs to be acknowledged that not every author expressly frames this as criminal law or as an expression of colonialism. Sidney Harring, however, does both. In White Man's Law, Harring acknowledges that he depicts law “in one-dimensional terms: much is said about law acting against indigenous people, but lacking is an understanding of how Indians acted to structure the impact of Canadian law on their lives.” In so doing, Harring situates himself within “the most well-known model of colonial law, that of imposed law:”

In this model the dominant colonial power imposes its law over acquired lands and peoples through its superior military and police power. Most legal history of colonial/indigenous

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82 See, e.g., Constance Backhouse, Colour-Coded: A Legal History of Racism in Canada, 1900-1950 (Toronto: The Osgoode Society for Canadian Legal History and University of Toronto Press, 1999) at 60 – 69 [Backhouse, Colour-Coded]; Loo, “Dan Cranmer’s Potlatch,” supra note 66 at 128; Harring, supra note 6 at 118 – 123, includes liquor, hunting and fishing regulations in his discussion of criminal law and Indians in Upper Canada. Borrows also refers to “the criminalization of their social, economic, and spiritual relations through the enactment of laws against potlatch...” in Recovering Canada, supra note 1 at 60, fn 168. Concerning a somewhat later period, see also Joan Sangster, “Criminalizing the Colonized: Ontario Native Women Confront the Criminal Justice System, 1920 - 60,” (1999), 80 Can. Hist. Rev. 32 who, at 34 (drawing on Chanock, supra note 64) characterizes law as the “cutting edge of colonialism,” with its “final lesson” of incarceration; Robin Brownlie & Mary Ellen Kelm, “Desperately Seeking Absolution: Native Agency as Colonialist Alibi?” (1994) 75 Can. Hist. Rev. 543 reproduce, at 546, in passing and without comment, a reference to criminalization of the potlatch in their critical engagement with Tina Loo. Even in their otherwise penetrating critique, criminalization appears as self-evident, requiring no interrogation.

83 Harring, ibid. at 14.
contact describes this model: at its simplest level, indigenous people have their lands taken away by colonial law and are forced to live isolated lives on the margins of the colonial society. This is a miserable legal history of oppression, violence, and domination. Indigenous people were victims of every kind of legal violence, fraud, and theft.\textsuperscript{84}

This, arguably, is a recurring image of both the nature of the relationship between Aboriginal people and colonial/Canadian law. The swath of implicated law is a wide one. There are other voices in the colonial law scholarship that offer different emphases. It is significant, in my view, that one recent study expressly devoted to law, colonialism, and First Nations addresses the struggle over the right to fish and the regulatory framework, including offences, of the \textit{Fisheries Act}.\textsuperscript{85} Nowhere in Douglas Harris' careful study of the restriction and regulation of the Aboriginal fishers of British Columbia does he characterize the process as one of criminalization. Similarly, Katherine Pettipas' equally rigorous study of the interference with and prosecution of First Nations ceremonies on the prairies characterizes Government policy as one of regulation.\textsuperscript{86}

And, while Tina Loo characterizes the introduction and operation of the Potlatch provisions as one of criminalization, she, like Merry, points to the way in which the West Coast peoples participated within the legal system, retained counsel, made arguments, used the rhetorical devices and technical arguments to their advantage. In this, as Fitzpatrick would remind us, they were not unique: as colonial legal subjects, they could assert legal rights, but not their right to self-determination.

\textsuperscript{84} \textit{Ibid.} at 10.

\textsuperscript{85} Harris, \textit{supra note 59}.

\textsuperscript{86} Pettipas, \textit{supra note 5}.
Finally, it appears that pan Canadian legal historiography might offer a challenge to the ‘centrality of criminal law’ thesis, not simply by an insistence upon more attention to the specificity of the legal form of criminal law. Jean-Marie Fecteau’s study of post conquest criminal law suggests that the pre-conquest inhabitants of Lower Canada effectively boycotted British criminal law. It is difficult to sustain an argument for centrality of law when in some contexts, the evidence suggests that the targets of subjugation ignore the legal instruments of, and refuse to cooperate in, their subjugation.

In recent socio-legal historical work on law and colonialism that, in varying degrees and combinations, bears the influence of anthropology, legal pluralism, and international law, scholars have begun to re-examine the nature of the relationships between colonized peoples and colonial law. This scholarship points to the ways in which Aboriginal peoples actively participated as actors in legal processes, as complainants, informants, interpreters, witnesses, and in the criminal justice system more generally, acting as guides and special constables for the police.

In an article that challenges conventional wisdom and ‘presentist’ assumptions about the extent of aboriginal crime in the NWT, Macleod and Rollason argue that considerable evidence can be found that Aboriginal people experimented and used the law when it appeared to them to be useful:

> Even in its earliest years, the criminal justice system in the NWT was emerging as layered and complex. Natives actively negotiated their place within the legal system: a fact that natives seem to have understood more clearly than whites, who

87 Fecteau, *supra* note 78; see also Hay, “The Meanings of the Criminal Law,” *supra* note 78.

took the native position within the system very much for granted. In the period before 1885 natives negotiated from a position of considerable strength. Political, demographic and economic changes after 1885 seriously diminished native bargaining power. How this development affected native crime rates remains to be documented.  

Tina Loo also pursues also the theme of First Nations peoples as active agents in the development of legal institutions and processes in the Canadian West – who, as guides, trackers, constables, court interpreters and Crown witnesses “brokered the extension of European state power in the form of law...” Loo demonstrates the ways in which Aboriginal peoples navigated the legal system, albeit in the context of their involuntary participation in the first place.

In a recent essay she pursues this theme of First Nations peoples who used the law, cooperated with the police, erected gallows, worked as constables, and so on, and offers this assessment:

... they helped reproduce the system that contributed so much to their domination. However, their engagement with the law and their victimization by it was more complex than simple, straightforward oppression. ...[n]ative peoples’ engagement with the law speaks to and for the ambiguities and contradictions of power, complicating our understanding of agency and oppression and hegemony and resistance (emphasis added).  

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89 Macleod & Rollason, supra note 13 at 178.


91 Ibid. at 63.
Loo’s argument is challenging, if not provocative, but I take issue with both her elevation of law’s rhetoric as a site of agency,\(^{92}\) and the casual implication that anyone regards any form of oppression as “simple” or “straightforward.” Her invocation of “agency” in opposition to “oppression” reveals an insufficient appreciation of the significance of structural constraints.\(^{93}\) Agency is not simply the act of self actualization; alternatively, agency in the face of coercive law may be a form of self actualization. In any event, Loo’s site of agency is the rhetoric or argument of law:

> The power of argument is creative. People have to make arguments—they have a degree of agency -- and in making them they can exploit the strategic potential embedded in the way the law works. As a way of arguing, the law not only allows the powerless to resist the oppression of the powerful, but it also gives them a means to transform their own relationships.\(^{94}\)

This celebration of the creative power of argument may have some resonance in the context of the cases with which she is concerned: Loo’s earlier study of the Potlatch prosecutions in British Columbia reveals that many of the Aboriginal people charged with violating the Indian Act restrictions of the Potlatch were represented by counsel at their trials and appeals. Many of them were acquitted. The Aboriginal Peoples of the B.C. northwest who figure in Loo’s study appear to have been relatively better off; their economy was resource-based (fishing, sealing and trapping) and their expertise beneficial to the developing British Columbia economy in the early years of the twentieth century.\(^{95}\) The contrast with the form of hunting and trading based economies of the Plains, the betrayal of the Treaties, and

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\(^{92}\) See Loo, “Don Cranmer’s Potlatch,” *supra* note 66.

\(^{93}\) See also, Brownlie & Kelm, *supra* note 82.

\(^{94}\) Loo, “Tonto’s Due,” *supra* note 92 at 64-65.

\(^{95}\) Loo, “Don Cranmer’s Potlatch,” *supra* note 66 at 138.
the forms of compulsion and coercion that accompanied it, could not be more striking. One finds very little legal rhetoric in their criminal trials, because precious few received the legal services and representation of legal rhetoriticians.

Loo also challenges the view that Aboriginal values disappeared completely from criminal law, arguing that not only did Aboriginal peoples engage with the law, but also shaped and influenced legal decisions. It may also be worth considering the extent to which the Aboriginal values (e.g. mercy, compensation) she cites and dominant legal values shared more consonance than is generally thought.

I want to return to her argument cited earlier above: that Aboriginal people who participated actively in policing and court processes “brokered the extension of European state power in the form of law,” and who thus “helped reproduce the system that contributed so much to their domination.” In an apparent effort to distance herself from what she clearly regards as one-dimensional understandings of victimization, she posits a notion of agency in which Aboriginal participation in the legal system is perceived as tantamount to collaboration with legal authority against their community. In explaining the employment of Aboriginal men as special constables, or the role of Chiefs and communities in turning over alleged murderers, she argues that they were deploying the law to serve their private

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97 Loo, “Tonto’s Due,” supra note 92 at 83 - 90. Loo refers to the influence of Aboriginal notions of compensation and government assistance in retaining counsel, the relevance of forms of provocation, and the exercise of the royal prerogative of mercy as sites where Aboriginal values continued to have influence in the legal system.

98 This is, obviously, a speculative point, but I am influenced, and inspired, to consider this more fully having read Emma LaRocque’s critical engagement with what she characterizes as “supposed Aboriginal and Euro-Canadian ‘justice paradigms’” in which Aboriginal and non-Aboriginal notions of justice are posed as antithetical to each other. See LaRocque, supra note 14 esp. at 78 - 93.

99 Loo, “Tonto’s Due,” supra note 92 at 63.
interests. In attempting to reclaim and reconstruct Tonto, she in fact bolsters a different stereotype, that of the morally suspect, always untrustworthy, Aboriginal man. Loo’s illustration of the ways in which Aboriginal people participated at all levels of the emerging criminal justice system is an important contribution, as is her argument that Aboriginal values continued to be relevant at different points and times in the legal process. While the fact of the participation of colonized peoples in colonial legal processes is not unique, as colonial scholars writing in other disciplines of other contexts have shown, understanding its forms and significance remains a more difficult challenge.

In conclusion, the self-evidence of the nature of the relationship between colonial domination and criminalization is, in my view, a trap for the unwary. Criminal law becomes all law; criminalization becomes an umbrella that covers all manner of legal forms (from liquor violations, to hunting and fishing offences, to the Indian Act, and sometimes even criminal law). In critical legal historical work on criminal law, criminal law is depicted “in

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100 Ibid, at 82. This is an argument with which I will take up more fully and take issue with in Chapters Five and Six. In the court records I have examined, the Chiefs who were prosecuted or who acted as Informants appear to have been pursuing their community’s interests. Cree Chiefs Beardy and Lucky Man (see Hildebrandt, supra note 8 at 46 - 47) and Stoney Chief Lean Man were prosecuted criminally at different times for attempting to assist their people; Cree Chiefs Beardy, Red Pheasant and Strike Him on the Back (through his Councillor) invoked the law to seek assistance or redress for their Band members; and, Stoney Chief Bear’s Head was permitted to post bail in 1882 for Chief Lean Man. Chief Mosquito testified as a character witness in another case, on behalf of one the members of his band charged with horse theft. One case, also discussed by Macleod & Rollason, supra note 13 at 176 - 77, involved the Blackfoot Chief Stamistocotar (Bull Head) in the prosecution of an apparently ‘private matter’: he accused a Métis man of stealing one of his horses.

101 See, e.g., Chanock, supra note 64; Benton, supra note 90 at 17. Benton observes at 14,

Conquered peoples showed themselves to be quite adepts and sophisticated at interpreting the significance of claims to jurisdiction and strategically taking positions to undermine those claims. ... [e.g.] American Indians at times showed considerable sophistication in their appeals to religious as well as state legal authorities.
one dimensional terms"\textsuperscript{102} – criminal law "acts against" subordinate people (women, indigenous peoples, workers, and so on). This is the dominant story – inequalities of class, race, and gender are reinforced as the criminal law bears down on those brought before it. Against the ‘coercive domination’ story of criminal law is set and celebrated instances and forms of ‘resistance’ to it. And yet, some of the literature reviewed above also may be read to offer a more relational notion of criminal law,\textsuperscript{103} even in a colonial context.

The question of how to identify and interpret forms of participation and treatment of subordinated peoples in the criminal processes is an important one for this dissertation. Few historians today would suggest that the Aboriginal peoples were simply passive victims of the new dominant order that was being established in the Territories. At the other extreme, it is also an error to regard every act of defiance or criminal activity as a form of resistance. The challenge is to identify forms and expression of resistance whilst resisting an impulse to portray every act in heroic terms. In the middle is the vexing matter of participation, and here again, the challenge is to attempt to avoid the worst excesses of misunderstanding.

5. Moral Regulation

For some historians, the language of coercion, oppression and control is too blunt and over inclusive to capture what relation, if any, might be found between criminal law and other legal forms of moral regulation. A relatively recent body of socio-legal historical scholarship in Canada has organized its lines of inquiry around the theoretical concept of

\begin{footnotesize}
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\item \textsuperscript{102} As Harring, \textit{supra} note 6 at 14 says of his own contribution.
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"moral regulation." This literature points to aspects of state law outside the criminal law (liquor prohibition, liquor licensing laws, the *Indian Act*). Tina Loo, for instance, emphasizes the "moral improvement" impulse of the *Indian Act*;104 Carolyn Strange and Tina Loo, characterize the federal Indian Affairs Department and the *Indian Act* as "unabashedly concerned with transforming the character of all aboriginals."105 While acknowledging the place of the National Policy and the role of the NWMP, Loo and Strange emphasize the "moral suasion" and "buffer role" of the NWMP in the introduction and maintenance of order in the young dominion.

One strength of this scholarship to socio-legal historians of criminal law is the call to look beyond criminal law to other areas of law and state policy and to other social institutions, to remind us of the other areas of law and social policy, such as employment, liquor regulation, child and social welfare, and health care, as well as social agencies and activists who operate outside the formal apparatus of the state.

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104 Tina Loo, "Don Cranmer's Potlatch," *supra* note 66 at 129.


On the use of the word "aboriginals," I prefer to use "Aboriginal" as an adjective (modifying the word "peoples" in this context) and not as a noun.

The moral regulation scholars seek to remind us that “social control” is too blunt an analytic instrument;\(^\text{107}\) that coercion offers but an incomplete explanation of the law’s role, and that ideology may similarly not capture the significance of law as rhetoric,\(^\text{108}\) and that the state has never held the monopoly in the area of social control and moral reform.\(^\text{109}\) These scholars seek to break with a theoretical tradition that emphasizes both the central and coercive role of the state (and law) in social theory and, given the muted treatment of matters economic and material in this literature, it is clear that they are part of ‘postmodernist’ break with materialist explanation for the nature of social relations and the direction of social change.\(^\text{110}\)

However, as Dorothy Chunn and I have argued elsewhere, the moral regulation school does not deliver the theoretical advance it insists upon, and it collapses social control into state control.\(^\text{111}\) In particular, I am concerned that this scholarship is not sufficiently attentive to the different forms and roles of law—coercive, controlling, and regulating. It is not a matter of transcending “coercion” or “control” in favour of a more flexible notion of regulation. Nor is it enough to “decentre” the law, state and power if the result is an

\(^\text{107}\) I have considerable sympathy with this aspect of the moral regulation school’s critique: see Dorothy Chunn and Shelley Gavigan, “Social Control: Analytic Tool or Analytic Quagmire?” (1988) 12 Contemporary Crises 107; see also Chunn & Gavigan, ibid.

\(^\text{108}\) Loo, “Don Cranmer’s Potlatch,” supra note 66.

\(^\text{109}\) Valverde, The Age of Light, supra note 106.

\(^\text{110}\) For an early and thorough exposition of postmodernist analyses and their relevance to law, see Alan Hunt, “The Big Fear: Law Confronts Postmodernism” (1990) 35 McGill L.J. 507.

explosive dispersal of social relations and the explanatory concepts/ analytic categories of “power, agency and experience.”

The *Indian Act*, as but one illustration, contained many sections which were oppressive, which compelled First Nations people to do certain things, but which were not coercive; but, the *Indian Act* clearly contained many coercive provisions. Thus, it is important to remember that while there was a “moral improvement” component to the *Indian Act*, it became increasingly coercive – a unique piece of legislation through which to discipline and punish.

6. Conclusion: Criminalization Recast

...in some colonial settings, shifting definitions of criminality were also central to political strategies of domination by colonial powers. But mere administrative regulations – changing requirements to sit for civil services examinations, for instance, could also emerge as focal points of controversy, and in turn drive legal reforms in other areas. When we analyze colonial law, we must not restrict our view to particular kinds of law but must allow wide flexibility in order to identify critical moments.

For some scholars, the prohibition of some forms of religious ceremonies and dances, together with special practices and policies, such as the Pass System, offer evidence of the

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113 Benton, *supra note 90* at 14.

114 Re: the pass system, see Carter, *Lost Harvests*, *supra note 5* at 149 - 158.
nature of the Canadian state's treatment of Aboriginal Peoples. For the most part, these initiatives occurred under the legislative auspices of the Indian Act or the administrative initiatives of the Indian Commissioner and his Indian Agents in the field. It has become commonplace in some of the literature to refer to the criminalization of Indians and Indian religious celebrations. But, we can also find instances and forms of NWMP resistance to federal Indian policy. Katherine Pettipas' carefully researched study of the regulation and repression of indigenous religious ceremonies on the Prairies provides irrefutable evidence of the legalised campaign of repression of forms of religious celebrations. And, while her work demonstrates both the lengths to which the government went to circumscribe and curtail these forms of religious expression, and of the prosecution and imprisonment of a number of Aboriginal celebrants, she also notes that some members of the NWMP actually ignored orders to prevent dances and facilitated the events. Pettipas and Jennings both cite Stipendiary Magistrate Macleod's refusal to convict Indians who had been arrested for performing a Sun Dance. Macleod, a former Commissioner of the NWMP, is said to have delivered "a scathing rebuff" to the police who had made the arrests, likening their conduct to having made an arrest in a church. (Even Hildebrandt concedes that the police were not the policy makers.)

115 Backhouse, supra note 82 at 60 - 63; Pettipas, supra note 5; Loo, “Don Cranmer’s Potlatch,” supra note 66

116 See, e.g., Backhouse, ibid. at 60; Loo, “Don Cranmer’s Potlatch,” ibid. at 128; Borrows, supra note 1, at 20, fn 168; Brownlie & Kelm, supra note 82 at 546.

117 Pettipas, supra note 5 at 110 -111.

118 Jennings, North-West Mounted Police, supra note 33 at 96 -97; Pettipas, ibid. at 111.

119 Hildebrandt, supra note 8 at 48.
In sum, Pettipas’ study of the regulation of Plains Indian religious ceremonies evinces a nuanced analysis, showing the uneven and contradictory tensions that accompanied this damaging legislative initiative. She reminds her readers that only some forms of dances and celebrations were prohibited (those involving ‘giveaways’, and ‘piercings’) by the Indian Act, that because of its vagueness, the police often declined to enforce the infamous s. 114 of the Indian Act,\textsuperscript{120} and that even Indian officials were of the view that a prosecution should be undertaken only as a last resort.\textsuperscript{121} It is also clear that some First Nations people were prepared to “test” the strength and limits of the law.

In the next chapter, I turn to the new legal institutions and the actors responsible for the introduction of Canadian criminal law to the First Nations in the NWT. Because of his prominence in the Territories and his court records in particular, I also introduce Hugh Richardson.

\textsuperscript{120} In 1884, the Indian Act had been amended prohibit the “Potlatch” and the dance known as the “Tamanawas”: An Act further to Amend the Indian Act, 1880, 27 Vict. (1884) c. 27, s. 3. The Act to further Amend the Indian Act, 58 – 59 Vict. (1894), c. 35, s. 6 extended the restrictions and created a new s. 114:

Every Indian or other person who engages in, or assist in celebrating or encourages either directly or indirectly another to celebrate, any Indian festival, dance or other ceremony of which the giving away or paying or giving back of money, goods or articles of any sort forms a part, or is a feature, whether such gift of money, goods or articles takes place before, at, or after the celebration of the same, and every Indian who engages or assist in any celebration or dance of which the wounding or mutilation of the dead or living human being or animals forms a part or is a feature, is guilty of an indictable offence and is liable to imprisonment for a term not exceeding six months and not less than two months; but nothing in this section shall be construed to prevent the holding of any agricultural show or exhibition or the giving of prizes for exhibits thereat [emphasis added].

\textsuperscript{121} Pettipas, \textit{supra} note 5; Jennings, \textit{The North West Mounted Police, supra} note 33.
Chapter Two

Legally Framing the North-West Territories:
The Introduction of Canadian Criminal Law to the Plains, 1870 – 1903

1. Introduction

In this chapter, I introduce the legal framework and institutions of, and actors in, the criminal law in the Canadian Plains after 1870. I widen the frame of conventional understandings of criminal law and the administration of criminal justice in the NWT to introduce the particular contribution of and relation to the Canadian state to the First Nations of the Plains.¹

I begin by considering the legal legacy of the Royal Charter of 1670 which effectively deeded the entirety of Rupert’s Land to the HBC, and delegated the administration of justice to the Company. One might be forgiven for simply saying - and the rest is history. But, of course, what followed from this imperial conceit was not a simple unfolding of history. Complex and contradictory relationships were forged between the Company and the First Peoples over the next three hundred years when, without a word to its indigenous partners, the Company signed off with the Crown for £300,000, land and mineral resources back, and (sort of) walked away.²

¹ In many ways, government policy and regulation expressed through and under the auspices of the Indian Act was the most significant contribution of the Canadian state to the lives of the First Nations. I demonstrate this more fully in Chapter Five.

² Sarah Carter, Capturing Women: The Manipulation of Cultural Imagery in Canada’s Prairie West (Montreal & Kingston: McGill-Queen’s University Press, 1997) at 20 [Carter, Capturing Women]; Sarah Carter, Aboriginal People and the Colonizers of Western Canada (Toronto: University of Toronto Press, 1999) at 106 [Carter, Aboriginal People]. See also, Lewis H. Thomas, The Struggle for Responsible Government in the
Mindful of the overarching importance of the Treaties, I identify the criminal law dimensions and implications of Treaties Four and Six. A brief overview of the legislative framework of the NWT follows, with the introduction of the principal legal offices and officers responsible for law and the introduction and administration of criminal justice, notably the NWMP and the stipendiary magistrates in the early period. With the creation of the Supreme Court of the North-West Territories in 1886, the office of stipendiary magistrate ceased to exist, and in the next section, I introduce this new Court to which Hugh Richardson was appointed, an appointment he held until his retirement in 1903. In the last section of the chapter, I introduce Hugh Richardson himself.

2. The Legal Legacy of a Royal Prerogative: Secrets and Lies

Many, many years ago, before we were born, one of the Kings gave the [Hudson Bay] Company certain rights to trade in this country. The Queen thought that this was not just neither to the white nor the red man. She considered that all should be equal...³

We heard our lands were sold, and we did not like it; we don’t want to sell our lands; it is our property, and no one has a right to sell them.⁴

³ Lieutenant-Governor Alexander Morris to The Gambler in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Saskatoon: Fifth House, 1991) (Facsimile reprint of the 1880 edition published in Toronto by Belfords, Clarke) at 103. The full text of each of Treaty Four and Treaty Six is reproduced in the Appendices.

It is easy to underestimate and difficult to overstate the importance of the Royal Charter of 1670 to the legal history of the NWT when by royal prerogative, Charles II bestowed a vast area of land along and stemming from the shores of Hudson Bay upon the Hudson’s Bay Company (HBC). In the years following 1670, the Company construed the terms and boundaries of its Charter in increasingly wide terms.

In addition to proprietary and trading rights, the Royal Charter purported to confer legislative and judicial power over the inhabitants of the territory. The administration of justice for Rupert’s Land such as it was rested in the hands of the Company. All HBC

5 Together with the right to the “sole trade and commerce of all the seas, straits, bays, rivers, lakes, creeks and sounds, within Hudson’s Straits; the lands countries, and territories upon their coasts which were not then actually possessed by the subjects of any Christian Prince or State; all sorts of fish, whales, sturgeons; and all mines, discovered and undiscovered, of gold, silver, gems and precious stones. E.H. Oliver, ed., The Canadian North-West: Its Early Development and Legislative Records Two Volumes. (Ottawa: Government Printing Bureau, 1915) Vol. 1 at 22. For Oliver the Royal Charter of 1670 was the first and the most important official document relating to Western Canada. Other scholars remind us that the Crown ignored the rights and claims to the land of the indigenous peoples of the region as well as any claims the French might have made, and that the terms of the Charter reveal the framers’ profound ignorance of conditions at Hudson’s Bay: Hamar Foster, “Long Distance Justice: The Criminal Jurisdiction of Canadian Courts West of the Canadas, 1763-1859” (1990) 34 Am. J. Legal Hist. 1 at 2-3 [Foster, “Long Distance Justice”]; Carter, Aboriginal People, supra note 2 at 106.

6 Foster, ibid.

Factors (managers) were regarded as magistrates, but the precise scope of the HBC’s judicial authority has been a matter of some differing interpretation. While the legislative authority conferred by the Charter covered officers and employees of the Company, the judicial authority appeared to be couched in broader terms, and to apply to all persons “that shall live under them.”

The First Nations of the Plains came to have more than passing, casual contact with Europeans thanks to their long-time trading relationship with the HBC. The norms and regulations governing those relationships were established through many decades of trading and barter. Two aspects of the HBC’s approach to the administration of justice are of particular relevance: first, it appears that, in practice, the HBC seldom interfered with the internal affairs or disputes of Aboriginal people, accepting it seems Aboriginal rule of law for Aboriginal matters; and, second, the Company never established a regularly convening

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8 Oliver, *ibid.* Volume 2, at 997, fn 1. After the Company relinquished formal control of the land, HBC men continued to be appointed as justices of the peace; seven of the first thirteen appointments of justices of the peace made by Lieutenant-Governor David Laird, were HBC men (Oliver, Volume 1, *ibid.* at 56). See also Thomas Reynolds, *Justices of the Peace in the NWT, 1870 -1905* (M.A. Thesis, University of Regina, 1978) [unpublished].

9 Foster, *supra* note 5 at 3, characterizes the terms of the conferral as “language that was as susceptible to contrary interpretations as the territorial grant;” the judicial power conferred upon the governor and council at each of the Company’s establishments was “to judge all persons belonging to the said Governor and Company or that shall live under them in all causes whether Civill or Criminall according to the Lawes of this Kingdome and to execute justice accordingly.” Louis Knafla appears to offer a narrower interpretation of the authority conferred by the Royal Charter. See Louis A. Knafla, “From Oral to Written Memory: The Common Law Tradition in Western Canada” in Louis A. Knafla, ed. *Law & Justice in a New Land: Essays in Western Canadian Legal History* (Toronto: Carswell, 1986) 31 at 35.

10 Foster, *ibid.* Foster argues at 4-6, 14-32 and 34-37 that two early nineteenth century pieces of Imperial legislation served to compound the problem, as the earlier one provided that courts in Lower and Upper Canada had jurisdiction to try British subjects charged with crimes in the Indian Territories and the later one purported to extend that to Rupert’s Land as well. *An Act for Extending the Jurisdiction of the Courts of Justice in the provinces of Lower and Upper Canada*, 43 Geo. III (1803) c. 138 and *An Act for Regulating the Fur Trade 1 & 2 Geo. IV (1821)* c. 66, s. 5.

11 Knafla, *supra* note 9 at 35; Foster, *ibid.* at 37-38; According to Thomas, *supra* note 2 at 24, the HBC’s “governance” was “primarily concerned with business matters – the company had no intention of transforming Indian society, and ancient customs and tribal organization were not disturbed.” See also W. Peter Ward, *The
court in Rupert’s Land.\textsuperscript{12}

One significant change followed 1870 when Rupert’s Land and the Indian Territories were acquired by Canada. The HBC’s policy of non-intervention in internal Aboriginal disputes had extended to areas of social life and social relations that in other contexts would attract the attention of the criminal courts. With the restructuring of the legal foundation of the land they called home, together with the arrival of a police force and the Treaties, Aboriginal self-governance and the policy of non-intervention changed with it.\textsuperscript{13}

One theme in the historical literature of this region speaks to a symmetry in the earlier and later acquisitions of this land: in 1670, the Imperial authorities knew little about the land and the peoples who were by royal decree transferred to the HBC;\textsuperscript{14} nineteenth – century Canadian officials regarded the North-West as untamed land, “occupied by a flawed


\textsuperscript{12} Baker, \textit{supra} note 7 at 213. Baker refers to “three known formal trials over a period of 120 years” (at 215). See also, W.F. Bowker, “Stipendiary Magistrates and Supreme Court of the North-West Territories, 1876-1907” (1988) 26 Alta. Law Rev. 245 at 245; Foster, \textit{supra} note 5 at 48; and Kenneth Bryan Leyton-Brown, \textit{The Origin and Evolution of a System for the Administration of Justice in the North-West Territories: 1870-1905} (Ph.D. dissertation, Queen’s University, 1988) [unpublished]. According to Leyton-Brown, at 5, during the period of its administration, the Company established only the most rudimentary of courts on the prairies; when the need arose, disputes were transferred to a jurisdiction which had a developed system of courts.

\textsuperscript{13} Irene Spry makes explicit the implications for self-determination as a result of the transition from HBC to Canadian government rule:

\begin{quote}
The arrival of the NWMP to enforce law and maintain order had one effect that is seldom recognized: the Indians were no longer to be permitted to keep intruders out their country by force.
\end{quote}


\textsuperscript{14} Foster, \textit{supra} note 5 at 3.
people,”15 without any system of law and order – land that was theirs for the taking, and a bridge that had to be taken in order to anchor British Columbia’s place in the Dominion and to fend off the aggressive Americans.

The image of a vast and ungoverned land concealed a substantive contradiction, which the central government failed, perhaps refused, to recognize: there was an indigenous legal tradition as well as a democratic political tradition in the North-West, one “which drew its strength from indigenous forces and the consent of the majority.”16

3. The Canadian State and the First Nations of the Plains after 1870

This land provided us with many things, gave us a good life and we were able to survive by all the resources available to us... The Creator had placed them on the land for our use, and though they were taken, continues to protect us, which is why we were never completely destroyed and why we are still here today. If the whiteman had a better understanding of what the land meant to us he would have thought differently about us.17

It is difficult to say with certainty what the population of the indigenous peoples was when Rupert’s Land and the Indian Territory were incorporated into Canada as the North-West Territories. The territory was home to the Plains, Swampy and Woodland Cree, the Assiniboine (Nakota, Stone Sioux, or Stonies), and the Saulteaux (Plains Ojibway) peoples.18

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15 Carter, Aboriginal People, supra note 2 at 105.

16 Thomas, supra note 2 at 21.


18 See, e.g., the map reproduced in Kathryn Pettipas, Severing the Ties That Bind (Winnipeg: University of
Further to the west lived the Blackfoot Confederacy (the Blood, Siksika and Peigan) and Tsuu T’ina (Sarsi) peoples.\(^{19}\) People of mixed Indigenous and European ancestry with strong associations, including familial, to both the HBC and the First Nations also called the territories home. In the official records and documents of the period, these many peoples invariably were referred to respectively as “Indians” and “Half-Breeds.” The decade following 1870 witnessed a ‘Métis’ exodus from the Red River into the Territories, settling in areas connected to Oblate missions such as St. Albert (which had received Métis migrants as early as 1866), St. Laurent, Duck Lake, Lake Qu’Appelle, as well as Wood Mountain and Cypress Hills.\(^{20}\)

Although maps of the region tend to situate the Cree, Saulteaux, and Assiniboine in discrete geographic territory, Aboriginal scholars of the region and period emphasize that the inter-relatedness of the Nations.\(^{21}\) Cree appears to have been the *lingua franca*\(^{22}\) – but the

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\(^{20}\) Carter, *Aboriginal People, supra* note 2 at 109. See also Marcel Giraud, “Métis Settlement in the North-west Territories” (1954) 7 Sask. Hist. 1. While many of the Manitoba Métis were nomadic and active buffalo hunters, they were also distinct from the more indigenous Half-breeds who lived with, travelled with, and identified with Indians. The arrival of the Red River Métis in 1870 and following, and their hunting practices, were experienced as disruptive by many Cree: see Christensen, *supra* note 4 at 135-136, and below at 146-147:

...many of the chiefs knew that more and more newcomers were arriving in their country each year, and that these people would want to divide the land into pieces for farms and towns. Additionally, it was becoming increasingly evident that many of the newcomers showed little respect for the Indian people. The Métis from the Red River Settlement were not only beginning to act as if they owned the land, but they were trying to take over the buffalo hunt and enforce their laws on the Indian people.


\(^{22}\) McLeod, *ibid.* at 446.
lines between the Nations may have been fluid as suggested no less than by the lineage of some of the leading Plains leaders of the period.  

Precision with respect to the population figures in the NWT is elusive and probably impossible. The total population of the Plains in 1870 has been estimated to have been between 40,000 and 50,000 persons, with the First Nations accounting for about 35,000. The 1884-1885 Census of the NWT reported that the Territories were home to at least 21,990 people of English, Irish, Scottish and French origin (the major non-Aboriginal population groups), 4,848 “Half-Breeds – Métis” (English (577), French (3,387), Scotch [sic] (762), Irish (65) and Unidentified (57)) and an Indian population of 20,170.

23Poundmaker was the orphaned son of an Assiniboine father and Cree, or Métis, mother, nephew of the Cree Chief Mistawasis, and adopted as an adult by the Blackfoot Chief, Crowfoot. Piapot was Cree but had been raised by his grandmother in a Sioux camp after they had been captured during a raid; Sweet Grass, one of the principal Chiefs of the Crees and spokesperson at the Fort Pitt signing of Treaty Six, is said to be been a full-blooded Crow. Big Bear was the son of Black Powder, a prominent Ojibway leader who had moved from further east (now Ontario). The name and nation of Big Bear’s mother is apparently not known, but she may have been Cree, as her son, and his father before him, led a mixed band of Cree and Saulteaux: see Dempsey, supra note 4 at 29; McLeod, ibid; Norma Sluman, Poundmaker (Toronto: Ryerson Press, 1967); Miller, Big Bear, supra note 4.

24Historian Olive Dickason puts the population figures for the Aboriginal population in 1870 about 35,000 with Métis about 10,000-12,000; and whites, fewer than 2,000: Olive Patricia Dickason, Canada’s First Nations: A History of Founding Peoples from Earliest Times (Toronto: McClelland & Stewart, 1992) at 97. See also, Spry, supra note 13.

Figures provided in the Report of the Special Committee of the House of Commons, 1857, of “Establishments of the Hudson’s Bay Company in 1856, and Number of Indians frequenting them” indicated that 22,050 Indians attended at the Hudson’s Bay posts that figure prominently in Hugh Richardson’s court records. Report of the Special Committee of the House of Commons, 1857 C. Appendix No. 2, pages 365,366 and 367), in Statistics Canada, Censuses of Canada 1865-1871, The Aboriginal Peoples at 12-13, http://www.statcan.ca/english/freepub/98-187-XIE/aborig.htm (Accessed 20/01/2004). The figures suggest a more significant presence in the northern districts: for the more northern posts (Edmonton (7500), Carlton (6000), Fort Pitt (7000), Lac La Biche (500) far exceed those for the more southern posts (Fort Ellice (250), Qu’Appelle Lakes (250), Touchwood Hills (300) and Egg Lake (200). The Census of 1871 reported that the population of the “Plains Tribes (Blackfeet, etc) totalled 25,000. For the year 1871, the total Aboriginal population for Labrador, Rupert’s Land and North West was estimated to be 55,500, while “other races” were estimated to number 5,000. Ibid at 16 & 17.

25Census of the Three Provisional Districts of the North-West Territories, 1884-1885 (Ottawa: Maclean, Roger & Co., 1886), Table III. The breakdown of the Indian population between the three Districts was Saskatchewan (6,260 Indians); Assiniboia (4,492); Alberta (9,418). This Census reported that there were 8,397 people of English origin, 8,387 French Half-breeds, 5,285 Irish; 6,788 Scots, and 1,520 people of French origin in the NWT (these were the major population groups). Thus by, 1884-1885, the population of newcomers (at 21,990)
By 1891, the population of the Territories was reported to be 66,799.26 It is difficult to ascertain the population figures for the First Nations in the NWT at the time of this census, as no separate category for “Indians” appears (although the number of Indian Chiefs is listed as 1327). However, from the figures reported for “Canadian born” persons in the NWT Districts of Eastern Assiniboia (5,936), Western Assiniboia (2,247) and Saskatchewan (7,659) in 1891, we can infer a dramatic drop in the Aboriginal population.28 And, by way of confirmation of this inference, the 1901 Census of Canada reported that the total population of the four districts of the NWT was 158,940.29 Of this, the Half-breed (Métis) population was said to number 11,135; the “Indian” population was reported to be 14,699 (by district: Saskatchewan (5,836); Western Assiniboia (292); Eastern Assiniboia (2,921); and Alberta (5,620)).30

In the thirty years following the incorporation of the NWT, the population of the Plains First Nations was reduced dramatically, possibly by one half or more. The ravages of disease, such as small pox, alone cannot account for this tragic attrition; one has to consider

represented these major population groups to the NWT (excluding the French Métis) had eclipsed the population of the First Nations (at 20,170).

26 Census of Canada 1890-1891 (Ottawa: Queen’s Printer, 1893) Volume I, Table II at 112.

27 Ibid., Volume II, Table XII at 185.


29 Fourth Census of Canada 1901 (Ottawa: S.E. Dawson, King’s Printer, 1902), Table XI at 392-393.

30 Ibid. Table XI at 403 (Saskatchewan); at 401 (Western Assiniboia); at 397 (Eastern Assiniboia); at 393 (Alberta). Hugh Richardson presided primarily in the Districts of Saskatchewan and, after 1883, Western Assiniboia. The demographic differences between the two districts were dramatic.
the demise of the buffalo, the loss of the commons,\textsuperscript{31} the relegation to reserves, restrictions on movement, and the determination of the Dominion government not to ameliorate, but rather to pursue policies that ensured, starvation and immiseration, designed to enforce the transition from traditional way of living to the new. In the midst of this well-documented catastrophe, I argue in this dissertation, the criminal law, while neither neutral nor benign, played a modest and often mediating role.

(1) \textbf{Treaty Four, Treaty Six, and the Administration of Justice}

... This is our land! It isn’t a piece of pemmican to be cut off and given in little pieces back to us. It is ours and we will take what we want.\textsuperscript{32}

I had ascertained that the Indian mind was oppressed with vague fears; they dreaded the treaty; they had been made to believe that they would be compelled to live on the reserves wholly, and abandon their hunting, and that in time of war, they would be placed in the front and made to fight.\textsuperscript{33}

A full consideration of the form and content, nature and implications of the Treaties – all issues of critical importance – exceeds the scope of this dissertation. Suffice it to say that if the Treaties are to be regarded as the foundation of the relationship between the First Nations and the Canadian government, that foundation from the beginning has been shaky and flawed. It is now widely recognized that the official texts were essentially boiler plate templates, that the signed versions of the Treaties represent only the version of the Canadian

\textsuperscript{31} See Spry, \textit{supra} note 13.

\textsuperscript{32} Poundmaker, at Treaty Six, quoted by Peter Erasmus, \textit{Buffalo Days and Nights, as told to Henry Thompson.} Introduction by Irene Spry (Calgary: Glenbow-Alberta Institute, 1976) at 244. See also Christensen, \textit{supra} note 4 at 247; Miller, \textit{supra} note 4 at 72.

\textsuperscript{33} Morris, \textit{supra} note 3 at 183. Morris is referring to the anxieties expressed by the Cree at the outset of the negotiations to Treaty Six when he first met with them.
government, and at best only an imperfect and incomplete expression of what the leaders of the First Nations regarded as the agreement(s) that were being negotiated. \(^{34}\)

It is clear that the primary concerns of the First Nations involved economic survival and well-being, and the need to ensure a future for their children, and their children’s children, including education and access to health care, for as long as the sun shines and the water flows. Needless to say, not everyone trusted the government or the Treaty process. Big Bear, the most reluctant signatory and the longest holdout, is said to have likened the invitation to make Treaties to bait for a trap. \(^{35}\) Cree Chief Mistawasis is said to have responded to critics and sceptics at the Treaty Six negotiations at Fort Carlton by invoking the terrible losses they had experienced already:

I speak directly to Poundmaker and The Badger and those others who object to the signing this treaty. Have you anything better to offer our people? I ask, again, can you suggest anything better that will bring these things back for tomorrow and all the tomorrows that face our people? \(^{36}\)


\(^{35}\) Quoted by Sluman & Goodwill, supra note 17 at 8; see also Dempsey, supra note 4 at 63; McLeod, *ibid.* at 76.

\(^{36}\) Mistawasis, quoted by Erasmus, supra note 28 at 246 - 247; Christensen, supra note 4 at 252; Miller, supra note 4 at 72. Peter Erasmus recalled Mistawasis’ intervention. Erasmus had been retained by the Cree Chiefs to act as their interpreter in the Treaty negotiations (Erasmus, *ibid.* at 235-238; Christensen, *ibid.* at 220; 227 – 231). It has been suggested by some that the Chiefs with Christian leanings were the leading advocates in favour of entering into treat with the government. Neal McLeod, *ibid.* intimates that Sweet Grass’ Christian
The arrival and role of the NWMP did not loom as large in the negotiations. Still, the argument attributed to Mistawasis suggests an explanation why, as the Richardson records reveal, Plains First Nations people also turned to the criminal court for assistance and redress. Referring to American whiskey traders as “cutthroats and criminals who recognized no authority but their guns ... [and who] murdered Indians without fear of reprisal,” and to the “Red Coats” who were sent by the Queen Mother, Mistawasis is said to have said:

The Police are the Queen Mother’s agents and have the same law for whites as they have for the Indians.

... I, for one, look to the Queen’s laws and her Red Coat servants to protect our people against the evils of white man’s firewater and to stop the senseless wars among our people... .

The Treaties made the First Nations subject to new law and imposed upon the Chiefs the obligation to assist in the bringing to justice and punishment any of their people who infringed Canadian criminal law. The written text of the Treaties which purported to

\[\text{leanings – he had converted to Roman Catholicism – were a significant factor in his desire to enter into a treaty with the government. It is perhaps worth noting that Ahtahkakoop and Mistawasis, also leading chiefs at Treaty Six, were also converts to Christianity. See Christensen at 182 (re: Ahtahkakoop’s conversion to the Anglican faith) and at 641(re: Mistawasis’ conversion to the Presbyterian faith). See also, Dempsey, supra note 4 at 59, 62.}

\[\text{Mistawasis, quoted by Erasmus, ibid at 248; Christensen, ibid. at 254.}

\[\text{The text below from Treaty Four, reproduced in Morris, supra note 3 at 233 is virtually identical in all the numbered Treaties:}

And the undersigned Chiefs and Headmen, on their own behalf, and on behalf of all other Indians inhabiting the tract within ceded ... They promise and engage that they will, in all respects, obey and abide by the law, ...; and that they will not molest the person or property of any inhabitant of such ceded tract, or the property of Her Majesty the Queen..., and that they will assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded. [emphasis added]
protect their hunting, trapping and fishing rights also contemplated legal encumbrance, regulation, and restriction.\textsuperscript{39} Finally, in addition to the general prohibition of the manufacture, importation, sale and possession of intoxicants in the NWT,\textsuperscript{40} an additional prohibition of sale or possession on Indian reserves also was incorporated into the Treaties.\textsuperscript{41} These prohibitions on alcohol would also be buttressed by the \textit{Indian Act} in 1876.\textsuperscript{42}

As I have suggested above, and will demonstrate in the later chapters, the Richardson court records reveal that in the early years following the Treaties and the arrival of the Stipendiary Magistrate, Chiefs and their Councillors made demands of the police and the Court when the well-being of their people was at risk or required redress. In the next section, I introduce the new approach to law and governance that came to the region after 1870 via

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See also Appendix 1 for the full text, signatories, as well as the adhesions. Treaty 6, signatories and adhesions are reproduced in Appendix 2.

\textsuperscript{39}\textit{Ibid.}:

And further, Her Majesty agrees that Her said Indians shall have right to pursue their avocations of hunting, trapping and fishing throughout the tract surrendered, \textit{subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty}, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining or other purposes, under grant or other right given by Her Majesty's said Government. [emphasis added]

See also the Appendices..

\textsuperscript{40} \textit{North-West Territories Act}, 38 Vict. (1875) c. 49, s. 74.

\textsuperscript{41} Treaty Four, reproduced in Morris, \textit{supra} note 3 at 333:

... Her Majesty agrees that within the boundary of the Indian reserves, until otherwise determined by the Government of the Dominion of Canada, \textit{no intoxicating liquor shall be allowed to be introduced or sold, and all laws now in force, or hereafter to be enacted, to preserve Her Indian subjects, inhabiting the reserves, or living elsewhere within the North-West Territories, from the evil effects of intoxicating liquor, shall be strictly enforced.}

See also Appendix 1..

\textsuperscript{42} \textit{Indian Act} 1876, 39 Vict. (1876) c. 18, ss. 79 – 85.
(2) The Arrival of Canadian Criminal Justice in the NWT, 1870-1905

i. The Early Period, 1870 – 1886

It would be an overstatement to suggest that attention to the matter of law and its territorial administration were among the central government’s highest priorities for the region. Even as Canada reconfigured Rupert’s Land and the Indian Territory into the NWT, neither law enforcement nor judicial institutions were established in the newly

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44 On June 23, 1870, Rupert’s Land and the North-West Territory were admitted by Order in Council to the Dominion of Canada. The groundwork had been laid in 1869 in the Act for the Temporary Government of Rupert’s Land and the North-West Territory when United with Canada, 32-33 Vict. (1869) c. 3 which authorized the appointment of a Lieutenant-Governor who would be responsible for the administration of justice and to make laws and ordinances necessary for the peace, order and good government of the inhabitants of the Territories, subject to the requirement that all laws and ordinances were to be placed before both Houses. Section 5 of this short statute provided:

All the Laws in force in Rupert’s Land and the North-Western Territory, at the time of their admission into the Union shall so far as they are consistent with the British North America Act, 1867,’ – with the terms and conditions of such admission approved of by the Queen under the 146th section thereof, – and with this Act, – remain in force until altered by the Parliament of Canada, or by the Lieutenant Governor under the authority of this Act.


45 It is important to note, as Thomas, supra note 2 does at 6, that s. 146 of the BNA Act recognized the existence of “two different territorial units in the North-West:” Rupert’s Land (the domain of the HBC) and the North-Western Territory, the boundaries of the two areas not having been “authoritatively settled” and the subject of competing claims by the HBC and the Canadians. The Canadians maintained their claim to the North-Western Territory, the boundaries of which they asserted was “contiguous with Upper Canada and included most of the prairie region from the Red River to the Rockies.” Thomas also notes, at 7, that s. 146
acquired territory. However, by Order in Council in 1870, the Lieutenant-Governor was authorized to provide for the administration of justice and to appoint justices of the peace.

In 1873, the Dominion Government enacted legislation to provide for the Governor in Council to make laws for the peace, order and good government of the North-West Territories; this statute continued the requirement that all laws passed by the Council were to be laid before both Houses of Parliament. Three other federal statutes of 1873 provided both the infra-structural form for the administration of criminal justice in the NWT and the federal department that would be responsible for the Territories more generally. The legislation underscored the central government's view of the inseparable connection between “Indian Affairs” and the NWT. The federal Department of the Interior was created by the statute that bore its name. Under this legislation, the Minister of the Interior was to have control and management of the affairs of the North-West Territories, and to act as Superintendent General of Indian Affairs, and, as such, “to have control and management of the lands and property of the Indians in Canada.”

provided that the process for admission of Rupert’s Land and the North-Western Territory was “to be initiated by unilateral action of the Canadian Parliament and effected by summary action of the Imperial government.” While compensation was paid to the Hudson Bay Company for its surrender of Rupert’s Land, neither the other inhabitants of the Territories, nor their representatives, were consulted.

46 Ward, supra note 11 at 6.

47 Ibid. at 14. Ward cites CSP 1871, no. 20, p. 26. According to Ward, Lieutenant-Governor Adams Archibald appointed six justices of the peace, but at the time of his writing, Ward was unable to confirm whether these justices ever performed judicial duties between 1870 and 1873.

48 An Act to amend the “Act to make further provision for the government of the North West Territories,” 36 Vict. (1873) c. 34.

49 Ibid., s. 3.

50 The Department of the Interior Act, 36 Vict. (1873) c. 4.

51 Ibid., s. 2.

52 Ibid., s. 3.
By another of the 1873 Acts, several federal criminal statutes were made to apply in the NWT, including statutes which governed substantive offences (such as forgery, larceny, offences against the person, perjury, high treason) as well as criminal procedure (including the duties of justices of the peace, and the availability of summary justice). With respect to summary trials, Schedule A provided that in the NWT, a competent magistrate was to be construed as meaning any two justices of the peace sitting together, whose jurisdiction was to be absolute without the consent of the parties charged.  

(a) The North-West Mounted Police

The most significant piece of 1873 legislation created the formal apparatus for the administration of justice, the office of Stipendiary Magistrate and the North-West Mounted Police Force (NWMP), a force of 300 men. A series of disparate provisions in the legislation in combination placed almost complete responsibility for all aspects of the administration of justice with the police. In addition to policing duties in relation to preventing crime and preserving the peace, enforcing the Ordinances of the NWT, and apprehending offenders, the NWMP were to attend upon the Stipendiary Magistrate or Justice of the Peace, to execute their warrants, and to escort prisoners and lunatics to their

53 An Act to amend the "Act to make further provision for the government of the North West Territories" 36 Vict. (1873) c. 34, s. 6, Schedule A.

54 Ibid.

55 An Act respecting the Administration of Justice, and for the establishment of a Police Force in the North West Territories, 36 Vict. (1873), c. 35. Section 15 of the Act specified that "persons" appointed to the Force were to be "of sound constitution, able to ride, active, able-bodied, of good character, and between the ages of eighteen and forty-years" and able to read and write either English or French.
respective places of the confinement. And, if gaol or prison was "at a distance," the sentencing magistrate was authorized to order that the convict be imprisoned at the police station.

The Commissioner and senior officers of the NWMP were ex officio justices of the peace, as were senior Indian Affairs officials, as well as Indian Superintendents and Indian Agents, initially only for the purposes of the Indian Act. It appears that despite the fact that there were more lay justices, the police justices adjudicated most of the criminal cases that came before justices of the peace, including trials of accused persons they themselves had

56 Ibid, s. 19.

57 See, e.g., An Act to amend and consolidate the Laws respecting the North-West Territories, 38 Vict. (1875) c. 49, s. 68; An Act to Amend and Consolidate the Several Acts Relating to the North-West Territories, 43 Vict. (1880) c. 25, ss. 78 & 79.

58 Macleod, North West Mounted Police, supra note 43; McCaul, supra note 43; Reynolds, supra note 8 at 10-22 reviews the jurisdiction of the Justice of the Peace in the NWT:

1. Enforcement of minor criminal statutes & the penal clauses of territorial ordinances;
2. Exercised jurisdiction to hear matters under federal and territorial law (e.g. Canada Temperance Act, 1892; Indian Act; Fisheries Act; Grain Inspections Act; Act re; Mounted Police Pensions; Criminal Code, 1892; NWT provisions re: Liquor;
3. Enforcement of the Ordinances of the NWT Council;
4. Enforcement of most municipal legislation with penal clauses;
5. Under one of the Ordinances: one justice of the peace could order a veterinarian to inspect an animal thought to be sick; two justices of the peace could order a diseased animal to be destroyed;
6. Under Ordinance 2, 1879, justices of the peace were allowed to judge a person’s sanity;
7. Under Liquor License Act, 1882, 2 justices of the peace could order the interdiction – sale of liquor to anyone who “because of drink was dissipating his estate, injuring his health, or threatening the happiness of his family;”
8. Between 1878-1882, justices of the peace could conduct marriages;
9. A justice of the peace could act as auctioneer with respect to stray animals;
10. Master & Servant: “magisterial returns indicate that masters & servants cases were numerous” (at 19); the Master &Servant Ordinance allowed workers to collect wages if a master refused to pay.

59 Reynolds, ibid. at 58. See the Indian Act, 44 Vict. (1881) c. 17, s. 12: the Indian Commissioner, Assistant Indian Commissioner, and every Indian Superintendent, Indian Inspector and Indian Agent were to be justices of the peace ex officio for the purposes of the Indian Act.

60 Reynolds, ibid. at 113-15. R.C. Macleod & Heather Rollason, "Restrain the Lawless Savages": Native Defendants in the Criminal Courts of the North-West Territories, 1878 - 1885" (1997) 10 J. Hist. Sociology 157 at 159 say that by 1877 six superintendents and twelve inspectors were all appointed justices of the peace.
apprehended.  

(b) The Office of Stipendiary Magistrate

The Stipendiary Magistrate was to be the senior judicial officer within the Territories, with the magisterial, judicial or other functions appertaining to any Justice of the Peace, or any two Justices of the Peace. However, none were appointed until 1876. Thus for the first five years following Canada’s acquisition of the Territories, the significant local judicial actors continued to be HBC men acting as justices of the peace; after 1873, they were joined by NWMP justices. Serious criminal matters were sent for trial to the Manitoba Court of Queen’s Bench.

On January 1, 1876 James F. Macleod (NWMP Commissioner) and Matthew Ryan, a member of the Quebec Bar who had been appointed in 1875 to enumerate Manitoba Métis, received their commissions as stipendiary magistrates for the NWT. Hugh Richardson received his commission in July 1876. Although the magistrates had jurisdiction throughout the NWT, three judicial districts (Saskatchewan, Bow River, and Qu’Appelle) were established in which regular courts were to be held presided over by a stipendiary magistrate, resident in the judicial district.

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61 Macleod, North-West Mounted Police, supra note 43 at 35.

62 An Act respecting the Administration of Justice, and for the Establishment of a Police Force in the North West Territories, 36 Vict. (1873), c. 35, s. 2.

63 Bowker, supra note 12 at 253 – 254.

64 McCaul, supra note 43 at 35. Macleod presided in the Bow River District and was based in Fort Macleod, Ryan (Qu’Appelle District) was based in Shoal Lake, and Richardson (Saskatchewan District) resided in Battleford. In 1883, Charles Borromée Rouleau was appointed to fill the position left vacant when Matthew Ryan quit, or was removed from office, in 1881 following allegations or complaints of bad or improper
The criminal law jurisdiction of the stipendiary magistrate was increased through four legislative amendments between 1873 and 1880, when the office was replaced with the creation of the Supreme Court of the NWT in 1886. Initially, a stipendiary magistrate sitting alone could hear only a narrow range of criminal offences, including relatively minor property offences, for which the maximum penalty was less than two years. The 1873 Act provided that offences for which the maximum punishment did not exceed seven years were to be tried summarily, without either a grand or petty jury, by two stipendiary magistrates sitting together, or by a Judge of the Manitoba Court of Queen’s Bench. A justice of the peace, stipendiary magistrate or judge of the Manitoba Queen’s Bench was empowered to commit persons charged with offences punishable by death or imprisonment in the penitentiary for trial in Manitoba before the Court of Queen’s Bench. The jurisdiction of the Manitoba Court was significant in the absence of any appointed stipendiary magistrates.

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65 See An Act Respecting the Administration of Justice, and for the Establishment of a Police Force in the North-West Territories, 36 Vict. (1873) c. 35, s. 3; An Act to Amend and Consolidate the Laws Respecting the North-West Territories, 38 Vict. (1875) c. 49, s. 64; An Act to Amend the “North-West Territories Act, 1875,” 40 Vict. (1877) c. 7, ss. 62 - 64, s. 71 (re: civil claims); An Act to Amend and Consolidate the Several Acts Relating to the North-West Territories, 43 Vict. (1880) c. 25, ss. 76, 82.

66 An Act Further to Amend the Law respecting the North-West Territories, 49 Vict. (1886) c. 25, ss. 30 - 32.

67 Initially, the stipendiary magistrate’s summary jurisdiction covered minor offences, including: larceny and property related offences where the value of the property did not exceed $100.00; attempted larceny; assault with a weapon, assault causing bodily harm, wounding; assault upon a female person of any age, other than rape and attempted rape, and assault upon a male child under 14; assault or obstruction of a range of judicial and law enforcement officers: An Act Respecting the Administration of Justice, and for the Establishment of a Police Force in the North-West Territories, 36 Vict. (1873) c. 35, s. 3.

68 Ibid., s. 4.

69 Ibid., s. 5.
The *North-West Territories Act, 1875*\(^70\) authorized the Governor in Council to appoint no more than three stipendiary magistrates who had jurisdiction to hear and try a broad range of criminal matters, although the Manitoba Court of Queen’s Bench continued to play both a companion and supervisory role.\(^71\) The federal government revisited the issue of the criminal jurisdiction of the stipendiary magistrate again in 1877, by which time the three magistrates had been appointed. The new legislation\(^72\) provided that a stipendiary magistrate sitting alone could try summarily any charge that had been set out in the 1873 Act as well as, with the consent of the accused, any offence where the maximum punishment was less than seven years imprisonment; for offences with a maximum penalty of more than seven years (other than the death penalty), the stipendiary magistrate was to sit with a justice of the peace and a jury of six.\(^73\) For offences punishable by the death, the stipendiary magistrate was to sit with two justices of the peace and a jury of six.\(^74\) Thus, by 1877 all criminal offences could be tried in the NWT. Appeals involving convictions for which a sentence of death had been imposed were to go to the Manitoba Queen’s Bench.\(^75\)

Finally, in 1880, the jurisdiction of the stipendiary magistrate, as well as that of the

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\(^70\) The *North-West Territories Act, 1875*, 38 Vict. (1875), c. 49, s. 61 ff. consolidated matters governing legal relations and procedure in the Territories. A form of omnibus legislation, the NWT Act dealt with everything from wills, estates and married women’s property to the prohibition of manufacture, import, distribution and sale, and possession of intoxicants.

\(^71\) Section 64 provided that the Chief Justice of Manitoba or any judge of the Manitoba Court of Queen’s Bench and one stipendiary magistrate as Associate had power to try summarily offences for which the maximum punishment was less than five years imprisonment. With the consent of the accused, they could also try summarily, or with a jury of six if the accused demanded trial by jury, all offences where the maximum punishment was greater than five years imprisonment, but not the death penalty. Where the offences provided for the death penalty upon conviction, a Manitoba judge and a stipendiary magistrate could preside with a jury of eight. A person sentenced to death was able to appeal to the Manitoba Queen’s Bench (s. 65).

\(^72\) An Act to Amend the “North-West Territories Act, 1875,” 40 Vict. (1877), c. 7, ss. 63-64.

\(^73\) *Ibid.*, s. 64.2.

\(^74\) *Ibid.*, s. 64.3.

\(^75\) *Ibid.*, s. 78.
justice of the peace, was broadened yet again. Now a stipendiary magistrate or two
justices of the peace could try summarily property related offences involving less than
$200.00; as well as all forms of assault, except rape, and offences related to escape custody,
obstruction of peace officer, and so on. All other offences were to be tried by a stipendiary
magistrate, sitting with a justice of the peace and a jury of six. Again, appeals of
convictions with the death penalty were to continue being heard by the Manitoba Court of
Queen's Bench.

In sum, the stipendiary magistrates figured prominently in the administration of justice
and in the governance of the NWT between 1876 and 1886. Their judicial powers increased
steadily following the appointment of Macleod, Ryan and Richardson in 1876. As ex officio
members of the small Territorial Council, their influence extended beyond their courtrooms;
Richardson, the former Justice Department clerk, in particular appears to have played an
active and important role on Council, and is said to have been the principal draftsperson of
territorial ordinances, and he is credited with having drafted the 1875 NWT Act.

ii. The Later Period: The Supreme Court of the North-West Territories

When the legal administration of the NWT was reconfigured yet again in 1886, the

76 An Act to Amend and Consolidate the Several Acts Relating to the North-West Territories, 43 Vict. (1880) c. 25, ss. 74, 76. The Act provided additional responsibilities to the Stipendiary magistrates, who were now, by virtue of s. 82, to act as Coroners (as was the Assistant Commissioner of the NWMP). By operation of ss. 85 - 89, the Stipendiary Magistrate could try most forms of civil cases, and all appeals could go to the Manitoba Queen's Bench.

77 Ibid., s. 76.5.

78 Bowker, supra note 12 at 262.

79 North-West Territories Act, R.S.C. 1886, c. 50.
office of stipendiary magistrate was eliminated and Supreme Court of the NWT (NWTSC) was created, as a supreme court of record of original and appellate jurisdiction.\textsuperscript{80} The new court, comprised of five puisne judges, was given all the powers, rights and privileges of the Court of Queen's Bench in respect of civil and criminal civil and criminal jurisdiction. The Court sat in banc in Regina to hear all questions or issues of law or points reserved for the opinion of the court, all appeals, motions, and so on; the court in banc required a quorum of three judges, and was presided over by the senior judge.\textsuperscript{81}

Three sitting stipendiary magistrates (Macleod, Richardson, and Rouleau) were elevated to the five member Supreme Court of the North-West Territories, joined by Edward Wetmore and John Maguire.\textsuperscript{82} Thus, Colonel Hugh Richardson S.M. became Mr. Justice Richardson, presiding over the judicial district of Western Assiniboia in Regina until his retirement in 1903.\textsuperscript{83} Wetmore sat in Moosomin; McGuire in Prince Albert, Rouleau in Calgary, and Macleod in Fort Macleod, and later Calgary. In 1902, Edward Prendergast was appointed to the Court and joined the ailing Richardson in Regina.\textsuperscript{84}

4. Hugh Richardson: Stipendiary Magistrate & NWTSC Justice

Hugh Richardson, who dispensed criminal and civil justice in the North-West

\textsuperscript{80} Ibid., s. 4.

\textsuperscript{81} Ibid., ss. 15 & 16.

\textsuperscript{82} McCaul, supra note 39 at 39; Bowker, supra note 12 at 277 - 278.

\textsuperscript{83} Leyton-Brown, supra note 12; Richardson had been passed over for the position of Chief Justice when it was created (McGuire was appointed Chief Justice in 1902). They both retired in 1903. Richardson moved back to Ottawa and died there in 1913: “Deceased Judge Presided at the Trial of Louis Riel” The Regina Leader (16 July 1913) 1 col. 3. See also Thomas Flanagan 14 Dictionary of Canadian Biography [1910-1913] 872-873.

\textsuperscript{84} The court records and press reports in the Regina Leader indicate that a number of matters had to be adjourned in July 1902 owing to the ill health of Justice Richardson.
Territories (NWT) for the last twenty-three years of the nineteenth century, appears to have been a dedicated, hard-working jurist. His tenure on the bench coincides with a period of monumental social, economic, political and legal transformation of the region, of which his courts were a part. He retired in 1903, before his region of the NWT was reconfigured in 1905 as the province of Saskatchewan, and his Court succeeded in 1906 by the Supreme Court of Saskatchewan.

Hugh Richardson is not a household name, even for Canadian legal historians. A flicker of acknowledgement tends to occur when his name is mentioned in relation to Louis Riel, the most famous accused person to appear in his courtroom. His formal contribution to Canadian legal history appears to be simply a controversial flash in the pan. He sentenced Riel to hang and this for many is his claim to infamy.

And yet, he was the first magistrate before whom the First Nations peoples of the Saskatchewan region would appear who was not also an officer of the Hudson’s Bay Company (HBC) or the North-West Mounted Police (NWMP). His was the first trial court to dispense a new form of justice based on new concepts of wrong, bringing new forms of punishment to the Cree, Nakota (Assiniboine) and Saulteaux peoples. He issued the first warrants and deferred sentences, and imposed the first terms of imprisonment that the First Nations experienced. There would have been as many firsts for him as well.

Several months after his 1876 appointment, Lieutenant-Colonel Hugh Richardson arrived in Battleford, the Territorial capital, to begin his judicial duties.\(^{85}\) One wonders what

\(^{85}\) Bowker, *supra* note 12 suggests at 263 that he came west by late 1876, and then returned to Ottawa in the late spring following to bring out his family. The return trip was difficult and long, and they were able to move into their new home in Battleford at the end of September 1877. The earliest dated prosecution before him that I have found in the court records took place in Fort Saskatchewan on October 10, 1877: Regnier Brillon (1877), SAB A-G (GR 11-1) CR-Regina, 1\(^{st}\) series, 1876 – 1886, file # 4.
in his previous life in Ontario would have prepared him for the bush and the plain of the NWT. Born in England in 1812, he had come with his family to Canada as a young man. He was admitted to Osgoode Hall and called to the Bar in 1847. He practised law in Woodstock until 1872, when by Order in Council he was appointed chief clerk at the Department of Justice in Ottawa, an appointment he held until July 1876, when he joined Macleod and Ryan as the third stipendiary magistrate appointed for the NWT.

A unilingual Anglophone whose adult life and professional career was spent mostly in the softer land of south-western Ontario, where cultural diversity came in the form of the Irish, he presided over matters requiring Cree, Assiniboine, Saulteaux, Sioux and French interpreters in remote, far flung outposts, along the old fur trade route of the north Saskatchewan River, reached only by horse and cart or York boats in good weather, horse-drawn sleds in winter, where court houses or inns would not appear for decades.

Richardson left few personal words behind him – there is no autobiography or biography, and there appears to be no personal diary or correspondence. To the extent that he is recalled at all, it is for his role in the 1885 treason trial of Louis Riel over which he presided with Henry LeJeune JP and a six man jury – and, here, most have not been generous. In The Queen v. Louis Riel, Desmond Morton intimates that Richardson’s judicial experience prior to the Riel trial derived from “the police court at Regina [where] liquor offences were the most common item on his docket,” although he acknowledges that Richardson had tried four other men for murder. J.M. Bumstead is less charitable:

86 Flanagan, supra note 81; see also, Bowker, supra note 12; Jonathan Swainger, The Department of Justice and the Completion of Confederation 1867 - 78 (Vancouver: UBC Press, 2000) at 39-40. Swainger suggests that Richardson’s long career on the bench illustrates both the calibre of his own legal abilities and the kind of legal talent the Department of Justice was able to recruit.

87 Desmond Morton, The Queen v. Louis Riel (Toronto: University of Toronto Press, 1974) at xiv.
He was a lawyer with limited trial experience and a very limited imagination who was not likely to have independent views. He had a strong dislike of the Métis, but his racial attitudes would probably not have disqualified him in the eyes of either the Crown or the legal system. Hugh Richardson – unimaginative, weak, inexperienced, and prejudiced – was probably the perfect instrument for a government looking to convict and execute Louis Riel.\(^{88}\)

More recently, the *Globe & Mail* marked the ninetieth anniversary of Richardson’s death with the following remembrance in its “Died This Day” column:

\[\ldots\text{In 1885, he secured a place in history when he presided at the trial of Louis Riel, the leader of the North-West Rebellion. Sadly, he was not up to the job and may have been selected for just that reason. The trial was a plodding, procedural affair that remains controversial to this day. In 1887, he was made chief justice of the NWT Supreme Court.}\]^{89}\]

Leaving aside the fact that the office of Chief Justice of the NWT did not exist in 1887, and that Richardson was not appointed to the position when it was later created, the basis of these assessments which intimate judicial inexperience and incompetence is less than clear. That these commentators understand the nature of the jurisdiction or workload of the territorial magistrates is not an inference easily drawn. By the time of the Riel trial, Richardson had sat as a stipendiary magistrate for nine years, during which time, as I have discussed, the jurisdiction of his court expanded on more than one occasion. By 1885, he had presided across the length and breadth of the Territories over at least two hundred and fifty matters, and likely more, both civil and criminal in nature. Contrary to Morton’s

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\(^{88}\) J.M. Bumstead, *Louis Riel v. Canada* (Winnipeg: Great Plains Publications, 2001) at 274. Bumstead does not burden his readers with the irritant of footnotes, so one does not know the sources upon which he draws for this assessment.

\(^{89}\) *Globe & Mail* (17 July 2006) at S 8.
assertion, liquor offences were far from the most common item on Richardson’s docket in Regina: between 1883 and 1885, only eleven of the hundred or so matters over which he presided involved liquor violations.90

Sandra Bingaman,91 Peter Ward,92 and Wilfred Bowker93 found that Richardson was well-respected in the Territories as a magistrate, that his reputation did not include political bias, and that he expressed no public opinions about the guilt or innocence of the accused persons who were charged in the aftermath of the events of the spring of 1885.94

While it is counter-intuitive to criticize a judge for being attentive to procedure, as Morton does, Richardson in fact does appear to have taken matters of procedure and jurisdiction very seriously. It is clear that he sought advice from the Minister of Justice on

90 SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #s 176 – 279. Interspersed within this series of files are ten files from Battleford, Fort Saskatchewan or Prince Albert; the rest are from the south (e.g., Regina, Moose Jaw, Qu’Appelle, Wood Mountain). In addition to the liquor violations, two C.P.R. men charged with being on duty while intoxicated. Forty-four (44) files involve theft and fraud offences; there are a handful of false pretences and horse smuggling offences, a few Master & Servant matters involving unpaid wages, among others, including assaults and so on. If a most common matter is to be found, it would have to be property-related offences, such as theft, fraud, and false pretences.


92 Ward, supra note 11 at 79.

93In Bowker’s view, “the record shows that Richardson acted with dignity, spoke little and did not demonstrate hostility to Riel, though one can guess that he felt it.” Bowker, supra note 12 at 273.

94 Unlike his fellow magistrate, Rouleau, who expressed his views in a letter to Lieutenant-Governor Dewdney prior to the trials:

It is high time that those indians [sic] should be taught a lesson. I think that General Middleton was altogether too kind to them. My impression is that a milk and water policy is a very wrong one. If the indians can commit all the crimes of the Statute with impunity, we may expect a renewal of the same scene in a short period.

Quoted by Bingaman, supra note 91 at 115. Bingaman notes that Rouleau suffered losses to both his property (his house in Battleford was burned to the ground during the hostilities) and his reputation during the events of 1885, giving rise to the hostility expressed in his letter. See also, Bowker, ibid. at 272 -273; and, Bob Beal & Rod McLeod, Prairie Fire: The 1885 North-West Rebellion (Edmonton: Hurtig Publishers, 1984) at 331, who quote from a letter written by the Oblate priest, Father André, to his superior. Fr. André, who had observed the trials in Regina and Battleford, described Richardson as fair and impartial and condemned as Rouleau as a "vindictive man and a servile instrument in the hands of the government."
procedural matters from time to time, and that he had a definite sense of the public duty owed by public servants. In one file, he queried the right of an NWMP officer, as a government official, to receive the informer’s fee, a portion of the fine imposed in a liquor violation. When he realized that this had caused offence to the officer, he relented in that instance, but indicated that he would refer the question to Ottawa.

Questions of jurisdiction, in many forms, arise time and again in Hugh Richardson’s court files. Often the question is implicit; at other points, a question of jurisdiction was raised by a person caught by the criminal processes, and occasionally by the judge himself. The NWT was a vast region with many borders. And, as with all borders and boundaries, it was life and law at the margins that provided particular challenges.

For instance, the extent of the reach of long distance law arose in an 1879 case in which the authority of the HBC Factor as Justice of the Peace and the jurisdiction of the Stipendiary Magistrate of the NWT was challenged. Daniel Williams of Fort St John was charged with a number of offences arising out of a dispute he had with the HBC. Initially accused of shooting and wounding three of the Company’s horses, as they grazed in his field, he was later charged with arson and threatening the lives of the Chief Trader and one of the clerks. They arrested him and took him in chains (following an escape attempt) down the river to Fort Saskatchewan for trial. He was held in custody for several months, and also sued the HBC men for false arrest and imprisonment.

Williams was firmly of the view that he should not be tried in the NWT, and it

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95 E.g., with respect to his jurisdiction to try Daniel Williams for offences that were alleged to have occurred in Fort St. John. Daniel Williams (1879), SAB, A-G (GR 11-1) CR-Regina, 1st Series, 1876-1886, file# 179 and Daniel Williams v. James McDougall & James McKinley (1879) (false arrest and imprisonment) SAB, A-G (GR 11-1) CR- CR-Regina, 1st Series, 1876-1886, file #107.

96 Goodwin Marchand (1878), SAB, A-G (GR 11-1) CR- CR-Regina, 1st Series, 1876-1886, file #18.
appears that Richardson too had his doubts. In response to Richardson’s letter to the Minister of Justice in Ottawa, the Deputy Minister offered pragmatic advice: if the evidence is good, assume jurisdiction; if the case looks weak, decline. While Richardson ultimately dismissed Williams’ complaints of wrongful arrest and imprisonment, it is not clear from the file what, if any, disposition was made in the criminal charges against Williams. One doubts that the veteran public servant and former clerk of the Department of Justice felt comforted by the advice he received from Ottawa.

Richardson also expressed a strong sense of one’s moral duty to protect others, especially those he regarded as vulnerable. In 1892, George Glover, a Regina man, was indicted and tried for theft of a sum of money from one William Park. Park, while extremely drunk, had spent the night with a young woman at an establishment described in the court file as a “whore house outside Regina.” In the morning, he pulled out a roll of bills and offered her $100 if “she would go with him for two weeks and not let another man touch her.” This was said within Glover’s hearing, and shortly thereafter, Park realized his roll of money was missing. The woman who ran the house insisted that the police be sent for; when the police arrived, the “girl” was searched, and nothing found. Something about Glover made the police officer suspicious and on searching him on the spot, he found a roll of $100 in Glover’s underdrawers.

Richardson convicted and sentenced Glover to two years hard labour at the Regina gaol. In sentencing him, Richardson commended the fairness of Crown Prosecutor, David

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97 Daniel Williams (1879), SAB, A-G (GR 11-1) CR-Regina, 1st Series, 1876-1886, files # 79 & 107.

98 This case was covered to a certain extent in the Saskatchewan Herald. Only in the Herald’s coverage, but not in the court file, do we learn that Daniel Williams was a mixed race man, “a mulatto” with a racist nickname - “Nigger Dan:” see Saskatchewan Herald, (25 August 1879,) 1, col. 4, & col. 1.

99 See, e.g., the Case of the Lost or Missing Child, Peaychew’s daughter, discussed in the Introduction.
Lynch Scott, and the efforts of defence counsel, T. C. Johnstone, and then continued at length:

... if this man was drunk it was the more your duty to have protected him or to have seen that he was protected, and not assist in making him worse; you should have done with him as you say was done with you in a like condition, and knowing that he had money about him it was your duty to have seen that that also was taken care of, and the police would have taken care of both; if anyone is to blame in this matter who can be said to more to blame than yourself.100

In the following year, when sentencing Pierre Bourassa to five years and 20 lashes of the cat o nine tails for unlawful carnal knowledge with a young Aboriginal girl who was apparently under fourteen,101 Richardson lectured the prisoner:

The Schools like the Industrial School where she has been for the last 6 years were established with the purpose of elevating these girls and putting them in a position where they would be perfectly civilized and of removing any distinction between as we say their colour and that of the whites and if ever there was a duty incumbent upon a young man even if she had that night asked you to cross the prairies with her it was your duty above all to have avoided anything wrong even if she proposed it herself.102

On the other hand, he appears to have been prepared, perhaps out of necessity, to sit on matters where he was the Informant/Complainant, as in the (ultimately unsuccessful) prosecution of Cst. Henry R. Elliott for a series of offences in relation to his unauthorized

100 George Glover (1891), SAB Coll. R1286, file #31.

101 Criminal Code 55-56 Vict. (1892), c. 29. Section 269 of the Code made it an indictable offence for any one to carnally know any girl under the age of fourteen of years, not being his wife, whether he believes her to be of or above that age or not. A person convicted under s. 269 was liable to imprisonment for life and to be whipped.

102 Pierre Bourassa (1892), SAB Coll. R1286, file # 39, trial transcript at 10.
marriage to Luders Richardson, Richardson's daughter, or the prosecution of a man for the theft of a shotgun which appears to have belonged to Richardson himself (although he was not the named Informant).

When the Territorial capital was moved from Battleford to Regina, Richardson moved with it. Once based in Regina, his circuit more closely followed and reflected the new iron route of the Canadian Pacific Railway. The distances he travelled were not as great as when he was based in Battleford; he heard matters in Regina as well as in Moose Jaw, Wood Mountain and Maple Creek, to the west, and Qu’Appelle to the immediate east.

5. Conclusion

In this chapter, I have introduced the framework of legal institutions and relations that transformed the Northern Plains Region of North America, from 1670 when the HBC acquired its rights and following 1870 when Rupert's Land and the Indian Territories became the NWT under Canadian authority. Just as it is impossible to overstate the significance of the HBC in the development of the NWT, so too is it impossible to overstate the relevance of the Indian Act in reshaping and governing the lives of the First Nations peoples who were subject to it. The outcome of the negotiated Treaties was disappointing, but at least the representatives of the First Nations were there. As others have noted, the Treaties made no mention of the legal and bureaucratic regime that would be administered by an Indian

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103 Henry R. Elliott (1878), SAB, A-G (GR 11-1) CR-Regina, 1st series, 1876-1886, file # 26. It appears that Macleod SM also had some involvement in this case. Macleod seems to have presided with Richardson with a jury at the trial. See also, Bowker, supra note 12 at 263 – 265.

104 Kenneth McLeod (1880), SAB, A-G (GR 11-1) CR-Regina, 1st series, 1876-1886, file #87. He convicted McLeod and sentenced him to two months hard labour.
Commissioner and overseen by the Minister of the Interior of the Dominion Government. Indian policy was devised in Ottawa and administered, and enforced, at the local level.

If the Treaties fundamentally altered the nature of the relationship of the First Nations to the land, so too did the Indian Act fundamentally alter the nature of the relationship of the First Nations to the Canadian government.

Finally, I have introduced Hugh Richardson, whose court records of the period form the basis of this dissertation. In the next chapter, I identify and analyze different forms of interpretative challenges presented by court records, and Richardson’ records in particular, in relation to Aboriginal people. In the chapters that follow, I will demonstrate that the relevance and probative value of the literature analyzed and the themes pursued in this chapter. In particular, I demonstrate the importance of attention to the legal form of criminal law, the efficacy of a relational analysis, and the importance of rethinking the ‘criminalization’ thesis.
Chapter Three

The Richardson Court Records: Interpretative Challenges and Strategies

1. Introduction

“Wringing meanings from case files calls for alternative interpretive strategies.”¹

The first file in the first series of “Richardson Papers” housed by the Saskatchewan Archives Board is demonstrative of many of the challenges confronting the researcher of court records. The court file contains four documents: the initial remand dated 27 November 1876 to 30 November 1876, a warrant of committal dated 30 November 1876 signed by Jarvis JP, the disposition by Richardson, and the surety entered into by Xavier Plante, farmer, of Lake St Anne, in the amount of $400.00.

These documents indicate that Felix Plante appeared as a prisoner before Hugh Richardson at Fort Saskatchewan on December 15, 1877. He entered a plea of guilty to a charge of assaulting Xavier Plante, his father, with a rake, seriously wounding and rendering him insensible. Following the guilty plea, Richardson ordered that the younger Plante be

released on a recognizance to keep the peace and be of good behaviour. He recorded his reasons in the following handwritten disposition:

That it appearing from the medical statement offered that the said Felix Plante is insane although not now a dangerous lunatic and upon the recommendation of W. Herchmer the medical staff constable of the Fort that confinement is not likely to result in any good effect and being informed by Ins Jarvis that prisoners friends have offered to [watch?] in charge if released — I decline to pass any sentence but direct that upon one surety to keep the peace for one year in $400 be given as surety or two sureties in two hundred dollars each [subject to] Ins Jarvis approval Felix Plante be released.²

There is neither an Information nor any depositions from any witnesses, including Xavier Plante himself, describing the incident and assault. There is no record of the medical officer’s statement or any record of any medical evidence. Clearly, the medical officer persuaded Hugh Richardson that Felix was insane although not a dangerous lunatic, but we learn neither the symptoms nor the basis of the diagnosis. It appears also that W.D. Jarvis participated in the process in multiple roles: as senior NMWP officer, justice of the peace who committed him for trial, possibly prosecutor who approved the conditions of his release and approved the surety. There is no statement of the accused.

We do not learn from the court record that the Plante family was Métis.³ We learn neither Felix Plante’s age, nor the identities of the friends and family members who agreed to keep an eye on him. If the dates in the file are correct, he had been held prisoner in the

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² Felix Plante (1877), SAB A-G (GR 11-1) CR Regina, 1st series, 1876 – 1886, file #1.
³ Department of Interior, Dominion Land Branch – Applications for Scrip 1886 -1901, 1906 made by North-West Half Breeds, SAB R 91 - 17 - Coll.R-5.11, file No. C14943.
NWMP guardhouse for a year; if so, the NWMP might have been happy enough to see him discharged from their responsibility.4

To further complicate the chronology, The Saskatchewan Herald reported the following short item in the Fall of 1878:

A half-breed named Felix Plante is under arrest at Fort Saskatchewan, charged with attempting to kill his father. Prisoner is undoubtedly insane, as he says that he is divinely commissioned to kill off the whole human race.5

It may be that Felix Plante was charged with another attempt on his father’s life, or he may have been brought back before Richardson on the original charge and breached recognizance. Finally, the NWMP court returns for 1879 contain an entry indicating that one “F. Plante” was prosecuted by “X. Plante” as a “Lunatic” under a Territorial Ordinance and

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4 It is possible that the ‘December 15, 1877’ date is a mistake of transcription on Richardson’s part, and the case was disposed of within one month of the date of the offence. If the date of his guilty plea is incorrect (and should be 15 December 1876 rather than 1877), he may have been held in custody for only two weeks (and thus a relatively short period of time following a serious assault in which to conclude that he was not “dangerous”). When I first read this file in July 2003, I did not query the 1877 date; having read other files since then, I have come to realize that Richardson occasionally mis-dated his record, especially in the early days of January and occasionally in October. However, it is likelier that the recorded date is correct in this instance. The earliest dated record in this series of court records is that of the inquest into the death of the prisoner Charles Cardinal held at Fort Saskatchewan in July 1877. It is not apparent from this file that Richardson played any role in that proceeding. The earliest dated record in the series in which Richardson appears to have presided is that of Regnier Brillon (1877), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file # 4, whose trial occurred in Battleford on 10 October 1877.

See John Beattie’s cautionary admonition in Crime and the Courts in England, 1660 - 1800 (Princeton: Princeton University Press, 1986) at 20–21. Noting that much of the information on a criminal indictment is probably reliable (e.g. name of accused and name of victim), other information “cannot be taken at face value” – including the date of the alleged offence. In the Richardson files, there is good reason to proceed with Beattie’s advice in mind, especially as the Cree and other Aboriginal peoples often described the time of an incident by reference to the season – e.g., in her deposition in Kee-chee-qua-pi-e-ka-wa’s case (1877) (SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #7) a young girl named Monique’s deposition explained when the murder of several members of her family by Kee-chee-qua-pi-e-ka-wa, alias Johnny, alias Son of the Big Man, alias Tis-ta-mous-noui, and his brother, Bear, took place:

“When the leaves were getting withered and two winters have passed since, my father’s family were camped at a small lake between [Lake?] Assiniboin and Lesser Slave Lake.

5 Saskatchewan Herald (31 October 1878) 1, col. 2.
convicted by W.D. Jarvis JP at Fort Saskatchewan; the penalty is recorded simply as "committed" but no final disposition is indicated. Felix Plante's file may be the first, but it is certainly neither the last nor the least with respect to unanswered questions, unfinished stories, and interpretive challenges. Mindful of such limitations, there nonetheless is a contribution to socio-legal history and to an understanding of socio-legal relations involving Aboriginal people of the Canadian Plains that the cryptic and partial accounts in the Richardson records can make.

Court records of early Canadian courts are understood to be an important area of research for a number of reasons, not least because of their potential to "deepen our understanding of the processes that have shaped modern Canada." On the traditional terrain of legal history, legal historians explicate and analyse the legal institution, processes, and actors that are revealed by a systematic study of the primary legal documents of a court, a region, or a period. Legal historians take legal process seriously. This may seem a self-evident, possibly self-referential point, but in my view its importance cannot be overstated.

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7 John Schultz, Writing About Canada: A Handbook for Modern Canadian History (Scarborough: 1990) at ix, quoted by Margaret McCallum, "Canadian Legal History in the Late 1990s: A Field in Search of Fences?" (1998) 27 Acadiensis 151 at 166.

8 McCallum, ibid. at 165 characterizes the promise of legal history for the legal historian:

Legal history exposes the contingent nature of law and legal processes and asserts that law is the product of human choice among various alternatives. Who makes those choices, how and why they are made, and who wins and loses from the consequences of the choices is thus the focus of legal history, as it is of any history that concerns itself with the creation, maintenance and distribution of power.
The failure of social historians to apprehend or attend to the significance of legal forms and legal distinctions can lead to problems. I return to and discuss this issue of the importance of attending, apprehending and “engaging with the law” more fully later in this chapter.

Lower court records, where they have survived at all, pose a particular challenge as they frequently provide only cryptic snippets of the actual proceedings before a trial judge. At first blush, there appear to be more gaps than data, more silences than text, and more questions than answers in these court records. A study of the records of ordinary criminal matters that came before the court, individually or together, may provide some answers to the and “where” and “what” of the process, but to the inevitable questions, “how” and “why,” a firm answer is more elusive, only hazy outlines, shadows and multiple, if finite, possibilities. Hugh Richardson’s court, as I have discussed in Chapter Two, was such a lower trial court.

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9 For instance, Joan Sangster’s failure to distinguish between “committal” and “conviction” flaws her study of Ontario’s Female Refuges Act 1897. Sangster misapprehends the nature of the provincial legislation which authorized the committal of young women to the ‘refuges’ for periods of up to two years. Sangster’s criticism of the legislation is weakened by her misunderstanding of the nature of process to which women were subjected; i.e., that they were neither convicted nor sentenced by the magistrates who committed them to the institutions under this legislation. See Joan Sangster, “Defining Sexual Promiscuity: “Race,” Gender, and Class in the Operation of Ontario’s Female Refuges Act, 1939-1960” in Wendy Chan & K. Mirchandani, eds., Crimes of Colour: Racialization and the Criminal Justice System in Canada (Peterborough: Broadview Press, 2002) 45; Joan Sangster, Regulating the Lives of Girls and Women: Sexuality, Family and the Law in Ontario, 1920-1960 (Don Mills: Oxford University Press, 2001).


11 The records of lower criminal courts are often not preserved, with the result that researchers are reliant on other sources, such as the press, police or jail records, for a court’s activity: See, e.g. Amanda Glasbeek, A Justice of Their Own: The Toronto Women’s Court, 1913 – 1934 (Ph.D. dissertation, York University 2003) [unpublished]; Amanda Glasbeek, “Maternalism Meets the Criminal Law: The Case of the Toronto Women’s Court” (1998) 10 C.J.W.L. 480. Glasbeek found that the court records of the Toronto women’s court have not survived. See also, Linda Gordon, Heroes of Their Own Lives: The Politics of Family Violence (New York: Viking, 1988); Annalee Golz, “Uncovering and Reconstructing Family Violence: Ontario Criminal Case Files” in Franca Iacovetta & Wendy Mitchinson, eds. On the Case: Explorations in Social History (Toronto: University of Toronto Press, 1998) 289 at 289, 291.
Some legal historians are drawn to micro-narratives of case studies, using discrete and/or leading or famous legal cases both to situate a case in its larger social and legal context, and for some, as well, to advance a larger social or political analysis of law's contribution to forms of systemic inequality. Other social historians seize upon the opportunity offered by the over-representation of the poor and marginalised in the criminal courts to uncover the voices and experiences of ordinary peoples whose stories otherwise would go untold. Still other historians, sceptical that experience can be 'uncovered' or revealed in official records, are inclined to reject 'experience' as an analytic tool.

In the next two sections, I consider two interdisciplinary approaches taken to court records and to the important issues of meaning and interpretation. I argue that a preoccupation with the records of high law can to be found in both approaches, which really are inter-related. Some social historical research that begins in the lower criminal courts finds its way into higher courts. I also argue that the interest in court records as “narrative”

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amenable to textual analysis implicitly reproduces and reinforces within both socio-legal and legal historical scholarship the class biases of high law. It is to these forms of historical inquiry into court records that I turn with a view to engaging in both appreciation and critique, endeavouring to incorporate their insights whilst suggesting some of their limits.

2. Court Records as Social History: The (Socio-legal) Lives of Ordinary People

Legal scholars, including legal historians, long have been criticized for their neglect of social relations, or for failing to see law as a social relation within a social formation. At the level of theory, the criticism has pointed to the continued primacy of law within socio-legal scholarship (the sun around which other lesser planetary relations circle). Methodologically, this criticism has involved an injunction to look at a broader range of sources beyond a narrow focus on legislation, case law, and court records – traditionally, the bread and butter of legal historians -- and to situate law in its social, economic and political context.

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16 Hunt, ibid. at 144 - 45.

17 As McCallum, supra note 7, notes at 154: “cases statutes and treaties.”

As I will demonstrate below, it has become axiomatic for historians to acknowledge the limitations of court records and the interpretative challenges they present. However, for some historians, court records, whatever their limitations, offer an important source, perhaps the only ‘record’, in their research area. Steven Maynard has argued, “It is almost impossible to imagine the writing of gay history without court records.” Maynard raises here the epistemological issue: he wants to write gay history, and he has to rely on court records to do this. Mindful of “formidable interpretative challenges” posed by court records, he reminds us of the sorts of metaphors that historians use to characterize them:

... metaphors of visibility – in particular, the court records as a ‘window’ through which the historian may glimpse some aspect of the past. Most historians are also fully aware that the view provided by court records is rarely clear and therefore

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19 For instance, of the relationship between women and law in nineteenth century Canada, Constance Backhouse once observed, “Studying the legal records of a white supremacist, patriarchal regime is not well calculated to unearthing much of relevance about the lives of women of the First Nations and women of colour in the nineteenth century.” Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth Century Canada* (Toronto: Women’s Press and the Osgoode Society, 1991) at 6. However, for Backhouse, the “snapshots” of women’s struggles through the angle of legal records are a beginning. Similarly, in her discussion of Research and Analysis Methods at the close of *Heroes, supra* note 11, Linda Gordon indicates that she had identified three potential sources for her study of family violence in nineteenth-century Boston — legal records, from criminal and civil court proceedings; public charity records, including those from institutional homes and state and local relief programmes; and, private social-work agency files. For Gordon, the legal records “proved least fruitful” (at 301): they were thin and incomplete—frequently no affidavits were gathered, and other papers had either not existed or had been destroyed. In the end she selected the files of three private charities whose records she felt “provided the richest and most representative data.”

20 Steven Maynard in “‘Horrible Temptations’: Sex, Men, and Working Class Male Youth in Urban Ontario, 1890 – 1935” (1997) 78 Can. Hist. Rev. 190 at 197 [Maynard, “Horrible Temptations”]. Maynard’s claim that gay history requires use of criminal court records is surely an over inclusive one. His research examines one aspect of the legal construction and regulation of the sexual lives of gay men, and in particular the proscription of inter-generational sexual relations between men and adolescents or boys. The criminal court records enable the social historian to understand the nature and perhaps implication of the criminalization of gay men’s sexuality. But it is too much to suggest that the history of gay men requires the criminal court records.
must be wiped clean, a method often referred to as reading against the grain."21

Maynard thus distances himself from approaches that rely on metaphors of windows or cameras in relation to court records.22 He turns instead to historians who find court records to be “particularly fruitful sources with which to experiment with social narratology,” because “there are lawyers on either side consciously organizing conflicting narrative [and] the partial and artificial character of all narratives is easily demonstrated.”23 However, Maynard concedes that court records are often “frustratingly short on narratives,”24 to which one can add, that in the lowest criminal courts, certainly those in the nineteenth-century NWT, there were precious few lawyers “consciously organizing conflicting narrative.”

Maynard thus proceeds with caution and modification, and makes the important point that [social] historians heretofore have not been sufficiently attentive to “differentiate between the many documents that often make up a legal case file, many of which had different textual forms, generating both narratives and non-narratives.”25

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21 Ibid. at 197-98. See Robertson, “Legal Records,” supra note 10, and infra for another reading of “reading against the grain.”

22 Robertson, ibid. at 161 – 162 also makes this point concerning “the pervasive use of the metaphor of legal sources as a window.” McCallum, supra note 7 at 153-54 provides another reason to move away from the language of visibility and metaphor of windows in her admonition concerning historical work which, for instance, summarizes or quotes verbatim descriptions of the abuse of women:

This approach, used frequently in new legal history, shows the value of legal records in revealing some aspects of the lives of ordinary people. .... The mere compilation of example after example, however, is closer to voyeurism or journalism than historical inquiry.


24 Maynard, ibid. at 199-200.

25 Ibid. at 200. This is also Stephen Robertson’s central argument in “Legal Records,” supra note 10. See McCallum’s obvious irritation with researchers in the field who proclaim at legal historical conferences that they are not legal historians, lawyers or even historians: supra note 7 at 152.
Support for Maynard’s observation that court records are “frustratingly short on narratives,” and my own concern that social and legal historical research tends to replicate a preoccupation with high law, may be found in a recent contribution by Annalee Golz on family violence in the courts. Like Maynard, Golz understands the importance of criminal case files and of proceeding with care:

...criminal court records pose very real interpretive challenges: they are, like many historical documents, often frustratingly incomplete, and court transcripts are riddled with gaps and silences that require cautious analysis and contextual explanations.26

Noting the importance of court records in the history of family violence, Golz similarly is mindful of the context in which the voices of abused women were heard.27 But, in order to study the way in which gendered relations of inequality were reproduced in the courtrooms, Golz makes a leap from context to text. Most cases were tried summarily at the lowest level of the judicial hierarchy where, unfortunately, “there are few surviving detailed records of the daily adjudication and mediation of familial and community matters ... .”28 And so, the researcher goes to high law, where most cases were not decided, but where there is a record, where there is text and narrative:

Since the criminal case files gathered and produced in the higher courts have tended to be preserved and tend to be more

26 Golz, supra note 11 at 289.
27 Ibid. at 289-90:
...the court testimonies, as written down through the medium of the police magistrate/court recorder and, in some cases, as presented through the voice of a paid interpreter, constitute historical ‘texts’ that were created within specific systems of meaning and relations of power. This process of re/construction makes it difficult to locate what could be termed the ‘originator of meaning’ or an ‘authorial voice,’ ...

28 Ibid. at 300.
detailed, it is these trial records that most clearly illustrate the kinds of marital tensions and struggles that emerged in the courtroom. [emphasis added] 29

The latter claim does not necessarily follow from the former. At best, the criminal court files from the higher courts may help us understand what happened in those courtrooms. But, they may well tell us nothing at all about the processes and "kinds of marital tensions" that played out in the lower courts.

As others have noted, the difficulty with using court courts to either 'open a window' or 'deconstruct narratives' is also one of numbers. 30 In my records, there are approximately one hundred criminal court files involving Aboriginal accused persons. However, in that period, there were several thousand Aboriginal people in the NWT. No matter how cautious we are interpreting our records, the fact remains that only a tiny fraction found themselves prosecuted in the criminal court. 31 This is not at all to diminish the importance of research into these court records, but to add my voice to those who urge caution at the interpretations,

29 Ibid.

30 See Robertson's discussion of this issue in "Legal Records," supra note 10 at 163, in particular the concern of scholars who argue that given the deviant or non-normal nature of the activity that is found in (criminal) court records, "legal records can tells us little about the majority of people and their behaviour" – including "ordinary" people who are the concern of social historians. It is also helpful also to remember E.P Thompson's injunction: the symbolic importance of violence, whether the violence of the state or the crowd may have no direct correction with numbers. E.P. Thompson, "Folklore, Anthropology and Social History" (1978) 3 Indian Hist. Rev. 247. See also Douglas Hay, "Property, Authority and Criminal Law" in Douglas Hay, et al, Albion's Fatal Tree: Crime and Society in Eighteenth – Century England (London: Pantheon, 1975) 17 at 33 – 34 (on the symbolic importance of occasionally executing "a man of property or position").

generalizations we can make arising out of our research. Of perhaps greater importance is the need to approach the court records in a manner that situates them in their broader social and legal contexts and is attentive to ideological as well as statistical dimensions. As E.P. Thompson has observed, the symbolic importance of terror, whatever its provenance, has no necessary correlation with numbers.\footnote{Thompson, \textit{supra} note 30.}

3. Court Records as Text

"Describing the law as word may be to ignore ... the law as deed and the necessary bond between the two."\footnote{Douglas Hay, \textit{\textit{Time, Inequality, and Law's Violence}}" in Austin Sarat and Thomas R. Kearns, eds. \textit{Law's Violence} (Ann Arbor: University of Michigan Press, 1995) 141 at 141 [Hay, \textit{\textit{Law's Violence}}].}

Criminal court records may be textual in form, but they represent more than words. The text is not the sum of law. They are a particular form of official record. Most narrowly construed, they are connected, at the very least, to two different sets of deeds:\footnote{Or, as Hay, \textit{\textit{ibid.}} might say, to violence: \textit{... to ignore the violence is to ignore a central (the central?) fact about law, its distinctiveness as discursive practice} (at 141).} the deeds of those who find themselves brought involuntarily to court, that are purportedly captured by the text of the court record, and the deeds of those whose authoritative words give rise to consequential deeds: imprisonment, corporal punishment, and occasionally the infliction of the death penalty. More broadly construed, these texts may be said to illustrate power and inequality. In my view, while it is essential to see them as having been produced and situated within contexts and relations of power and inequality, this is but a necessary precondition,
not complete in and of itself. It is precisely from this point that the most difficult lines of 
inquiry begin.

State records often document (and are often the only documents of) captive or 
vulnerable or marginalized populations (prisoners, patients, psychiatrized individuals, welfare 
mothers, and so on). In these records, overt resistance or defiance may be more easily 
documented than less visible or inaudible forms, and forms of accommodation, where noted 
at all, may have been misunderstood by the interpreter and the initial recorder. Some 
historians approach these texts by “reading against the grain.”

Other historians appear to reject the proposition that legal records, or indeed any form 
of text, contain voices but rather only the discursive construction of subjects. The text of law 
is authored by neither its object nor its subject. Here, then is yet another aspect of law’s 
distinctiveness as discourse; the “woman of legal discourse,” for instance, neither writes nor 
interprets her own story. This phenomenon, of course, is not unique to law. Franca Iacovetta 
and Wendy Mitchinson have noted in the context of “case file” research more generally:

...the central epistemological challenges facing researcher in 
the field [is]: how do we interpret the experiences, strategies, 
and perceptions of those women, men, and children who did 
not leave behind their own written record and who appear in

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35 Robertson, “Legal Records,” supra note 10 at 163:

Reading against the grain focuses on moments of misunderstanding and conflict – ruptures in 
the legal process, departures from legal forms, formulas, and languages, and information that 
has not been shaped to fit the terms of the law. In those moments, in those places in texts, can 
be found the voices of ordinary people.

36 From Carol Smart, “The Woman of Legal Discourse” (1992) 1 S.L.S. 29. I have engaged critically with 
Smart’s woman of legal discourse in “Mothers, Other Mothers and Others: The Legal Challenges of Lesbian 
Parents” in Dorothy E. Chunn & Dany Lacombe, eds. Law as a Gendering Strategy (Toronto: Oxford 
the historical record only fleetingly and usually as the objects
or targets of more powerful others.\(^{37}\)

In the case of criminal law, this inequality of silence is an omission occasioned not by
oversight, but enforced:

The relationship of ... judge and accused, while intimate is
highly unlikely to be one of shared discursive practice of any
kind... . Law, and especially criminal law, seeks to prevent the
victim of law from generating a public version of his or her
life’s argument, and law is usually successful.\(^{38}\)

With respect to lower court records, there is often precious little text either to “read
against” or discourse to deconstruct. Unlike psychiatric clinical case files\(^{39}\) or capital case
files,\(^{40}\) the criminal court records of the NWT provide a paucity of information concerning
the participants (informants, deponents, prisoners, police officers, judges) in the criminal
proceedings. We seldom, if ever, learn the actual age of any of the accused persons,
complainants or other witnesses.\(^{41}\) There is very little of the prisoner’s voice to be found,

\(^{37}\) Franca Iacovetta & Wendy Mitchinson, “Introduction: Social History and Case Files Research,” in Franca
Iacovetta & Wendy Mitchinson, eds. On the Case: Explorations in Social History (Toronto: University of

\(^{38}\) Hay, “Law’s Violence,” supra note 33 at 142.

\(^{39}\) See e.g., Menzies & Chunn, “Order-in-Council Women,” supra note 35; Menzies & Chunn, “Charlotte’s
Web,” supra note 35; Lykke De La Cœur & Geoffrey Rémacle, “Patient Perspectives in Psychiatric Case Files”
in Franca Iacovetta & Wendy Mitchinson, eds. On the Case: Explorations in Social History (Toronto:
University of Toronto Press, 1998) 242; Stephen Maynard, “On the Case of the Case: The Emergence of the
Homosexual as a Case History in Early Twentieth-Century Ontario” in Franca Iacovetta & Wendy Mitchinson,
eds. On the Case: Explorations in Social History (Toronto: University of Toronto Press, 1998) 65 [Maynard,
“On the Case”].

\(^{40}\) Strange, supra note 1.

\(^{41}\) The exception, of course, may be found in the files in which the alleged offence is one of unlawful carnal
knowledge with a female person under the age of twelve years (as in the case of Ka-nah-pic-a-nah-haw, or ‘The
Snake Indian’ in November 1882 (SAB, A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #171) or
fourteen years (as in the case of Pierre Bourassa, (1892) (SAB, CR-Regina RG-1286, file # 39).
other than in the statements of accused, and occasionally in the form of participation cross examination by the accused persons. The statements from witnesses have been transcribed, often interpreted through interpreters. They appear in the files in the form of narrative, but occasionally one sees a question and answer, or a statement directed directly to the prisoner or complainant. The challenge for the researcher is to avoid compounding the injury of misunderstanding with the insult of misinterpretation and the erasure or caricature of human agency.

A related challenge concerns the interpretation of silence; for instance, the silence of the accused who says: "I will not say anything," or "I have nothing to say," or "I will say nothing until the Big Bull arrives;" the silence of the unrepresented prisoner who asks no questions. Was the silence indicative of custom, acquiescence, defiance or intimidation? Did the accused actually say "I will not say anything," and, if so, did that have a different meaning than "I have nothing to say." As Karen Dubinsky has observed in another context, "Sometimes... silence also equals power. Interrogating that silence — which was rendered

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42 See e.g., Frederick Kidd’s questions of witnesses before the justices of the peace (Frederick Kidd, (1877 SAB, A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file # 8); Pierre Bourassa’s efforts, ibid., through the Interpreter Peter Hourie, during his trial.

43 See, e.g. Cree complainant, John Eye’s statement, through Pierre Daigneault, Cree interpreter, to the accused, William Turner (1877) SAB, A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #5.

When I went for water I met Turner near the water hole. He told me to go to the river. I told him I would not. I went to the mill and took a bucket full. He came behind me and told me to throw that water in the hole. I asked him what for. He repeated this order. I put the water in the hole and stepping back called Turner a "son of a Bitch." Turner struck me on the side of the head with his hand. I jumped for a stick but did not take it. Turner took a stick and I ran away.

To defendant My reason for making use of the expression I did use was because you spoke so roughly to me. I was going to take up a stick but when you [picked] up one, I ran away.
natural in the day-to-day workings of the criminal-justice system – will be a challenging issue facing those who try to explore the history of masculine identities.  

Many of the trials themselves are cloaked in the silence imposed by the closure, “tried and convicted.” In fact, one might say that the criminal trials in Judge Richardson’s court are evocative in many ways, not least this, of a form of oral tradition of the lower trial courts.

A recent contribution by Stephen Robertson offers an approach to reading and analyzing court records – in his words, “a primer for how to read them.” Robertson argues that historians need to engage with law by paying close attention to, indeed foregrounding, legal rules and institutions, by looking critically at how law works “in practice;” by attending to the law and society relationship, and by examining the ways in which “ordinary people” used the law and were not simply subjected to it. Robertson makes a compelling case for “adopting a broad view when looking for evidence” in court records; in his view, examining an offence in isolation is rather like “pulling a thread out of the fabric of law.” In the last part of this chapter, I take up Robertson’s primer and demonstrate how my approach the NWT court records has actually anticipated his advice.


45 Robertson, “Legal Records,” supra note 10 at 163. I was delighted to encounter Robertson’s article, albeit only recently (long after I had completed my research, and was well into the writing!). However, as I hope to demonstrate in this chapter and those that follow, my approach to the court records shares much with what he identifies in his primer.

46 Ibid.

47 Ibid. at 171.
4. Sources

(1) Richardson's Court Records

(a) Early Period, 1876-1886

My data is derived from two sets of criminal court records. Richardson’s records as Stipendiary Magistrate, 1876-1886 (comprising most of “The Richardson Papers” held by the Saskatchewan Archives Board in Regina) as well as his court files of the Supreme Court of the North West Territories, from 1887 until his retirement in 1903.

The collection covering the early period (1876-1886) contains two hundred eighty-two (282) records, thirty-nine (39) of which relate to non-criminal matters (breach of contract (including breach of contract of employment, non-payment of wages, debt, and wrongful dismissal). Of the remaining two hundred forty-three (243) criminal court matters, one hundred ten (110) cases (45.26%) seem to involve Aboriginal persons as Accused persons,

48 I have left aside a number of records relating to the collection of debt and unpaid wages.

49 This collection is located at the Saskatchewan Archives Board (Regina) in the Records of the Department of the Attorney-General, Regina Judicial Centre: Court Records, First Series, Files 1 – 282, 1876 – 1886. There is no collection number for these records, which currently can be found on shelf location H – 1198.5.4 in the Regina office of SAB. In this dissertation, I identify the files from this set of records as follows: SAB, A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #.

50 This collection is located at the Saskatchewan Archives Board (Regina) (SAB) in CR-Regina RG 1286.

51 I am mindful that these figures are somewhat imprecise. Some of the Accused persons are described in the documents as “a Cree Indian,” “a Sioux Indian,” and so on (e.g. Ochaque, a Saulteaux Indian, otherwise “the Fisher” (1879/80) SAB, A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file # 96). Some of the names are clearly those of an Aboriginal person (e.g., Ka-Ki-Si-Kut-Chin, also known the Swift Runner (1879), SAB, A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #65); whereas others are revealed by the context and contents of the file to be an Aboriginal person (e.g. Joseph Cardinal (1880), SAB A-G (GR 11-1) CR-Regina, 1st series,
whereas individuals identified specifically as “Indian” accused are found in seventy-one (71) files (or 29.2%). Some of these cases, notably the cases in which theft of horses was alleged, involve more than one accused person. In fifty-four (54) cases (22%), the Informant or Complainant appears to have been an Aboriginal person (those described only as “Indian” are found in twenty (20, or 8.2% of the files).

A few general observations, which will be developed more fully in Chapters Four, Five and Six, can be made here. Between 1876 and 1883, these court files principally involve criminal prosecutions that arose in and around the settlements and forts in the District of Saskatchewan; after Richardson’s move to Regina in 1883, the files derive principally from Regina, Qu’Appelle, Moose Jaw, and surrounding areas. In this early period, where the population of the NWT was overwhelmingly Aboriginal, they nonetheless appear as accused persons in significantly fewer numbers. Most accused persons were held in custody in the gaol in the police barracks and thus appeared in court as prisoners. Most criminal prosecutions (as opposed to liquor violation prosecutions) were commenced by Informants

1876 – 1886, file #104). In some instances, I have drawn an inference by virtue of the fact that many Francophone names (e.g. Plante, Ballendine, Poitras, Trottier, Delorme, Pruden, Cardinal, Venne, Letendre, Lavallée, to cite but a few) and/or community (e.g. St. Laurent, Lac La Biche, Duck Lake,) are generally known to be prairie Métis. See: Department of Interior, Dominion Lands Branch – Application for Scrip 1886-1901, 1906 made by North-West Half Breeds. SAB R 91-7 Coll. R-5.11 File No. C14943. See also Diane Payment’s discussion of the Métis families of early Batoche: “Batoche After 1885, A Society in Transition,” in F. Laurie Barron & James B. Waldram, eds. 1885 and After: Native Society in Transition (Regina: Canadian Plains Research Centre, University of Regina, 1986), 173, esp. 175-78. In other cases, an individual was described in the file as a “Half-breed” or “Half-breed Indian” (e.g. Scholastique Cardinal (1882), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #145). For the purposes of this calculation, I have included Cree, Saulteaux, Assiniboine (Stoney), Sioux, Blackfoot and Half-breed within the meaning of “Aboriginal.” I have also included every file where an interpreter for an Aboriginal language is indicated in the file. It should be noted that only the term “half-breed”, never the word “Métis, appears in the documents, having acquired a form of legal legitimacy by its inclusion as a legal term in the 1876 Indian Act: see Douglas Sanders, “The Queen’s Promises,” in Louis Knafla, ed. Law and Justice in a New Land: Essays in Western Canadian Legal History (Calgary: Carswell, 1986) 101 at 109.

52 See, e.g., Chac-a-Chas and six others, (1884) SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #143; The Rock, Little Fish, and Is-te-wa , three Cree Indians (1884) , SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #226.
who were private individuals, not NWMP officers swearing on information and belief. Most Informants knew by name the individual they alleged had committed the offence. It appears that most Informants and accused persons had a social or legal relationship prior to and/or giving rise to the matter before the court.

Most property related offences involved forms of larceny of 'subsistence goods' (flour, sugar, bacon, tea, matches, trousers, socks, vests, as well as livestock and horses) but some involved theft of ribbon, watches, buttons, and other readily carried and concealed objects. The major victims of property offences were the major holders of property, the Crown and the HBC.

The governing legislation required the justices of the peace to receive Informations, examine witnesses, record the depositions and forward the entire record of the proceedings before them to the Stipendiary Magistrate for trial. Occasionally, the committing JP included a covering note to Colonel Richardson (as they addressed him). For instance, HBC Factor and JP Lawrence Clarke wrote to Richardson concerning debt matter, describing the poor state of health of the elderly Plaintiff who claimed that the defendant owed him $80.00 for the sale and delivery of a mare.53

Each court file contains the hand written record of the proceedings before the justice(s) of the peace who committed the accused for trial; these justices of the peace more

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53 *MacKenzie v. Lafond* (1877), A-G (GR 11-1) CR-Regina, 1st series, 1876 - 1886, file #2. Clarke’s cover letter explained,

> I send you Information for which a summons is asked, as the debt is only one item and that which is stated in Information I did not think account would be required. Poor old McKenzie has gone totally blind and is a pitiable object so I should like to help him, the Fellow can pay if he likes as he has property.

No other document is contained in the file.
often than not were Senior Officers of the NWMP.54 Included are the Information, Warrant to Apprehend (where relevant), the occasional Warrant to Search (again where relevant), the Depositions of the Informant and other witnesses, frequently the Statement of the Accused, the warrant of committal for trial, the warrant to the gaoler (commanding officer) to hold the prisoner until the next sittings; occasionally, again, a Recognizance releasing the accused pending trial, and Recognizance to prosecute, and finally and infrequently a cover letter from the committing justice. Orders involving Recognizances almost invariably required sureties and money. The record of the actual trial is much less detailed. The Informants tended to be present at the hearing before the justices of the peace, but it is not clear that they were present at the trials. Often, the phrase "tried and convicted" is all that appears, or "guilty plea" together with record of the sentence and calculation of the court costs – and sometimes not even that. Before 1887, there is seldom reference in the court file to prosecuting counsel (who the NWMP returns suggest would have been a senior NWMP officer).

Thus, while each court record contains (for the most part, most of) the requisite legal forms and documents, the language is more informal than formal. The depositions appear as first person accounts, as uninterrupted narratives, but of course they were the product of examination (perhaps by an NWMP officer or a private prosecutor) and some cross examination. In many of the records, the depositions were taken through Cree and Sioux interpreters, some of whom appear to have been sworn, others not. In virtually all the depositions taken from Aboriginal witnesses, the witness has marked an "X" in place of a signature.

54 James Walker, Sèvère Gagnon, W M. Herchmer, R. Burton Deane all figure prominently. The most active 'lay' Justices of the Peace were two HBC men, Lawrence Clarke (Carlton) and Richard Hardisty (Edmonton).
(b) Richardson's Court Records, The Later Period 1886 - 1903

With the creation of the Supreme Court of the NWT, Richardson remained a trial judge; however, he was no longer a magistrate, but a justice of the Territorial Supreme Court, presiding over the Judicial District of Western Assiniboia. In that sense, he and I make a leap into Territorial "high law" with this set of records.

Richardson’s records from the NWTSC are not much different in form or content, especially in the earlier period, than his records from his tenure as Stipendiary Magistrate. The kinds of alleged offences which came before him were essentially the same as before. He appears to have acquired more institutional support, and his handwritten notes appear less frequently. His court acquired a proper court clerk (Dixie Watson), and a Crown Prosecutor (David Lynch Scott, later T.C. Johnstone, and John Secord) appears more frequently, as do defence counsel (most often T.C. Johnstone, in the earlier period, Norman MacKenzie later on). In these records, one finds more typed documents, including transcripts, and more counsel. One finds a bit more process in these records, as one now finds formal indictments signed by the Crown Prosecutor in the files.

As I have indicated in a previous chapter, the demographics of Western Assiniboia did not include many Aboriginal communities. However, the Touchwood Hills, File Hills and western part of the Qu’Appelle Valley, as well as Indian Head were included, as well as Wood Mountain and Maple Creek to the west. These districts were home to a number of First Nations bands, including those of Piapot, The Man Who Carries the Coat,

55 The SAB CR- Regina RG 1286 collection includes “Criminal Docket” Books of the Supreme Court of the North West Territories commencing in 1901. Given the similarity in the handwriting in both the court files and the docket book, I believe these docket books were created and maintained by Dixie Watson.
Peepeekeesis, Muscowequan, Muscowpetung, as well as a few Métis communities, such as Lebret.

With respect to his records arising from his time on the Supreme Court of the North West Territories (NWTSC), it appears that of the three hundred seventy-eight (378 files) (of which I was able to read three hundred-sixty-one (361)\textsuperscript{56} between 1887 and 1903;\textsuperscript{57} thirty-six cases (36, or 9.9%) involve Aboriginal persons as Accused persons ("Indians" appear as Accused in twenty files (20, or 5.5%); "Indian" informants are found in eight files (8, or 2.2%), although it appears that a further seven cases involved Aboriginal victims (including three homicide victims, and two cases in which Father Joseph Hugounard, Principal of the Industrial School at Lebret, as Informant, alleged that young Aboriginal women had been sexually assaulted, and one case where an entire Indian Band was alleged to be the victim).

(2) The ‘Court Records and Court Reports’ of the NWMP and Territorial Press

(a) The Territorial Press

The court records are thus less than exhaustive in their contents and particulars. When one turns to the press reports, supplementary and occasionally fuller and different accounts may be found in the \textit{Saskatchewan Herald} (Battleford) (1878 - 1883) and in the Regina \textit{Leader} (1883 - 1903). For the most part, with few exceptions, both newspapers contain sparse, cryptic, but no less judgmental, accounts of the criminal court. The few exceptions may be found in the ‘big’ or notorious trials (such as the 1885 Rebellion/Resistance trials,

\textsuperscript{56} I have recorded and used the SAB file numbers rather than the court docket numbers. I was unable to read seventeen of the court files in this series due to their damaged and/or fragile state.
the Swift Runner’s murder trial and execution in 1879, Cst. Henry Elliott’s 1878 trial in Battleford following his elopement with the magistrate’s daughter). The *Herald*, in particular, appeared quicker to proceed to judgment prior to trial, and to offer ‘insider’ information or interpretation of the facts that do not appear in the court records. As I will discuss in Chapter Five, the *Herald* displayed particular animus to “troublesome” First Nations leaders, such as Big Bear and Beardy.

In the Regina *Leader*, reports of the criminal court tended to be snippets, surrounded by items of local interest: comings and goings, picnics, dances, hunting trips and the like on the paper’s “Town and Country” page. The barest of particulars, occasional hint of scandal or editorial disapproval are offered, as in the case of the step-father thought to be the father of his step-daughter’s dead newborn infant; even in this case, the *Leader* did not report on the trial of either the young woman (for concealment of birth) or of the step-father (for unlawfully disposing of the body of the dead child).58

Local and political histories of the region offer some further evidence of and insight into the social dimensions and transformation in the region, notably the changing demographic composition of the population, and the emerging tensions with respect to governance.59 The

57 After the summer of 1902, the newly appointed Mr. Justice Edward Prendergast presided over some of the matters.
58 *The Regina Leader* (29 April 1897) 8, col. 3, reported, under the heading, “A Serious Charge” a small item: “A sensational investigation is under way in Moose Jaw. ... There is suspicion that the step father of the girl – a young woman of about 24 years - is the father of the child. The girl’s mother is alive but has lived in Ontario for year past.” Nothing further on the case was reported. The legal result may be read perhaps as a juridical apportioning of responsibility and blame in the matter. The young woman, Maggie Coulter, was acquitted by a jury of the charge of neglect to obtain assistance in childbirth and concealment of birth (1897) SAB, CR-Regina RG 1286, file #149; her stepfather, Samuel Flack, pleaded guilty before Richardson on 26 June 1897 to unlawfully disposing of the body of the child, and was sentenced to one day imprisonment and $200 fine, payable forthwith, in default 3 months HL Regina gaol. See SAB, CR-Regina, RG 1286, file #154.
biographies, reminiscences and stories of First Nations peoples and their leaders, together
with ethnographic studies and social histories provide perspectives and insights that are
drawn from their experiences of law and the Canadian state.  

(b) The NWMP Returns

Writing in 1986, Louis Knafla lamented the then “haphazard affair” of western
Canadian legal history, dominated by the NWMP and the Riel Rebellions as well as the lack
of a critical context and focus for much of what had been written. Some redress of this
preoccupation has emerged in the two decades since Knafla’s observation, with legal and
socio-legal historians addressing, inter alia, the particular form of legal colonialism

From Fort Battleford: Constructed Visions of an Anglo-Canadian West (Regina: Canadian Plains Research Centre, University of Regina, 1994); F. Laurie Barron & James B. Waldrum, eds., 1885 and After: Native Society in Transition (Regina: Canadian Plains Research Centre, University of Regina, 1986). For instance, from McPherson, The Battlefords, ibid. we learn that Goodwin Marchant, freighter, who appears as an Accused in a couple of importing of liquor cases (SAB, A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #18) was regarded as “a man of repute” (at 59), and that Robert C. Wyld, became a prominent Battleford farmer following his two terms with the Mounted Police” (at 53).


61 Louis A. Knafla, “From Oral to Written Memory: The Common Law Tradition in Western Canada” in Louis Knafla, ed. Law and Justice in a New Land: Essays in Western Canadian Legal History (Toronto: Carswell, 1986) 31 argued that the preoccupation with the NWMP and Riel had “deflected research and writing on more fundamental as well as broader legal subjects.”
experienced by the Aboriginal peoples, the legacy of colonialism and racism and the
development of the legal profession in western Canada.\textsuperscript{62}

However, the NWMP continue to loom large in western legal history. Indeed, it is
difficult, if not impossible, to examine the operation of criminal law and courts in western
Canada without considering the significant role played by the NWMP, especially their
officers who were justices of the peace, and their Commissioner, James Farquharson
Macleod, who was Stipendiary Magistrate and later Judge of the Supreme Court of the North­
West Territories. Historians have continued to turn to the records and reports of the NWMP.

For instance, in their recent study of the relationship to and integration of Native
peoples into the criminal justice in the NWT, R.C. Macleod and Heather Rollason draw
heavily on NWMP records and conclude that of 1,355 cases/accused persons in the records,
242 were Native persons (18\%) and that the conviction rate for Native defendants was 55\%
(as opposed to 62\% were non-Native accused).\textsuperscript{63}

\textsuperscript{62} See e.g., W.F. Bowker, "Stipendiary Magistrates and Supreme Court of the North-West Territories, 1876­
1907" (1988) 26 Alta L. Rev. 243; Lesley Erickson, "Murdered Women and Mythic Villains: The Criminal
Case and the Imaginary Criminal in the Canadian West, 1886 – 1930" in Jonathan Swainger & Constance
Backhouse, eds. \textit{People and Place: Historical Influences on Legal Culture} (Vancouver: UBC Press, 2003) 95;
Sidney L. Harring, ""There Seemed to Be No Recognized Law": Canadian Law and the Prairie First Nations"
in Louis A. Knafla & Jonathan Swainger, eds. \textit{Laws and Societies in the Canadian Prairie West 1670 -1940}
Jurisprudence} (Toronto: University of Toronto Press & The Osgoode Society for Canadian Legal History,
1998); Roderick G. Martin, "Macleod at Law: A Judicial Biography of James Farquharson Macleod” in
Jonathan Swainger & Constance Backhouse, eds. \textit{People and Place: Historical Influences on Legal Culture}
(Vancouver: UBC Press, 2003) 37; Louis Knafla & Jonathan Swainger, eds. \textit{Laws and Societies in the

\textsuperscript{63} R.C. Macleod & Heather Rollason. ""Restrain the Lawless Savages": Native Defendants in the Criminal
Courts of the North-West Territories, 1878 - 1885”(1997) 10 J. Hist. Sociology 157. Their sources include
NWMP returns of criminal court cases (starting in 1878); newspaper articles on criminal activities in four
regional newspapers (83 additional case reports were found in the newspapers that had not been reported in the
police returns); annual summaries of activities submitted by Indian agents to the Canadian government.
Macleod & Rollason rely on the names that appeared in the NWMP returns to distinguish between Native and
non-Native accused person. This is not always safe; for example, Robert Saunders, John Thomas, Thomas A.
Beckett, Moses Bunn and John Eye, to cite but a few, were all Aboriginal accused persons who appeared in
Richardson’s court.
Macleod and Rollason also conclude that Canadian authorities proceeded with caution in the imposition of criminal law on the Native population of the prairies and, importantly, they argue that with the exception of livestock-related offences, Native people were under-represented in criminal prosecutions and were generally treated more leniently when convicted.\textsuperscript{64} While they do not suggest that Native peoples “perceived the courts as other than a repressive institution,”\textsuperscript{65} they do observe in closing: “There is quite a lot evidence that the Natives adopted an instrumental approach to the law, experimenting with it and using it where it seemed useful.”\textsuperscript{66}

Macleod and Rollason’s research on the NWMP returns, coupled with their more recent work on newspaper coverage in the Territories of criminal trials,\textsuperscript{67} provides a broad outline and overview of who appeared in the Territorial courts, how the press reported on their cases, and, in particular, how Aboriginal offenders were treated, perceived, and perceived to be treated. The NWMP returns provide a detailed overview of the records of proceedings, of accused, charges, dispositions and so on. However, Macleod and Rollason do not tell us, other than through the newspaper accounts, what happened in the courtrooms, who the complainants and witnesses were, who required interpreters, who appeared as Informant one year and as an accused in the next. The significance of the NWMP records and their findings cannot be overstated, but there are important aspects of the form and

\begin{flushleft}
\textsuperscript{64}Ibid. at 173.
\textsuperscript{65}Ibid. at 173-74.
\textsuperscript{66}Ibid. at 176.
\end{flushleft}
practice of criminal justice in the NWT that are not to be found in the police returns. My research on the court records is informed by and builds upon their work, but I look at another set of records that were kept for another purpose. And, the depositions and evidence in those records illustrate somewhat different stories requiring somewhat different analytical and methodological tools.

5. Conclusion: Interpreting Richardson’s Court Records

Court records offer rich and simultaneously limited data, depending upon the questions that are asked of them, and the hypotheses that are sought to be tested. They are the ne plus ultra of ‘official’ documents. Even in handwritten form, the warrants they contain -- warrants for search, warrants for arrest, warrants of committal for trial, warrants of committal following conviction -- all gave the bearers thereof the legal authority to search premises, arrest suspects and hold them in custody pending their trial or after their conviction, and of course to execute in the case of a capital offence.

The evidence of alleged offences contained in Richardson’s court files is provided primarily through the Informations and depositions taken down before two justices of the peace, the warrants of apprehension or of committal to gaol, and cryptic, abbreviated endorsements by the trial judge. The depositions appear as first person accounts, as uninterrupted narratives, but of course they were the product of examination (perhaps by an NWMP officer or a private prosecutor) and some cross examination. The words taken down in front of the justice of the peace have been transcribed, having been interpreted in many cases from Cree, Sioux, Saulteaux, or French. Some of these languages would have no
words for the legal concepts and terms (e.g., guilt, manslaughter, wilful murder). Almost none of the depositions given by Aboriginal witnesses are signed with a signature. Witnesses whose depositions have been taken through an interpreter, whose signature indicated by an “X” – “their mark.” -- accompanied by the signature of the Interpreter.

The pre-trial depositions do not necessarily reflect the evidence given by the witness at trial, nor is it safe to assume that they reflect the entirety of the evidence ultimately presented by the prosecution at trial. Many depositions in the Richardson records contain all manner of hearsay, character and reputation evidence concerning the accused and the complainants alike, some of which Richardson may or may not have admitted into evidence at trial.

How does one proceed interpret the depositions and statements of the Accused in these files? Mindful of Carolyn Strange’s injunction against seeing court files “textual productions of truth,”69 these depositions perhaps may be described as textual productions of allegations. Some historians express ambivalence at the probative value of depositions.70

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69 Supra note 1 at 43.


It could well be argued that every judicial document in a case is a tissue of lies: defendants reconstructing their past to make it as innocent sounding as possible accusers recasting events to make the accused seem as guilty as possible; investigators working to fit individuals and events into preconceived notions of crime; witnesses shaping their testimony because of animosities, friendships, the desire to please the powerful, or the need to thwart them.

In the face of such an apparently endless range of possibilities, it might seem that reconstructing any sort of history from such documentation would be extremely problematic. ...
However, as Edward Muir and Guido Ruggiero remind us, “not just any lie will do in
testifying about a crime. Usually lies must have the ring of credibility.”

The depositions do (re)present a form of first person account by Informants and witnesses of events that gave rise to the matters in the criminal courts. Indeed, John Beattie has characterized the depositions of victims, witnesses and the examinations of accused persons as “among the most useful” supplements to the Indictments he was studying in his landmark study of crime and courts in seventeenth and eighteenth century England.

And, for all their frailty, the depositions and the Statements of the Accused tend to be the only words in the file that tell us anything about what gave rise to the criminal prosecution before the Court.

The information in the records may be skeletal, but there can be no doubt that these texts are anything but disembodied legal discourse. The voices in the files are lay voices, the voices of ordinary people coming or being brought to law, as well as those of the NWMP, men of standing, such as HBC men, other merchants, government men, and, of course, other lay witnesses, some of them less reluctant than others. The only professional experts to be found are the Medical Sergeants of the NWMP who, on occasion, also gave opinion evidence as experts on Indian medicines and potions.

Peter Hourie, (who was allowed by Richardson

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71 Muir & Ruggiero, ibid. Similarly, Muir & Ruggiero (like Byrne) are not paralyzed in the face of the possibility of falsehood and fiction in the court documents:

Crime documents over and over again construct narrative that have a large fictional component and which are directed toward pleasing a certain audience. Both accusations and investigations try to force the details of an event into the mold of what was required or perceived to be required to designate a specific action as a crime. Testimonies might have the opposite goal of exculpation. .. The task is always in some sense rhetorical, that is, to convince a jury, judge, or broader public that something criminal did or did not occur (at 235).

72 Beattie, supra note 4 at 21.

73 See the medical officer’s evidence in Paskada (otherwise Whitehead) (1880) (SAB H 1198.5.4, file #91).
to be qualified as an expert on the interpretation of certain Cree and Saulteaux words in Tom Lemac’s 1902 murder trial,\(^{74}\) and latterly veterinary surgeons, midwives, and medical doctors.\(^{75}\)

But in the depositions Aboriginal deponents and witnesses, even as recently as 1902 in Tom Lemac’s murder trial, were also called upon to give forms of expert evidence: on the entry and exit of bullets in the wounds of a dead body,\(^{76}\) on the effect of alcohol on Indians, and as cultural interpreters of the ways and meanings of Indian gestures and forms of courtesy.\(^{77}\)

The nature of the evidence in the court files suggests the mediated nature of law and law’s construction of experience. The mediation that takes place is multi-layered: complaints appear to have been made to a Chief or husband, who then complained to the police, or to a justice of the peace, or stipendiary magistrate, after which an Information was taken and sworn. It may be best to eschew the metaphors the window or the camera in favour of the prism,\(^{78}\) which then by definition, contemplates a partial and refracted image of the

\(^{74}\) Tom Lemac (1902), SAB CR-Regina, RG 1286, file #266. I discuss this case in Chapters Five and Six.

\(^{75}\) E.g. Samuel Flack (1897), SAB CR-Regina, RG 1286, file #154; Charles Langdon (1900), SAB, CR-Regina, RG 1286, file #226.

\(^{76}\) See, e.g., Rev. Henry Stenhauer’s evidence in Charles Cardinal (1877), SAB A-G (GR 11-1) CR-Regina, 1st Series, 1876-1886, file #6. I discuss this case in Chapter Four.

\(^{77}\) See the witnesses in Tom Lemac’s trial (1902) SAB, CR-Regina RG 1286, file #266. I discuss this case in Chapters Five & Six.

experiences caught by the records. The images are partial, the stories fragmentary and incomplete—but still some conclusions can begin to be drawn.

In sum, I accept completely the insistence that legal historical research into court records work with broader contexts and take a “broad view” of the evidence in court records. It is important to be clear how one defines one’s “broader contexts.” My study is of the relationship between Aboriginal people and the criminal law in the NWT during the period Hugh Richardson was on the bench. On one level, my broader context encompasses the entire set of criminal court records, not simply the ones in which Aboriginal persons are named as accused persons. By reading the criminal files of the two courts between 1877 and 1903, I was able to identify non-Aboriginal, as well as Aboriginal accused persons, and develop a fuller understanding of the operation of criminal justice in the region in the period. By reading all the files, I was also able to locate files involving Aboriginal peoples that might otherwise not be read, in particular the files involving Aboriginal victims and informants. This enabled me to analyze a fuller range of Aboriginal experience of and engagement with criminal law in the NWT: as witnesses, victims and informants, as well as accused persons.

Despite their statistical rarity and virtual invisibility in the writing of feminist history, these Order-in-Council women offer a unique understanding about women’s lives in late nineteenth- and early twentieth century British Columbia. Specifically, these women’s biographies of disorder disrepute, the regulatory discourses and practices that enveloped them, and their own, along with official, accounts of their transactions with forensic authorities can tell us much about two issues. First, by studying the forensic careers of these “double deviants”, we can learn about the assumptions and practices governing “normal” womanhood over time. Secondly, we can gain critical insight into the relationship between gender, crime, and madness in the provinces segregative institutions of medico-legal control during a period of social transformation.

Although my focus is on criminal law, I have broadened the legal context of this study as well: I have looked beyond the formal black letter of criminal law to identify and incorporate other forms of law that emerge as relevant: Treaty Four and Treaty Six, the Dominion government's Indian legislation and policy, and Aboriginal "criminal law" prior to 1870. This broader legal context allows me to consider, in particular, the forms of "criminalization" that were (and were not) experienced.

I agree with Robertson that it is important to engage with the law. In my view, this means paying close attention to the distinction and relationship between legal forms, legal institutions and legal actors. Informed by the social historical work I reviewed in Chapter Two (which identified forms of agency and activism within the First Nations and forms of conflict within the state), I eschewed an assumed relationship between the criminal court and government policy and I looked for the expressions of Indian policy in criminal prosecutions. I have proceeded with the understanding that the coercive aspects of Indian legislation and policy were a different form of legal coercion – and not simply another point along a supposed continuum of criminal law.

I have drawn extensively on socio-legal, non-legal and Aboriginal sources, as well as the nineteenth-century Territorial Press and Annual Reports of the NWMP to enable me to develop a more fully social account of both the data and the dimensions of the court record.

Finally, I have made extensive use of direct quotations of the words attributed to First Nations participants in the criminal trials. I am mindful that the words they spoke were likely spoken in their own language, interpreted by man charged with that responsibility, on occasion sworn in by the court, and then transcribed by a justice of the peace, or a court

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clerk. Where possible, I have attempted to reproduce their words, by quoting directly from
the court documents (e.g. depositions, statement of the accused) rather than summarizing and
paraphrasing their words through my words. I am mindful that lengthy quotations should be
used sparingly, but on balance, I think it is important in this writing to stay as close to their
original words as possible (bearing in mind that the text is at lease twice removed from the
speaker). While court proceedings do not give much space for the voices of the
marginalized, what the marginalized have to say for themselves in these settings is worth
repeating.

In the next three chapters, I demonstrate the benefit of this “broader” approach to the
court records: in Chapter Four, I am able to demonstrate with greater precision particular
forms of criminalization experienced by the First Nations in the NWT. In Chapter Five, I
analyze the intervention of the government’s Indian policy to criminal justice, and the
criminal court’s response thereto. In the last Chapter, I depart from a conventional approach
to the relationship between Aboriginal people and Canadian criminal law by focussing on
Aboriginal participation and Aboriginal voices in the criminal process. My ability to
produce a dissertation that is more fully engaged with forms of law, forms of participation
and the full dimensions to the law and society relationship has been facilitated by the broader
contexts and broader approach I have brought to this research.
Chapter Four

"Of course no one saw them ....:"
Aboriginal Accused in the Criminal Court

1. Introduction

In this chapter, I analyze the relationship between the First Nations and Canadian criminal law through court files involving First Nations persons who stood as prisoners in Hugh Richardson’s criminal court. These records reveal some of what we have come to expect of the criminal law’s contribution to the substantive inequality of Canada’s Aboriginal Peoples. A number of cases in this chapter lend support to the ‘criminalization’ thesis discussed in Chapter Two; however, applying this thesis does not present a particularly significant challenge. Indeed, the fact that seventy-one of the two hundred forty-three (ordinary) criminal cases (29%) in the early period (1876 – 1886)\(^1\) involve one or more accused persons described in the files as ‘Indian’ tends to support the argument that many First Nations peoples experienced the arrival of the police, criminal law, and the criminal court as one of criminalization. At least one hundred First Nations men and a handful of women\(^2\) (almost all without benefit of defence counsel) found themselves charged, arrested, 

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\(^1\) Saskatchewan Archives Board, Department of the Attorney-General, Regina Judicial Centre, Court Records 1\(^{st}\) series 1878 -1886, Files 1 – 282, [SAB A-G (GR11-1) CR Regina, 1\(^{st}\) series, 1876-1886].

\(^2\) I have found seven files in the records between 1876 and 1903 that involve Aboriginal women as accused persons, three of them having been charged with male co-accused persons. Three women appear to have been
and prosecuted. Most were convicted of something; some, but not all, sentenced to terms of confinement at hard labour in a gaol at the police barracks or, for a few, to penitentiary terms in Manitoba.

Many of these early prosecutions occurred years before the exemplar of criminalization identified in some of the literature became law: *Indian Act* amendments which prohibited particular kinds of dances and celebrations (such as the Potlatch in British Columbia); the most expansive and relevant for the Plains Indians were contained in the 1895 amendment to s. 114 which prohibited dances involving giveaways and wounding or mutilation. These prohibitions were resented, resisted, and ignored as well as only prosecuted criminally in the Richardson records from the early period: Scholastique Cardinal (1882), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file # 145, charged with murder and concealment of birth of her newborn infant. I discuss her case more fully in Chapter Six. "The Squaw also known as Little Knoll" (charged with Nakiss, Cree Indian, and "Bear Hand", an Assiniboine half-breed) (1884), SAB, A-G (GR 11-1) CR Regina, 1st series, 1876-1886, file # 244. In 1881 Caroline Gouin, SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file # 124 was charged with stealing a pocket book from her employer; the file indicates that Peter Erasmus was the Cree interpreter in this case, and thus it is likely that she was either a First Nations or Métis woman. There is no disposition indicated in her file.

In the later period (1887 – 1903), four Aboriginal women appear as accused in Richardson’s records: Betsy Horsefall (with Benjamin Gordon) (1892), SAB Coll. RG R1286, file # 83 (charged with theft of a horse, but the prosecution did not proceed); Margaret Favel (1892), SAB Coll. RG R1286, file # 40 (charged with theft of four silver spoons and forks and other small items from the empty school house on Poor Man’s reserve in the Touchwood Hills; pleaded guilty to stealing one spoon; suspended sentence); JC (1894), SAB Coll. RG R1286, file # 85 (with AB, charged with theft of clothes she was wearing when she ran away from the Industrial School; she and Alex pleaded guilty and received). I discuss JC’s case more fully later in this chapter. It is not completely clear that Mary Martin Daniel (1900), SAB Coll. RG R1286, file # 229 was an Aboriginal woman, but I believe she may have been Métis. She required the assistance of an interpreter at her trial, but the language was not indicated. She was tried and convicted of theft of three ladies hats, a picture frame and other items of clothing that had been part of a display at the Exhibition Grounds. Her sentence was deferred; her husband Joseph Daniel entered into recognizance in the amount of $50 and to produce her for sentence when & if required to do so.

In 1884, the *Indian Act* had been amended prohibit the “Potlatch” and the dance known as the “Tamanawas”: An Act further to Amend the Indian Act, 1880, 47 Vict. (1884) c. 27, s. 3. The *Indian Act* was amended again in 1895 (An Act to further Amend the Indian Act, 58 – 59 Vict. (1895) c. 35). Section 6 of the 1895 Act extended the restrictions and created a new s. 114:

Every Indian or other person who engages in, or assist in celebrating or encourages either directly or indirectly another to celebrate, any Indian festival, dance or other ceremony of which the giving away or paying or giving back of money, goods or articles of any sort forms a part, or is a
occasionally and unevenly enforced (indeed, they were almost unenforceable) on the ground.\(^4\) In my view, the operation of the regular criminal court offers more support for the criminalization thesis than do these offensive provisions of the *Indian Act*, whilst also demonstrating that criminalization must be understood as a process, involving the contradictions and multi-facets of all social relations, including relations of inequality, and one in which Aboriginal peoples acted as well as were acted upon.

In the next part, I draw on a combination of official, ethnographic and Aboriginal sources to provide a brief overview of Plains Cree and Assiniboine notions of wrongs and punishment, or crime and justice, in order to provide a context and to lay the groundwork for the cases that I present and analyze in the sections that follow.

In the third part of the chapter, I turn to a number of themes that I have identified in

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feature, whether such gift of money, goods or articles takes place before, at, or after the celebration of the same, and every Indian who engages or assist in any celebration or dance of which the *wounding or mutilation* of the dead or living human being or animals forms a part or is a feature, is guilty of an indictable offence and is liable to imprisonment for a term not exceeding six months and not less than two months; but nothing in this section shall be construed to prevent the holding of any agricultural show or exhibition or the giving of prizes for exhibits thereat [emphasis added].


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\(^4\) E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* Vancouver: University of British Columbia Press, 1986) at 164 (fn 9) & 167 [Titley, *A Narrow Vision*] Pettipas, *ibid.* Titley refers to Fine Day, (who was David G. Mandelbaum’s principal informant in *The Plains Cree: An Ethnographic, Historical and Comparative Study* (Regina: Canadian Plains Research Center, 1979) at 4 (where his name is spelled as “Fine-Day”). Mandelbaum and Titley each describe Fine-Day as a great leader of the Sweetgrass Cree, a warrior of formidable reputation, one who was said to be “brave in all things.” True to his reputation, Fine-Day sponsored seven Thirst Dances during his lifetime despite “official disapproval” (Titley at 164, fn 9). The 1996 Report of the Royal Commission on Aboriginal Peoples [RCAP], *Volume I Looking Forward, Looking Back* (Ottawa: Minister of Supply & Services, 1996) Chapter Eight, presents a careful
the court files that seem to me to all fit well under a general heading of “Old Relations, New Relations, Differently Defined, Differently Enforced.” By this I mean to capture the criminal law’s contribution to the enforcement of new forms of legal relations (such as wage labour), an entirely new approach to disciplining children (locking them up), as well as the challenges the criminal law posed to family forms (and relationships such as marriage) and traditional practices (such as horse raids, blood feuds, child rearing). In short, I am able to demonstrate through the court records the nature of the contribution of Canadian criminal law to the transformation of social relations and legal regulation of “life on the plains.” In the last part of the chapter, I draw together these themes and the evidence in a reconsideration of the law’s criminalization of the First Nations in the North-West Territories between 1876 and 1903. In order to understand what was transformed, and how deep was the transformation, I begin with how the Plains First Nations appear to have defined their relations, forms of wrongs and harm, and how they responded to them.

The Gambler: When an Indian takes anything from another we call it stealing...
Morris: What did the Company steal from you?
The Gambler: The Earth, trees, grass, stones, all that I see with my eyes.  

My interest in this section is with aspects of Plains First Nations norms and practices that had the appearance of 'criminal law.' To invoke the discourse of criminal law, or to speak of 'Aboriginal criminal law' – in the sense of a system or principles and practices devoted to the identification, apprehension, prosecution and punishment of wrongdoers – may risk imposing Anglo-Canadian legal categories and discourse where they do not fit. Compounding this is the difficulty of writing with confidence about Aboriginal or Indigenous traditions of dealing with crime and criminal justice, as it is important to avoid the pitfalls of essentialism, generalization, romanticization, and the possibility of what Emma LaRocque characterizes as "reinvented traditions."  

Certainly customary practices would not have been fixed in stone across time, region and community, and the hundreds of years of contact with Europeans could scarcely have left the First Nations untouched. The written sources available are less than voluminous, and the issue of cultural informants, both then and now, presents more challenges than safely reliable answers. However, some of the Inquiries into Aboriginal peoples’ recent and current experience of injustice in the Canadian legal system have attempted to understand the apparent conflicts between Aboriginal and non-Aboriginal

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6 See, e.g., Emma LaRocque’s critique: “Re-Examining Culturally Appropriate Models in Criminal Justice
perspectives and approaches, and to provide an historical context for the current problems. To do this, some have canvassed and advanced "Aboriginal Concepts of Law."  

Of the many officially commissioned Canadian Inquiries, the 1991 Manitoba Aboriginal Justice Inquiry stands out for its commitment to historical and community-based perspectives on the relationship between Aboriginal peoples and the justice system. Commissioned in response to two specific incidents - the 1987 trial of two men for the 1971 murder of Helen Betty Osborne in The Pas and the 1988 death of a prominent leader, J.J. Harper, who had been shot during an encounter with the Winnipeg City Police - the two Manitoba judges who served as Commissioners were given scope to examine all aspects of the criminal justice system (policing, courts, corrections), to consider whether and to what extent Aboriginal and non-Aboriginal persons were treated differently by the system, including whether systemic discrimination against Aboriginal people might be a factor. The Commission took the view from the beginning that it was important to hear directly from Aboriginal people and visited thirty-six Aboriginal communities across the province, holding hearings in the City of Winnipeg, in seven other Manitoba communities, and in five provincial correctional institutions.  

In addition, the Commission produced nine volumes of research papers, including a comprehensive study of Indigenous languages and the administration of justice. 


Ibid, at 1 - 7.  

Freda Ahenakew, Cecil King Catherine I. Littlejohn, "Indigenous Languages in the Delivery of Justice in Manitoba" (A Paper Presented to the Public Inquiry into the Administration of Justice and Aboriginal People, March 9, 1990).
Commission devoted an entire chapter in its final report to Aboriginal Concepts of Justice, identifying the underlying philosophy in dealing with crime to be resolution, healing and harmony within the community: "Atonement and the restoration of harmony were the goals - not punishment."\(^{10}\)

It is difficult to imagine a greater contrast between this approach to crime and the one dispatched to the NWT by the Canadian government. I do not suggest that atonement formed no part of nineteenth Canadian criminal justice, and its English legacy, but it involved a different process of exacting atonement, one with precious little healing and harmony. As but one example, incarceration, with or without chains, hard labour and corporal punishment, and much less a penitentiary, formed no part of the 'atonement' process in Aboriginal communities.\(^{11}\)

Contemporary Aboriginal legal scholars remind us of the importance of language to the development of their own understanding of traditions.\(^{12}\) We are told that there are no words for Anglo-Canadian criminal law concepts and terms, such as 'guilty' in Aboriginal

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\(^{10}\) *Supra* note 7 at 27.

\(^{11}\) Self-imposed exile of many years might be undertaken by murderers who were “palpably in the wrong”: Mandelbaum, *supra note* 4 at 122.

languages. However, as Freda Ahenakew and her colleagues found in their research for the Manitoba Aboriginal Justice Inquiry, “pleading guilty has become so accepted by Aboriginal people … it has become part of [contemporary] folklore” in the Battleford region of Saskatchewan – the local Cree say “é-nitawi-nâh-naémiskwêyiwan cì, which means “Are you going to nod your head?” (perhaps accompanied by a “Ganootamagaagewinini, “the man who begs for someone” – the word used for a defence lawyer).  

Of particular interest to this dissertation is the manner in which the Plains Aboriginal Peoples defined harms or wrongs, as well as how they dealt with “culprits” or wrong-doers. However, this is a line of inquiry that is fraught with uncertainty; even the naming of the nations and identifying their norms cannot be claimed with confidence. For instance, were David Mandelbaum’s informants in his 1930s ethnographic study with the “Plains Cree” in fact “Cree”? Neal McLeod suggests Mandelbaum’s designation may have been imprecise and over-inclusive. Still, Mandelbaum’s informants appear to have described their  

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13 Monture-Okanee, ibid. For instance, in the current context, the Supreme Court of the North-West Territories has developed a list of legal terms, their translation into, and ‘back translation’ from five indigenous languages (Chipewyan, Dogrib, Loucheux, North Slavey and South Slavey). The ‘back translation’ for “not guilty” from the indigenous languages is “Did you not do it?” (Chipewyan); “Did you do not do it?” (Dogrib); “Person says he did not do wrong” (Loucheux); “I did not act in that manner” (North Slavey); “I did not do it” (South Slavey). While there is to be sure an emphasis on the physical (as opposed to mental) elements of the offence in these translations, it is also clear that there are differences as well as similarities in the ‘back translations’. These and other cultural and linguistic challenges were discussed by Justice John Vertes, “Northern Justice: “Jury Trials in Aboriginal Communities” (Paper presented at the Faculty of Law, University of British Columbia, 25 January 2007). The list of translations and back translations that was distributed by Justice Vertes at his lecture is on file with the author.

14 Ahenakew, et al, supra note 9 at 32.

15 Mandelbaum, supra note 4.

16 Given the genealogy, fluidity and composition of many bands: Neal McLeod, “Plains Cree Identity: Borderlands, Ambiguous Genealogies and Narrative Irony” (2000) 20 Can. J. Native Studies 455. As noted previously in this dissertation, some sources suggest that Big Bear may not have been Cree at all, as his father Black Powder was Ojibway originally from Ontario and his mother may also have been Ojibway, although he was clearly raised as a Cree: see Dempsey, infra note 23 at 11 – 15. Dempsey, at 28, tells us as well that Little Pine’s mother was a Blackfoot, and Sweet Grass was a full-blooded Crow. Poundmaker, similarly, was of
understanding of the nature of a Chief's responsibilities in matters akin to crime and justice:

It was incumbent upon the chief to maintain order and peace in his camp. ... Gift giving was the socially accepted method of mollifying an aggrieved person and in this way the chief eased troublesome situations.\(^{17}\)

Some of the sources of information come in the form of legends, stories and reminiscences, all redolent of ideological significance. For instance, Edward Ahenakew recounts a story from Mistawasis' band of a dispute between a man who blamed the chief's nephew (Ahenakew's uncle), Ė-pay-as, for having provoked a Blackfoot raid on the camp in which the first man's son had been killed; he pressed Ė-pay-as to give him two horses, but was refused. Tired of the man's insistence, Ė-pay-as, his brothers and their families left and set up camp elsewhere. When a large party from the main camp followed them to their camp, they refused to leave their tent. In this way, says Edward Ahenakew, "the three refused to obey the camp law."\(^{18}\) The large party began to cut up their possessions, while the three brothers watched. When Mistawasis' son arrived on the scene, one of the brothers (his cousin) teased him, telling him that he had mistaken him for a white man. Mistawasis' son responded in anger with a crushing blow to the man's head. Things then took an even more serious turn, as Ė-pay-as shot and killed the man who had led the party. He fled with his injured brother, saying to the young Edward, "Go away, my nephew. We have no relatives now. Go away."\(^{19}\) In Edward's recounting, a sorrowful Mistawasis is said to have assembled

\(^{17}\) Mandelbaum, *supra* note 4. at 107.

\(^{18}\) Edward Ahenakew, *Voices of the Plains Cree*. Edited and with an Introduction by Ruth M. Buck. (Toronto: McClelland & Stewart, 1973) at 34. This story is entitled "Indian Laws."

\(^{19}\) *Ibid.* at 35.
his people and told them he wanted no more trouble. The Chief arranged for two of his finest horses to be delivered by Edward’s father (É-pay-as’ brother-in-law) to É-pay-as so that he might give them, or two of his own, to the son of the man he had killed. Edward’s father delivered the Chief’s horses as a peace offering and É-pay-as, holding his dying brother, said he would do as his Chief had asked.

Drawing on another story from the Sweetgrass band, Mandelbaum’s study suggested that this role of a Chief continued to be important well into the twentieth century:

A bitter quarrel broke out between two men over the disputed ownership of a heifer. The chief of the Reserve gave one of his own cattle to the man who claimed that his animal had been stolen. By this act the dispute was settled, the possibility of bloodshed averted, and the prestige of the chief was enhanced.20

Moreover, a chief was expected to conduct his own affairs “with the highest restraint:”21 “Even if one of his relatives should be murdered, a chief was supposed to forego the blood vengeance which ordinary tribesmen would be impelled to take.”22 Mandelbaum was told a story of Chief Big Bear’s response to an assault as an example of this “restraint,” as well as the extra-legal fate of the wrong-doer:

[Big Bear] was once wantonly assaulted and knocked unconscious by a drunken member of his band. In retaliation, Big-bear’s daughter immediately ran to the attacker’s tipi, slashed it, and bore off his possessions. When Big-bear was revived, he ordered all the man’s goods taken back and decreed that no further retaliatory measures be taken. The attacker later tried to make propitiatory gifts, but he was never thenceforth

20 Mandelbaum, supra note 4 at 107.

21 Ibid.

22 Ibid. at 108.
able to regain his former prestige status.\textsuperscript{23}

\textit{Mens rea}, so important to contemporary criminal law principles, appears not to have been a prominent, or even essential, element of Aboriginal law. The rules of the hunt are said to have been of particular importance and these were policed by members of a Band's Warrior Society, whose responsibilities also included caring and providing for the needy, (including divesting oneself of one's possessions if need be), protecting women, children and the elderly when the band moved camp, and attending to rituals associated with preparing a body for funeral.\textsuperscript{24} Individual hunting was not permitted when preparations for a hunt involving a herd of buffalo were being made, and \textit{mens rea} was not necessary if the hunt was jeopardized. A hunter who either intentionally evaded the watch of the Warrior Society or one who, because he could not control his horse, unintentionally caused a herd to stampede received the same sanction, swiftly administered: his tipi was slashed and his possessions destroyed. If he accepted the action and responded without anger or resistance to this sanction (as \textit{E}-pay-as and his brothers had not done), restitution for his lost possessions would be made.\textsuperscript{25}

Mandelbaum's study concluded that theft was rare.\textsuperscript{26} Murder is said to have

\textsuperscript{23}\textit{Ibid.} at 107-108. Hugh Dempsey also provides a detailed account of the same story in \textit{Big Bear: The End of Freedom} (Vancouver: Douglas & McIntyre, 1984) at 97. Dempsey also makes it clear Big Bear never forgave the man.

\textsuperscript{24} Deanna Christensen, \textit{Ahtahkakoop: The Epic Account of a Plains Cree Head Chief, His People, and Their Struggle for Survival} (Shell Lake, Saskatchewan: Ahtahkakoop Publishing, 2000) at 63; Mandelbaum, \textit{supra} note 4 at 111-121.

\textsuperscript{25} Mandelbaum, \textit{ibid.} at 115. However, Mandelbaum also notes that an offender who resisted or showed anger during the punishment would receive nothing.

\textsuperscript{26} \textit{Ibid.} at 123.
demanded blood vengeance by the relatives of the murdered man,\textsuperscript{27} — a practice, of course, not unique to the Cree.\textsuperscript{28} However, according to Mandelbaum, “disastrous blood feuds” were averted by the intercession of Worthy Young Men\textsuperscript{29} through a ceremony with the Sacred Pipestem.\textsuperscript{30} Apparently, also, a payment of horses could commute blood vengeance.\textsuperscript{31}

Of particular significance for my purposes are aspects of Aboriginal cultural norms and customary practices that would ultimately attract the attention of both religious missionaries and Canadian criminal law. We are given to understand that Aboriginal peoples of this region, not burdened by the strictures of Christian dogma and morality, did not punish expressions of sexuality, other than the sexual violence of rape, and that the concept of “crimes without victims” was not known.

It appears to have been common for Cree men of importance to take more than one wife;\textsuperscript{32} they were to discover that to Christian missionaries, this was a sin which would prevent their baptism if they converted to Christianity;\textsuperscript{33} to the criminal law, this was the

\textsuperscript{27} Ibid. at 122.

\textsuperscript{28} See Manitoba Aboriginal Justice Inquiry, supra note 7 at 27.

\textsuperscript{29} Young men known for their bravery or daring, who were not [yet] members of the Warrior Society.

\textsuperscript{30} Mandelbaum, supra note 4 at 122.

\textsuperscript{31} Ibid.

\textsuperscript{32} Ibid. at 148; Christensen, supra note 24 at 318-319. For instance, prominent Cree leaders, Big Bear and Poundmaker, had several wives: see, Norma Sluman, Poundmaker (Toronto: Ryerson Press, 1967) at 34-35 and 288 - 297; J.R. Miller, Big Bear: [Mistahimusqua]: A Biography (Toronto: ECW Press, 1996) at 32-33 [Miller, Big Bear]; Dempsey, supra note 23 at 24-25.

\textsuperscript{33} Deanna Christensen’s biography of Ahtahkakoop provides heart rending accounts of the spiritual and emotional anguish experienced by the Cree in their conversion to Christianity (e.g., the destruction of medicine bundles; the distress of parents whose children had died and who they would not see again after death if they (the parents) went to the white man’s heaven); she does suggests that the Anglican missionary, John Hines, took a more sympathetic approach to the baptism of the first and oldest of Saskakamoos’s two wives. The older woman desired to be baptized, and since she only had one husband, Hines agreed to baptize her: see Christensen, \textit{ibid.} at 182 -184.
crime of polygamy. The preferred response of a brave Cree man to a wife’s infidelity was to give her to her lover, who in turn was obliged to reciprocate with the gift of a horse. According to Mandelbaum’s informants, the Cree also practised a form of consensual wife exchange – consensual between two husbands. However, Sarah Carter suggests that if a woman’s kin did not approve of her husband’s behaviour, they could keep her from him; an “abandoned husband” had to rely on others to negotiate her return, since such negotiations only took place between their senior kin.

Cree and Assiniboine men also observed strict “mother-in-law avoidance;” a woman could be close to her mother-in-law, but could have nothing to do with her father-in-law, and there was to be no communication between a woman and her son-in-law. According to Mandelbaum, the “taboo was raised” between a man and his father-in-law only if the son-in-law presented the father-in-law with a scalp obtained in battle.

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35 Mandelbaum, supra note 4 at 148. This, arguably, is not far removed from the practice of wife-selling in eighteenth century England. See: E.P. Thompson, Folklore, Anthropology and Social History (1978) 3 Indian Hist. Rev. 247. I do, however, recall a story told by my mother from her time as a nurse in a small community hospital in west central Saskatchewan in the 1970s: a Cree man arrived at the hospital, having been escorted by his wife, carrying a small willow switch, which she used intermittently to swat him as they had walked. His injury: his wife had pierced his nose with a small willow branch when she found him in bed with her sister. I am mindful that it would be unwise to generalize at all from this one incident of at least one Cree wife who was not tolerant of her husband’s infidelity.

36 Mandelbaum, ibid. at 149. While not presented in the court record as a ‘wife exchange, it appears that the young Saulteaux man, Eungana, who was convicted of murder in 1885 was said to have attempted to send his wife to his victim’s tent, as a way of appeasing the other man. However, Eungana’s wife refused to go: I discuss this case more fully in Chapter Five.


38 Mandelbaum, supra note 4 at 126; Dan Kennedy (Ochankugahe), Recollections of an Assiniboine Chief. Edited and with an Introduction by James R. Stevens (Toronto: McClelland & Stewart, 1972) at 107.

39 Mandelbaum, ibid.
Other principles, and practices, notably the ‘ethic of non-interference,’\textsuperscript{40} would attract the negative attention of religious and government authorities: children were never reprimanded nor physically disciplined; non-intervention, together with teasing and humour, were preferred approaches to child rearing.\textsuperscript{41} Their education, including introduction to sexual expression and practices, took the form of observation and peer discussion,\textsuperscript{42} through, as James Miller has described, “the three Ls:” looking, listening and learning.\textsuperscript{43}

Familial relationships were complicated. As Chief Dan Kennedy said of the Assiniboine peoples: “…my brother’s sons and daughters are my sons and daughters; my sister’s children are my nephews and nieces; my brother’s children and mine are brothers and sisters, and my sister’s children are cousins of my children and so forth.”\textsuperscript{44} It seems that within Cree and Assiniboine communities, children spent more time with their grandparents than with their parents.

The imposition of new legal notions governing property, marriage and sexual relations, and the redefinition as crime of past practices associated with the hunt, sport, and inter-tribal relations, such as capturing and recapturing horses represent an historic cultural defeat or achievement (depending on one’s perspective) of immeasurable proportion. Also significant to people who previously had travelled from north to south and back without legal

\textsuperscript{40} \textit{Manitoba Aboriginal Justice Inquiry}, \textit{supra} note 7 at 31.

\textsuperscript{41} Mandelbaum, \textit{supra} note 4 at 143-144.

\textsuperscript{42} \textit{Ibid.} at 144. A less casual approach to consensual sexual relations was expressed by Richardson J in the \textit{Bourassa} trial, \textit{infra}, in 1896.

\textsuperscript{43} J.R. Miller, \textit{Shingwauk’s Vision A History of Native Residential Schools} (Toronto: University of Toronto Press, 1996) at 15 – 38. Miller also notes the use of embarrassment rather than physical punishment in the sanctioning of children’s behaviour.

\textsuperscript{44} Kennedy, \textit{supra} note 38 at 107.
encumbrance was the Canada - U.S. border, which amplified ordinary horse theft into smuggling stolen horses. However, as some of the cases I discuss below suggest, the Cree and Assiniboine who engaged in the cross-border horse raids were mindful both of the nature of the risks and the protection the border afforded.

The themes that I have identified in the cases in the Richardson records provide compelling evidence of a wrenching transition, one that was simultaneously negotiated, avoided, resisted and painfully experienced by the First Nations of the Plains. I turn now to old and new forms of relations, and new forms of enforcement, that came with the arrival of Canadian criminal law.

3. **Old Relations, New Relations, Differently Defined, Differently Enforced**

As I have suggested in the Introduction, the temporal period covered by this dissertation demarcates a watershed: from the period prior to 1870, when the HBC’s criminal law norms were not applied to the internal relations of the Indigenous peoples of Rupert’s Land, to 1899 when Bear’s Shin Bone was convicted of polygamy under the *Criminal Code* for having married two women according to the marriage custom of his people, the Blood;\(^45\) and, to 1902, when Ce Tan (or Chaton) a Sioux man, was charged with failing to provide the

\(^{45}\) *R. v. Bear’s Shin Bone* (1899), 3 *C.C.C.* 329, 4 *Terr. L. R.* 173 (NWTSC). Rouleau J. relied on the case of *R. v. Nan-e-quis-a-ka* (1889), 1 *Terr. L. R.* 211, in which the NWTSC had held that the marriage customs of the Blood were valid and to be legally recognized in the Territories, such that a woman married according to the custom of her people was not competent and not compellable as a witness against her husband.
necessaries of life to his wife and children, after briefly leaving them for a young woman, whose parents objected and invoked the law. In thirty short years, Canadian criminal law reached into and redefined the most personal and the most important aspects of First Nations life.

(1) “I didn’t kill anybody’s children but my own:” Homicide and Familial Relations

It is fair to observe at the outset of this section that other institutions and socially transformative forces affecting the personal and family lives of the indigenous peoples of the Plains were of equal, if not greater importance, than the criminal law. The fur trade, Christian missionaries and, later, the Indian Department all intervened and reshaped relations in ways that were intrusive and intimate. Certainly, no definition of family, community or a people could have been more dramatically rewritten than through the inter-marriage of fur trade men with First Nations women and the social, cultural and demographic transformation that resulted. Evidence of the close inter-relationships between First Nations and “Half-breeds” of the North-West also may be found at the more formal level, as in the interventions and advocacy by the Chiefs and spokesmen at Treaty Four and Treaty Six negotiations, to

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46 Ce Tan (or Chaton) (1902), SAB Coll. RG R1286, file #264.
48 See, e.g., Morris, supra note 5 at 98 and 186-87 for his record of the interventions on their behalf by The Gambler at Treaty Four and Mistawasis at Treaty Six. It is my understanding that The Gambler and Mistawasis were speaking on behalf of “Indian Half-breeds” many of whom were relatives and who they regarded as members of their community, and not the ‘immigrant’ Métis from the Red River Colony (who posed a challenge to the territory and hunt of the First Nations). The Gambler chided the Treaty Commissioner early in the Treaty Four discussions, “Now when you have come here, you see sitting out there a mixture of Half-breeds, Crees, Saulteaux and Stonies, all are one, and you were slow in taking the hand of a Half-breed.” This, for The
the more informal as seen in the court files, where Cree, Saulteaux and Half-breeds travelled and camped together.⁴⁹

Many of the family-related assaults⁵⁰ and homicides that can be identified in Richardson’s court records bear evidence of the prior or co-extensive involvement of the Church, the Company or the Government – either directly or indirectly implicated in precipitating the events giving rise to an alleged offence, or as an animating presence in the prosecution. The presence of religious influence and the active role of clergy may be seen in both the earlier and later files. In some of the files, the fact of religious influence or interference within a family appears to have been a contributing factor to the distress resulting in a crime.

Richardson’s files from the early period, his tenure as Stipendiary Magistrate, contain five homicides which, while not typical of the criminal activity among First Nations in the NWT, nonetheless allow us to analyze the extent of the rupture from the old to the new, and the ways in which the latter supplanted the former. All but one of the five homicides between 1876 and 1886 involved the deceased having been killed by a family member.⁵¹

Gambler was one of “the many things that are in my way.”

⁴⁹ See, e.g., the Montour cousins and the Youngest Son of the Netmaker; SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file # 28; and, Baptiste Flammond (Half-Breed), Moses Bunn (Sioux), Simoose (Saulteaux) & Jim Sioux (1877), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file # 11.

⁵⁰ See, e.g. I-ah-pee-coo-cah (1881); SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file # 115; Jean Marie (1881), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file # 118; Hoh-pie-sah-pah, otherwise Blacknest, (1882) SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file # 185. These cases will be discussed in greater detail in Chapter 5 (I-ah-pee-coo-cah) and Chapter Six (Jean Marie, Blacknest).

⁵¹ Charles Cardinal (1877), SAB CR-Regina, SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file #6; Ka-Ki-Si-kut-chin, the Swift Runner (1979), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file #65; Joseph Cardinal (1880), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file #104; Scholastique Cardinal (1882), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file #145. Two of these accused men died in custody prior to trial (Charles Cardinal and Kee-Chee-Qua-Pie-Ka-wa (below). While Richardson did not then preside at their trials, the depositions and transcript of the inquests form part of the court records in his files. One other
The fifth homicide, while not intra-familial, was familial in another sense, as it involved an attack on an entire Assiniboine family, the Sussey’s, by two men who were themselves brothers. The killings had occurred “when the leaves were getting withered and two winters [had] passed” near a lake about four days travel from Lesser Slave Lake. It appears that the killings were the result of a dispute over beaver hunting territory. Four children, two sisters and two brothers, survived, some of whom had witnessed the killing of their father, their mother, the baby she was holding, and two little brothers. One of the attackers, the Bear, was killed by one of the Sussey boys; the Bear’s brother, Kee-chee-qua-pie-ka-wa, was later prosecuted for murder. One of the surviving daughters, Monique, told the justice of the peace that their lives were spared only by the intercession of their grandmother. After the prisoner had burned their tent and threatened to kill her as well, she offered him a horse to spare the children’s lives, and her own. Monique said her grandmother died two weeks later, having never recovering from the fright.

It is not clear what precipitated the formal criminal process, how the surviving children found their way to Inspector W.D. Jarvis of the NWMP, or under what circumstances Kee-chee-qua-pie-ka-wa came to be arrested. On August 30, 1877, the depositions of Alexis (who

52 Kee-Chee-Qua-Pie-Ka-wa (1877), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file #7. The Informant, Alexis Sussey, described the encounter between the accused, his brother Bear, and his deceased father. The accused had accused the boy’s father of hunting in a place where he promised not to hunt; according to Alexis, his father said, “...God put the beaver for anybody. Bear then said you don’t do what you agree to. My father said you have ill-treated some of my relations and you think you will do the same to me. The prisoner walked up to my father, told him not to say two words more or he would lie there.” Shortly, he did, having been shot by the two men. Alexis described the shooting of his mother, “...before he shot her she asked for her life, and called him her son. The prisoner said I am no son of yours, you Blackfoot wife. He shot her in the back, and then began to stab her....” Alexis deposed that he and his brother then shot and killed Bear, at which point the prisoner threatened to kill them all. (Deposition of Alexis Sussey).
was also the Informant), Monique and Jean-Baptiste Sussey were found to be sufficient to warrant the committal of Kee-chee-qua-pie-ka-wa (also known by names Johnny, The Son of the Big Man, and Tis-ta-mous-noui) for the murder of their parents and siblings. Kee-chee-qua-pie-ka-wa declined to make a statement, “on account of his health.” The process that had been undertaken by the surviving children was not one that a previous generation of Sussey’s would have pursued to avenge the deaths of their parents and siblings at the hands of the two brothers. Perhaps there was no one else to help them, perhaps nowhere else to turn. Even less than a decade earlier, the hunter Kee-chee-qua-pie-ka-wa would not have contemplated ending his days in a police guardroom or on a gallows. He died ten days after the hearing before the NWMP justice of the peace.

At the September 10, 1877 inquest into his death, George Herchmer, the medical officer of the NWMP who had attended him (and Charles Cardinal another prisoner who had died earlier in July), stated that in his medical opinion, the prisoner had died of consumption, but added,

> From the experience of these two prisoners that have lately died, it is my opinion that Indian prisoners should be kept at labor during the time of their imprisonment and dieted differently to other prisoners, as they are physically unable owing to their habits of life, to stand close confinement.\(^{53}\)

Herchmer neglected to refer to anything he might have done, including cutting the prisoners’ hair when they were ill, which may have exacerbated the negative impact of the experience.

The other prisoner to whom Herchmer referred was Charles Cardinal, who had been accused in 1877 by Margaret Gladieu, his mother-in-law, of shooting and killing her husband,

\(^{53}\)Deposition of George W. Herchmer, MD, ibid.
Naboise, in the previous year.\textsuperscript{54} The provenance of the problem between Cardinal and herself and her husband was said by Margaret to have been the admonition by a Roman Catholic priest that it was not proper for a man to have two wives. Charles Cardinal had two wives: two daughters of Naboise and Margaret Gladieu. He had been married to one of their daughters for approximately twelve years when, as Margaret explained in her own words,

...he bought another daughter from us for whom he paid a horse, he lived with both for two years, then the Priest told me it was not proper to have two wives, and urged me to take the last one away. I told the Priest I was afraid to do it, that he was a bad man and would kill some of us for it. The Priest then told me he would not do such a thing, and if he attempted to do the like to take a stick and maul him. At that time, he was only living with the one and put the other one away. I told the priest that I would tell them of it when I had an opportunity. When Charles came with his wife I told him of it. I then took my daughter and gave him his lawful wife. I went off with my daughter and kept her with me for the whole winter. He did his utmost to take her from us the whole time.\textsuperscript{55}

It is certainly not evident from this account that Cardinal/Gladieu family had observed "in-law avoidance." When Naiboise, Margaret and their daughter Mary Anne (Cardinal's second wife) were making their way from Beaver Lake to White Fish Lake in June 1876 to join a band of Indians under Treaty, Cardinal shot and killed Naboise. The Gladieu party had stopped to make camp near the Large Beaver River, and Naboise went to hunt ducks by a

\textsuperscript{54} Charles Cardinal (1877), SAB A-G (GR11-1) CR Regina, 1\textsuperscript{st} series, 1876-1886, file # 6. Although committed to trial, Cardinal died in custody shortly, unable it seems to cope with the experience of imprisonment and all that that entailed.

\textsuperscript{55} Deposition of Margaret Gladieu, \textit{ibid.} Carter, \textit{supra} note 37 at 164-165, discusses the 'appearance of purchase' in Aboriginal marriages. She quotes plains ethnologist, Robert Lowie, as follows: There was generally rather an appearance of purchase than the reality. The girl's kin often gave back as much property as they received. The significant thing was an exchange of gifts between the two families..." In the context of the criminal court file, it is difficult to say whether the second marriage between Cardinal and the second daughter would have been accompanied by the formality of the first, and it is also difficult to say with confidence that Margaret characterized the second marriage in the terms that were attributed to her.
pond. Cardinal had been tracking them. No one witnessed the shooting, but Margaret and Mary Anne heard the shots. When they saw that no ducks flew after the shots were fired, they knew that something was wrong. Margaret found her husband’s body, and confronted Cardinal. He knocked her down, and made off with Mary Anne to his father’s camp. Margaret eventually made her way to White Fish Lake, and asked for help with her husband’s body.

Cardinal disputed his mother-in-law’s interpretation of the shooting, and her version of what took place after the old man was shot. Although Cardinal later claimed to the NWMP interpreter that his father-in-law had aimed at him first and that he shot in self-defence, the men and boys from White Fish who were sent to find and bring the body back said that it looked to them that Naiboise had been shot in the back.56

One cannot but help but recall Margaret’s account of the priest’s advice to her -- to take a stick and maul him -- in response to her prescient prediction that Cardinal would kill them if they interfered in his relationship with their second daughter, his second wife. Although Margaret invoked the priest’s intervention as the reason for taking her daughter back, it is also possible that she and her husband regarded Charles as a bad man, but one of whom they were afraid. It is also distinctly possible that they did not approve of the fact that he was living only with the second daughter, having “put the other one away,” and hence no

56 In Reverend Henry Steinhauer’s words,

...on examining the body, we found the mark of the ball, where it had entered between the shoulder blades and came out immediately below the left breast. I am satisfied that the ball entered the back. I have seen gunshot wounds before and am therefore satisfied that that was the case.

This appears to be another instance in which the expertise of the Aboriginal deponent, derived as it was from his experience, was accepted.
longer providing for her in his camp.

The facts giving rise to the dispute between the elder Gladieus and their son-in-law, as recounted by the widowed mother-in-law, are suggestive of the difficult transition in social and familial relations and the disruptive influence of a missionary upon one Cree family, together with the deleterious effects that the new system of criminal justice -- including prisoners in police custody being placed in irons, enforced confinement, a white man's diet (bread and milk as rations when sick) and the cutting of their hair -- had on Aboriginal prisoners.

Not surprisingly, members of the clergy participated as informants, both formally and informally, in the criminal justice process. Different forms of these informal roles can be seen in the two other family homicides, also from the north-west region of the NWT (now the province of Alberta). The earlier of the two, Ka-ki-si-kut-chin, The Swift Runner,\(^57\) attracted enormous interest in the Territorial press, and later in popular true crime accounts of 'outlaws' in Western Canada.\(^58\) He was the first man to be executed in the NWT. There were extensive reports of his arrest, trial, confession, execution at Fort Saskatchewan at the end of December 1879 and, following his execution, an account of his spiritual reclamation written by the Oblate priest who had ministered to him in the days before his death.\(^59\) Ka-ki-si-kut-

\(^57\) Ka-ki-si-kut-chin, the Swift Runner (1879), SAB A-G (GR11-1) CR - Regina, 1\(^{st}\) series, 1876-1886, file #65.


\(^59\) "Sad Case of Cannibalism, A Whole Family Slain and Eaten" Saskatchewan Herald (30 June 1879) 1, col 4; "Trial of the Swift Runner for Murder, Found Guilty and Sentenced to Death" Saskatchewan Herald (25 August 1879)1, col. 4; "Exit the Swift Runner" Saskatchewan Herald (12 January 1880)1, col. 4 & p. 2 col. 1-3. See also Thomson, ibid., Appendix “B” at 99 – 102.
chin, a forty year old Cree trapper, onetime HBC trader, and possibly a former guide for the NWMP, was accused of murdering his wife and six children at their winter camp over the course of the previous winter. The intense interest in his case derived from the accusation that he had eaten his family after he had killed them. There was a suggestion that he was "a lunatic," and one recent biographer has suggested that in the year or two prior to the murders, he had undergone a personality transformation: from a gentle trustworthy man to one who had a penchant for whiskey and violence, and who was drunk for months at a time. According to Colin Thomson, "Windigo seized his brain like a bad migraine."

Ka-ki-si-kut-chin was charged with the murder of his wife Charlotte on February 1, 1879, "at the Open Hill Creek near the Athabasca Trail." It appears that Charlotte’s father may have been the first person to suspect the murders, when he saw his son-in-law return alone from the bush earlier in the spring, at which time he was told by Ka-ki-si-kut-chin that he was the only one of his family left.

Ka-ki-si-kut-chin maintained his innocence, even as he took the police and interpreter on a long circular march in the bush, until finally human remains were found. He initially claimed his wife and children had starved to death. At his trial, the police witnesses, including the NWMP medical officer, described the scene and were clearly of the view that none of the deceased had been buried in graves, but appeared to have been cut apart. But

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60 Thomson, ibid. at 27.

61 Ibid. at 28 – 29.

62 Ibid. at 29. Thomson offers this explanation: "The meanings of those signposts remained unrecognized. His strange impulses, delusions, nausea, anorexia and acute depression were all symptoms of the Windigo psychosis. The six-foot-three inch man was a walking threat."

63 SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file # 65.
essentially all that appears to have remained were bones, ashes, and bits of hair.

At his hearing on June 15, 1879 before the justices of the peace (Inspector Jarvis and Sub-Inspector Gagnon) it was alleged that “during the last six months, in the woods at a place south of Muskeg River, between the Saskatchewan and Athabasca Rivers” he had murdered several members of his family. He confessed at the conclusion of this hearing, and a document described as his “voluntary confession” was later tendered as an exhibit “A”, through the evidence of William Drummond Jarvis. In this confession, he said, “I am going to tell the truth; I have done a great deal of harm, that is the reason I was backward in telling about it. I did not kill anybody else’s children but my own. …” He admitted killing his wife and five of his children; he denied killing his oldest son (who he said had starved to death), his mother and brother, who had also disappeared. He concluded his confession by admitting that he had come out of the bush after he had eaten his last boy and by denying that he had threatened previously to kill and eat his wife.

At his trial before Richardson and two justices of the peace on August 6, 1879, Ka-ki-si-kut-chin had the assistance of an interpreter, but was “otherwise undefended;” the prosecution’s case was presented by Inspector Jarvis, the justice of the peace who had received his confession and who had committed him for trial. Jarvis, among other police witnesses, also testified and it was through him, as I have indicated above, that the critically important confession was admitted into evidence. It is fair to observe that Ka-ki-si-kut-chin’s confession was the only evidence that directly linked the fate of the human remains to him, and thus directly implicated him in the murder.

His father-in-law, Kis-sic-kow-way, testified that he had last seen his daughter and

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64 "Voluntary Confession of Ka-ki-si-kut-chin" marked “A”, ibid. An account of his confession is also
her family the previous autumn at a place where his entire family had been camped. When they all broke camp, Ka-ki-si-kut-chin, Charlotte, their six children as well as Ka-ki-si-kut-chin’s mother and brother had forked off in another direction, and went off on their own. It was the father-in-law’s opinion that his daughter’s family could “readily have got into the Hudson’s Bay post at the River landing without risk of starvation, even if no game could be found.” Kis-sic-kow-way testified at the trial in August that his son-in-law told him that Charlotte had shot herself, that two children had died, and the rest had left him.

The six man jury deliberated for twenty minutes before returning a verdict of guilty.

It is difficult to assess just what the accused’s mental state was — either at the time of the alleged murders or at the time of his trial. No evidence was led at the trial as to the accused’s mental state; the NWMP medical officer appeared not to have examined him (or at least he made no reference to this in his evidence). Ka-ki-sit-kut-chin’s confession appears to have prompted Sub-Inspector Gagnon to contact the Roman Catholic mission to send a priest to minister to the prisoner and prepare him for death. Father Hippolyte Leduc arrived at Fort Saskatchewan in the week prior to the December 20 date that had been set for the execution, and ascertained that his soul could be saved.

Leduc received confessions that were both secular and religious in nature; the

reproduced in the Saskatchewan Herald’s report of his trial, (25 August 1879) 1, col. 4.

65 Evidence of Kis-sic-kow-way at the trial of Ka-ki-si-kut-chin, ibid.

66 Four of whom were said to be able to converse in Cree: Saskatchewan Herald, supra note 64.

67 In a long article in the Saskatchewan Herald (09 February 1880) 1, col. 3 & 3, cols. 1–3, published after the execution, Father Leduc wrote of his first meeting with Ka-ki-sit-kut-chin,

After questioning him, I found him far enough advanced in his religious instruction to warrant me advising him to avail himself of the presence of the Bishop and to receive the sacrament of confirmation. He at once expressed a wish that the holy sacrament would be given to him, and received it from the Bishop with evident satisfaction.
condemned man told the priest that he wanted to correct the statements he had made when first interrogated and the priest said he received his express permission to publish the particulars of the secular confession. In this final account, Ka-ki-sit-kut-chin told the priest that in the early part of the winter, all had been well, that he had been able to find enough moose and bears to keep the family fed, but then he had fallen sick, and those with him had not been able to find any game. He was still not fully recovered when he was able to travel to an HBC post where the officer in charge gave him a few provisions, which did not last them long. They were starving, and so his brother and mother set off on their own. He urged his wife and children to follow, and he would stay on his own in the woods. One of his little boys would not leave him when the others left. The two of them camped together for a period of time when “an abominable thought crossed my mind:” he shot his child while the boy was sleeping, and then ate parts of the boy’s body and bone marrow. He left that place and carried on, coming across his wife and other children; he told them that the son who had been with him had died of starvation, “but [he] remarked immediately that they suspected the frightful reality.” After a few days together, he realized that his family wanted to leave him, “from fear of meeting the same fate as my boy.” And so, one morning, he rose early, his entire family sleeping around him, “...I was mad. It seemed to me that all the devils had entered my heart.” He killed his wife and three little girls in their sleep. He kept his starving and bewildered seven year old boy alive for a while. But when they had travelled a distance and arrived close to Egg Lake where some of his relations lived,

... the devil took possession of my soul; and in order to live longer far from people, and to put out of the way the only witness to my crimes, I seized my gun and killed the last of my children, and ate him as I did the others.\(^68\)

\(^68\) *Ibid.* at col. 2.
Father Leduc reported that Ka-ki-sit-kut-chin repented sincerely and asked God’s pardon: “I had no knowledge of God, although three of my children had been baptized. I am the worst of men.” As he had promised, Father Leduc remained with the condemned man until the very last, hearing his last confession, arranging for a mass to be celebrated, and investing him with the scapular of Our Lady of Mount Carmel. The thought of the impending execution affected the priest, who revealed to his readers that when he first saw the scaffold while walking Ka-ki-sit-kut-chin back to his cell the day before his execution, he encouraged his charge to have courage, but “it was with utmost difficulty I was able to keep my feelings under control.” In the end, Ka-ki-sit-kut-chin went to his death, accompanied by the priest and his prayers, reported by the priest to have been courageous to the end:

    Poor Indian; human justice had to condemn him, but I have the sweet confidence that he found mercy at the tribunal of God.

Leduc’s lengthy eulogy published in the Herald was undoubtedly designed to reinvest a measure of humanity and a soul into the image of an Indian man who had been convicted of a heinous murder and condemned as a cannibal. Leduc celebrated the transformative impact of religion upon the man who had committed savage murders. It is also clear that the priest was mesmerized by the possibility of reclaiming this condemned

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69 Ibid.
70 Ibid.
71 Ibid. col. 3. Still, one rather hopes that having experienced an earthly redemption through the intervention of Father Leduc, Ka-ki-sit-kut-chin nonetheless had to meet Charlotte and her children at God’s tribunal before he entered Leduc’s kingdom of heaven.
72 Following initial religious instruction by another priest, Leduc said that Ka-ki-sit-kut-chin showed repentance and obedience to God’s grace: “O, depth of the mysteries of the wisdom and mercy of God! A pagan – an
soul and over-whelmed by his own terror of “human justice.” It is distinctly possible that Ka-ki-sit-kut-chin played the priest, and if so, who could blame him. As he apparently said to the priest, everyone else shunned and despised him; yet Leduc came to him “in the name of God to console, fortify and encourage [him].” It had been reported that no Indians had attended his trial, and one might reasonably infer that he was being shunned.

This case, together with Felix Plante’s case discussed in Chapter Three, and perhaps the case that follows below, are suggestive of yet another level of complexity in social relations and the clash of old and new, but also perhaps of a shared conundrum in respect of mental illness. Felix Plante’s family clearly turned to the law, and the law tried to send him home – as clearly neither had the resources to handle the mentally ill boy. The horror of the police at their discovery of the charred remains of Charlotte and her children and the horror and fascination of the Territorial press at the reports of the aggravating expression of cannibalism is palpable in the file. There is no discussion of mental illness and there appears to have been no doubt but that he should be executed, but not as a lesson to his people (who appear to have abandoned him) but as a denunciation by the law of a heinous crime, a vile expression of violence, betrayal and evil. Father Leduc attempted to explain the murders by invoking Ka-ki-sit-kut-chin’s lack of faith and to transform the events into a religious experience. I do not know whether Richardson thought that this was a crime that only an Aboriginal man could commit, but there is no evidence that the police, court or press regarded this as anything but an abhorrent act by an individual (Cree) man, not his people.

\[\text{infidel} - \text{a cannibal – will undergo under the influence of holy religion, a complete transformation.} \] (1, col. 4).

\[\text{Ibid.}, 3, \text{col. 2.} \]

\[\text{Saskatchewan Herald (25 August 1879)}] 1, \text{col. 1.} \]
Three months after Ka-ki-sit-kut-chin’s execution, a *Saskatchewan Herald* headline announced “Another Murder, An Indian Kills His Son.” Here again, a member of the Roman Catholic clergy played an important role, but in this case, it was the suspicion of a priest that facilitated a criminal prosecution of another Cree father for the murder of his seventeen year old son. And, but for an apparently devout Roman Catholic Cree man, the dead boy’s paternal uncle, this particular homicide might never have come to the attention of the priest or anyone else outside the family.

At his uncle’s insistence, the body of seventeen year old Moise Cardinal had been brought to the mission at Lac la Biche for burial. Although the coffin had been closed by a blanket that had been sewn over it, the priest was concerned. It appears that he did not open the coffin, but perhaps given the circumstances of its arrival (possibly accompanied by Moise’s brother St. Luke Cardinal, perhaps with a message from the deceased boy’s uncle), Father Groward quickly sent a letter to the local justices of the peace, suggesting that the young man had suffered a violent death, asking them to come to examine the body before it was to be buried.

A “post mortem examination” was held on February 22, 1880 presided over by two justices of the peace, Edward Traill and James Pruden, and twelve Métis and First Nations men as “witnesses.” The coffin was opened, and the fourteen men observed that the head of the young man was entirely severed from the body, having been cut off with a heavy knife or axe; there was what was described as a terrible gash to the back of the head, and other deep

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75 *Saskatchewan Herald* (15 March 1880) 2, col. 4.

76 Letter of 22 February 1880 from Father E. Groward [sp?] to W.W. Traill, Joseph Cardinal (1880), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file # 104.
gashes to other parts of the body. From the smell, they concluded that the young man had been dead for some days. As the clothing was not torn, it was clear that someone had taken care to dress him and put a pair of “Indian shoes” on his feet. They also observed that the right hand held a small metal cross. Justice of the Peace Traill wrote to the commanding officer at Fort Saskatchewan, asking him to come immediately, to bring the coroner, and informing him of the steps that he had taken to apprehend Joseph Cardinal and to arrange for the attendance of witnesses.77

The case can be read differently, depending on the source of information: the court file or the Saskatchewan Herald. The depositions of the relatives, including the deceased’s eleven year old brother who was with his father and brother when the brother was killed, tell a story of a menacing young man who was not in his right mind. After Moise had accosted and frightened his step-mother, Angelique, Joseph sent her and the little girls to his father’s place across the lake. Angelique told the justices of the peace that her husband had said to her, “Tell my father to make haste and come. In the meantime, I will be keeping my son.”78 When she returned with her father-in-law, they found Moise already dead, and the house in disorder; Angelique ended her deposition by saying the Moise had been “wrong in his head for some time before the murder.” J-B (the youngest brother) gave an unsworn deposition at the hearing. His narrative portrayed a terrifying scene, in which he said his brother “wanted to kill us” and he ended his deposition by saying his brother “had been beside himself for two days.” He described his brother knocking a cup or pot out of his father’s hand. The child’s deposition continues in narrative form, but with words that may have been attributed to him

77 Letter of February 23, 1880 from Edward Traill JP to Superintendent Jarvis, NWMP, Fort Saskatchewan, ibid.
rather than his own,

The deceased then had hold of his father by arm and at the same time trying to get at me. I ran away crying and my father then struck the deceased with the axe on the head. The blow seemed to give deceased more strength. He was more vigorous after the blow. My father called for a knife. I gave my father the knife and I ran out crying. He was still breathing when I left the house. 

The justice of the peace noted in the body of the boy's deposition, "The witness is a boy, is aged 11 years. His evidence is very much confused so that the court was obliged to question him very closely." Thus to the trauma of what he had witnessed and experienced, the child was subjected to close questioning by the white men at a hearing where his father was a prisoner, accused of murdering his older brother.

Antoine Cardinal, brother of the accused, had seen nothing himself, but his deposition provides a moving account of his response to the killing. He said he arrived at the house the following day and saw the body lying:

I knelt down and said as many prayers for the dead as I know. When I finished praying over him, I took off the covering from the body. I tried to take off the two shirts that the deceased had on, but was unable. I then took some printed cotton and wrapped the body in it after which my wife and sisters-in-law sewed up the cotton. When done with that we took wood and made a coffin as best I could. After I finished I put the corpse into the coffin. Only after the above proceedings I began to speak to my brother (the prisoner). I told him that body could not remain there. The pères must see the body. All of those that were present consented that the body should be brought to the church. I then asked two young men to take the body to the mission.

78 Deposition of Angélique Cardinal, *ibid.*
79 Deposition of J-BC, *ibid.*
81 Deposition of Antoine Cardinal, *ibid.*
When asked by the justice of the peace if he had ever seen anything which would lead him to believe the deceased was crazy, Antoine said that he had never seen anything, as they lived some distance away.

Joseph Cardinal gave an extremely long account of the events in his statement of the accused at the end of the hearing. In it, he repeated what his wife and youngest son had said, that Moise was not in his right mind, and that he acted to defend himself.

Cardinal, having been charged with murder of his son, was committed to stand trial. The record of the trial is simply a record of a conviction entered by Richardson, who had presided at the trial with Sévère Gagnon, as justice of the peace, and a jury. The jury convicted Cardinal of manslaughter on July 12, 1880. No sentence is indicated in the file, but an item later that autumn in the Saskatchewan Herald suggests that he was sentenced to a term in the Manitoba Penitentiary.

The Saskatchewan Herald offered a slightly different account of the incident. The Herald reported, based on a “special dispatch” apparently received prior to the arrest, that Joseph Cardinal had barricaded himself in his house, with four guns, and intended to resist to the death any attempt to arrest him. The Herald’s report indicated that “the lad had evidently been laboring under temporary insanity for two or three days before his death, but it does not appear that he was in any way dangerous.”

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82 Saskatchewan Herald (10 October 1880) 1, col. 2: “On Monday, 27th September, Inspector Antrobus and a small party left with two prisoners – Cardinal the murderer, and LaPlante, a lunatic – both sentenced to the Provincial Penitentiary in Manitoba.”

83 “Another Murder…” Saskatchewan Herald (15 March 1880) 2, col. 4.

84 Saskatchewan Herald (26 April 1880) 1, col 4.
Cardinal was a “hard case” and a “dangerous character” from a family that had produced several criminals;\(^{85}\) the *Herald*’s theory of the case was that Joseph had recently married a younger woman, and suspected his second son [Moise] of having too intimate relations with her.\(^{86}\) The *Herald* reported that although Cardinal claimed to have acted in self defence, the neighbours said the death was due to his jealousy.

In the previous decade, none of the men who were prosecuted for these murders would have faced this form of white man’s justice, and the intervention of white man’s religion may not have been so significant. It is difficult to say whether vengeance by blood would have followed in any of these homicides. In some of the families, it appears that the patriarch was killed (Naboise Gladieu, the Sussey children’s father) and we do not know if there were other relatives who could and would have retaliated. In the other two cases, the father himself had killed his family member(s). Perhaps Charlotte’s father and his remaining family could have retaliated against Ka-ki-sit-kut-chin, but it is difficult to imagine that St. Luke Cardinal would have avenged his brother’s killing by killing their father (or if under the circumstances such a response would have been appropriate). And, in any event, even before the law intervened, members of that family had turned to the church.

These homicides all derive from the most remote part of the North-West Territories, where the HBC and the church had preceded the arrival of the law. The bush, more than the plain, is evident here. These northern files have a different feel to them, as if they involve relations from an even earlier period and, notwithstanding the presence of the priests either directly or indirectly in the files, the files are filled with old ways, with the voices of the

\(^{85}\) *Ibid.*

\(^{86}\) *Supra* note 83.
people having a different cadence, as if their contact with white people was quite recent. They appear to have lived in relative isolation from white people; there is less a sense of new relations being forged, but old relations being differently defined and enforced. In the next part of this chapter, I turn to some new forms of relations, including employment relations, as well as new forms of protecting new and old property relations. And here, life on the Plain appears to be more represented.

(2) Economic and Property Relations

The Hudson’s Bay Company was an important participant in the criminalization process. Between 1877 and 1883 (before Richardson moved to Regina), HBC officials figured prominently as informants in a number of cases involving non-Aboriginal and Aboriginal accused persons accused of break, enter and theft, as well as other offences. In one case involving one young Cree and three young Half-breeds who were charged with stealing and killing an HBC ox, the initial letter of informal complaint lamented: “Of course no one saw them kill him. I hope you will take means to put them through, they

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87 SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, files: James Reid (1877) file #12, charged with Break, enter & theft of HBC Store, guilty plea (12 months); Jean Baptiste Montour, Joseph Desjarlais, Charles Desjarlais & Na-ne-ka-qua-nep, The Youngest Son of the Netmaker (also known as Shakes His Wings) (1878), file #28, charged with unlawfully killing an ox the property of HBC, guilty plea, 3 months hard labor (Richardson specified that the” hard labor” was to cutting wood and other ordinary labor for the space of eight hours of every working day during the said time”); Charles Gouin (1879), file #76, Break, enter & theft HBC (no disposition); Charles Cardinal & Joseph Desjarlais (1879) file # 78, Break, enter & theft HBC, three years; Daniel Williams (1879) file #79, arson, maiming HBC horses, threatening HBC officers (no disposition); Peecoose (Sandfly), theft from HBC, 2 ½ years; James Robertson (1881) file #113, Break, enter & theft HBC warehouse, guilty plea, one month; Thomas, a Stony Indian, theft of fur and bacon from HBC, guilty plea, one month.

88 In the initial letter in file # 28, the four are described as “sons of Abram Montour, Baptiste Montour, Abram Montour Junior and the Netmaker”, supra note 87.
deserve to be punished very severely.” Although no one saw the Youngest Son of the 
Netmaker and his party kill the ox, a man recounted meeting their carts on the trail on his 
way to Fort Pitt, “at the side of the Red Deer Hills, near the west on the right hand side near 
the lake.” At this point, it seems that the ox was pulling the Netmaker’s son’s cart. The 
deponent asked the Netmaker’s youngest son for some tea, and was obliged; but he was told 
that they had no food. Later, in Duck Lake (many miles to the south-east of Fort Pitt), the 
Youngest Son of the Netmaker hired a horse from this man’s brother, and paid for the hire 
with a shirt, seven shillings and a shoulder of beef. When asked where he got the beef, 
“laughing he said it is funny for a man to kill his ox and tie his carts together…. .” On the 
basis of a case stitched together with circumstantial evidence, not least the Netmaker’s 
youngest son’s joke on himself, the four young men were arrested. All made statements that 
were, to greater or lesser extents, exculpatory, each minimizing his own involvement, but all 
four pleaded guilty before Richardson who sentenced each to three months hard labour.

Despite the fact that no one saw them kill the animal, their case suggests that the Plain 
in this instance offered no protective anonymity to the Youngest Son of the Netmaker and his 
half-breed companions.\(^{89}\) The chance encounter on the trail, the exchange of pleasantries and 
tea, and his joke on himself in Duck Lake – the case bears the hallmark of the misadventure 
of four young men who might well have been hungry and indifferent to the possibility that 
anyone ‘owned’ the ox. Richardson seemed to recognize this when he specified that their 
three months of hard labor was to involve cutting wood and ordinary labour for every

\(^{89}\) As Hugh Dempsey has observed, supra note 24 at 39, “In spite of vast distances and problems of 
communication, news could travel like a prairie fire across the plains.”
working day of their sentence.\textsuperscript{90} This is the only file in which he made this express direction concerning the form of labour to be performed during their sentence.\textsuperscript{91}

Recourse by the Company, and other employers, to the criminal court to police and discipline wage labourers is found in the Richardson files. A Stony man named Thomas (or Joseph) was charged in 1883 with theft of one fisher, one marten and about two pounds of bacon from his employer, the HBC at Fort Saskatchewan; he had sold the furs to a man named Carey who suspected they were stolen because he knew that Thomas worked at the HBC fort and that he had not been out hunting. Alerted of Carey's suspicions, Thomas' boss placed a fisher skin in an area where he sent Thomas to work, and then later found the skin was missing. As Thomas was working alone, he locked him in the building, and went around outside to see if Thomas had thrown the skin out the window, which apparently he had not done — rather, he found bacon on the ground. He confronted Thomas, who ultimately admitted that he had thrown the bacon out the window and stolen the other furs. At the hearing before the justice of the peace, Thomas asked one question of his boss: "Did you see with your own eyes that I took the furs and sold them to Carey? Answer: No"\textsuperscript{92} Thomas was committed for trial and appears to have been held in custody for four months before entering his guilty plea before Richardson on July 16, 1883, at which time he was sentenced to a

\textsuperscript{90} Supra note 87.

\textsuperscript{91} One gathers from another court file that the prisoners serving their sentences at the Battleford police barracks had some measure of freedom of movement. Napesis (or Joseph), pleaded guilty in 1881 and 1882 to theft from two different employers, and sentenced on each occasion to six months hard labour in Battleford. Shortly after the 1882 conviction, he was back in court entering another guilty plea to another theft charge: on this occasion, he had lifted two silk handkerchiefs belonging to the NWMP men who were responsible for the prisoners. This netted him an additional six months in gaol. See Napesis (or Joseph) (1881), SAB A-G (GR11-1) CR Regina, 1\textsuperscript{st} series, 1876-1886, file #s 131, 152 and 154.

\textsuperscript{92} Thomas (1883), SAB A-G (GR11-1) CR Regina, 1\textsuperscript{st} series, 1876-1886. file # 188.
further one month hard labour at Fort Saskatchewan.

In theft cases involving theft from an employer, and from the Company, both as employer and as retailer, it bears noting that most of those convicted received a custodial sentence for their offence, even as in the case of the ‘stolen bacon’ where it was recovered on site (one is left to wonder whether Carey returned the stolen furs to the HBC). There can be no doubt that the Company had more property than most in the Territories (rivaled only by the Government), and hence certainly more than most to lose.

An 1880 case involving a man named Peecoose (Sandfly), apparently a member of Big Bear’s Band, is interesting because of the suggestion that his prosecution was motivated less to protect the HBC than to ensure that the government man who had taken up with his wife could proceed unimpeded by Peecoose’s presence and interference. Charged with theft of goods from the Hudson’s Bay Company at Fort Pitt, Peecoose spent several months in police custody before being brought before the Magistrate. The Information sworn by James Keith Simpson before HBC Factor, W. McKay JP on October 8, 1879 was a model of efficiency for criminal justice, setting out both the particulars of the alleged offence, and the evidence:

...on or about the night of the fourth of August last the store of the [HBC] ... was feloniously entered and a quantity of goods and chattels – that is to say (among other things) – two blankets, three tweed coats, one vest, one “L’Assomption belt, two shirts, one scarlet wool shawl, one single rein bridle, one single barrel shotgun, one felt hat and two towels, and that he

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93 Not every Aboriginal person accused of theft from an employer was convicted. It appears that Caroline Gouin, charged with stealing a pocket book from her employer, never went to trial. As I have indicated earlier in this chapter, Peter Erasmus is named as an interpreter in the file, and thus I infer that she was either a First Nations or Métis woman (and my further inference would be the latter). Caroline Gouin (1881), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file # 124.

94 In the days of HBC rule, the Factor might have dispensed a form of private Company justice or even possibly let the matter go, as the goods were retrieved.
hath just and reasonable cause to suspect and doth suspect that the said goods and chattels were feloniously stolen by one Pee Coose (or Sandfly) a Cree Indian, the said Pee Coose – otherwise said Sandfly having on the thirtieth day of September last hand [sic] to the said James Keith Simpson, the above-mentioned goods & chattels, confessing that he had stolen the same the said [HBC].

The list of items he was said to have stolen were more in number than that of Thomas, and like Thomas, the goods that were the subject of the particular charge were returned to the Company (although Simpson’s information hints that there were more items taken). The record of Peecoose’s prosecution is remarkably thin. One finds no record of a hearing before the justice of the peace (if indeed one was held), nor any record of the proceedings before Richardson.

The Saskatchewan Herald (whose editor, P.G. Laurie was listed as one of the jury men) chortled that “An Indian rejoicing in the innocent name of Sandfly” had pleaded guilty to a charge of stealing of a large quantity of goods from the HBC at Fort Pitt and was sentenced to “two and half years’ exile to Manitoba.” This sentence ranks with the most severe Richardson handed out for theft of recovered goods (although the facts contained in the Information suggest a break-in which, if true, would have warranted the more serious

95 Peecoose (Sandfly) (1880), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file #88.

96 A mere five pages, containing simply the Information, cover letter dated 24 April 1880 from W. McKay forwarding the Information to Richardson, (“...I do not think it necessary to put the Government to the expense of sending any witness but one – Mr. J.K. Simpson – who will deliver this letter to you.”); a letter of 29 April 1880 from Inspector French of the Battleford NWMP confirming “an Indian named Sandfly in our custody for the last six months awaiting his trial on a charge of felony;” a further letter of 02 June 1880 from Inspector French, still at Battleford Barracks, apparently responding to a request earlier that morning from Richardson for the documents concerning Peecoose, and asking Richardson to inform him of the date and place of the trial so that he could arrange for the attendance of the Prisoner. The file also contains a paper indicating Peter Ballendon [sic], “Interpreter,” James Keith Simpson “Evidence” and the names of eleven jury men under the heading “jury men”; next to the names of nine of the men is the word “mark”.

97 Saskatchewan Herald (07 June 1880) 2, col. 2.
charge of break, enter and theft). The sentence appears especially severe when one considers that Peecoose was in custody, apparently in Battleford itself, for eight months prior to his appearance before Richardson. One can only infer that Richardson did not receive the April correspondence, and that Peecoose languished for a further two months due to paperwork that went missing. Given the seriousness of the offence, it is surprising that the file contains no depositions taken before justices of the peace prior to committal unless, as I have intimated above, there was no hearing. It is also possible that the file in the Archives is not the complete file, but its sparseness combined with the delay in bringing him before Richardson, and the harsh sentence, do raise questions about the process as well as the result.

On this point, others have implied a more sinister motive by a real culprit. Hugh Dempsey suggests this particular prosecution was something of a put up job.\(^98\) Dempsey implicates Frog Lake Indian farm instructor, John Delaney, who had “stolen” Sandfly’s wife. When Sandfly protested, Delaney apparently had him charged with assault: “This failed to have him jailed, so a further charge of theft was levied against the Indian, and he was sentenced to two and a half years in prison.”\(^99\) Dempsey draws upon correspondence from Hayter Reed to Dewdney: “The feeling was general that “Mr. Delaney had the man arrested so he could accomplish his designs,” and he cohabited with the prisoner’s wife all winter.”\(^100\)

I have found no court record of the assault charge to which Dempsey refers, and there

\(^{98}\) Dempsey, supra note 23 at 117; Carter, supra note 37 at 57 – 58; Walter Hildebrandt, Views from Fort Battleford: Constructed Visions of an Anglo-Canadian West (Regina: Canadian Plains Research Centre, University of Regina, 1994) at 62.

\(^{99}\) Dempsey, ibid.

\(^{100}\) Ibid.
is nothing in the court file which expressly supports Dempsey’s account. However, as I suggest above, Peecoose’s case raises questions, and Dempsey, among others, offers a compelling answer. For his mistreatment of Sandfly, and others, as well as his earlier reputation for contributing to the debauchery of young Indian women, Delaney was said to have been despised by the First Nations people with whom he worked. Peecoose escaped from the NWMP barracks before he could be transported to the penitentiary, and was said to be back in Big Bear’s camp during the spring of 1885; arrested as a “suspected rebel,” he was convicted of treason-felony and sentenced by Rouleau to three years in the penitentiary. Peecoose did not kill Delaney at Frog Lake, but Delaney’s death at the hands of the Cree at Frog Lake was not a random event. Others remembered; few accounts of his violent death at Frog Lake in 1885, by those who have looked closely at the “Frog Lake massacre” with eyes that are sympathetic to the Cree, fail to aver to his mistreatment of Peecoose, and other victims.

101 The account provided by Dempsey is also referred to by Hildebrandt, supra note 100, at 62. Blair Stonechild & Bill Waiser, Loyal Till Death: Indians and the North-West Rebellion (Saskatoon: Fifth House, 1997) refer at 108 to Delaney’s affair with “Sand Fly’s wife, but make no mention of the theft charge.

102 The Saskatchewan Herald (05 July 1880) 2, col. 4 later reported that while the guard had left the guardroom for a short period of time, Sandfly had unscrewed the lock plate and walked away unobserved. It appears that he remained at large until his arrest in 1885.

103 Report of the Commissioner of the NWMP 1885, Appendix “O” at 115. See also Dempsey, supra note 24 at 161, who says that Peecoose (Sandfly) was in the village of Frog Lake at the time of the killings on April 2, 1885.

104 See, e.g., Dempsey, ibid. at 161; Stonechild & Waiser, supra note 101. The Saskatchewan Herald offered a different assessment of Delaney’s relationship with the Indians. Reporting on the men who had been killed at Frog Lake, the Herald said of Delaney, “He was looked upon as having been successful in civilizing and humanizing the band of miserable wretches amongst whom he labored so diligently. That they killed their best friends [referring also to Thomas Quinn, et al.] first shows them to be utterly depraved and not to be trusted in anything.” Saskatchewan Herald (23 April 1885) 2, col. 1.

Delaney’s death was later overshadowed by the national celebration of his widow’s ‘rescue’ from Big Bear’s camp: see Carter, supra note 37. Carter, with her characteristic even handedness, reminds her readers that Delaney been disciplined by his superiors on at least one occasion for giving out rations without work.
What emerges from these files, including the story of Peecoose, his lost wife and the government man, is that social and economic relations between the First Nations and the HBC, among others, were being extended. First Nations people were being employed and their employers (the government, HBC, settlers) could turn to the criminal law to prosecute and punish them for their theft, non-performance and insubordination.  

(3) **Criminalizing Aboriginal Children**

Three Indian boys were up on the 4th [of May, 1881] for an assault on John Burnett. Prisoners were discharged under suspended sentence.

One of the challenges posed by these court records is the lack of identifying information with respect to the accused persons – as whether they were, for example, Métis, Cree, children or adults. Thus, the *Saskatchewan Herald*'s brief report above offers one sliver of evidence that JT and the Widow C’s son, known by the nickname TA’B, were children (that the *Herald* did not refer to them as “bucks,” the paper’s preferred noun for Indian men, also supports the inference). The court file refers to two not three accused, who are described as “2 Cree Indians.” The fact that Hayter Reed, the Battleford Indian Agent,

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105 In Chapter Five, I also discuss Hayter Reed’s use of the criminal court to enforce contracts of employment with two different Aboriginal men in his capacity as Indian agent.

106 The court files use the names of Aboriginal children prisoners. I refer to the court files where their names can be located and I have their names in my files, but I have not reproduced the names of the children here. I regard this as a modest effort not to restigmatize these children in this dissertation, one that is in keeping with current youth criminal justice practice in Canada.

107 *Saskatchewan Herald* (09 May 1881)1, col. 4.

108 JT and TA’B (1881), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file #116.
appeared on behalf of the prisoners is also suggestive that they were not adults. The facts of their case are strongly suggestive of a prank on an old(er) man whose furious embarrassment and hyperbole packed a criminalizing punch.

Burnett, a labourer, laid an Information on April 27, 1881 before his neighbour, a justice of the peace named Scott, claiming that the boys had fired a revolver at him, “with intent, feloniously and of their malice aforethought to kill and murder” him. At their trial on May 3, he claimed that JT had come to his tipi in the evening, When asked why he had come so late, JT replied that he and another boy, and “someone else,” who was out on the road had come with him. JT had asked Burnett if he had any money, and continued to press Burnett when he said he had none. Finally TA’B, the other boy, joined them in the tipi, and Burnett decided to see who else was outside. He testified that upon seeing no one, he came back into the tent and saw that TA’B had something in his hand, pointing at him: “I saw a flash, heard a report of either a pistol or revolver fired off. I backed out feeling as if there a hole thro’ my head. I picked up an axe. They both then ran away.” Under cross-examination, Burnett denied that he had any clear understanding why the “two men” had come that evening; he maintained that he could see clearly who they were, as he had a good fire in his tipi, and he admitted that he had never known either prisoner to have any firearms. The NWMP surgeon testified that he had examined Burnett the next morning. In his opinion Burnett had not been shot; he did not think it possible that the lump he had examined on Burnett’s head could have been caused by a bullet.

At the close of Burnett’s case, Richardson, likely on Reed’s motion, discharged JT, as there was no evidence against him. JT then was sworn, and through his testimony, the boys’
story came out: they had not been able to get back to their own tent that night, and they had agreed “to play a practical joke on Burnett about a squaw.”\footnote{JT’s evidence, \textit{ibid.}} After they had induced Burnett to go out and look for the woman who was not there, he came back into the tent angry, and swearing at them. TA’B struck Burnett in the head with a small stick; they then ran away because Burnett came after them with an axe and they feared for their lives. The file contains no indication of the final disposition for TA’B, but it is likely he was convicted by Richardson of assault and discharged on the suspended sentence (as perhaps partially correctly reported by the \textit{Herald}). For their practical joke, the boys had spent a week in custody in the cells in the police guardroom at the behest of the private prosecutor. One rather hopes that Burnett’s embarrassment was amplified by the public trial, although clearly the \textit{Herald} spared his feelings in its report. And, we are left to ponder just how young these “Indian boys” were.

It is quite likely that many of the accused who appeared before Richardson were young people. JT and TA’B were not the only children – Aboriginal or white - who appeared as prisoners in the criminal courts in the Territories. A few settler boys and adolescent labourers appeared as prisoners in Richardson’s court.\footnote{In a sprinkling of files, the ages of very young accused are indicated. Two German brothers, the younger of whom was said to be thirteen, were tried and acquitted by Richardson on a charge of rape when he was sitting in the south: in Regina in 1894, GR and PR were tried and acquitted of rape of a young neighbour girl at their farm: SAB Coll. RG R1286, file #s 88 & 89. A 15 year old boy, AO, was convicted in 1895 of break, enter with intent to steal, after he had been found in an empty house. The file is silent with respect to the “intent to steal” element of the offence, and it would appear that AO’s explanation for his presence in the house did not suffice: he told the court, “I wanted a house of my own.” Richardson wrote, “Prisoner states he is under 15, an orphan, brought out from St Johns home Ipswich England by one Pady in April’94.” (SAB Coll. RG R1286, file #100). See also ES (under 16) (1901), SAB Coll. RG R1286, file #252 convicted of theft of horses, and later sentenced to a year in gaol and a further two year recognizance to keep the peace and be of good behaviour (if no surety came forward, he was to serve another year consecutive to the first year) for another theft conviction as well as the previous conviction (SAB Coll. RG R1286, file # 271).}
Mounted police indicate that five Blood boys appeared (and were discharged) at Fort Macleod, and that a nine year old Sarcee boy was discharged on a charge of larceny.\textsuperscript{112} The 1883 returns indicate that “Patrick, half-breed boy,” was sentenced by Stipendiary Magistrate Macleod in Calgary to two years in the penitentiary for horse stealing.\textsuperscript{113} These are children for whom the twentieth-centuryjuvenile delinquents actcould not come soon enough.

The coercive edge of the government’s Indian education policy was experienced by a boy, AB,\textsuperscript{114} and a girl, JC,\textsuperscript{115} after they ran away from the Indian Industrial School in Regina. Given the industrial schools provisions of theIndian act, it is reasonable to infer that they were under the age of sixteen.\textsuperscript{116} Charged with theft of the school clothes they were wearing when they ran away,\textsuperscript{117} they were held in jail for a month. AB and JC were held in custody in the cells in Regina for one month, before entering a guilty plea. Who could blame them if they simply nodded their head? Richardson discharged them on their promise of good behaviour. The boy’s file indicates that the Principal of the School, the Informant in the case, was prepared to take him back to the School. The girl’s file is silent on this point.


\textsuperscript{113}Report of the Commissioner of the North-West Mounted Police, 1883, Appendix D, at 38 (cases tried at Ft. Macleod) & at 40 (cases tried at Ft. Calgary), respectively, reprinted in ibid.

\textsuperscript{114}AB (1894), SAB Coll. RG R1286, file # 84.

\textsuperscript{115}JC (1894), SAB Coll. RG R1286, file # 85.

\textsuperscript{116}An Act to Amend the Indian Act 57 58 Vict. (1894) c. 32, s. 11.

\textsuperscript{117}This form of ingenuity, of course, was not unique to Indian department officials. See, e.g., D. Murray, “Hands Across the Border: The Abortive Extradition of Solomon Moseby,” (2000) 30 Can.Rev. American Studies 187, for an account of the criminal prosecution of a runaway slave for theft of the horse on which he escaped.
Aboriginal children were not the only children in the period to face criminal charges and to be held in jail prior to their trials or guilty pleas. But it was an experience which likely reinforced the experience of the Industrial school and would have been a fate beyond the vision of their grandparents, much less the approach they would have taken to helping their children be better children.

(4) “Nobody saw me steal the horses”

While most property thefts in the Territories involved small movable or wearable pieces of property (rings, watches and wallets, left in pockets or on wash stands, or shawls, belts, socks shirts and pants, and occasionally ribbons and shawls, household items from an empty houses, and so on) the most significant, and challenging, form of theft involved horses. And, here, as others have observed, the Canadian government faced the formidable challenge of transforming the meaning of horse raids into horse theft. Given that horse raids appear to have been an important part of warfare, the objective of which was to make off with as many horses as possible from an enemy camp, Hubner’s argument that in the 1880s and 1890s, horse stealing replaced warfare as an important expression of Native autonomy is curious. Hubner argues that the NWMP initially took a lenient view of horse stealing, but

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118 “Statement of the Accused,” Kakawusk (1880), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file #120.
119 R.C. Macleod & Heather Rollason, “‘Restrain the Lawless Savages’: Native Defendants in the Criminal Courts of the North-West Territories, 1878 - 1885”(1997) 10 J. Hist. Sociology 157 at 170; Brian Hubner, “Horse Stealing and the Borderline: The NWMP and the Control of Indian Movement, 18 – 1900” (1995) 20 Prairie Forum 281 at 285. For the importance of the “raid” see also Mandelbaum, supra note 4 at 239 -245.
120 Mandelbaum, ibid. at 239.
121 Hubner, supra note 119 at 285.
a crackdown commenced in the 1880s, which resulted in Aboriginal ‘horse thieves’ receiving penitentiary sentences when they were convicted of bringing stolen property (ie. horses) into Canada from the United States. And, here, is likelier site of the conflict: that the Indians could no longer retrieve horses stolen from them by American Indians who were able to take refuge south of the border. If they ventured over the border, took back or stole American horses, they faced the more serious offence of smuggling once back in Canada.

Hubner appears to be on solid ground when he argues that the desire to prevent the practice of cross border horse raids weighed heavily in the decision to move the closely aligned Cree bands of Piapot and Little Pine, and the Assiniboines led by Lean Man and Grizzly Bear’s Head to reserves far away from the Cypress Hills, but it is not clear that the Richardson court records support his more general claim that the Indians received increasingly harsh sentences for horse stealing as the 1880s went on. It is of course the case that the aggravated offence of smuggling or bringing stolen property across the border could attract a more serious sentence, but even here, Richardson’s court files suggest more temperance than Hubner conveys. It is of course undeniable that eleven Cree men were sentenced to two year terms in the penitentiary in 1883 (having been sentenced by Stipendiary Magistrates McLeod and A.G. Irvine (who was also NWMP Commissioner). Given the composition of that bench, and the fact Commissioner/ Stipendiary Magistrate Irvine when sitting either at Fort Walsh or Fort McLeod did not hesitate to impose

\[122\] Ibid. at 288.

\[123\] Report of the Commissioner of the NWMP, supra note 113 Appendix “A” at 38.
penitentiary sentences for these offences and for cattle killing, it is understandable that Hubner would be inclined to collapse the NWMP into “the law.” While Richardson did not routinely sit at either Fort Walsh or Fort McLeod, he did preside over horse stealing and smuggling cases that were committed to Qu’Appelle for trial. From these cases, it is not clear, however, that Richardson’s approach to sentencing in these cases was as harsh as described by Hubner.

In a set of companion cases before him in 1882, the sentences he imposed were modest. Three Cree men, Chac-a-Chas, Wa-ya-koo-la-ya-hoo, and Weka-repee-asoo, each pleaded guilty to “bringing stolen horses and mules into Canada, knowing them to have been stolen and having same in their possession” and received 30 days imprisonment at hard labour. Seven Cree men and one Saulteaux man also pleaded guilty of having possession of stolen horses belonging to Jean Baptiste Champagne. It seems that the two sets of men may have been part of what the NWMP described as a “war party of thirty-two Crees” that had arrived at the end of April that year at the camp of Jean Louis Legarie, a trader based in Willow Bunch, Wood Mountain, NWT. In his deposition he indicated that his party, which included a Teton Sioux and a Half-breed man, was camped somewhere between Fort Buford, North Dakota and Wood Mountain in the Territories. The ‘war party’ asked him for something to eat, and he gave them supper. Later in the evening, they began to go through his carts, taking what they wanted, and declined to stop despite his order that they do so.

124 Ibid, at 37, 45.

125 He was possibly a signatory to Treaty Four. See Morris, supra note 5 at 334 where one “Cha-ca-chas” is listed as a signatory to Treaty Four. If so, if he was a Chief or headman or a man of stature, this might shed some light on the relatively light sentence he and his co-accused received. See also Treaty Four in Appendix 1.

126 Chac-A-Chas, et al (1882), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file # 143.
Over night, he said he heard them planning to kill the Teton Sioux man who was with him.\textsuperscript{128} (the Annual Report of the NWMP indicated that the ‘war party’ had said they were going to kill Legarie as well).\textsuperscript{129} Seven Cree men (The Bear, The Man That Walks There, The Man that Takes Them in His Canoe, The Man That Thinks Most, Short Thunder, Dry Grain, Stony Hair) and one Saulteaux man (The Man That Makes Noise in the Sky) were ultimately arrested and charged with theft of tea, sugar and blankets from Legarie, threatening to take the life of Legarie and the Teton Sioux, and also with possession of stolen property (horses) that belonged to Jean Baptiste Champagne. They were also charged with possession of a stolen blanket, belonging to Mathias Sansregret.

The eight men apparently gave a collective Statement of the Accused taken in respect of both sets of charges, which warrant reproduction. In response to the Legarie and Sansregret charges, they said:

\textquote{We were with the party who met Mr. Legarie and his party and did not want to take anything from him but the majority of our party wished to take the goods and kill Mr. Legarie and the Sioux Indian and we were too few in number to do anything towards protecting them so we were forced to join the majority of the party.}\textsuperscript{130}

In response to charge concerning Champagne’s horses and Sansregret’s blanket they said:

\textquote{We took the horses from John Baptiste Champagne at night but next day was overtaken by the owner who got them back. We would not have taken them had we known they were half-breed’s horses. Pie-a-Pot told us not to steal any horse on this}

\textsuperscript{127} Report of the Commissioner of the NWMP, supra note 113 at 8-9.
\textsuperscript{128} Deposition of Jean Louis Legarie, supra note 126.
\textsuperscript{129} Supra note 113.
\textsuperscript{130} Statement of the Accused (The Man That Walks There, et al) re: Legarie charges, taken 12 May 1882, SAB A-G (GR11-1) CR Regina, 1\textsuperscript{st} series, 1876-1886, file #143.
Both sets of Accused appear to have been held in custody from May 12 until they entered their guilty pleas before Richardson in Qu’Appelle on October 9. The Legarie charges appear not to have proceeded. Chic-A-Chas and his two colleagues pleaded guilty to having brought stolen horses into Canada, knowing them to have been stolen. The Bear alone pleaded guilty to possession of the stolen Sansregret blanket, and he and his seven colleagues pleaded guilty to Champagne charge, for which they received twenty days at hard labour. Of course, the sentences were not as light as appears at first blush, given the five months they had spent in custody awaiting trial. But, a sentence of twenty days or one month, served closer to home, does not come close to a term in the Manitoba penitentiary.

Similarly, in a series of cases before him two years later on 26 August 1884, Richardson sentenced seven Cree men to two months and one Assiniboine man (Ah-kee-tap) to one month for “smuggling stolen horses into Canada.”

There is an interesting connection between one of the ‘horse smugglers’ (Ah-kee-Tap) and another Assiniboine man, Buffalo Calf, who also appeared before Richardson that year, and here the story is suggestive of intrigue and possible arrangements or inducements that are not made express in the court files. Buffalo Calf’s arrest on June 22, 1884 and prosecution could not have occurred without the cooperation of his fellow Assiniboines, Ah-kee-tap and O-see-wat-a tao, the only witnesses who could have seen him commit the offence. In fact, Ah-kee-Tap, O-see-wat-a

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131 Statement of the Accused (The Man That Walks There, et al) re: Champagne and Sansregret charges, taken 12 May 1882, SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file #143.
132 Ah-kee-tap (1884), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file #221; The Cree (1884), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file #224; Ahsti-ni-ah (1884), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file #225; The Rock, Little Fish and Is-te-wah (1884), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file #226; Day Thunder (1884), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file #227; Little Fish[again] (1884), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file #228.
tao, and another man, Little Eye, had been charged with the offence of "placing obstruction on C.P. Railway track" on June 18, 1884; the charges against them were dismissed by Supt. Deane, J.P. on June 19.¹³³

Three days later, on June 22, Buffalo Calf was charged with obstructing the CPR railway line at a place "six days march west of Regina": specifically that he "unlawfully and maliciously put upon the line of the Canadian Pacific Railway at or near Parkbeg ... an obstruction, to wit, a piece of iron rail, with intent to endanger the safety of some person or persons unknown travelling or being upon the same railway."¹³⁴ Before the Justice of the Peace, (NWMP Supt Deane), three witnesses were examined: NWMP Sergeant Blight, Ah-kee-tap and O-see-wat-a-tao. Cpl. James Thompson was sworn as interpreter, who translated the evidence of Sgt Blight and "explained to the Prisoner the nature of the charge." After each witness, Buffalo Calf is recorded as having declined to cross examine. The two lay witnesses were brothers; Ah-kee-tap was married to Buffalo Calf's sister. Their depositions indicated that they saw Buffalo Calf place the iron rail across the track. At the end of the evidence, Buffalo Calf declined the offer to make a statement: "I will not say anything." The record of his trial before Richardson S.M. indicates simply plea of "not guilty" and "verdict of jury guilty" on June 25, 1884.

It seems that the jury recommended mercy. It may be that prior to sentencing Richardson canvassed the range of possibility: perhaps by simply discharging Buffalo Calf or perhaps the Executive might intervene after sentence was passed. No record of his inquiries

¹³³ Report of the Commissioner of the NWMP, 1884, Appendix "A" at 46, in supra note 112.

¹³⁴ Buffalo Calf, an Assiniboine Indian (1884), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file #219. John Jennings also refers to Buffalo Calf in his dissertation, The North West Mounted Police and Canadian
is found in the file, but the NWMP Commissioner delivered the following message to

"Colonel Richardson:"

I saw the Lieut. Governor this evening and he is not disposed to interfere with the ordinary course of law in the case of "Buffalo Calf" and prefers to let the recommendation to mercy of the jury stand on its own merits --- if circumstances should subsequently justify a mitigation of punishment he will not be averse to recommend it but considering the improbability of obtaining sufficient evidence to convict in future similar cases should they occur and the desirability of impressing upon the Indian mind that such crimes cannot be committed with impunity, he prefers to leave the matter to your judicial discretion.\(^{135}\)

While the court file is silent with respect to the disposition, the 1884 Report of the NWMP Commissioner indicates that Buffalo Calf was sentenced two days later, on June 27, to two years in the penitentiary.\(^{136}\) The returns of the NWMP for 1884 indicate that on July 19, Empty Belly, or O-see-wat-a tao, was sentenced in Regina by Col. Irvine SM to two years in the Penitentiary for horse stealing\(^{137}\) (the NWMP returns that three days earlier, in Regina, Richardson sentenced Corbert Peltier, Baptiste Peltier, Alexandre Peltier and Brisbois Brier to two years for theft of horses on June 15).\(^{138}\) So, it appears that Richardson arranged for Irvine to deal with the Assiniboine man, perhaps because he knew that O-see-a-wat-a-teo would be appearing as a witness before him during the trial of Buffalo Calf which was yet to

\(^{135}\) Indian Policy, 1873-1896 (University of Toronto, Ph.D. dissertation, 1979) at 188.

\(^{136}\) This letter contained in the court file was written on stationary bearing the letterhead of the Commissioner of the NWMP.

\(^{137}\) Supra, note 133 at 46.

\(^{138}\) Ibid. The Richardson court records include the Peltier & Brier Informations; however, nothing else is contained in the file: SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file # 212.
take place.

Later that summer, on August 14, Ah-ke-tap, was charged, on an Information sworn by Louis Leveille, with bringing two stolen horses into Canada earlier that spring, on April 30, 1884. On Aug 16, “Ka-ke-tap, Assiniboine Indian, is named as informant also be the Informant in an Information laid against The Rock, Little Fish and Is-te-wah, three Cree Indians charging them with bringing one horse “stolen or unlawfully obtained” in the United States on 30 April 1884. Also charged on August 16 on Informations sworn by Louis Leveille of Maple Creek, were other Cree men, Ahsti-wi-ah, Day Thunder, and Little Fish.

The Statement of Accused made by Ah-ke-tap on August 14 in response to his own charge of bringing stolen horses into Canada is telling: “I have told already that I took the horses and all about the men who were with me.” For his part, The Rock who was charged on “Ka-ke-tap’s information, simply said: “I have nothing to say. I have a few words to say to “Big Bull.” Ah-sti-ne-ah’s statement similarly referred to the Big Bull: “I brought five horses over. All I have to say I will say when I see the Big Bull.” Finally, in The Cree’s

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139 The Rock, Little Fish, & Is-te-wah, 3 Cree Indians (1884), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file #226.
140 Ahsti-ni-ah, Cree Indian (1884), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file #225.
141 Day Thunder, a Cree Indian (1884), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file # 227.
142 Little Fish, Cree Indian (1884), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file # 228.
143 Statement of Accused, Ah-ke-tap, Assiniboine Indian (1884), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file # 221.
144 Statement of Accused, The Rock (1884), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file # 226.
145 Statement of Accused, Ah-sti-wi-ah (1884), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file # 225. Nowhere in the records does the identity of the Big Bull appear, although he may have been “Boss Bull.”
statement, we encounter the grievance flagged earlier in this chapter about American Indians stealing their horses with impunity: "Five times they did me wrong from the other side. Four times I stood it. The fifth I could not."\textsuperscript{146}

Richardson accepted the guilty pleas of all the accused, and sentenced the seven Cree men to two months hard labour; Ah-ke-tap was sentenced to one month hard labour. As noted above, his brother O-see-wat-a-tao (sentenced by Irvine) and the four Half-breed men sentenced earlier by Richardson received much longer penitentiary terms.

In this complex web of charges, Ah-ke-tap emerges as a central figure - as informant, witness and accused - in the chain of events that followed his initial arrest on June 16 in respect of a charge that was summarily dismissed against him. His brother and brother-in-law fared less well, of course. But, at the end of the day, once again, Hubner’s concern, that Indians received increasingly harsh sentences for horse theft and bringing stolen horses into Canada, is not supported by this series of cases (although it is clear that the sentences handed down to the ‘half-breed gang’ and O-See-wat-a-tao offer some support for Hubner’s argument).

However, not all horse thefts involved raids and cross border activity.

On May 23, 1879, Na-tok-kris-tok-ka (The Only Mountain) of the Blackfoot Nation appeared before Hugh Richardson and, through interpreter Jean L’Heureux, laid an Information to obtain a search warrant. In his declaration, The Only Mountain charged that on May 1, his large bay horse (fully described with white star on forehead and black points) had been stolen

\textsuperscript{146} Statement of Accused, The Cree, Cree Indian (1884), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file #224.
by The Little Person, a Cree Indian, son of Running Crow.\textsuperscript{147} Richardson issued the search warrant, but it appears that it was never executed by the police. On September 10, Supt. Walker of the Battleford NWMP explained, apparently in response to a letter sent by Richardson the day before, that he had intended to execute the warrant at Sounding Lake during the Treaty payment time, but he had not gone there himself. Rather, he reported that he had transferred the warrant to Major Irvine who took it to the Cypress Hills, as he believed that “the parties implicated are in that neighbourhood.”\textsuperscript{148}

It is doubtful that Major Irvine ever executed the warrant, and more likely that this horse from Blackfoot territory at the junction of the Red Deer and Saskatchewan Rivers became a Cree horse that accompanied his new owner to and from the Cypress Hills.

One wonders if The Only Mountain experienced a sense of loss, or perhaps shame, at having to ask these men for assistance in finding the horse stolen by Running Crow’s son. Could the Blackfoot no longer take back what was theirs from the Cree? Or, did he feel he had a right to call on the white man’s law to help him, to use its power, influence and police, to show a young Cree that he could no longer make off with a Blackfoot horse and not expect trouble. Did The Only Mountain want The Little Person punished by the law, or did he simply want his horse returned? Was the young Cree a following traditional path, or was he just a thief? Had there been a raid or simply a dispute? Was he trying to become a Worthy Young Man through the taking of the Blackfoot’s horse or did he just need a way to get home? Was the (possibly older) Blackfoot following a new path? Was the Blackfoot right?

\textsuperscript{147} The Little Person, Son of Running Crow (1879), SAB A-G (GR11-1) CR Regina, \textsuperscript{1\textsuperscript{st}} series, 1876-1886, file #73.

\textsuperscript{148} Letter of 10\textsuperscript{th} September 79, James Walker, Supt, NWMP, \textsl{ibid}.\textsuperscript{149}
Was their world now turned upside down?

The Only Mountain’s complaint about his lost or stolen large bay horse represents one small unresolved file in the Richardson records, and not the only file in which members of different First Nations charged others with horse theft. In the summer of 1881, three horses went missing from William Wolf’s pasture on the Eagle Hills Cree Reserve near Battleford. It appears that Peter Ballendine alerted Wolf in early October that his three horses were in the possession of some Stonies to the south, heading in the direction of the Cypress Hills. (Ballendine may have encountered the party in his travels as mail carrier.149) Wolf’s Information, which had been translated into Cree for him, was based on information and his belief that four Stoney (Assiniboine) men had his horses. The Information named: A Small Bull, A Soul, The Thunders Home Son, and A Deceiving Man. On October 31, the Saskatchewan Herald convicted them in advance of their trial, “The Assiniboine horse thieves brought in from the Red Deer Forks will be tried today.”150 Three trials were held in Battleford; the files contain only Richardson’s handwritten notes from the three trials, in which two of the three accused, testified for each other and against the third. No other legal documents are in the four files. It appears that a Mr. Forget cross-examined the witnesses on behalf of the Prisoner, Esktope, who emerges from the record as the principal accused, and for whom Mosquito, Chief of the Eagle Hills Stonies, testified as a character witness.

149 “A Small Bull,” “A Soul,” “The Thunders Home Son,” and “A Deceiving Man” (1881) SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file # 133. This file contains only the Information. In the trial of The Ghost, (1881), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file # 135, the police witness Sgt Parker testified in cross-examination, “There were 2 large and 1 small [??] forming the camp on the north side. There were 3 men besides the prisoner at this cap. There were horses belonging to the mail carrier nearby but not belonging with those described.” It is possible that this is a reference to Peter Ballendine, who was the mail carrier for Battleford. In 1883, Ballendine, “mail contractor,” charged and prosecuted Joseph Alexander with abandoning the mail; the accused offered an explanation, he was cautioned and the prosecution allowed to be dropped: SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file #180.
The three Stonies tried were, Esktope, The Ghost and The Bull That Walks Painted Black. Given that Wolf spoke no English, his initial complaint, including the names of the Stonies who allegedly had stolen his horses; this complaint would have been translated into English for the initial Information, including a translation of the Stoney names, and then again for him into Cree; then for the purpose of the trial the Information would have had to be translated into Stoney for the three accused. The trials required a Stoney interpreter (Thomas Quinn) for the accused, and a Cree interpreter for the witness, Wolf. And, finally, the proceedings were transcribed in English, apparently in Richardson’s handwriting. Thus, it is distinctly possible that The Ghost was the person named as “The Soul” in the Information, that The Bull That Walks Painted Red was the person named as “The Small Bull”, and that Esktope was either “The Deceiving Man” or “Thunders Home Son.”

The challenge of the plain is once again revealed through the evidence of the Prosecution witnesses. Sergeant William Parker, who arrested the Prisoners at their camp on the south side of South Branch [of the South Saskatchewan River], testified that he found the horses at the Stony Creek on the north side of the river. He brought only one of the horses back with him, leaving the other mare who was maimed (or ‘hobbled’ in Wolf’s words) and the colt; Wolf identified this horse as his horse. When cross-examined, Parker testified that he “understood that these Indians were after buffalo and were waiting a chance to cross the river going southward.” Parker also admitted in The Bull’s trial that he “explained on arrest the nature of the charge through the interpreter but can’t say if my words were properly translated.”151 Wolf also admitted under cross-examination that his horses had wandered off

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150 Saskatchewan Herald (31 October 1881) 1, col. 4.
151 A Bull That Walks Painted Red (1881), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file # 136.
before, but added that they had come back of their own accord. It is possible that if this had
been the only evidence, all three accused might have been acquitted. However, The Bull
That Walks Painted Red gave unsworn evidence in The Ghost's trial; as a non-Christian
Indian he was warned in accordance with the provisions of the Indian Act.¹⁵² The Bull
testified that Esktope brought the horses into camp, and that The Ghost was with him hunting
ducks when Esktope arrived with the horses. The Bull also testified that Esktope had had no
horses when their party had left the reserve.¹⁵³ The Ghost testified for the prosecution in
Esktope's trial that Esktope had not been with them when they left the reserve, and that he
did not know that Esktope was coming. He testified that Esktope caught up to their party five
days after they had left, and that he said he had found the horses. Esktope called two
witnesses in his defence, one of whom was his Chief, Mosquito, who testified to the
prisoner's good character: "I don't think he would steal a horse."¹⁵⁴ The Chief also testified
that he remembered when the party had left the reserve for Red Deer River, and Esktope had
left on foot five days later. Chief Mosquito added that both the party and Esktope had headed
off to the west, while Wolf's place on the next reserve was to the east.

Richardson's files contain no record as to the disposition, but the NWMP
Commissioner's Annual Report indicates that on October 31, "The Bull Painted Red Who

¹⁵² The relevant provisions of the 1876 Indian Act, 39 Vict. (1876) c. 18, ss. 74 – 78, permitted a judge to
accept the unsworn evidence of a non-Christian Indian ("who is destitute of the knowledge of God and of any
fixed and clear belief in religion or in a future state of rewards and punishments") upon the solemn declaration
or affirmation by the Indian to tell the truth. Prior to the receipt of the evidence, the court was required to
cautions every Indian that he would be liable to punishment if he did not tell the truth. In the files that I have
read, I have not found one in which Richardson declined to receive the evidence of a non-Christian Indian.

¹⁵³ The Ghost (1881), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file # 135.

¹⁵⁴ Evidence of Chief Mosquito, Esktope (1881), SAB A-G (GR11-1) CR Regina, 1st series, 1876-1886, file #
134.
Walks,” “The Ghost,” and “The Cloud Old Man” were acquitted of horse stealing, and that Esktope was acquitted of shooting a horse. Here again, there is a less than perfect fit between the press, court and police records. No mention of the case or the outcome appeared in either of the next two issues of the Saskatchewan Herald, perhaps the Herald, satisfied with its own pre-trial pronouncement on the guilt of the “Assiniboine horse thieves,” could not bring itself to admit that the men had been acquitted.

4. Conclusion: Criminalization Revisited

In this chapter I have analyzed cases of First Nations persons who found themselves criminally prosecuted between 1876 and 1903 for activity that a few short decades earlier would not have found them prosecuted for anything, much less punished. I have done this against the backdrop of the forms of conduct and harms that were considered wrong and the sanctions for them, derived as this is from my understanding of the literature. Like Macleod and Rollason, I have found that Aboriginal Accused persons represent less than one third of the accused persons in the court files. Most of the numbers are even smaller fractions: four First Nations children prosecuted in two very different circumstances, one scarcely less spurious than the other; seven women and girls charged (and discharged) over the entire period; eight homicide files, one of which was a trumped up charge of accessory after the fact to murder.

These records allow, indeed require, one to reassess the discourse of criminalization


156 The next two issues of the Saskatchewan Herald appeared on November 12 and November 26, 1881. No
and its exemplars. In the next chapter, I will discuss the three prosecutions under the Indian Act to be found in the Criminal Court docket of the SCNWT for Indian Act violations, one of which resulted in a conviction. At the outset of this chapter I suggested that the very fact that seventy-one files in the early period (1876-1886) involved accused persons described as "Indian" is evidence of their criminalization. They were prosecuted for the most part for small thefts, -- ridiculously minor items -- assault, smuggling stolen horses into Canada, and few with murder. They appeared in court as prisoners, and many if not most were not imprisoned when convicted. Many pleaded guilty without benefit of legal advice or counsel; a fortunate few had someone speak for them, such as their Chief. The property stolen tended to be items of clothing, foodstuffs and money, and really not much in any case.

The cases in this Chapter support the argument I advanced in Chapter One: the First Nations peoples did experience criminalization – not in the systemic or overwhelming numbers that "-ization" usually connotes – but still they were criminally prosecuted. To the extent that this happened, it was through the ordinary criminal law. This does not deny the overarching importance of the Indian Act or the government’s increasingly coercive policies, to which I turn in the next Chapter. However, here again the criminalization thesis needs to be revisited, contextualized, and applied with greater precision. As others have argued more generally, and as I will demonstrate in the next chapter, the criminal court was not inevitably the 'best friend' of the Indian officials.157

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Chapter Five

"Make a Better Indian of Him:" Indian Policy and the Criminal Court

1. Introduction: Indian Policy and the Administration of Justice

The historiography of the criminal law in the NWT, as I have discussed in Chapter One, has been dominated by the NWMP, acting as both the symbol and, for some, the source of law. The police are often seen as the enforcers of and the government’s Indian legislation and policy, an unfortunate if understandable impression given the multiple roles of the most senior officers (police officers, justices of the peace, ex officio Stipendiary Magistrate in the case of the Commissioner). The annual Reports of the NWMP Commissioner offer evidence of a close relationship between the police and the Indian department officials. However, it is clear from these, and other, accounts that the relationship between the police and the Indian department officials in the field was also marked by disagreement over the creation

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1 See, for instance, the accounts under the heading “Indians” and “Assistance to Indian Department” in the Report of the Commissioner of the NWMP, 1884 at 6 – 13. The 1884 Report contains the police version of the famous incident involving the altercation at a Thirst Dance organized by Big Bear between Indian farm instructor John Craig and the son of Lucky Man due to Craig’s refusal to provide him with more rations. Lucky Man delivered up his son, Kawaeecchatawaymat (Man Who Speaks Our Language) who was arrested, charged with assault and sentenced to seven days. Hugh A. Dempsey, Big Bear: The End of Freedom (Vancouver: Douglas & McIntyre, 1984) at 132, quotes the Saskatchewan Herald’s account of the incident: The presiding magistrate (likely C.B. Rouleau) is reported to have accepted that Craig precipitated the incident: “From the evidence before me, ... I believe that Craig was in a great measure to blame in this matter. But if Craig pushed or struck an Indian, it was the Indian’s duty to complain to his agent or to a magistrate and then he would be punished....” Dempsey says that Man Who Speaks Our Language, who died at the Battle of Frenchman’s Butte in 1885, was responsible for the deaths of two men at Frog Lake: (at 156-157; 176). See also, Blair Stonechild, “The Indian View of the 1885 Uprising,” in F. Laurie Barron & James B. Waldram, eds., 1885 and After: Native Society in Transition (Regina: Canadian Plains Research Center, University of Regina, 1986) 155 at 167.
and escalation of conflicts.²

In this chapter, I turn to the relationship between the dominion government’s Indian legislation and policy and the criminal law, to the extent that evidence thereof may be found in the court files. Just as the records of the NWMP offer some evidence of tensions between the police and the government, so too do the court files. When conflicts resulted in criminal charges being brought against First Nations persons, the result in court was not invariably what was desired or expected by the Indian department officials who were the informants and complainants. I also analyze another site of government intervention in the post-conviction process through the cases of two First Nations men convicted of murder and sentenced to death by Richardson.

Stark examples of the expression of government policy in criminal justice, and the profound change it wrought in the lives of the people of the First Nations, are not difficult to find. Indeed, one easily could look no further than the prosecution of AB and JC, the youngsters who were charged by the principal of the Industrial school with stealing the clothes they were wearing when they ran away from the school,⁴ and who spent a month in the cells, awaiting their court appearance, which occurred under the watchful eye of an Indian department official.

Less formal, but no less important, interventions within and without the criminal

² See, also, E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada.* (Vancouver: University of British Columbia Press, 1986) at 167 [Titley, *A Narrow Vision*] for an example of the NWMP differing with Indian agents on the question of Indian dancing, the former taking a more tolerant position. The Report of the Royal Commission on Aboriginal Peoples (RCAP), *Volume I Looking Forward, Looking Back* (Ottawa: Minister of Supply & Services, 1996) at 298 [RCAP] echoes Titley on this point, noting that while some Indian agents were petty despots, others were persons of integrity, who resisted and opposed the *Indian Act* prohibitions of the potlatch, etc., and other aspects of the government’s Indian policies.

⁴ I have discussed these cases in the previous chapter: AB (1894), SAB Coll. RG R1286, file # 84; JC (1894), SAB Coll. RG R1286, file # 85.
process are also not difficult to find. For instance, Simon Crow Moccasin’s theft charge in 1898 provided the opportunity for a larger, if less legal, indictment by an Indian Agent. Crow Moccasin was charged with theft of another man’s pony which served as a platform to ‘indict’ him as for his general failure to conduct himself in a manner expected by the Indian Agent of a young man who had had seven years of education at the Industrial School.\(^5\)

William Graham’s moralizing narrative at the hearing before the justice of the peace described Crow Moccasin as lazy, indolent, unreliable and untruthful (even in 1898, not in and of themselves criminal offences):

I expected as a discharged pupil from the school, he would have been a good reliable man … . As evidence of his unreliability, when discharged from the school, he got married and I gave him a house on the reserve, the school furnished him with furniture and he had 9 or 10 head of cattle. During the winter of ’97 he killed one of his cattle without my permission, he disposed of his furniture and became degraded and was in a worse state than before going to school.

[To the Accused] … As an instance of your untruthfulness, you assaulted your wife and then denied you did so. When you disposed of your furniture, you denied it. I did not order you off the reserve, you left without my permission.\(^6\)

Simon Crow Moccasin later entered a guilty plea before Richardson and was sentenced to one year hard labour, severe by Richardson’s standards. The sentence clearly addressed more than the pony with which he had absconded, but a condemnation of the litany of failings and character flaws, in which the particulars of the actual offence had figured

\(^5\) Simon Crow Moccasin (1898), SAB Coll. RG R1286, file #180. Crow Moccasin entered a guilty plea in front of Richardson and was sentenced to one year hard labour for theft of Chaquay’s pony.

\(^6\) Deposition of William Graham, *ibid.*
scarcely at all for the Indian Agent.\footnote{Fortunately for the prosecution, Chaquay, the man who lost the pony had provided a sworn deposition that he had lent the horse to Crow Moccasin, but it had not been returned; he denied Crow Moccasin’s suggestion in cross-examination at the hearing before the justice of the peace that he had given him permission to sell the horse.}

Indian Agent Graham and the principal of the Industrial School derived their power, authority and influence from the legislative framework of the \textit{Indian Act}. No piece of legislation occupies a more important place in the history of the relationship between the Canadian Government and the First Nations of Canada than does the \textit{Indian Act}. It is useful to recall Alexander Morris’ lament at the commencement of the Treaty Six negotiations: for some reason, “the Indian mind was oppressed with vague fears; they dreaded the treaty; they had been made to believe that they would be compelled to live on the reserves wholly, and abandon their hunting, …”\footnote{Alexander Morris, \textit{The Treaties of Canada with the Indians of Manitoba and the North-West Territories} (Saskatoon: Fifth House, 1991) (Facsimile reprint of the 1880 edition published in Toronto by Belfords, Clarke) at 183.} With the benefit of hindsight, research and analysis, we are able to say that the Indians were right and Morris was, at best, wrong.

In 1876, the same year that Treaty Six was signed, Canada’s Parliament enacted a new \textit{Indian Act}\footnote{\textit{Indian Act}, 39 Vict. (1876), c. 18.} which consolidated its previous provisions and established a new regulatory regime, defining who could be an Indian, who could live on Indian reserves, what and how they could hold as property, what happened to their property at their death, who could do business on and in relation to Reserve land, and so on. In 1996, \textit{the Report of the Royal Commission on Aboriginal Peoples} (RCAP) characterized this regime as a “legislative straitjacket” that had “regulated almost every important aspect of the daily lives” of the people.\footnote{RCAP, \textit{supra} note 2 at 257.} Unlike the Treaty making process, as flawed it was, there was not even the
pretence of consultation or negotiation as to its form and content. The *Indian Act* made no reference to the Treaties. For RCAP, this amounted to a deliberate act of forgetting from which one could infer that Canada had attached little importance to the Treaties, and their status as ‘nation – to – nation’ agreements.\(^{11}\)

By virtue of the *Indian Act*, and the government policy it facilitated, the peoples of the First Nations were legally transformed into children of the state.\(^{12}\) The operation and legacy of Canada’s destructive Indian policies, notably its contribution to the infantilization and immiseration of First Nations peoples, and its regulation of everything from the most basic to most sacred, has been documented by historians, policy analysts, Aboriginal legal scholars, Aboriginal Justice Inquiries and Royal Commissions, to cite but a few.\(^{13}\) The *Indian Act* left no aspect of Indian life and governance untouched and untransformed;

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\(^{11}\) *Ibid.* at 278.


however, again, for my purposes, the provisions that are of most interest are those that created offences, and touched the administration of justice more generally.

The responsibilities of Indian agents increased in the period to include a judicial function. The ‘criminalization’ thesis, discussed in Chapter One, neglects this important aspect of the “criminalization” of the Indian Act – the increasing judicial power of the Indian Agents. The 1876 Indian Act was silent on this, but in 1881, Indian Agents, and a few designated senior Indian officials, were made justices of the peace, ex officio, for the purposes of offences under the Indian Act.14 By 1895, this magisterial role had been expanded to empower Indian Agents to hear offences under Parts XIII and XV of the Criminal Code (offences against morality and vagrancy offences), as well as two sections of the Criminal Code dealing with the prostitution of Indian women.15 The jurisdiction of the Indian Agent to sit as a justice of the peace extended to the entire North-West Territories; in other words, his jurisdiction was not confined to matters involving Indians in his own region. This significant expansion of the legal powers of the Indian agents undoubtedly reflected dissatisfaction with the justice enforced and dispensed in the regular criminal courts.

The formal powers granted the Indian Agent by Parliament were matched, and perhaps outstripped, by aggressive government policy hatched in Ottawa, deployed in the field. Within the court files in the Richardson records, one encounters the names of many associated with Indian policy administration in the NWT (Edgar Dewdney, Hayter Reed), and with the events of 1885, including Indian department men who would be killed: Thomas

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15 Indian Act, 58-59 Vict. (1895) c. 35, s.7.
Quinn, James Payne, and John Delaney, to name the most prominent. The presence of Indian officials in the court files is significant, and their attempts to use the criminal law to enforce their policy and to punish Indian wrong-doers are evident.

The court files do not yield two of the most important names associated with the government’s Indian policy in the period: those of John A. Macdonald, Prime Minister and Superintendent of Indian Affairs, and his loyal deputy, Lawrence Vankoughnet, Deputy Superintendent of Indian Affairs (1874 – 1893). These men were the principal authors of the policies that were to be implemented on the ground. Vankoughnet was so keen to do Macdonald’s bidding that it seems that Macdonald was scarcely required to make it express: Vankoughnet’s loyalty to Macdonald, together with his reputation for inflexibility, parsimony and ‘by the book’ administration directly contributed, as Douglas Leighton has argued, “to the rigidity so characteristic of the department’s decision-making processes just when it needed to be as flexible as possible, particularly in regard to the Plains Indians.” In the years following 1876, Vankoughnet, often over opposition by those in the field, required government officials to pursue policies of starvation, use food as a means of subjugating the Plains Cree, require Indians to work for rations and cut or deny rations as

16 Laurie Barron argues that Quinn, who was killed at Frog Lake was “intensely disliked for personal reasons.” He reminds his readers that Quinn was related by marriage to Lone Man (Big Bear’s son – in – law) and that Payne also had family ties to the Assiniboine. See F. Laurie Barron, “Indian Agents and the North-West Rebellion,” in F. Laurie Barron & James B. Waldram, eds., 1885 and After: Native Society in Transition (Regina: Canadian Plains Research Center, University of Regina, 1986) 139 at 149. John Delaney, who was also disliked, nonetheless was disciplined by Quinn when Quinn discovered that he was distributing rations without requiring work (ibid.). See also, Walter Hildebrandt, Views From Fort Battleford: Constructed Visions of an Anglo-Canadian West (Regina: Canadian Plains Research Centre, University of Regina, 1994); Dempsey, supra note 1, and Stonechild, supra note 1 at 159 for their accounts of the personal grievances against Payne and Delaney respectively.

punishment. Brian Titley and John Tobias both argue that Edgar Dewdney, Indian Commissioner (and after 1882, also Lieutenant-Governor of the NWT) differed somewhat with Vankoughnet on the efficacy of attempting to starve the Cree into submission. However, by the winter of 1885, they were ad idem about pursuing a more coercive approach to Indian unrest and resistance. As Titley recounts, both Dewdney and Macdonald liked Vankoughnet’s idea to “throw the instigators of agitation in jail,”

…but [Dewdney] pointed out it hadn’t worked very well in the past mainly because the magistrates rarely handed down sufficiently lengthy jail sentences to act as a deterrent or to keep trouble-makers out of the way when their presence was least desired.

Titley adds that Macdonald “encouraged Dewdney to use his personal influence on magistrates to secure their cooperation on sentencing.” Through this we are offered a glimpse of the regard in which the Superintendent General of Indian Affairs (and Prime Minister) and his most senior bureaucrats held the court, and their expectation of it: to be an instrument of their will as expressed through government policy. The worst fears, or fondest hopes, of a conspiracy theorist are realized: “Have a word with the judges....”

The disputes reflected in the court files, with a few exceptions, tend not to involve violations of the Indian Act. Admittedly, offences under the Indian Act could have been dealt with by justices of the peace and may not have come before the stipendiary magistrate. However, I will demonstrate, through a number of prosecutions, the presence of Indian policy in the court, through efforts to use the criminal court to enforce and advance Indian

18 Ibid. at 107; Shewell, supra note 13 at 69; Titley, Edgar Dewdney, supra note 13 at 51 – 55.

19 Tobias, “Canada’s Subjugation,” supra note 13 at 221; Titley, ibid. at 52-54.

20 Titley, ibid. at 65.

21 Ibid.
policy – “to make better Indians” – as well as forms of resistance to and mediation of
government policy. Finally, I note in particular, and discuss in the conclusion, the fact that
Richardson often did not acquiesce to the entreaties and admonitions of Indian officials in his
court, whilst engaging in his own admonitions to the Aboriginal people before him.

My research supports the view that the criminal court was not necessarily the
government’s best friend. I argue, and demonstrate through the cases from the Richardson
files, that paradoxically, only in the criminal court was the legal subjectivity of Aboriginal
peoples, and a measure - modest to be sure - of formal equality, recognized. This had been
its appeal to Chief Mistawasis at the time of Treaty Six – the same law for whites and Indians
– but this notion of formal equality was a problem for the government who preferred a
special law for Indians, and a criminal court to do its bidding.

2. Prosecuting Leaders

Who can say when the discourse of the “bad Indian” and the “good Indian” entered the
vernacular - both Dewdney and Vankoughnet are reported to have been particularly offended
at the prospect of “saucy” Indians\(^{22}\) - but by 1876, Cree Leaders Big Bear and Kah-mee-yis-
too-way-sit\(^{23}\) (Beardy), Chief of the Willow Crees, were firmly in the ranks of ‘bad’ Indians,

\(^{22}\) *Ibid.* at 7; Leighton, *supra* note 17 at 107. For another reference to saucy Indians, see Laura Peer, *The Ojibwa of Western Canada, 1780 – 1870* (Winnipeg: University of Manitoba Press, 1994) at 144. Peer observes that mixed group camps of Cree and Ojibwa (Saulteaux) were regarded by traders as “saucy and independent.” Big Bear’s father was the Ojibwa Chief Black Powder, who led a mixed band of Cree and Ojibwa that combined the cultural traditions of both the Plains Cree and the ‘woodland’ Ojibwa.

\(^{23}\) This is the spelling of his name appears in Treaty Four. John Tobias spells his name Kam-yistowesit, or Beardy, Chief of the Willow Band of the Plains Cree. *Dictionary of Canadian Biography*
and those who sought to discredit them were vociferous. In this, the Territorial press was a spirited and frequent contributor. Beardy, whose Band settled near Duck Lake, was not a Chief or religious leader of the stature of Big Bear or Piapot, but records suggest a man with what would be characterized in current parlance as ‘attitude,’ and certainly saucy.

The reputation constructed for him by the *Saskatchewan Herald* was that of a liar and a thief, with a facility for evading the long reach of the law. Beardy appears to have been prosecuted and convicted in the pages of the *Herald* more often than in court;\(^24\) despite the *Herald*’s regular accounts of his alleged activity (killing cattle, theft, idleness), Beardy appears in the Richardson records twice as an Accused, but apparently never convicted,\(^25\) and once as an Informant.\(^26\) On September 11, 1879, Lawrence Clarke, HBC factor and Justice of the Peace at Fort Carlton, wrote to Richardson, forwarding an Information that had been laid before him at Carlton the previous day. The Informant, Owen Edward Hughes, was described in the Information as the “duly authorized agent of Stobart Eden and Company,” the owner of a horse that was the object of the criminal charge. The Information alleged that Beardy had possession of a horse that he was “illegally detaining” and refusing to give up. Clarke’s letter to Richardson informed him that he and the NWMP Sergeant had decided it

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\(^{24}\) See, e.g., *Saskatchewan Herald* (06 February 1880) 1 col. 3; “A Bit of Indian Ugliness,” *Saskatchewan Herald* (16 August 1880) 1, col. 4.

\(^{25}\) Beardy (1879), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #72. The second proceeding against Beardy occurred on July 28, 1880 before two justices of the peace at Duck Lake, following the killing of cattle on the Reserve. The record contains no Information, only the depositions of two men who deposed that they had killed the cattle on the instructions of Beardy and two other Chiefs. This document is contained (misfiled, it seems) in a file concerning Robert Saunders (1880), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #82 (an Information sworn on July 29, 1880 at Battleford by Peter Ballendine against Robert Saunders for entering Ballendine’s house without permission and “disappearing from the neighbourhood” with Ballendine’s double-barrelled muzzle loading short gun and bark canoe. There is no disposition of this matter. I have placed my copy of the July 28, 1880 record concerning Beardy, One Arrow and Cut Nose in my file containing a copy of the 1879 record (file #72) concerning Beardy’s earlier matter.

\(^{26}\) Francis Deschaw (1878), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file # 57. I discuss this case in Chapter Six.
was too risky to serve the warrant on Beardy. He asked Richardson to decide what to do with the warrant, warning that "if this man is not arrested, it is very probable that the settlers will take the law into their own hands, as this Indian has become a public nuisance." On September 17, Richardson issued a warrant, but on the same day it appears that the informant withdrew the warrant and a summons was issued for "25 October at Duck Lake, 3 pm." As the file contains no disposition, we do not know if Beardy responded to the summons. A reasonably safe inference is that the process ended with the issuing of the summons.

In late July of the following year, Beardy and fellow Chiefs One Arrow and Cut Nose were charged after some of their people killed cattle. The allegation was that the three Chiefs had caused the cattle, property of the Indian Department, to be stolen, shot and killed two days earlier. At the hearing before the JPs, two men gave depositions based on their affirmation that they had killed the cattle on the orders of the Chiefs. Omenakaw's deposition told the story, which also contained the seed of the Chiefs' defence should the matter have proceeded to trial:

Some of us, I among the number, killed the cattle as we had nothing to eat and we were told they belonged to us (the Indians) it was the [??] told us. The council decided that the cattle were to be killed, the three chiefs were there and were the headmen at the council. They gave us the orders.\(^{28}\)

There is no warrant of committal and no disposition in the court file. Only from the NWMP returns for 1880 do we learn that Beardy and his fellow chiefs were acquitted by a jury on

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\(^{27}\) Beardy (1879), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file # 72.

\(^{28}\) Deposition of Omenakaw before the Justices of the Peace Herchmer & Hughes, on July 28, 1880 (contained in my file Beardy (1879), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #72. See also Carter, *Lost Harvests, supra* note 13 at 121–122, who says that this view was shared by the Indians, who maintained that the contents of the reserve storehouses belonged to them.
July 27,\textsuperscript{29} supporting both contemporary\textsuperscript{30} and more recent assessments\textsuperscript{31} that Beardy had a facility for successfully testing and withstanding the authority of white men. And, despite the \textit{Saskatchewan Herald}'s fervent hope and confident prediction, Beardy was never convicted nor deposed as Chief. One Arrow appears to have continued to regard the cattle on the reserve as belonging to his band, not the government: in 1881, Indian Agent Rae charged a Métis man with acquiring two oxen from Chief One Arrow without the written consent of the Superintendent General of Indian Affairs; no conviction is recorded, but a warrant of distress was issued.\textsuperscript{32}

One Arrow and Beardy both suffered as a result of the events of 1885, One Arrow more so, given his disputed conviction and three year sentence for treason-felony. One Arrow would not make it home, dying en route shortly after his release from the penitentiary in 1886. Although Beardy's band was characterized by Hayter Reed as having been disloyal during the event of 1885,\textsuperscript{33} Blair Stonechild maintains that Beardy, among many other Cree Chiefs, did not support Riel because he (and his fellow Chiefs) felt bound by their obligations

\textsuperscript{29}Report of the NWMP Commissioner of the NWMP, 1880 at 41. It appears that only Omenakaw was convicted.

\textsuperscript{30} In the following year, the \textit{Saskatchewan Herald} (16 August 1880,) at 1, col. 4 celebrated Beardy's arrest on yet another charge with the following scathing characterization:

> Of the Indian Chiefs on the Saskatchewan few have a wider and at the same time less enviable reputation than The Beardy, of Duck Lake. His name is associated with all the troubles that have arisen in that neighbourhood, and is looked upon as synonymous with everything that is base and dishonest. Fidelity to promises is a principle entirely unknown to him. ... He has had several narrow escapes from arrest, but has hitherto stopped short of committing any overt act; but mistaking the leniency of the authorities for fear, he this time overstepped the mark and this time laid himself open to punishment.

Despite the \textit{Saskatchewan Herald}'s confidence and fervent hope, Beardy was not imprisoned.

\textsuperscript{31} McEwen, supra note 23 at 157-158.

\textsuperscript{32} Norbert Delorme (1881), SAB A-G (GR 11-1) CR-Regina, 1\textsuperscript{st} series, 1876 – 1886, file #112.

under the Treaty.\footnote{Stonechild, supra note 1.}

One of the clearest efforts to prosecute (punish and discredit) Plains Chiefs who sought to protect or advance their peoples' interests comes not from the Richardson records, but from the NWMP, and an incident involving the Indian Agent, the police and the Head Chief of the Sarcee, Stamiscotocar (Bull Head).\footnote{Stamiscotocar (Bull Head) also turned to the criminal law to enforce his rights in his successful prosecution of a Métis man for theft of his horse: Joseph Gouin (1879), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #69. R.C. Macleod & Heather Rollason, “Restrain the Lawless Savages”: Native Defendants in the Criminal Courts of the North-West Territories, 1878 – 1885” (1997) 10 J. Hist. Sociology 157 at 176 - 177, also refer to this case, citing it as “evidence that the Natives adopted an instrumental approach to the law; experimenting with it and using it when it seemed useful” (at 176). I address this further in Chapter Six.} In May 1884, the Indian Agent on the Sarcee Reserve complained to the NWMP that a Sarcee man named Crow Collar had destroyed property in the Reserve's ration house. NWMP Supt. McIlree dispatched one of his men to arrest Crow Collar, but his Chief would not give him up. McIlree, himself, then went to the Reserve, demanded that Bull Head deliver Crow Collar to him, and when this was refused, McIlree attempted without success to arrest the Chief himself. Rather than risk bloodshed, McIlree withdrew. However, on the next day, he sent word that Crow Collar and Bull Head were to be brought in. Crow Collar was delivered up, and Bull Head sent word to McIlree that he would come in on the next day. The Chief came in the next day, arriving accompanied but unarmed; McIlree locked him up, held him for three days, releasing him only when Bull Head “promised he would give no more trouble.”\footnote{Report of the Commissioner of the NWMP, 1884 at 15. In Appendix A of the Returns for 1884, Crow Collar is reported to have been convicted by Supt. McIlree J.P. of “malicious injury to property” and sentenced to ten days imprisonment at hard labour; Bull Head is listed as having been charged with causing a disturbance, which charge was “dismissed, with caution after three days' imprisonment” (at 49).} Like other Chiefs, and their people, Bull Head had used the law and also experienced its high hand. It was a site of struggle where, as here, in an attempt to undermine his authority and to make him heel, he had been abused by
Stoney Chief Lean Man, whose band no longer exists, is not well known, although the incident giving rise to his criminal prosecution has been mentioned by others. His little known case sheds light on the plight of the Assiniboines in the early 1880s, provides a context for some of the events of 1885, and provides evidence of the criminal law's mediation of the unequal and antagonistic relations between some Indian officials and Aboriginal peoples. Lean Man, and his fellow Chief, Grizzly-Bear's Head, and their bands had asked for and been promised reserves in the Cypress Hills (as had the Cree Chiefs, Little Pine and Piapot); however, government officials changed their mind, fearing both the proximity to the United States border (and the problem of cross border horse raids) and more importantly, the potential perils of creating a large Indian territory in the Cypress Hills. Over the summer and fall of 1882, Lean Man and Grizzly Bear's Head were required to move onto the reserve of Mosquito's Assiniboine Band, in the Eagle Hills, near Battleford, until their own reserves could be set aside. The newly arrived Stonies had suffered great hardship in the previous year; the addition of over two hundred and fifty people to Mosquito's reserve created even more hardship and stretched the already overextended resources of the Battleford Indian district. In this situation of sickness and hunger, the "work for rations" policy could scarcely have been more unworkable, as little of either was available to the Assiniboines.

In January 1883, Lean Man was charged on an Information sworn by farm instructor

37 See, e.g., Stonechild & Waiser, supra note 33 at 51, fn 15; Bob Beal & Rod Macleod, Prairie Fire: The 1885 North-West Rebellion (Edmonton: Hurtig, 1986) at 76.

38 Titley, Edgar Dewdney, supra note 13 at 46; Stonechild & Waiser, ibid. at 50 – 51.

39 Stonechild & Waiser, ibid.
James Payne that, having been ordered to leave and then forcibly ejected from Payne's house, he persisted in attempting to gain entry and, ultimately, he had pointed a loaded firearm at the instructor. The deposition of Alphonse Carrier, who had been in the house (and who may have been his interpreter) indicated that the farm instructor had told Lean Man "that he had better go as he might get mad and put him out." Further, that "the prisoner was very much excited and so mad that while Mr. Payne was holding him he spat in his face." For his part, Lean Man's Statement of the Accused (likely through an Interpreter, although no one is indicated) offered the following explanation:

There was one of my children sick and another child so I went to the Instructor's house to tell him. When I arrived at the house Mosquito and Left and Right were inside. The Instructor told me motioning with his hand to go off. I opened the door a second time and the Instructor shut the door. I opened the door a third time—rather [violently?] ...when my daughter came and tried to take the revolver away from me. I refused to give it saying that seven of our people had been turned out already. I have been a good Indian ever since I took the medal. Colonel Irvine told me to come here and make a living and I have been trying to take his advise [sic]. I did not take the revolver into the house. I did not intend to use it against the Instructor.

On January 16, Lean Man was committed for trial and remanded in custody. A letter of 21 February 1883 on the file addressed to Richardson over T.T. Quinn's signature, advised Richardson that "Chief Bear's Head," was willing to post bail for Lean Man; later that day the recognizance in the amount of $200.00 was entered into and Lean Man was released.

There is no record of the trial in the file, only an endorsement on the back of the Information that he was "tried 20 May 83, convicted of common assault, sentence deferred." The

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40 Lean Man, an Assiniboine Indian (1883), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 - 1886, file # 193.
41 Ibid.
42 Lean Man is referring here to the medal he received as a signatory to the Treaty.
43 Statement of the Accused, Ibid.
Saskatchewan Herald's report was only slightly less cryptic and likely less accurate: the paper indicated that Lean Man pleaded guilty to pointing a pistol at Payne, and received a deferred sentence. Other records reveal that Lean Man was charged with treason-felony in the aftermath of the events of 1885, and that he was discharged.

Lean Man’s case is in many ways extraordinary in the context of the Richardson records: although the legal record does not indicate that he was a Chief, the fact that another Chief came forward to post bail, and that Lean Man was released on bail, notwithstanding the informant’s claim that he had been threatened with a loaded pistol, is remarkable to say the least. Lean Man was charged by a government employee engaged in his duties with having threatened him with a loaded firearm. And yet, at his trial in May 1883 he was convicted only of the lesser offence of common assault, and discharged, presumably to return to what remained of his people, his home and family. It is difficult to imagine that this is the lesson that James Payne would have wanted brought home to the Chief when he charged him with the more serious offence.

There is no record of what was said in court, and the Herald’s report could not be briefer. It may be that Richardson accepted an account of the incident that more closely resembled Lean Man’s than Payne’s; the result suggests as much. Faced with a desperate Chief acting on behalf of his sick and dying people and (from all accounts) an ill-tempered despotic farm instructor, Richardson’s disposition could not have been more positive for the Stoney Chief.

Like Peaychew, the Cree warrior, who was arrested in 1882 on a fraud charge

44 Saskatchewan Herald (09 June 1883) 1, col. 4.

45 See the Rebellion conviction tables in Sandra E. Bingaman, The North-West Rebellion Trials, 1885 (Master’s Thesis, University of Regina, 1971) at 204-10; Stonechild & Waiser, supra note 33, Appendix 5 at 261-63; Report of the Commissioner of the NWMP, 1885, Appendix “O”.
(apparently withdrawn on Richardson’s intervention), Lean Man was a prominent leader in
the region. Perhaps it would have been satisfaction enough for the Indian department
officials to have them arrested, charged, and held in police cells for a short period of time (as
Supt. McIlree had done with Chief Bull Head). But, the evidence marshalled by other
historians suggests that this was not the case for the Indian department men. The government
officials wanted stiffer responses from the court, which were not forthcoming in these cases.

As I have indicated earlier this chapter, James Payne was shot and killed during the
spring of 1885, around the same time as the events that came to be known as the Frog Lake
Massacre. Payne was killed not by the Cree at Frog Lake, but in a separate and apparently
unrelated incident. He was shot at his home during the Rebellion, by Itka, an Assiniboine
man from Mosquito’s band. An eyewitness to the event is said to have attributed Payne’s
reputation for violence towards aboriginal women, and drunken mistreatment of his common
law wife, a young Assiniboine woman, was the likely reason for his killing in 1885.
Stonechild and Waiser suggest that Itka knocked on Payne’s door (as Payne apparently
insisted be done) and shot him when he opened the door. Itka, a grieving father, is said to
have been avenging the death of his young daughter (who had been staying with her aunt,
Payne’s wife) who had been thrown out of the house and to the ground by Payne. In Cree
Elder John Tootoosis’ account, the girl died of tubercolitis not long after she had experienced

46 For accounts, see Stonechild & Waiser; ibid at 98 – 99; Dempsey, supra note 1 at 161; Beal & Macleod, supra note 37 at 183.

47 Hildebrandt, supra note 15 at 84 – 85.

48 The Saskatchewan Herald’s report of Itka’s statement in court is a bit different yet again. The Herald reported that Itka said at the time of his plea in court that he had asked Payne for some shot and flour, and that Payne would not give him any: “...then my heart got bad and Payne got vexed; I told him not to get vexed; he said he would not give me flour for ten days; I went away and got my gun and came back...” Itka reported that they struggled, and he shot Payne. Saskatchewan Herald (12 October 1885) 2, col. 3 & 4.

49 Stonechild & Waiser, supra note 33 at 98.
Payne's violence, and Itka blamed Payne for her death. On either version, it is clear that Payne died when Itka took the occasion of the troubles to settle a personal account. On the basis of all the accounts, one doubts that many tears were shed for Payne. Itka, without legal counsel, pleaded guilty to his murder before Magistrate Rouleau and a justice of the peace on October 9 and was hanged with his fellow Stoney, Man Without Blood, and six Cree warriors from Frog Lake, at Fort Battleford on November 27, 1885. Rouleau is reported to addressed Itka directly when he sentenced him,

You, Itka, have confessed to having killed a connection of your own, the late farming instructor on your reserve. If the instructor had done you any wrong, you could have come to me and I would have given you redress. I am here for that purpose.\(^{51}\)

Leaving aside the very real possibility that this was just rhetoric, it is not necessarily the case, following E.P. Thompson, that it was empty rhetoric. It may be that the magistrates did hold themselves out as a place to come to complain about abuses of the Indian department officials. This would tend to support the view that the government men were not confident of support when they brought their charges (in both senses of the word) to court.

The Chiefs had been prosecuted criminally for trying to vindicate or protect their peoples' interests in the face of intransigent officials on the ground, on their reserves. Lean Man's struggle, of course, did not end with the modest victory of the deferred sentence in Richardson's court, but as modest as his victory may have been, the result could not be understood as anything but a setback for the Indian department.


\(^{51}\) *Saskatchewan Herald*, supra note 48. The admonition attributed by the *Herald* to Rouleau is similar to the admonition attributed by Hugh Dempsey (relying on the *Herald*) to an unnamed magistrate (likely Rouleau) who sentenced The Man Who Talks Our Language following the incident with John Delaney at the Thirst Dance in June 1884: Dempsey, *supra* note 1.
3. Enforcing & Resisting Indian Policy

In the years before he moved to Regina, Richardson travelled widely and, in the period between Matthew Ryan’s departure from the bench in 1881 and his replacement by Rouleau in 1883, he covered the south and eastern district (Fort Ellice, Fort Qu’Appelle, and Prince Albert) as well. Lean Man’s case would have been one of the last criminal matters over which he would have presided before he moved from Battleford. Criminal prosecutions arising out of many of the incidents associated with ‘pre-rebellion’ activity or organizing would have been in the Duck Lake, Fort Pitt and Battleford regions would have come before Rouleau, or have been dealt with by justices of the peace, either sitting alone, or with another.

In this section, I am interested in analyzing the criminal files in which Indian department officials acted as informants against Aboriginal accused persons or where an offence under the Indian Act was before the court. There are also a few files in which government officials were, or have been suggested by others to be, behind the scene, one step removed from the prosecution.

The Richardson files from the early period (1876 – 1885) do reveal different ways in which Indian policy was an issue in different cases. The NWT was to be dry; only those with permits issued by the Lieutenant-Governor were permitted to have or transport specified amounts of alcohol (it is likely that many applicants sought a generous interpretation be given for an exemption for “medicinal purposes”). However, the Indian Act also made it an offence to provide intoxicants to Indians. Bazil Lafond was convicted in Battleford in 1878 of giving John Longman, an Indian, one quart of intoxicating liquor; although the statute

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52 Bazil Lafond (1878), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file # 16.
supporting the charge is not indicated in the court documents, it is clear from the evidence that the offence was under the Indian Act. Longman testified that he was invited to Lafond’s house on the 22nd of October, and that Lafond “treated me to liquor. I went there again and got more. It made me tipsy.” The clerk of the Indian superintendency testified that he knew Longman, a Treaty Indian. Nothing else about Longman is revealed, except that one of the defence witnesses testified that Longman was funny after he had had a drink. Peter Ballendine, a frequent presence as an interpreter and prosecutor in the Battleford court files, testified that he had seen Longman in a state of intoxication on the 22nd, but that his only knowledge of where he obtained the liquor had come from Longman himself.

Lafond’s defence was advanced through evidence that he had a permit issued by Lieutenant-Governor David Laird permitting him to have three gallons of alcohol for medicinal purposes, that the date of the alleged offence (set out in the Summons to the Defendant and to the witnesses) was said to be October 21 (not the 22nd), and two witnesses who had been present on the 22nd, who said that they had not seen Lafond offer liquor to Longman. Still, Lafond was convicted and fined $100.00 and costs (including $6.00 in interpreter’s fees). As with Longman, we learn nothing more from the file concerning Lafond, but it is likely that he was “Basile Lafond,” a former HBC man who had settled permanently in Battleford in 1876. He is said to have worked along the Saskatchewan with Ballendine, also a former HBC man, who had been among the first to stake a claim in Battleford in 1874. It seems that Lafond was sufficiently well off as he was able to pay the

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53 *Indian Act*, 39 Vict. (1876) c.18, s. 79 made it an offence for anyone to sell, exchange with, barter or supply any kind of intoxicant to any Indian or non-treaty Indian in Canada. A stipendiary magistrate or two justices of the peace could convict on the evidence of one credible witness other than the informer or prosecutor. Upon conviction, one could be liable to a sentence of not less than one month and not more than six months, and to a fine of not less than $50.00 and not more than $300.00 plus costs of the prosecution.

fine and costs immediately. The file contains no formal Information, but it would appear from a receipt in the file, that Lafond’s former colleague, Peter Ballendine was the Informant, as Ballendine received $50.00 from Richardson (one half the fine to which an Informant was entitled).

A trio of similar liquor related prosecutions in 1881 included a ‘tit for tat’ pair in which Indian Agent John Rae and Reverend John Hines successfully prosecuted each other for supplying intoxicating liquor to Indians. Despite this little flurry of liquor-related cases in 1880 and 1881, very few of the files involving Aboriginal accused seem to have involved alcohol. In a couple of the later files, notably Tom Lemac’s murder trial in 1902 (which I discuss in the last section of this chapter), it is clear that the Aboriginal accused had been under the influence of alcohol at the time of the alleged offence; but, in these early files in the early period, hunger and illness are more prevalent than alcohol.

Indian Agent Hayter Reed used Richardson’s court to enforce contracts of

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55 Indian Act, 39 Vict. (1876) c. 18, s. 79, “one moiety of the fine to go the informer or prosecutor, and the other moiety to Her Majesty, to form part of a fund for the benefit of that body of Indians...with respect to one or more members of which the offence was committed.”

56 See James Falster (1881), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #109 (this matter was tried before Hayter Reed JP). The informant against Falster was Daniel Clink, Farm Instructor who claimed that Falster, a labourer, had come to Moosomin’s Reserve near Battleford and offered him a drink of liquor, which Clink refused; Falster told Clink he was off to the Chief’s tent, and stayed there all night. Clink claimed that nearly all the Indians on the reserve “are this morning drunk or more or less on the influence of liquor and from the information supplied by such of the Indians who are fit to speak of it,” he believed that Falster was the cause of it. One wonders, of course, why Clink would have allowed Falster to stay on the reserve in the first place.

John M. Rae, Indian Agent (1881), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #110, charged with supplying liquor to Indians (informant Rev. John Hines), Rev John Hines (1881) charged with selling intoxicating liquor (informant John M. Rae), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #111. Rae and Hines were convicted. Hines was the Anglican missionary invited by Cree Chief Ahtahkakoop to build a school and church on his reserve. He is favourably represented in Deanna Christensen, Ahtahkakoop: The Epic Account of a Plains Cree Head Chief, His People, and Their Struggle for Survival, 1816 – 1896 (Shell Lake, Saskatchewan: Ahtahkakoop Publishing, 2000); see, for instance, his remarkably sympathetic approach to the baptism of the first and oldest of Sasakamoose’s two wives: as she had only one husband, he decided he could baptize her (at 183-184). Sasakamoose was the older brother of Ahtahkakoop.
employment involving Aboriginal men whom he had hired. Here again, the facts in these files are sparse, but it is clear that Reed was prepared to use the court to prosecute for non-performance, as in the case of Wachan, a Sioux man, although again no sentence was imposed by Richardson. In a handful of other cases, accused men were charged with forms of assault against government men. Some of these files, such as Ah-tim-musis-se-quine in 1881, contain simply three documents with no particulars or records of evidence: the Information sworn by Daniel Clink Indian farm instructor, charging that he had been assaulted with a knife with intent to wound, the Warrant to Apprehend (both documents issued on the same day) and the record of conviction dated the following day, with a sentence of two months being imposed by Richardson.58

In a number of the early files, notably some emanating from the Fort Pitt/Frog Lake area, the Indian farm instructor John Delaney is implicated either directly or indirectly in prosecutions of Peecoose (Sandfly),59 The Dancing Bull and Moostus,60 and I-ah-pee-coo-
caw. As I have discussed in the previous chapter, Hugh Dempsey has suggested that Peecoose’s conviction for theft from the HBC store at Fort Pitt, and lengthy sentence, was orchestrated by Delaney, who had taken up with Peecoose’s wife, and that Delaney’s treatment of him was resented by the people at Frog Lake. One of Peecoose’s aggrieved supporters is said to have been his brother, The Dancing Bull, who with Moostus, Delaney charged with having stolen and killed a heifer that had gone missing in October 1882. Delaney’s Information was based on information and belief and sworn before Richardson at Frog Lake on December 1, 1882. Again, record of any evidence in support of the charge is found on the file; other than the Information, only the record of conviction which indicates that each man pleaded not guilty, but was found guilty by Richardson. The Dancing Bull was sentenced to two months’ hard labour at Battleford, Moostus to four months. Dempsey suggests that Delaney may have regarded The Dancing Bull as a threat, and accused him of witnessing the killing of a government ox, in order to have him removed as well.

In October 1880, the Saskatchewan Herald celebrated the successful arrest and conviction of two Cree men, William Gladieu and I-ah-pee-coo-cah, for assaulting Delaney. The men had been arrested in the bush near Frog Lake, and the Herald reported that the police party transporting them, first to Fort Pitt for a court appearance (before the NWMP JP), and then to Battleford to serve their sentence, had been stopped more than once reported by the Saskatchewan Herald to be back in his community by August 1880 (1, col. 3) and he was still at large in 1885, until sentenced to more time in the penitentiary for treason – felony, arising out of the events of 1885.

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60 The Dancing Bull & Moostus (1882), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #153.

61 I-ah-pee-coo-caw (1881), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #115.

62 Dempsey, supra note 1 at 117. Dempsey reports that Dancing Bull received a sentence of four months, but the court record indicates a sentence of two months for him.

63 Saskatchewan Herald (10 October 1880) 1, cols, 1 & 2.
by "several parties of Indians" seeking to liberate their friends. It appears from the press report that Delaney was the principal witness against the men; once again, no particulars of the assault were disclosed, but there was evidence of sustained yet unsuccessful attempts to prevent the two men from being carted away.

I-ah-pee-coo-cah would have only just completed serving his two month sentence when his wife Margaret laid an Information and Complaint before William McKay, HBC factor and JP, on January 12, 1881. McKay recorded Margaret to say "in the words to the effect" that on January 7, she had asked her husband for permission "to go to the Indian farm instructor's for provisions for their child who was crying from hunger." She said that he gave her permission to go, but then told her "if she did not get provisions she should not come into the house again." As she was about to leave, her husband jumped up, tried to find something to use as a weapon and, settling for a chisel, threatened to kill her. His brother who was there tried to restrain him, but he made several attempts to stab her. She was able to run into her mother's house, and other men kept him from following her and striking her. In her Information and complaint, she asked that he be placed on a peace bond, with sureties, citing his threats and her fear that he would injure her.

While it is not completely clear from the file, I-ah-pee-coo-cah may then have been held in the cells at Battleford until April, when his three sureties were brought from Fort Pitt. On his posting $100.00 and his three sureties posting $35.00, he was released on a twelve month recognizance to keep the peace and be of good behaviour, especially towards his wife.

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64 I-ah-pee-coo-caw (1881), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #115. In another case, a Cree man named Jean Marie was charged with assaulting his wife, Kah-kiche-inew, with a knife. One of the witnesses against him was Thomas Quinn, the farm instructor to whom the assaulted woman had gone for assistance. Jean Marie (1881), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #118. Although Jean Marie was committed for trial on the assault charge, it was withdrawn before Richardson, apparently at Kah-kiche-inew's request.

65 Ibid.
Margaret. In this case, we see the indirect implication of John Delaney in I-ah-pee-coo-cah’s violence against his wife. Delaney would have been the farm instructor to whom Margaret would have had to go ask for provisions for their hungry child – undoubtedly a galling prospect for her husband who had just served a jail sentence for assaulting him. While I turn in the next chapter to a fuller engagement with the contribution of criminal law to gender relations, and its form as a gendered and gendering practice, this case foreshadows some of the issues. The relationship of I-ah-pee-coo-cah, Margaret and John Delaney introduces the myriad disruptive possibilities that came with the presence of the Indian farm instructors in Aboriginal communities, displacing some forms of patriarchal relations and reinforcing others.

Hunger, like the government men, is a constant presence in the files in this chapter – from Beardy, One Arrow and Cut Nose at Duck Lake, to Lean Man in the Eagle Hills, to Crow Collar on the Sarcee reserve, to Margaret and her hungry child and angry husband at Frog Lake, to Jean Felix Callilouis at Rivière Qui Barre in the Edmonton district, and Yellow Calf at Crooked Lake and Gopher Tom in File Hills and those yet to be discussed.

66 Jean Felix Callilouis (1882), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file # 175.
67 Although, Richardson tried Yellow Calf and two others on February 28, 1884 for breaking into the “Government store” at Crooked Lake and stealing flour and bacon, this case does not form part of his records in the SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886 collection. The trial was covered in the Regina Leader, and it appears that Yellow Calf and his colleagues were represented by counsel, Mr. Forget. Yellow Calf et al pleaded guilty to the charge, and in speaking to sentence, Forget is reported to have told the court that at the time of the offence, the prisoners had been a “starving condition” and “being under the impression that those store were place there by the Queen for the relief of the needy Indians, and having applied to the agent for relief and refused...” they did what they believed they had to do, and had a right to do. They voluntarily surrendered to the police, and offered to make reparation. Richardson reserved their sentence, but is reported to have directed the interpreter to tell Yellow Calf and the others that “he had been informed that they had threatened to use firearms to resist arrest” and they had not been charged, he warned them that this was a serious crime, and if it ever happened, they would lose their firearms. The Regina Leader (06 March 1884) 3, cols 3 & 4. Isabel Andrews discusses the background to this case in her article, “Indian Protest Against Starvation: The Yellow Calf Incident of 1884” (1975) 28 Sask. Hist. 41.
68 Tom Gopher (1884), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file # 213. The Regina Leader reported on this case, in particular that Judge Richardson addressed the prisoner in encouraging term when he
in the next section – to all of them, the insult of poverty and starvation was added the injury of violence and the threats and harassment of criminal prosecution. These court files give names and recurring voices to the unrelieved hardship and misery experienced by the Cree, Assiniboine, and Saulteaux, across the Territories in the late years of the 1870s and early years of 1880s – a fraction of the stories that could have been told.

4. The Richardson Court Files After 1885: ê-mâyi-kamikahk (“where it went wrong”) 69

The aftermath of the events of 1885 witnessed the seemingly impossible: things became even direr as, under the leadership of Hayter Reed (now Assistant Indian Commissioner), increasingly punitive policies were devised and imposed. 70

Richardson had moved to Regina and Treaty Four territory in 1883. The Treaty Four bands had not been active participants in the 1885 events; and, although they were not sentenced him to one month hard labour after his guilty plea to break and enter of the Storehouse at the File Hills Reserve, and theft of some flour and bacon. The Leader’s headline said it all: “Gopher Tom Says He was Starving, Cree Indian From File Hills” The Leader (06 March 1884) 3, cols. 2 & 3:

The Judge told the prisoner that it was his duty both to protect the Indian from harm and to punish him when he did wrong, he sentenced him to a month’s imprisonment but in a kindly manner gave him some good advice which from the expression of the Indian’s face he evidently appreciated.

69 Of all the descriptions of the events of 1885 (“Riel Rebellion,” “1885 Uprising,” “North-West Rebellion,” “North-West Resistance”), I find this phrase expressed the nature of the events, their implications and aftermath. I am indebted to Neal Macleod, “Rethinking Treaty Six in the Spirit of Mistahai Maskwa (Big Bear),” (1999) 19 Can. J. Native Studies 69 at 84.

70 Carter, Lost Harvests, supra note 13 at 130 – 158, esp. 141 ff. Carter at 141, describes Reed as the “major architect of Indian policy in the North-West in the decades following the rebellion.” She cites an 1885 memorandum prepared by Reed for Vankoughnet, in which he advocated “extremely repressive measures” for the future management of Indians, measures that were initially supposed to be temporary and punitive, targeted to the ‘rebel bands’, but which became “permanent and universal” (Carter, 145). The two cornerstones to Reed’s agenda were the attack on traditional forms of Band leadership and authority and the introduction of the ‘pass system’ intended to restrict Aboriginal movement and interaction (146 – 156) and to isolate them from the broader society. Reed’s memorandum is reproduced in Stonechild & Waiser, supra note 33, Appendix 3 at 250-53
labelled disloyal, their bands not broken up, and their people scattered to other bands, they still felt the scourge of hunger and of changes in government policy in the years following 1885.

In 1885, Richardson’s Regina docket included the majority of Métis and First Nations men charge with treason-related offences, as well as his regular court docket. While not overwhelming in numbers in the pre-1885 period, even fewer cases are found in his post-1885 records. After 1886, Richardson sat a member of the Supreme Court of the North-West Territories in Regina. The demographics of his judicial district, Western Assiniboia, due in large measure to the removal of the Cree and Assiniboine from Cypress Hills, were such that far fewer Aboriginal people appeared before him than had been his experience as a Stipendiary Magistrate based in Battleford. Other than a few Sioux from Wood Mountain and the occasional case that came in to him from the western part of the Qu’Appelle or the Touchwood Hills, Richardson presided over matters that tended to be property and assault offences in and around Regina and Moose Jaw, involving settler farmers, young labouring men, and businessmen enforcing or dodging their promissory bills. The isolation of homestead life and vulnerabilities of children in those homes and barns, and the failure of the law to offer them any meaningful protection, then as now, is also expressed in his records.

However, a handful of cases involving Aboriginal men accused of livestock related offences provide evidence that life on the southern reserves matched the hardship of the people in the north-west. The struggle and resistance of the pre-1885 period can also be found. For instance, in 1889, a man named Mequaness (The Little Quill) was charged with inciting Indians to violence, an offence under the Indian Act.71 The Informant was the Indian

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71 Mequaness (The Little Quill) (1889), SAB Coll. RG R1286, file #10.
Agent of the Peepeekeesis Band of the File Hills Agency. The Little Quill had refused, when ordered to do so, to go and cut hay. The Indian Agent withheld the band’s rations, a tried and true method of discipline. Chief Peepeekeesis had died not long before, and the Band did not have a Chief. The Little Quill appears to have been regarded as a leader by both the people of the Band and the Indian Agent. He was taken into custody and charged with “inciting a number of named others to make demands of the Indian Agent in a riotous, disorderly and threatening manner.” When he appeared in court, The Little Quill did not nod his head; rather, he informed the court that he required the attendance of a number of witnesses for his trial. Correspondence in the court file reveals a recommendation that rather than proceed further with the prosecution, the matter ought to be dropped “in the public interest.” Clearly, a decision had been made that prosecuting this man would only backfire on the Indian Agent, and perhaps further compromise his shaky authority.

In 1896, two men, Shave Tail and Jean Baptiste, from the same reserve were charged with unlawfully killing a steer that belonged to Buffalo Bow, also of their reserve. The Indian officials did not regard Jean Baptiste as the main culprit, but rather an “involuntary agent” who was controlled by Shave Tail. The Commissioner of Indian Affairs wrote to Justice Richardson: “Jean Baptiste has always been well-behaved and not troublesome” and trusted that the judge “will consider this when it comes before you.” At trial the jury entered a verdict of guilty; Richardson granted a deferred sentence and Jean Baptiste was discharged on his own recognizance.

Correspondence on the court file, dated “August 8 ‘96” from “S. Hockley,
Temporarily in charge of Agency to the Indian Commissioner in Regina indicated:

"Shave Tail" says he did not do any shooting himself but is responsible for the shooting and says his reason for doing so was because he was hungry.\textsuperscript{74}

Later correspondence on the court file, dated September 25, 1896, from the Indian Agent forwarded by the Commissioner of Indian Affairs to Justice Richardson by letter dated September 29, 1896, indicated that Shave Tail was the son of the deceased Chief, and that neither he nor his mother owned any cattle:

I hope whatever sentence he gets, that it will make a better Indian of him. Being the son of the deceased Chief Peepeekeesis he has considerable influence with the Band and does not, I am sorry to say, always show a good example - in fact he gives me more trouble than any other Indian in the Agency.\textsuperscript{75}

On October 1, Shave Tail pleaded guilty to the charge before Justice Richardson; he was remanded in custody until October 9 when Richardson J. resisted the position advanced by the Indian Agent, declined to make a further example of him, and as with Jean Baptiste, Shave Tail was discharged on a suspended sentence.

Earlier, in the spring of 1896, Richardson had imposed a similar sentence on a man from Muscowequan Reserve, Eopiassis, Son of the Old Blind Man, who had been convicted of "unlawfully and wilfully without legal justification or excuse and without colour of right" wounding a cow that belonged to the Government of Canada.\textsuperscript{76}

The criminal law had been invoked against these accused men for engaging in the only form of hunting now available to them, and, in The Little Quill’s case, for outright resistance

\textsuperscript{74} Ibid.

\textsuperscript{75} Ibid.

\textsuperscript{76} Eopiassis, the Son of the Old Blind Man (1896), SAB Coll. RG R1286, file #122.
to the authority of the Indian Agent. And yet, the violence of the law was tempered by the judge. The Indian Affairs officials seem to have met continued resistance not simply from the First Nations, but on occasion from Richardson’s court.

These cases reveal the coercive face of the law, the resistance of the people in the context of their immiseration, and the mediating role of law in relation to Indian Affairs officials and the First Nations peoples. Again, the relations found here are complex. The illustration of hunger, oppression, and dire poverty is clear. Recourse by the authorities to the criminal law’s coercive force in order to enforce compliance, when mere threats and compulsion failed, is also clear. Less straightforward is the contribution of the criminal law once invoked. I do not doubt for an instant that Richardson shared the desire to “make better Indians” - he expressed such a sentiment at least once from the bench\(^77\) - but the dispositions in these cases, and the earlier ones, suggest that Richardson did not endorse the approach taken by the Indian Agents, or the use of his Court to enforce these Indian policies, to punish hungry people even further.\(^78\)

5. **At the Mercy of Indian Policy: Eungana and Tom Lemac**

During his tenure on the bench, as both a Stipendiary Magistrate and as a Justice of the NWT Supreme Court, Richardson presided over nine capital cases, including eight

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\(^77\) In sentencing Pierre Bourassa (1892) for unlawful carnal knowledge: SAB Coll. RG R1286, file # 39.

\(^78\) In offering this interpretation, I am mindful that on at least two occasions, he did sentence men charged with similar offences to jail: young Jean Felix Callilouis, who said he killed the farm instructor’s ox because his family was starving; his mistake was that he had thought the ox belonged to the government (and thus to the reserve) received six months (SAB A-G (GR 11-1) CR-Regina, 1\(^{st}\) series, 1876 – 1886, file #175); as I have discussed above, Gopher Tom was also sentenced to one month hard labour in 1884 for breaking into and stealing flour and bacon from the Reserve’s ration storehouse (having been delivered up by his Chief) (SAB A-G (GR 11-1) CR-Regina, 1\(^{st}\) series, 1876 – 1886, file # 213).
murder trials. Of these prosecutions, five involved First Nations men accused of murder and one involved a young woman described as a “Treaty Half-breed” charged with murder and concealment of birth. Of the three First Nations men convicted of murder, only one (Ka-Ki-Si-kut-chin, the Swift Runner) was hanged following his conviction; the death sentences of the other two men Eungana (The Fast Runner) in 1885, and Tom Lemac (Winegee) in 1902) were commuted.

The ‘capital case’ files housed in the National Archives are a rich source of material that have been invaluable to criminal justice historians, including those whose research is directed at the experience of Aboriginal prisoners sentenced to death. Tina Loo has

79 In addition the Riel treason trial in 1885, Stipendiary Magistrate Richardson presided with a justice of the peace at the trials of Ka-ka-si-kut-chin (the Swift Runner) (1879), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #65 (convicted and executed at Fort Saskatchewan for the murder of his wife and children, and other members of his family in the bush in the region of Lac La Biche. The case excited interest in the press because of the allegations that he was a cannibal and wendigo); Joseph Cardinal (1880), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #104, for the murder of his teenage son, Moise (convicted at Lac La Biche of manslaughter, and sentenced to an unknown term in the Penitentiary) (see Chapter Four); Scholastique Cardinal (1882), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #145 (initially charged with murder and concealment of birth of her newborn infant, convicted of concealment of birth, sentence deferred) (see Chapter Six); John Stevenson (1884); John Connor [1985] 1 Terr. L.R. 4 (Man. Q.B.); Eungana (the Fast Runner) (1885), SAB Coll. R 996, file # 284L (National Archives of Canada, RG 13, vol. 1421, Capital Case file # 193) (convicting of murdering Eagle Child). As a judge of the NWT Supreme Court, he presided at the murder trial of John McDonald (1893), SAB R1286, file # 64 (charge with murder of Vincent Weidman, convicted of manslaughter, and sentenced to five years in the penitentiary); Tom Lemac (Winegee) (1902), SAB CR-Regina, R1286, file # 266 (National Archives of Canada, RG 13, Capital Case file) convicted of murdering Josiah Matoney (Oskinaway) (see also Chapter Six). Not every one of these cases, including Eungana’s case which I will discuss here, is found in the two SAB collections that form the basis of my research. I cannot explain why, in particular, Eungana’s trial in October 1885 is found in another collection (that of the Attorney General files, Coll. R996), but it is clear that Richardson, with justice of the peace (and coroner) Dr. Dodd, presided at the Regina trial, and wrote the report to the Executive Council, following Eungana’s conviction and sentence of death.

examined the British Columbia cases in which ‘cultural’ defences were advanced on behalf of Aboriginal persons accused of murder; she argues that while they tended not to be successful (and possibly not seriously advanced) at trial, they more often secured recommendations of mercy following a conviction.\(^8\) I am also interested in the actual process in the criminal trial itself, the difficulty in establishing the facts of the case, the evidentiary basis for anything, the conduct (and in Eungana’s case, the lament) of the defence counsel of an Aboriginal accused in a murder trial. And, given the focus of this chapter, the nature of the interventions and recommendations of Territorial and Indian department officials and Indian policy in the post-conviction processes in these two capital cases are of particular interest to me.

\section*{a. Eungana’s reprieve}

In the summer of 1885, Eungana (The Fast Runner), the twenty-three year old second brother of Assiniboine Chief, The Man Who Carries the Coat, was vexed by a complicated relationship involving himself, another man and their wives. The exact contours of the vexation are not revealed with clarity from the court documents. It may be that the other man, Eagle Child, was after Eungana’s wife, and/or it may be that Eungana was interested in Eagle Child’s wife, the Peigan Woman. In either event, Eungana faced a dilemma: to yield

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\textsuperscript{8} Loo, \textit{ibid.}
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or to challenge Eagle Child, or try to find a way to avoid further conflict as a result of his wife’s refusal to go to Eagle Child.  

Eagle Child, the source of Eungana’s distress, was a prominent man on his reserve, older than Eungana, with a reputation for being brave. Before the end of the summer, Eungana was charged with murdering Eagle Child. By the end of September, he was convicted and sentenced to death. By the end of October, his death sentence was commuted by order of the Governor General in Council to a sentence of life imprisonment. By the end of October 1888, he was set free from prison.

Eungana’s story was told in two ways at the two (fundamentally) different stages in the process: first, through evidence that was admitted at the trial; and, secondly through evidence that was either ruled inadmissible or not presented at the trial. The former ensured his conviction; the latter facilitated the commutation of his sentence and secured his release. That Eungana had shot Eagle Child was clear, but nothing else was. Any confidence that the legal system, casting its white eyes on the intricacies of Assiniboine cultural practices and relations, domestic and otherwise, could elicit the facts, much less the truth, could not have been more misplaced. However, at the end of the day another, more familiar, form of

82  Eungana (The Fast Runner) (1885), SAB Coll. R 996, file # 284L.

83  An abbreviated account of Eungana’s story was also told in one snippet entry in the Regina Leader (01 October 1885) 4, col. 2, under the headline, “The Gallows:”

On Tuesday before Their Honors Judge Richardson and Dr. Dodd, Eungana a Sioux Indian was tried for the murder of another Indian named Eagle Child. Mr. D.L. Scott prosecuted and Mr. Secord defended. The facts of the case are well known. Eungana it is supposed was jealous though this did not come out. It was clearly proved that he shot Eagle Child. Verdict “guilty” with a recommendation to mercy. His honor sentenced him to be hanged on the 13th of November next.

The assertion that the facts of the case were well known raises the question of how this was so. As this was the only reference to Eungana I could find in the Leader, one may infer again that news travelled like prairie fire, but not necessarily through the press. See Dempsey, supra note 1 at 39.
cultural practice drove the resulting commutation of the sentence and Eungana’s release from prison three years following his conviction: politics, and the recognition of political debts due.

During the summer of 1885, Eagle Child was building a new house; it was said that as he lay dying, he continued to give instructions on the work that remained to be done to complete the house. There was uncontroverted evidence at trial that Eungana had come upon Eagle Child at the construction site and that he fired two shots that struck Eagle Child, resulting in a flesh wound to the abdomen and a wound to one of his upper arms. Directly after the shooting, Eungana and his wife went to find Indian Farm Instructor, Arthur Taylor to tell him what had happened. Eagle Child’s wounds were attended to by his brother and his cousin; they removed at least one of the bullets from his body.

The Indian Agent and a medical doctor from town were called to the Reserve; the doctor examined Eagle Child and, given the grave nature of the injury to the arm, he recommended that it be amputated. Eagle Child and the people with him “stoutly refused” the procedure. The people from the Reserve who were attending to Eagle Child had given him a purgative which the medical doctor believed had weakened him and “would be against recovery.” There was some suggestion that the Indians caring for Eagle Child had not given him the nutritional rations that the medical man had recommended, and which had been provided by the farm instructor. Eagle Child died on August 10, 1885, and Eungana was charged with his murder.

On August 19, 1885, five weeks before the trial, Edgar Dewdney, in his capacity as

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84 The Indian Agent said of him, “...an active and good working Indian is gone. He was about completing the best house on the reserve and working at it when he was shot. From then to his death his mind was on his house giving instructions how it should be finished off.” Quoted by Edgar Dewdney, Commissioner of Indian Affairs, NWT, in his letter of August 19, 1885 to the Superintendent General of Indian Affairs.
Commissioner of Indian Affairs, advised the Superintendent General of Indian Affairs in Ottawa that one of the brothers of Chief The Man That Carries the Coat had shot and killed another man of the band, resulting in a great deal of excitement but no further violence on the reserve. Dewdney's letter contained the particulars that had been provided to him by the Indian Agent, including his understanding that The Fast Runner [Eungana] and the deceased, "had for some time past been attentive to each other's wives, which after a while caused jealousy and ended by one shooting the other." 85 On his arrival at the Reserve, the Agent had made his way to the Chief's house, where a large number of people had collected. He expressed his regrets to the Chief for the reason for his visit, but told the Chief that it was important for the guilty party to give himself up to the police and stand his trial: "The Chief said his brother was ready to go and he would accompany him to Regina." 86 They met the police on the way into Regina, and Eungana was given over to them.

Dewdney also noted that the Indians refused to allow the coroner to hold an inquest on the body of Eagle Child and, in closing, observed that "the Indians had behaved very well although labouring under great excitement and the law will now take its course." 87

(i) The story/evidence at trial

The theory of Eungana's defence counsel, John Secord, was that Eagle Child was a bad man who had been trying to take Eungana's wife away from him, that Eagle Child had assaulted Eungana shortly before the shooting, resulting in Eungana being injured, and that he had caused Eungana to be in fear for his life. Eungana told his lawyer that he had "offered

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85 Letter of August 19, 1885 from Edgar Dewdney, Indian Commissioner to Superintendent General of Indian Affairs, quoting from the account of incident provided to him by the Indian Agent.

86 Ibid.

87 Ibid.
on several occasions to give up his [wife] to Eagle Child in order to prevent trouble, and on one occasion shortly before these troubles, he told his wife to go to Eagle Child, but she refused."^88 Secord faced the unenviable challenge of attempting to elicit that evidence from the Aboriginal witnesses for the prosecution, all of whom were Eagle Child’s relatives or friends.

Ha-wa-he (The Arrival), testified in examination-in-chief that he remembered witnessing a quarrel between Eagle Child and Eungana two days before the shooting. While he was present when Eagle Child was shot, he maintained that he did not see the shooting when it happened, he only heard it. He also testified that he knew that Eungana had been poisoned four years earlier and that he had never been well since. When asked in cross-examination whether Eungana had been struck or injured in the earlier quarrel, he could not say, had not seen anything. When asked to say how Eungana had not been well following the poisoning incident, the discourse of the good Indian was invoked, through the interpreter who answered for the witness in the third person:

Well he says he never knowed the Indian to be a bad Indian, but sometimes he knowed that he was not in good humour – it was not a man to be always in exact humour.^89

Eagle Child’s cousin, The Man That Comes First (who with Eagle Child’s brother was one of the people who had attended to Eagle Child after he had been shot) testified that he had never heard of any trouble between Eagle Child and Eungana with reference to Eungana’s wife. He had been at the house with Eagle Child when Eungana arrived, and

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^88 Letter from John Secord to Lieutenant-Governor (and Indian Commissioner) Edgar Dewdney, 29th September 1885. Secord’s second line of defence, not repeated following the trial, involved a long-shot, a causation issue based on his argument that the Indian medicine, and not the injury, had caused the man’s death.

^89 Transcript of the trial, p. 3.
heard Eagle Child say to Eungana,

[blockquote]
... [Eagle Child] threw in his axe that way (down) he says
Eungana says he, if you are mad, there is nobody holding you,
do what you like.\(^{90}\)
[/blockquote]

When asked what Eagle Child meant by that phrase, he answered:

If you are mad, he says, there is nobody holding you, content
yourself, content yourself, he means I suppose if her feeling
like shooting him, to shoot him, that there was nobody holding
him. This is what he says.\(^{91}\)

At this point, Eungana appears to have intervened: “Prisoner thinks the witness does not tell
all he knows.” The witness was reminded by the interpreter and the defence counsel that he
was required to tell the truth, but the witness said he could say what he saw with his eyes.

The last Indian witness for the prosecution was Eagle Child’s widow, The Peigan
Woman, who testified that she heard that her husband and Eungana were not on good terms.
When asked about a conversation she had had with Eungana the day before the shooting, she
remembered nothing, knew nothing.\(^{92}\) She did admit that she had heard Eungana say to her
and the woman she was with, “I could do something if I wanted... ;” She did not know to
what he was referring, did not know what he meant and denied saying that if Eungana did not
keep away, Eagle Child would kill him. When pressed by Secord, the interpreter expressed
what she had said:

She just meant the same, if he wanted to talk to this woman, to

\(^{90}\) Transcript of the trial, p. 6.

\(^{91}\) Transcript of the trial, ibid. These words are similar to ones uttered by the deceased and which gave rise to
and supported the defence of provocation in a recent Supreme Court of Canada decision in R v Thibert [1995] I
S.C.R. 37 (SCC). Mr. Thibert had shot his wife’s lover, as the deceased had walked towards him, with his
hands on Mrs. Thibert’s shoulders. His evidence in part was that the deceased had taunted him, by saying “You
want to shoot me? Go ahead and shoot me.” And “Come on big fellow, shoot me ... .”

\(^{92}\) Transcript of the trial, p. 11.
try to revenge on this woman – of course the other one he was blaming that Eagle Child want to take his wife away from him, he wanted to do the same, and did not feel like it, that is why she told him to keep away, or else Eagle Child will kill you.  

The Peigan Woman said she said that because “Eagle Child was a wicked man, he had beaten her, and that is why she told the Prisoner to be quiet, to keep away from him or her like, for if Eagle Child was to know it, he would kill him.” The Assiniboine women emerge as less than compliant: just as Eungana had told Secord that his wife had refused to go to Eagle Child, so too does it appear that the Peigan Woman “did not feel like it” if Eungana “wanted to do the same.”

This is as much evidence of the basis of the quarrel between Eagle Child and Eungana as could be extracted from the witness.

In advancing the case for the defence, Secord faced a dilemma (or what should have been a dilemma for him): in order to defend his client, he had to deny the nature and significance of the relationship that was apparently the very heart of the case. Secord wanted to call Eungana’s wife as a witness for the defence, but in order to do so, he had to take the position that she was not in law his wife, that she was simply living with him. Richardson made short shrift of this line of argument:

If she says she is his wife, her evidence is inadmissible, because the wife is – according to the Indian custom, just as much a wife in law under that decision in Lower Canada courts which went to the court of appeal – just as much a wife as our wives. I refer to the Connolly case.  

Secord called her, asked her if she was the prisoner’s wife; she replied yes, and that was that.

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93 Transcript of the trial, p. 12.

94 Ibid.

95 Transcript of the trial, p 13.
She was not permitted to testify on behalf of her husband. One other witness had been called by the defence to testify that she had seen Eungana's mother and wife attending to him two days before Eagle Child was shot (evidence that was intended to support the defence's theory that Eungana had suffered a serious injury as a result of the earlier assault by Eagle Child). And, that ended the case for the defence.

Secord was allowed great scope and he took full advantage in his address to the jury, coming perilously close to giving evidence himself:

Now gentlemen I may mention or point out to you that there is difficulty in defending an Indian charged with any of these crimes. You have seen the difficulty that I have had to get answers from questions, and I may say that I had the same difficulty with the prisoner in getting instructions in order to defend him properly. ... I have felt that I have been in a manner handicapped in the defence of this case, and I am satisfied from what the prisoner tells me, that there is evidence that could have been brought out if the witnesses were not adverse to him. But you must take it as you find it ... upon the evidence that is given.  

For the Crown Prosecutor, Scott, the question at the heart of the matter was a simple one: if Eungana was afraid of the deceased, why did he go to him, to the place where Eagle Child was working: "What did Eungana go to that house on that occasion for?" The Crown's case was so strong, it was as easy as it was apparently irresistible for the Crown Prosecutor to claim the high ground:

Gentlemen, my duty as a crown prosecutor does not direct me to ask for a conviction at your hands if you think the prisoner should not be convicted. I am merely endeavouring to place the case as fairly as possible before you in order that you may

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96 Transcript of the trial, pp. 14 -15.

97 Transcript of the trial, p. 18.
see all points of evidence that have arisen in this case and consider all questions. That is as far as my duty leads me to go. I have no intention of asking for a conviction at your hands — I merely ask you that you should do your duty ... and as my learned friend says, give the prisoner the benefit of every reasonable doubt.  

Richardson’s charge to the jury was a careful summary of the evidence and explanation of the law concerning causation, and he outlined the difference between murder and manslaughter. He reminded the jury that the doctor had testified that the cause of death was the wound, “accelerated, however, by foolish attention” and that if Eagle Child had received no treatment at all, he would have died.

The jury deliberated for thirty minutes, before returning with a verdict of “guilty with recommendation to mercy.” Richardson sentenced Eungana to be hanged on November 13, 1885.

(ii) The other story: The ‘inadmissible’ and not presented evidence

John Secord’s formal letter of petition against the death sentence was in Lieutenant Governor’s Dewdney’s office the day following the trial. He cited the legal issues in the case and the difficulties he had encountered in conducting a proper defence for his client, including the refusal, on the morning of the trial, of an Indian witness he had intended to call to testify. Secord expressed the view that the witness who refused to testify was really implicated in the troubles, having stirred things up between Eungana and Eagle Child, but on

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98 Transcript of the trial, p. 19.

99 Transcript of the trial, p. 20.
the morning of the trial, the witness denied any knowledge of anything. He closed with his lament and plea for his client:

> The difficulty of getting the Indians to understand the nature of evidence is very great, and I cannot help but feel that the prisoner is not deserving of the death penalty, although no doubt he should be punished to some extent.\(^{100}\)

Secord also referred to the facts that had not come out in trial: that Eungana had offered to give up his wife to Eagle Child, and shortly before the incident, he had told his wife to go, but she refused. Secord stressed that he understood that Eungana had been led to believe that Eagle Child would kill him, and that he had fired the shots on the spur of the moment, after Eagle Child had provoked him.

On October 2, Richardson forwarded a full copy of the proceedings and evidence report to the Minister of Justice, drawing to the Minister’s attention the jury’s recommendation for mercy. By way of explanation for the recommendation, Richardson informed the Minister that the deceased and Eungana belonged to the same band (which Richardson incorrectly described as Sioux), and there was “evidently some bad feeling between them, resulting from jealousy over their women.” Richardson’s reference to jealousy is of interest, because of course this had not been established in the evidence at trial. Richardson added that the medical evidence adduced at trial indicated that the deceased’s life might have been saved “but for the ignorance of the deceased, and the ignorance and negligence of his friends attending him” and their refusal to allow amputation.

Dewdney forwarded Secord’s petition to the Secretary of State, expressing the hope that it would receive favourable consideration, noting the prevailing opinion that the crime was committed “under extenuating circumstances, hence the strong recommendation to

\(^{100}\) Petition of John Secord, 29 September 1885.
Dewdney then added what surely was the real reason he was requesting favourable consideration, and it merits the lengthy quote that follows:

The chief of the band, who is the brother of the prisoner and some other relatives of the latter acted in a most commendable manner at the time of the commission of the crime, in holding the prisoner and sending word to the Police for his arrest. This conduct on their part would be gratefully rewarded by an act of clemency towards their unfortunate relative, and I have no doubt would go a great way in maintaining their present good feeling towards the authorities. The prisoner is an Assiniboine Indian and member of the band of the Chief, "The man that took the coat" – During the Rebellion the conduct of the whole band, including the prisoner was exemplary.101

The Minister of Justice’s recommendation to the Governor General was contained in his letter of October 29, 1885. In it he repeated Richardson’s point that Eagle Child had been weakened by the treatment he had received from his people, and noted the refusal of the recommended course of treatment by the medical doctor. While he acknowledged that this not lessen Eungana’s culpability, he noted the uncertainty that flowed from the possibility that the deceased might have recovered had he received proper treatment. However, it was the recommendation from the Lieutenant-Governor of the NWT that appeared to weigh most heavily for the Minister of Justice, as he reproduced Dewdney’s letter verbatim. The legal and cultural issues raised by Secord in his petition were not referenced. The loyalty and exemplary behaviour of the Band, including Eungana, during the Rebellion identified by Dewdney and their responsible behaviour in the matter of Eagle Child’s death were to be rewarded. On October 31, 1885, the Governor General signed the order commuting Eungana’s sentence to one of life imprisonment at the penitentiary in Manitoba.

At the time of Eungana’s trial and conviction, Edgar Dewdney had also been the Indian Commissioner, and this fact would not have been lost on the Chief. It is surely

101 Letter of 9th October 1885 to Lieutenant – Governor Edgar Dewdney to the Secretary of State.
difficult to say in which capacity Dewdney had derived his knowledge about the exemplary
behaviour of the Band during the events of 1885. So, while his formal intervention in
Eungana’s capital case was as the Queen’s Representative in the Territories, he was also
known to all as the Indian Commissioner.

Three years later, the Indian Commissioner of the NWT, now Hayter Reed,
intervened again on behalf of Eungana and his band. Reed wrote to the Superintendent of
Indian Affairs about the case, citing reasons “which induce me to recommend to the
Department that it should exert its influence to have him now released.” Reed referred to
Secord’s concerns expressed immediately after the trial about the witnesses who would not
speak the whole truth, and the out of court assertions that Eagle Child had been persistently
endeavouring to take away Eungana’s wife, and that but for her refusal, he would have
agreed to part with her in order to avoid trouble. Reed intimated that the fatal encounter was
accidental (a rather dubious claim on the facts), but more importantly, Reed reminded the
Superintendent General that Eungana had surrendered, and that the pain of imprisonment was
experienced more acutely by Indian prisoners. He proclaimed his strong support for the
Band’s desire to have Eungana released, and concluded with what he clearly regarded as
insight derived from his expertise:

Another aspect of the Indian’s criminality, to which no small
consideration should be given, is the fact that he only carried
out the prevalent Indian view of justice; and the reclamation, of
the Indians from their own deeply rooted ideas, must be a
gradual process.103

102 Letter of August 13, 1888 from the Indian Commissioner, NWT, Hayter Reed to the Superintendent of
Indian Affairs.

103 Ibid, p. 3.
Two weeks later, the Deputy Minister of Justice recommended the release of the prisoner and the Minister of Justice and the Secretary of State indicated their concurrence;\textsuperscript{104} Sedgewick then asked that the Indian Commissioner and Superintendent General of Indian Affairs be informed of this recommendation.\textsuperscript{105} A rather long two months later, Eungana was released from Stony Mountain Penitentiary. The significance of the advocacy and pressure of his brother and the Band must not be understated or underestimated; but, similarly, it is equally important to note that his fate from beginning to end of the process had been shaped, if not driven, by the most senior government officials in the area of Indian Affairs.

(b) Tom Lemac (Winegee)'s reprieve (1902)

The quality of the Indian department's mercy experienced by Tom Lemac\textsuperscript{106} fifteen years later was less vivid and somewhat less beneficial than that experienced by Eungana. Lemac, it will be remembered, had been convicted for murder in Regina 1902 of the 1894 death of Oskinaway (also named in the court file as Josiah Matoney\textsuperscript{107}). There had been evidence at the trial that Lemac, and Oskinaway, had been in a state of intoxication at the time of the shooting, which had occurred on the plain in the middle of the night, as the two men were riding back to the Reserve from Fort Qu’Appelle. There had been no witnesses to the shooting, and the fatally wounded Oskinaway had been found near the trail the following

\textsuperscript{104} Memorandum of September 1, 1888 from Robert W. Sedgewick, Deputy Minister of Justice.

\textsuperscript{105} Memorandum of September 3, 1888 from Robert W. Sedgewick, Deputy Minister of Justice to the Under Secretary of State.

\textsuperscript{106} Tom Lemac (Winegee) (1902), SAB R 1286, file # 266. I discuss this case in greater detail in Chapter Six.

\textsuperscript{107} The First Nations witnesses called him Oskinaway; the other witnesses referred to him as Matoney.
morning. As I will discuss more fully in Chapter Six, a great part of the trial focussed on what Lemac had said to others later that night, and how the words he spoke in Saulteaux to the women in their tents related to the offence of murder with which he was charged. The Indian witnesses in Lemac’s trial were asked to recall with certainty the events that had taken place eight years earlier, and to act as cultural interpreters for the judge and jury, in order to explain Lemac’s conduct and the import of his words and his departure (and long exile) after the shooting.

Lemac was convicted of murder, although it was surely open to the jury to have convicted him of manslaughter. He was sentenced to death. Almost immediately, a petition for clemency was circulated, and in the end the signatories included every businessman in the town of Regina and a few prominent Aboriginal individuals as well. Lemac, a former interpreter, guide and special constable for the NWMP, was clearly held in high regard and respected for his work with the police. The sheriff, and future mayor, P.M. McAra was a strong supporter, both for the reprieve and for his early release. Lemac and McAra corresponded while Lemac was in Stoney Mountain, and in 1906 McAra, as Mayor, corresponded with Premier Walter Scott in 1906, asking for Scott’s support for Lemac’s release. The Premier in turn forwarded this correspondence to the Minister of Justice.

The capital case file reveals the active and serious intervention in the matter by the Department of Indian Affairs, including a lengthy memorandum of law prepared by one the Indian Department’s law clerks. The memorandum, addressed to the Minister of Justice, advanced several reasons in favour of clemency for Lemac. In the event that the Minister was not in favour of recommending clemency, the Indian department official urged that there was
also a ground to ask for a reserved case, and if refused, an application for leave to appeal.\footnote{108
Memorandum of June 7, 1902 from Reginald Rimmer [or Rimmell?] Law Clerk, Department of Indian Affairs to the Minister of Justice, The Hon. C. Fitzpatrick.}

It is clear that the Minister of Justice read the memorandum, because he inserted a marginal note of his disagreement to one point of law advanced by the Indian department law clerk. The memorandum argued that the trial judge should have charged the jury that if they were satisfied that the accused, being an Indian to whom the sale of intoxicants was prohibited, killed Matoney when he was in state of intoxication in which he was utterly unable to form any intention and that the prisoner had not intention to kill they should find him guilty of manslaughter, not murder. The basis of the Justice Minister’s disagreement is not clear, although one inference is that he disagreed with the emphasis in the memorandum that special consideration should be given to the fact that Lemac was an Indian to whom the supply or sale of intoxicants was prohibited.

The memorandum outlined the basis for a possible appeal, but acknowledged:

\begin{quote}
I can conceive that it may not be thought desirable, as a matter of policy, to create in the minds of the Indians in the Northwest, by a new trial and consequent publicity, the impression that they will be protected by the Department [of Indian Affairs] if they become intoxicated and commit homicide in that condition. Practically the same end can be obtained by commutation.\footnote{109 \textit{Ibid.}, p. 7.}
\end{quote}

The author’s ambivalence in the memorandum is palpable. Clearly of the view that Lemac should not have been convicted of murder and that there were compelling legal arguments for an appeal to be undertaken, he understood the terrain on which he was treading. He was fully mindful that the best he could hope for was a commutation of Lemac’s sentence, but clearly
he was uncomfortable re-situating himself within that discourse, and reminded his seniors of how he regarded Lemac’s culpability, and the death penalty itself:

I can see no weighty reasons of policy in this case which outweigh the value of a human life if the Minister of Justice decides that the sparing of it would be consistent with justice. The effect of the trial and sentence will be sufficient warning to the Indians of the Northwest without the infliction of the most abhorrent form of death upon a man who may be considered to have had no real intention to kill and who is shown by the evidence to have passed the ordinary span of life.¹¹⁰

Lemac of course did not receive a new trial, but his death sentence was commuted to life imprisonment. He was sixty years of age, and would be released in 1906, dying shortly thereafter.

In both Eungana and Lemac’s ‘capital cases’ the importance of the government’s Indian policy, even more than “Indian culture” is evident. The Indian department is everywhere in these files, advocating for the condemned men, albeit in Lemac’s case in the discourse of admonition of Indians about the evils of alcohol. But even in Lemac’s case, their Law Clerk urged that a human life not be sacrificed in the pursuit of policy.

The agency and activism of the Indians, including Eungana and Lemac themselves, in pressing the case for their release following commutation is evident. I make no general claim here about the clemency process concerning other Aboriginal people convicted of murder to be found in other capital case files. I confine my conclusion to the experience of Lemac and Eungana. In these cases, the rule of law, the specificity of Indian culture and political interests combined to ensure that the men were eventually released. The paradoxical fact is that these Aboriginal men had supporters in high places, and in neither case was Indian policy or the rule law determinative – but there is evidence that a form of reciprocal

¹¹⁰ Ibid., p.8
mediation was at play, and perhaps more relevant than questions of "Indian culture."

6. Conclusion

In the spring of 1903, Shave Tail, son of the late Chief Peepeekeesis, continued to be a good Indian, but not in the way the Indian agent had hoped when he wrote to the court in 1896. Shave Tail once again found himself prosecuted for an alleged violation of the Indian Act, specifically that did encourage another Indian to celebrate a dance of which the giving away of goods consisting of provisions forms a part.¹¹¹ On May 22, the depositions and notification from the gaoler that the accused was in his custody were filed with the NWTCS. On June 13, the Crown Prosecutor, likely T.C. Johnstone filed the formal charge against him, and on June 15, at the request of the same Prosecutor, Shave Tail was released, or as the clerk recorded in the docket book, he was allowed to go free on promising to appear in Regina to answer the charge when called upon to do so.

Shave Tail spent three weeks in jail, but on this occasion he was not convicted. As in 1896, he was released from custody on his promise to return to court when required to do so. Earlier that spring another man, Etchease from Muscowpetung Reserve, had not navigated the criminal court quite so ably as Shave Tail. Etchease too was charged with assisting in celebrating a dance of which giving away goods were a part and also with encouraging

¹¹¹ Shave Tail (1903), SAB, Coll. RG R1286, file # 316.
another Indian to celebrate a dance. At his trial in May, the jury convicted him on both charges, and Richardson sentenced him to three months in the Regina Gaol. Finally, in 1903, one finds in these court records a conviction and some jail time for an Indian Act violation.

In this chapter I have demonstrated different ways in which the Indian Act and Indian policy are found in the ordinary criminal court records of the North-West Territories: through the prosecution of First Nations leaders, through the role of Indian Agents and farm instructors as informants, either complaining of assault or attempting to enforce government policy through the criminal prosecutions. While this is not unexpected, it is significant, as I suggested at the outset, that the criminal court was not invariably the government’s best friend. I argue that the expansion of the judicial powers of the Indian Agent reflected a desire to have matters decided by Indian Agent justices of the peace, whose dispositions in matters involving Indian people would be more certain and consistent with government policy.

Throughout the period, the most striking aspect of the files is the consistent evidence of hunger and material deprivation across the First Nations communities. It drove the cases. The homicide cases – those discussed in the previous chapter as well as those of Eungana and Lemac - represent a tiny fraction of the small fraction represented by First Nations accused – are of a different order. And yet, as is to be expected, they offer the most extensive evidence of life and the challenges involved in the relationship between First Nations and the criminal law.

And, of course, the ubiquitous presence of Indian policy in myriad forms may be seen at every stage of the criminal process. In some ways, in the capital case files of Eungana and

\[112\] Etchease (1903), SAB CR Regina RG 1286, file # 314. His conviction attracted a small piece in the Leader: "Imprisoned for Breach of Indian Act," Regina Leader (04 June 1903) 5
Lemac, we see the Indian Commissioner and the officials of the Indian Department at their ‘best’, advocating on behalf of the condemned men. And here we see the convergence of politics and policy: one can almost hear Dewdney’s pleading, as much for himself and his reputation as for the condemned young Assiniboine man. One can only imagine the fallout for Dewdney and the government had Eungana been hanged in the autumn of 1885, within a month of the mass hanging of the eight Cree and Assiniboine men in Battleford.

The cases discussed and analyzed in this Chapter do not lead one to deny the coercive role of the criminal law, even in relation to the government’s Indian policy. But it is clear that this is far from the most interesting or compelling lesson one can draw from these many different cases. Did government officials turn to the criminal law, to prosecute and hopefully punish leaders, such as Beardy, Lean Man, Peaychew, Shave Tail, Mequaness, and Piapot?113 Clearly they did. Was there a close relationship between the police and the Indian department officials? Clearly there was. Did Judge Hugh Richardson acquiesce in the use of his court to enforce the worst failures and excesses of government policy? In this chapter, I have demonstrated that the answer is not one that would expect if one were to rely solely on the insights of Harring, Bumstead and others.

In the next and last chapter, I turn to another form of Aboriginal form of participation in the criminal court, one that has only recently begun to be examined by Canadian historians: Aboriginal informants, complainants and witnesses.

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113 Piapot was sentenced to sixty days in Regina 1903 for obstructing a peace officer in the execution of his duty, apparently arising out of an incident involving a dance. It is not clear whether he was sentenced by Richardson, or a justice of the peace, but in either case, this case also does not form part of the collection. The Regina Leader (31 October 1901) 5, col. 1.
Chapter Six

“Prisoner Never Gave Me Anything for What He Done:”
Aboriginal Voices in the Criminal Court

1. Introduction

_In colonial law,... it is tempting but wrong to view any participation in an imposed legal system as collaboration, on the one hand, and to represent any form of rejection of the law’s authority as resistance._

This chapter examines the engagement of Aboriginal peoples with criminal law during this period through the transcribed, often interpreted, words of Aboriginal peoples who appear as informants, complainants and witnesses in the criminal court records. This focus represents a shift from a traditional if understandable preoccupation of legal historians of criminal law with the Accused and the Crown, through whom the coercive form of the law is expressed, and by whose numbers it is counted and its efficacy is measured. The criminal process involved many more ordinary people as well, some of whom invoked the criminal law for support, protection and redress. To say that the criminal law is simply the coercive arm of the state against the people is to identify only the most visible aspect of this legal form, and to miss its more contradictory contribution, in which social relations of inequality are not simply enforced, but also mediated. This is one of the partial ‘truths’ of criminal law and Aboriginal peoples in the NWT.

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The insights of legal pluralism are deployed by some scholars to provide a different way of understanding the relational nature of the legal encounters between the Anglo-European-Canadian authorities and the First Nations. This approach also invites researchers to look for ways in which Aboriginal norms and processes influenced as well as were influenced by the dominant legal system. In an article which addresses the provenance and nature of Aboriginal rights, Jeremy Webber makes a brief excursion into criminal law, specifically murder, to offer an example the development and operation of intercommunal norms.² By intercommunal norms in the context of Aboriginal rights, he argues that,

[Aboriginal rights] are the result of the interaction between Aboriginal and non-Aboriginal peoples, and the process of reflection on that experience, rather than the positive law of one people. They constitute a set of norms that are fundamentally intercommunal, created not by the dictation of one society, but by the interaction of various societies through time.³

Webber argues that “the internal norms of the Aboriginal and non-Aboriginal societies did influence this emergent normativity, but not in the straight-forward, deductive fashion often supposed:”

The distinctive norms of each society furnished the point of departure, determining the spirit of interaction, colouring the first interpretations of the other’s customs, and shaping the beginning of a common normative language. But the final result was above all the result of mutual adaptation, in which the structure of the relationship was formed as much from compromises on the ground as from abstract principles of justice.⁴ (Emphasis added)

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³ Ibid. at 626.

⁴ Ibid. at 626 - 627.
Webber does not claim that the “new cross-cultural community” which was thus created displaced its “constituent societies:” “Its aspirations were modest, restricted to intercommunal relations.” Nor does he deny the dynamics of power, the role of force, and the substantive inequality between Aboriginal peoples and non-Aboriginal peoples. However, he holds onto the possibility of “a negotiated normative order in situations of domination.” In other words, social relations of inequality, including legal relations, are still relations. Drawing exclusively on a range of secondary sources, Webber uses responses to murder in seventeenth-century New France as an example of the emergence of intercommunal norms which took their points of departure in Aboriginal (the Montagnais) and French culture, but as a result of the ‘intercommunality’ in which they were forged, reflected something rather unique and specific. In his understanding of the “two normative universes” Webber acknowledges his indebtedness to Richard White’s discussion of the different ways in which Aboriginal peoples and Europeans responded to murder. In seventeenth-century New France, the disposition of murder emerged to reflect a “conciliatory approach:”

Its typical form was a mixture of French and Aboriginal justice: the Aboriginal community surrendered culprits to French authorities, who then pardoned them, the whole transaction accompanied by a ceremonial exchange of gifts. It was the synthesis of individual responsibility practised by the French, and the acts of compensation and reconciliation common among Aboriginal peoples. It was not premised upon equality.

5 Ibid., at 627.

6 Ibid., at 629.


8 Webber, supra note 2 at 640.
Lauren Benton also engages with the issue of engagement and participation of Aboriginal peoples in colonial legal system,

... legal actors interpret the repressive qualities of legal institutions against the background of both the possibilities of occasional just outcomes and the existence of other arenas and sources of law. In the colonial world, indigenous legal actors are not necessarily collaborators if they take actions that affirm the legitimacy of colonial courts. The knowledge of the harm inflicted by legal institutions coexists with the knowledge that they are a part of a larger spectrum of behaviours and beliefs that constitute law. It is possible simultaneously to use imposed authority (thereby reaffirming it) and to seek to undermine its authority.\(^9\)

Benton and Webber offer support for a more relational analysis of colonial laws, including criminal laws, in which the relevance of agency, struggles and compromises forged ‘on the ground’ even in communities comprised of heterogeneity, diversity and substantively unequal relationships. I do not argue that Benton and Webber’s approach offers a new, improved ‘one model fits all’ framework for the study of colonial legal regimes, rendering other work on other periods and locations less probative. Indeed, one finds in their work an insistence on the existence and relevance of agency of subordinated peoples that one also finds in Tina Loo’s work on nineteenth-century British Columbia.\(^10\) One difference, though, may be in how forms of agency are explained, and whether the participation of subordinate peoples in (dominant) legal processes is (best) understood as a form of brokerage and facilitation of their own oppression.

The extent and nature of Aboriginal participation in the criminal process is one that

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\(^9\) Benton, supra note 1, at 258.

merits attention, as does the argument that Aboriginal norms influenced and shaped the dominant legal system, and that a form of normative community was forged, notwithstanding the substantively unequal forms of participation. What then can be said of the nature of the contribution of the criminal law, and the relatively small numbers of people who came before the criminal courts either as prisoners, informants or witnesses?

2. Aboriginal Informants

In a document neither sworn nor dated, one Is-pinik-hah-kee-toot complained that in the winter of 1874 – 1875, his brother-in-law Apistatim had taken seven horses, without authority, from Is-pinik-hah-kee-toot’s father (since dead).\(^\text{11}\) With the assistance of the police at Tail Creek, Is-pinik-hah-kee-toot, described throughout the document as “Complt” had recovered six of the horses, but his brother-in-law had come the previous summer and made off with six horses that he owned. Friends of Is-pinik-hah-kee-toot had retrieved these horses, but in October 1877, Apistatim had returned in the complainant’s absence and taken three horses which he never returned. Apistatim is described in the complaint as being non-treaty and in Big Bear’s camp. Is-pinik-hah-kee-toot estimated that the three horses were worth $75.00 each. His witnesses are said to be “the whole camp” and he concludes that he himself will be back at his camp in about seventeen days. The court file is one single sheet of paper, and not surprisingly there is no disposition, much less a hearing, into the complaint.

\(^{11}\) Apistatim (1878), SAB A-G (GR 11-1) CR-Regina, 1\(^{st}\) series, 1876 – 1886, file # 42.
The fact that the matter was not resolved is of less interest to me than the fact of the complaint itself. Clearly this was a dispute between extended family members; it seems that Is-pinik-hah-kee-toot was acting in the capacity akin to an executor in his efforts to reclaim his father's horses from his brother-in-law. The dispute over the horses is not one which less than a decade earlier would have witnessed the involvement of police or the white man’s court, and yet a clearly exasperated Is-pinik-hah-kee-toot turned to the law for assistance, not once but twice. Perhaps he was a Treaty Indian who felt he had a right to assistance from the Canadian authorities in dealing with his non-treaty brother-in-law who kept stealing his horses.

While not overwhelming in numbers, it is clear from Richardson’s court records that First Nations individuals invoked the assistance of the criminal law. Many of the cases I have discussed in earlier chapters have involved First Nations complainants and informants: Peaychew, William Wolf, Na-tox-kris-tok-ka (The Only Mountain), Margaret Gladieu, Alexis Sussey, and so on. In addition to these files, the court records indicate that a number of Aboriginal women charged their husbands with forms of assault. Joseph Jack, described as a Sioux farmer on the Sioux Reserve at Bird Tail Creek, charged one Paskada (otherwise Whitehead) with administering poison with intent to kill Solomon Tankansaecije, described in the court file as a Sioux Indian minister, who had consumed tea and and a dinner of bread and pork at Paskada's home. Shortly thereafter, Solomon had charged his wife with assaulting him with a knife, although this charge was withdrawn at her request: Jean Marie (1881) SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #115. Kah-kiche-Inew charged her husband Jean Marie with assaulting her with a knife, although this charge was withdrawn at her request: Jean Marie (1881) SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file 118. The Little Girl, a Saulteaux Indian charged her husband with assault after he split her head open with an axe: Hoh-pie-sah-pah, otherwise Blacknest (1882) SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file # 155. The Saskatchewanan Herald (22 July 1882) 1, col. 4 reported that owing to the great (but nowhere described) provocation, Blacknest's sentence was a modest ten days at hard labour in the Battleford police station.

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12 See, e.g. At Fort Pitt, a Cree woman named Margaret charged her husband I-ah-pee-koo-caw with threatening bodily harm: (1881) SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #115. Kah-kiche-Inew charged her husband Jean Marie with assaulting her with a knife, although this charge was withdrawn at her request: Jean Marie (1881) SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file 118. The Little Girl, a Saulteaux Indian charged her husband with assault after he split her head open with an axe: Hoh-pie-sah-pah, otherwise Blacknest (1882) SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file # 155. The Saskatchewanan Herald (22 July 1882) 1, col. 4 reported that owing to the great (but nowhere described) provocation, Blacknest's sentence was a modest ten days at hard labour in the Battleford police station.
become very ill. In Paskada’s case, the evidence was not particularly compelling – it was suggested that Paskada did not like the minister, that the minister had eaten alone when invited to Paskada’s home for dinner, and that he had become sick after dinner. There was no evidence that Paskada had in any way been involved in the preparation of the offending meal, and the ‘expert’ evidence of poison was provided by the NWMP surgeon, Robert Miller (“... I was and am of the opinion Solomon got poison in a liquid state and in the tea he drank and the long continued affects described indicate those of digitalis which is indigenous in this country. Digitalis is a strong poison with various affects on persons taking.”). The jury acquitted him.  

The participation of First Nations leaders, notably of Chiefs and their Councillors, figure significantly among the thirty “Indian” Informants in the early period. The Richardson files suggest that even when not named formally as Informant, Chiefs (e.g. Red Pheasant, Beardy and Strike Him in on the Back) were prepared to use the police and the court for assistance.  

In my view, one of the most interesting if least resolved case of an Indian leader as Informant is that of Oo-pee-too-kah-ran-up-see-we-yin, referred to in the court file as “the

13 Paskada (otherwise Whitehead) (1880), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #91.

14 As I have indicated in previous chapters, R.C. Macleod & Heather Rollason, “‘Restrain the Lawless Savages’: Native Defendants in the Criminal Courts of the North-West Territories, 1878 – 1885” (1997) 10 J Hist. Sociology 157 at 176-77 discuss the use of the criminal law made by the Blackfoot Chief, Stamistocotar (Bull Head) in his prosecution of Joseph Gouin. Stamistocotar consciously invoked the ‘Queen’s law’ when he charged Gouin with theft of a horse, arising out an incident which reflected either a misunderstanding or a breakdown in their relationship and the meaning of gifts that had been exchanged between them. Gouin was convicted by Richardson and sentenced to three months hard labour. This case is in the first series of Richardson’s records, Joseph Gouin (1879), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file #72.
Pondmaker.” I believe that “The Pondmaker” is undoubtedly the man known now to us as Poundmaker (Pitikwahanapiwiyin), head man of the River People, and spokesperson at Treaty Six negotiations, and one of the prominent Chiefs convicted of treason-felony and sentenced in 1885 to three years in the penitentiary.\footnote{John Ballendine (1878), SAB A-G (GR 11-1) CR-Regina, 1\textsuperscript{st} series, 1876 – 1886, file # 29.}

In August 1878, Poundmaker swore an Information, as a Christian Indian, before Hugh Richardson, interpreted by Peter Erasmus,\footnote{I conclude that “The Pondmaker” and “Poundmaker” are one and the same man for several reasons, despite the fact that the Informant was described as a “Christian Indian” (and I understand that Poundmaker is said to have converted to Christianity later while in prison). The Informant in this file was clearly a Cree man of standing, given the prominent men he was able to mobilize on his behalf (Peter Erasmus, Hugh Richardson, Mr. Brelland) in his attempt to retrieve his horse. The court file refers to the Pondmaker’s brother as “Yellow Earth Blanket”; Poundmaker’s brother was named as Yellow Mud Blanket. Alexander Morris names him as Oo-pee-too-kerah-han-ap-ee-wee-yin (the Pondmaker): \textit{The Treaties of Canada with the Indians of Manitoba and the North West Territories} (Toronto: Prospero Books, 2000), at 210; at 219, he appears as ‘Oo-pee-too-kerah-hair-ap-ee-wee-yin’ (the Pond-maker). The many spellings of Poundmaker’s name in translation illustrate the difficulty one has in asserting with confidence the identity of the persons named in the court files. Poundmaker himself arguably illustrates, as well, the fluidity of relations among the First Peoples of the Prairies, and why it is a trap for the unwary to insist upon rigid distinctions between “Indian” and “Métis”, Cree and Saulteaux, and even that the description of him as a “Cree” may not be how he would have described himself: He was the son of Sikakwayan, a Stoney shaman, and a Métis mother. On his mother’s side, he was a nephew of the prominent Chief, Mistawasis, and he was as well the adopted son of the Chief of the Blackfoot, Crowfoot. His brother, Yellow Mud Blanket (or as he was named in the court file, Yellow Earth Blanket) like Poundmaker, was also prosecuted after the 1885 Resistance/Rebellion. Unlike Poundmaker, who was sentenced to three years in the Penitentiary Yellow Mud Blanket was released by the Court on the recommendation of Crown Counsel; see Sandra E. Bingaman, \textit{The North-West Rebellion Trials, 1885} (Master’s Thesis, University of Regina, 1971), Appendix A, at 206; see also Sandra E. Bingaman, “The Trials of Poundmaker and Big Bear, 1885” (1975) 28 Sask. Hist. 81; Blair Stonechild & Bill Waiser, \textit{Loyal till Death Indians and the North-West Rebellion} (Saskatoon: Fifth House, 1997); Bob Beal & Rod Macleod, \textit{Prairie Fire: The 1885 North-West Rebellion} (Edmonton: Hurtig Publishers, 1984).} that John Ballendine had stolen his horse. The horse had been the subject of a wager between Ballendine and the Pondmaker on a horse race that they had agreed would be run over the course of a mile; they had shaken hands on the wager. Ballendine had told Poundmaker that twenty-seven telegraph poles measured one mile, although one in Poundmaker’s party (Pierre Daignault) disputed this, saying thirty-one poles comprised one mile. Poundmaker accepted Ballendine’s word...
when he insisted it was twenty-seven poles to the mile. The race was run, Ballendine’s horse won. After the race, a man named Todd told Pondmaker that “he heard I had lost the race and that there was some foul play about it.” With the assistance of the surveyor’s camp crew, a measure was taken, and indeed a further seven poles beyond the twenty-seventh made up the distance of one mile. Poundmaker went to Ballendine and told him where the horse was and that he was satisfied that a mile had not been run, and proposed yet another race. Ballendine declined to race his horse again. Faced with Ballendine’s intransigence, Poundmaker “consulted Mr. Brelland who told me to go to Mr. Richardson and lay a complaint. I was afraid to do so as I had heard from Daignault and others I might be punished for gambling. Mr. Brelland insisted I should go and I went.” Poundmaker continued:

After seeing Mr. Richardson I went with Lazare to Ballendine and Lazare told him as I understood what Mr. R had directed. Ballendine made rough reply in English. Ballendine afterwards in my absence went to my camp and took my horse.

In this matter, Pondmaker had been assisted by the Survey crew and by Peter Erasmus; he invoked the highest levels of authority in Battleford, consulting with “Mr. Brelland,” likely Paschal Breland, Métis member of the North-West Council, who sent him to Richardson (who was also a member of the Territorial Council). Richardson clearly had sent a message to Ballendine through Lazare, and Poundmaker’s English was sufficiently good to understand a “rough reply.” No new race was run, and Ballendine surreptitiously made off with his horse. The Poundmaker’s Information was laid, not

\[\textit{ibid.} \text{ at 196.}\]

before a justice of the Peace, but before the more senior Stipendiary Magistrate. Whether or not he experienced being cheated as a humiliation, Poundmaker’s indignation at the “foul play” is matched by the unresolved nature of the matter in the court file.

Even when not named in the Information as “Chief,” some of the charges clearly were laid in that capacity, on behalf of their Band members (or the Band’s resources). For instance, at Chief Beardy’s instance, Francis Deschaw was charged and convicted in 1878 for theft of clothing and money, the property of Beardy’s band. Deschaw had accompanied Beardy and his Councillors to Winnipeg shortly after their Treaty money had been paid. Deschaw had helped himself to a pair of trousers and a coat from the goods that they purchased, wore them on the trip back, never paid for them, and upon conviction for theft, was sentenced to six months hard labour at the Battleford police station.

On October 6, 1882 a Cree man named Ka-nah-pic-a-nah-haw, also known as the Snake Indian, was accused in an Information sworn on information and belief by Metchewais, a Councillor of Strike Him on the Back’s band:

...that Ka-nah-pic-a-nah-haw or the Snake Indian a Cree Indian of _______ band on the fourth day of October inst. at Strike him on the Back’s Reserve by force and against her will, feloniously ravished and carnally knew K, an Indian girl, a daughter of K-O-A-P a Cree Indian under the age of twelve years. I was told this by some who knew of it.

19 Francis Deschaw (1878), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file # 57.

20 Ka-nah-pic-a-nah-haw or the Snake Indian (1882), SAB A-G (GR 11-1) CR-Regina, 1st series, 1876 – 1886, file # 172. It is not clear from the file who K-O-A-P is; given that the mother’s name is somewhat different (see fn 22 infra), it may be that this is the name of K’s father. The names of these witnesses appear in the court file, and I have a record of them. I have elected not to use the child’s name, or that of her mother or grandmother.
At the trial of the Snake Indian, the girl described through the interpreter what the prisoner had done to her, and what she had done afterwards. The second witness was her mother:

I live at the Battle River Indian Reserve. Know the prisoner who is my present husband. The last witness is my daughter by a previous husband. She is past seven years of age. Recollect when Indians at the Reserve were lately paid, and prisoner sending the girl off for potatoes. Prisoner followed shortly after. Late on the same day I was told by an Indian woman called KNDT that prisoner had [violated?] the girl. I then examined the girl and found her privates injured and blood flowing. Prisoner at this time was away.

She then appeared to direct herself to the prisoner, perhaps in response to a question by him:

To Prisoner: I examined the child carefully. Prisoner never gave me anything for what he did. I never consented that prisoner should sleep with the girl, nor did he ever ask me to do so.

The third and final witness, KNĐT, testified that the girl was her grandchild and that she had found standing in water and crying: “I asked her what was the matter. She replied that prisoner had connection with her in the bush pointing to a bush near by. ... – I then told the girl’s mother.”

Someone, it is not clear who, must have contacted Councillor Metchewais, and perhaps even Chief Strike Him on the Back. The matter was brought to court, and it seems that the child’s mother was herself kept in custody until the trial. While Richardson’s

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21 In Richardson’s notes a last line of her evidence is crossed out: “When I got home soon after I told my mother.”

22 The entry in the Report of the Commissioner of the NWMP indicates that a witness named [KNNCM] was released on the same day as Ka-na-pic-a-nahon (Snake Indian) was convicted: Report of the Commissioner of the NWMP, 1882, Appendix D, p. 41. This witness may have been the child’s mother, who was described by an English name in the court file.
file does not indicate the disposition in the case, the annual Report of the Commissioner of the NWMP indicates that a prisoner named Ka-na-pic-a-nahon (Snake Indian) was convicted by Judge Richardson and sentenced to five years at Manitoba Penitentiary.

It may be that the Snake Indian was not a member of Strike Him on the Back’s band, given that his Band was left blank on the Information, which may also explain why Metchawais and KNDT each pursued the matter, and it may be also that the child’s mother was a reluctant witness which is why she was likely also held in custody. And, while the Prisoner appeared to have asked no questions of the child and the grandmother, he seems to have asked a question of his wife, which gave rise to her answer that she examined the child and she never consented to him sleeping with the child.

It is possible that the Snake Indian had not apologized to his wife and offered no compensation for the assault upon her child and the consequent injury to her. Or perhaps, his question to her addressed this; perhaps he had attempted a form of reparation and she had not accepted it or simply denied that it had been offered. And, clearly she denied that she had consented to his conduct.

Other Aboriginal peoples laid Informations before a justice of the peace or the stipendiary magistrate, including women complaining of mistreatment by men who were not their husbands. Sometimes, the accused was a husband or man with whom she had wintered; in other files, the accused is a prominent merchant (e.g. prominent Battleford merchant, J.B Mahoney\(^{23}\)) accused of indecent assault, or a member of the NWMP accused

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\(^{23}\) James B. Mahoney (1878), SAB A-G (GR 11-1) CR-Regina, 1\(^{st}\) series, 1876 – 1886, file #54. A woman named Mrs. Mary Hamblyn (who required a Cree interpreter) accused Mahoney of indecently assaulting her when she went to his store for some biscuits. She said he owed her some money. After she pushed him away, he gave her the biscuits. After he received her Information, Richardson sent a letter to Mahoney, indicating that the complaint had been filed, and asking whether he would come to his office. There is no disposition
of theft following “connection” for money. A Battleford man, William Williams, was convicted in 1882 of assaulting a woman described as “A certain Cree Indian woman know as Little Duck” and required to pay a fine of $5.00 and $4.50 to Little Duck. In NWMP Cst. James Ford’s case, the Informant, O-cha-nah-kis, told of his coming to her camp, “calling for a woman” and had paid her $1.00 for connection. She said he then returned and extorted $12.00 from her and her family. Although her identification of him was a bit shaky, as she said she was nearly blind, Ford was convicted of theft of the $12.00, and while the one hour in gaol he received as a sentence was insignificant, it was likely one hour longer than he ever thought he would spend in gaol as a result of his behaviour towards her.

In 1891, a man named Wa-Chin was charged with theft of a pony. The Informant was a woman named Swaspekeoke who deposed:

I wintered with the Defendant and when he left me he took the pony away with him. Five days after he went away I sent my little boy after the pony. When the little boy came home he told me that the Defendant would [not?] let anybody have the horse. Two days after the boy came home I saw Lemac and he brought me downtown and laid the information next morning. The horse now here in the possession of the police is my property.

Constable Andrews, NWMP, arrested Wa-Chin on Pasqua’s Reserve: “When I arrested him he was riding the pony.” For his part, Wa-Chin’s statement contained on the court file conceded:

24 William Williams (1882), SAB A-G (GR 11-1) CR Regina, 1st series, 1876 – 1886, file # 172.
25 James Ford (1889), SAB Coll. RG R1286, File #11.
26 Wa-Chin (1891), SAB Coll. RG R-1286, file #28.
27 Ibid.
It is true I took the horse away without asking for the use of it, but I intended to return the horse when I was done with it. I asked my little half-brother for permission to sell the colt, but that was neither here nor there.\textsuperscript{28}

The court file ends with a record of Wa-Chin’s plea of not guilty, and a note that “Horse restored to prosecutor.”

Swaspekoke and O-Cha-nak-kis turned to the law for assistance, and while the criminal justice ‘returns’ were modest, especially in the paltry sentence of one hour in gaol imposed on James Ford, each woman received restitution. Clearly Cst. Ford thought he could enter an Indian camp and take a woman “for connection.” -- a gendered and racist assumption and practice not unique to him.\textsuperscript{29} However, of greater interest is the expressions of agency of women in socially subordinate positions are clear, which neither denies their oppression, nor, arguably, supports the characterization of them as brokers of their own oppression.

3. An Aboriginal Jury of Matrons and Scholastique Cardinal’s Pregnancy (1882)

Here I explore, more tentatively, the extent to which the presence of “Aboriginal values” and “inter-communal norms”\textsuperscript{30} might be suggested in the court files. To do this, I consider Jeremy Webber’s exploration of “cross cultural community” and his argument

\textsuperscript{28} Ibid.

\textsuperscript{29} See Sarah Carter, Capturing Women: The Manipulation of Cultural Imagery in Canada’s Prairie West (Montreal & Kingston: McGill-Queen’s University Press, 1997) at 160 [Carter, Capturing Women].

\textsuperscript{30} Webber, supra note 2.
that "social orders are marked simultaneously by relations of power and relations of justice...,"\textsuperscript{31} which often permit "alliances across the cultural divide."\textsuperscript{32} For the purpose of this paper, I want to suggest that Webber's analysis can be applied to the "unequal inter-communal relations" in the North-West Territories. The norms invoked or applied in Richardson's court were not simply those imposed by the dominant social order.

But old norms and values also appear to have found expression and support in the criminal court. In 1882, Scholastique Cardinal, an eighteen year old woman of the western community of Lac La Biche (north of Edmonton), was charged with murder and concealment of birth of her newborn infant,\textsuperscript{33} following "an investigation" by the women in her community. The women deposed that they had noticed that she had a big belly over the winter, but no longer. And, there was no baby. When she was silent in response to their questions, one of the women grabbed her breasts and expressed milk, and only after this, did she take them to the side of the lake where the baby was found buried. The women took her head scarf and wrapped the baby's body in it, and laid the baby on the table in her house. The file contains the depositions of the people of Lac la Biche, and not a single NWMP officer. She was committed for trial, and pleaded guilty before Richardson. Her sentence was deferred. The entire process appears to have been driven by the women of Scholastique Cardinal's community. There is no mention of who the father might have been, and of course one wonders whether the husband of one of the 'jury of matrons' might have been implicated. In any event, the method of determining whether

\textsuperscript{31} Ibid. at 629.

\textsuperscript{32} Ibid., at 630.

\textsuperscript{33} SAB A-G (GR 11-1) CR-Regina, 1\textsuperscript{st} series, 1876 – 1886, file #145.
Scholastique had recently given birth to a baby was not one (arguably) that would likely have been deployed by the NWMP, had they ever become involved in the matter in the first place.

### 4. Linguistic and Cultural Interpreters and Interpretation

An often-repeated story in the historical literature of the 1885 Rebellion trials tells of Chief One Arrow’s response when the treason-felony indictment against him was read to him. Having heard the indictment which, when interpreted into his own language, accused him of knocking the Queen’s bonnet off her head and stabbing her in the behind, One Arrow is said to have asked the interpreter if he was drunk. One Arrow was offended, as he had never met the Queen, much less knocked off her bonnet.

Big Bear, who was also tried in 1885 on the same charge as One Arrow and Poundmaker, among others, had long been misunderstood. In 1876, he arrived at the Treaty Six negotiations at Fort Pitt, after Sweet Grass and the others at Fort Pitt had agreed to take the Treaty, and after the most experienced interpreter, Peter Erasmus, had left. Erasmus had emerged through the Treaty Six meetings as the most competent, respected and trusted interpreter; his assessment, for instance, of Peter Ballendine (who had been retained by the Treaty Commissioners to act as one of their interpreters) was that Ballendine had neither the command of the Cree language nor the rhetorical skills to interpret and convey the complex legal concepts that were involved in the Treaties.

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34 Stonechild & Waiser, supra note 16; Beal & Macleod, supra note 16.
35 Peter Erasmus, Buffalo Days and Nights As Told to Henry Thompson. Introduction by Irene Spry (Calgary: Glenbow Alberta Institute, 1976) at 241; see also Deanna Christensen, Ahitakkakoop: The Epic Account of a Plains Cree Head Chief, His People, and Their Struggle for Survival 1816 – 1896 (Shell Lake, Sask.:
Bear's words to Alexander Morris may have been interpreted by Peter Ballendine, and it is
now generally accepted that his meaning was not conveyed properly. At one point, he said
to the Commissioner that he feared the white man's rope being placed around his neck;
this was conveyed to and understood by Morris to mean that Big Bear feared the death
penalty, rather than the yoke of indenture and the loss of freedom. While the idioms and
metaphors of the Cree language, and customary practices and courtesies, were likely lost
on Morris, Big Bear's analogy of the treaties as bait for a trap was likely well enough
conveyed and understood by both of them.

That many Aboriginal people appear as witnesses in the Richardson records is not
particularly surprising; however, given the legal and cultural issues involved, the
paucity of legal scholarship in the area of linguistic interpretation, including issues of
cross-cultural interpretation is more surprising.

The receipt of their evidence posed two major challenges, one which might be
categorized as linguistic, and another which went to the issue of their competency as a
witness. In this part, I consider the issues raised by aboriginal witnesses, their interpreters, and the interpretation of Aboriginal culture in court.

A challenge of considerable proportion is the issue of transcription of the interpreted statements or depositions in the court files. When an Aboriginal deponent spoke in Cree or Saulteaux, for instance, we have no record of what was actually said. The records contain transcriptions that surely involve both cultural and linguistic forms of interpretation. Every level was surely fraught with uncertainty: many of the concepts and phrases relevant to an Anglo-Canadian criminal legal process had no correlation in the indigenous languages; the frailty of the interpretation (especially when the first language of the interpreters was not the Aboriginal language); the standing of the interpreter, the transcription of the interpretation by a court official. And, in addition to the questions of the text, contextual questions of how the Aboriginal deponent or complainant came to be in court and the personal and inter- and intra-community relations that may have been important and relevant must not be forgotten.

The most prominent Cree interpreters in the early records were Peter Erasmus, NWMP Cst. Washington Brazeau, William McKay, Pierre Daignault, Louis Laronde, and Peter Ballendine, and later in the south, Peter Hourie. Ballendine, of Battleford, in particular, emerges as a man of influence — although, as I have indicated above, his ability to interpret more than ordinary conversation was questioned by Erasmus at the time of the Treaty Six negotiations\(^39\) — not only does he appear as a sworn interpreter, but also as informant/prosecutor and witness in a number of files, described variously as merchant,

\(^{39}\)Erasmus, supra note 35 at 241.
mail contractor, and Crown timber agent. He was also later employed by Edgar Dewdney as a special agent or informant (some say, spy), and he was one of the witnesses for the Crown against Poundmaker in his 1885 treason-felony trial (although apparently he testified that Poundmaker took no part in the ‘sacking’ of Battleford). Ballendine and Hourie were certainly Métis, which is likely the case for the other interpreters named above. From time to time, justices of the peace complained about the difficulties they encountered in finding a suitable interpreter, and then, of course, in the end the files contain only the English words ascribed to the Cree, Assiniboine, French, Sioux witnesses. Occasionally, as I will discuss below, the actual Cree word, for example, is reproduced in the transcript, as well as the discussion of its (possible) meaning.

Interestingly, there were few challenges to the competency of “non Christian Indians” to testify. Richardson seems routinely to have followed the procedure set out in the Indian Act, and then proceeded to receive their evidence. For instance, in the trial of

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40 In the six court files in the early period in which he appears as Informant, he is described variously as “merchant” (Ernest E. Wood, (1877), SAB file #3 (an enforcement of a debt matter); the government timber agent (1878) Peter Boyer, file # 27 (charged with theft of timber; convicted and fined $1.00 & costs), William Turner (1878), file # 47 (unlawfully cut timber on Dominion lands; fine of $1.50 & $2.50 costs), Louis Sayer (1879) file # 66 (theft of timber; i.e. Cutting timber without a licence; convicted and fine $1.00 and $8.00 in costs (including costs of the interpreter); as property owner when he charged Robert Saunders in 1880 (file #82) with breaking and entering and theft at his home in Battleford (no disposition); mail contractor (Joseph Alexander, (1883), file # 180 (charged with abandoning the mail; prosecution allowed to be dropped and accused discharged after the accused offered an explanation and received a caution; Ballendine is listed as representing the Crown in this case).

41 See Beal & Macleod, supra note 16 at 314.

42 Ballendine, a former HBC employee, who arrived in 1874, was one of the first settlers and merchants in Telegraphs Flats, which later became the Battleford townsite. He served as an interpreter for Alexander Morris during the Treaty Six Negotiations in 1876, as ‘secret agent’ for Lieutenant Govern Dewdney, and as a witness for the Crown in Poundmaker’s trial in 1885. See Arlean McPherson, The Battlefords: A History (Saskatoon: Modern Press, 1967 at 35-36; Beal & Macleod, ibid. at 119-120; E.Brian Titley, The Frontier World of Edgar Dewdney (Vancouver: UBC Press, 1999) at 62; Morris, supra note 16 at 196.

43 The Indian Act, 39 Vict. (1876) c. 18, ss. 74 - 78 governed this process. Section 74 permitted the receipt of evidence on the affirmation to tell the truth:

....it shall be lawful for any court, judge, stipendiary magistrate, coroner,
the Snake Indian in November 1882, three Cree witnesses, including a young child, gave evidence through interpreter Louis Laronde at the trial before Richardson. The child witness, K, was described as “non English non Christian Cree Indian girl; her mother was also described as “non English speaking Cree Indian who appears destitute of the knowledge of God and of any fixed and clear belief in religion;” the third witness testified that she was the child’s grandmother. The evidence of all three witnesses was received after they were “cautioned” pursuant to the Indian Act.

In 1902, Tom Lemac, described in court as “a Christian Indian who formerly went under the name of Wingegee,” was tried with the 1894 shooting death of Oskinaway (also named and referred to in the court file as Josiah Matoney). The evidence was Lemac had last been seen a few days after Oskinaway’s death, and then had been in the United States until his arrest eight years later. There were no witnesses to the shooting and there was no direct evidence that Lemac had shot the deceased man. One witness testified that he had seen Lemac and Oskinaway leave Fort Qu’Appelle on horseback on the September evening that Oskinaway was shot. The wounded Oskinawy was found alone near the trail the next morning, and was taken to the nearby home of William and Elizabeth Daniels, where he died. Elizabeth Daniels testified that she had heard two people passing by late at night, talking in Saulteaux in an angry manner:

44 Ka-nah-pic-a-nah-haw, or the Snake Indian (1882), SAB, A-G (GR 11-1) CR-Regina, 1st series, 1876 - 1886, file # 172.

45 Tom Lemac (1902), SAB Coll. RG R1286, file # 266.
I could not take up their words but still it is easily known when people speak angrily with each another she speak roughly. I understand Saulteaux. I could not hear what was said but I knew they were angry.

There was also evidence that Lemac returned in the morning looking for his friend.

The theory of the Crown was that Lemac blamed Oskinaway for the death of his sister. The Crown’s case rested largely on the evidence of Cree/Saulteaux witnesses who spoke to Lemac and who saw him shortly after the man died. The defence counsel objected to the receipt of the evidence of these Crown witnesses. The following exchanges during cross-examination of Crown witness, a woman named Aka Moose, after she had been ordered sworn as a witness by Judge Richardson.

Q. You say you believe in God. What kind of God?
Witness: I believe in the God the white people pray to.
Q: What do you know about that God?
A: The reason I say so is that the white man prays to a god and are always prosperous and get on well.
Q: What has that God done for you?

His Lordship: You are going too far. If anybody has done wrong it is myself and you have your redress against me if I have done wrong.

The transcript reveals Richardson’s impatience with the defence lawyer’s insistence upon challenging each of the ‘non-Christian’ witnesses, asserting that he had been following the same practice since 1877, and reminding the lawyer, “I may just as well say that I have taken a little trouble in looking this matter up in English law ... .”

In addition to the issue of the competency of the Indian witnesses to testify, Lemac’s trial revealed important issues of linguistic and cultural interpretation and their
arguably inseverable connection. At the heart of the matter was the meaning of the words Lemac had spoken to the witnesses on the night, eight years earlier, when Oskinaway was shot. Aka Moose testified that about eight years earlier, he had come into her tent where she had been camped beyond Star Blanket’s Reserve:

Aka Moose: I heard Tom Lemac say when he came into the tent “I think I have done wrong.” In Cree when anybody talks like that we get afraid. We know he has done something very bad.

Q: What else did he say?

A: When he came to the tent the fire was a little low. We were in bed but not asleep. He said “Are you all asleep?” Then he said “I think I have done something very wrong.”

Q: When he said “Are you all asleep?” Did not any one answer?

A: Yes I said I was not asleep. He said “I fired two shots at him and I think I have killed him.” I then asked him Whom? He named the man and said Oskinaway.

The witness, Kakoom, described as a Cree Indian woman, whose sister, Peewusk, was married to Wingegee, testified that she heard him say: “I fired two shots at Oskinaway and I think I may have killed him.”

Q: Did he use the word murder?

A: He said “I think I have killed him.”

Q: Did he use the word murder?
A: Yes, that was what he said.

Q: What was he then saying?

A: He said "I killed Oskinaway.

Q: What was he saying when he used the word murder?

Interpreter: Kill and murder are the same word in Cree.

Peter Hourie, the court interpreter was then sworn as the last Crown witness to give evidence as to the meaning of the Indian words.

Q: During the evidence of several witnesses the expression "I have done wrong" was used. What is the Indian word for "wrong"?

A: Ne-mi-ye-too-tin.

Q: The meaning is?

A: That he has done wrong.

Q: What is the Indian word for "Killed"?

A: NeNepaha, that is the Cree, the Saulteaux is Ginesah.

Q: The interpretation of the word "wrong" has the same meaning as in English?

A: Not with the Indians.

Q: What is the meaning of the word with an Indian?

A: He might have stolen or killed and is the first expression he would use in his language to relate what he had done.
His Lordship: What you mean is that when an Indian uses the expression “I have done wrong” he means he has committed a crime.

A: To that effect.

Q: When the word “killed” follows “I have done wrong” what meaning has the word to an Indian?

A: There is no word for murder. I cannot find a word for it. The two expressions taken together mean I have committed a murder, the two expressions “I have done wrong” and “I have killed my fellow Saulteaux”.

When pressed by defence counsel on cross examination, Hourie maintained there “there is no word for murder in the Indian language.” Lemac, a former interpreter, guide and assistant for the police, was convicted of murder and sentenced to death. His sentence was commuted to life in prison. It appears that he was about sixty-five years of age at the time of his conviction.

I wish to make two points here. First, the express consideration in Lemac’s trial of the meaning and interpretation of language, of concepts from two different cultures, offers supportive evidence for my ever present concern that the interpreted and transcribed words

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46 This continues to be an issue of relevance: See, e.g., Patricia Monture-Okane, “Reclaiming Justice: Aboriginal Women and Justice Initiatives in the 1990s,” in Royal Commission on Aboriginal Peoples, Aboriginal Peoples and the Justice System, Report of the National Round Table on Aboriginal Justice Issues (Ottawa: Minister of Supply and Services Canada, 1993) 105 at 121.

47 Lemac was likely the man to whom Swaspekoke (whose case I discuss in this chapter, infra) complained that Wa Chin had taken her pony, and who took her to the justice of the police.
of the Aboriginal deponents may or may not represent their original meaning. Without the original words in their original language, we are left with imperfect sources and, inevitably, imperfect understandings.

The second point to be made concerns the issue of the interpretation of culture, and by whom. In Lemac’s case, the Indian witnesses time and again attempted to explain the significance of a symbol, a gesture, a measure of time, to the judge and jury. This is what Mrs. Aka Moose seems to have been doing when she said, “When an Indian says this ...” While it is a distinct and unsettling possibility that Peter Hourie was editorializing in his interpretation, it nonetheless appears that the Aboriginal witnesses were attempting to make their culture understood. For instance, in responding to a question that implied that a conversation must have taken a long time, a witness answered, conveying the courtesy expected to be shown when listening to another:

Q: How long was he with you?
A: It would be about an hour. When Indians meet like that we listen till he is through and then we separate.

Or, when asked in cross-examination about the effect of liquor upon Indians, Bazil Mozine offered an explanation as well as a gentle reminder that, in his experience, liquor also affected the behaviour of white men:

As far as I know about this liquor business let a man be ever so quiet and if he gets full of drink it makes him foolish and he loses all memory of what he does. It has a little of that effect upon white people. I have known certain white person and when he got drunk

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he wanted to fight me but when he was sober he was very quiet.

4. Gendered Relations in the Criminal Court

The analysis of criminal law as a gendering practice is not a dominant theme within Western Canadian legal history and thus Lesley Erickson’s recent contributions to the field are a welcome addition to our knowledge of the area. Erickson’s research covers a longer period (1889 – 1940) and is based on a sample of court files from select judicial districts in Manitoba, Saskatchewan and Alberta.

We share common ground, address many of the same issues, and draw up some of the same court files from the Richardson records, (e.g., Motow (Gopher Tom), George Evense, Pierre Bourassa) but her work encompasses as well as some prominent cases and practices from the other jurisdictions. Referring to three such cases (those of the 1899 murder of Rosalie, as well as the murder trials and executions of Lawrence Gowland in 1907, Earl Nelson in 1927) Erickson concludes:


50 (1889), SAB Coll. RG 1286, file # 6.

51 (1890), SAB Coll. RG 1286, file # 21.

52 (1892), SAB Coll. RG R1286, file #39.
[These] cases enhanced the influence of racist, nativist, and classist ideologies in the West; they also reinforced the patriarchal nature of prairie society by serving as cautionary tales that encouraged women to limit their social interactions and sexual relationships to me within their own race and class. Newspaper coverage of the trials and criminal investigations instilled in women an exaggerated fear of the city, and more generally, the public sphere. ...Newspapers and the police warned women to be aware of “strange-looking men and to stay off the city streets [of Winnipeg and Calgary].”

Erickson is concerned with, among other things, the representation of Aboriginal men and women, victims and accused, in the criminal courts and in the press. She is interested in demonstrating how different ideologies informed legal and public accounts of Aboriginal crime and how these in turn shaped popular understandings and attitudes. For instance, she notes that prairie judges (Rouleau, Macleod and Richardson alike) emphasized the “need for inter-racial equity” in cases where Aboriginal women had been victims of violence, such as murder and sexual violence. She quotes Rouleau’s charge to the jury in a case that came to be known as the “Rosalie” case (in which a white man had been charged with the brutal murder of Rosalie, an Aboriginal woman): “forget the woman’s race and consider only the evidence at hand,” reminding the jury that “it made no difference whether Rosalie was white or black, and Indian or a negro. In the eyes of the law, every British subject is equal.”

Despite the lofty language, Lesley Erickson, “Murdered Women,” supra note 49 at 113-114.

Ibid., at 98.

This was not exactly the position Rouleau took in 1885 when, in the aftermath of the North-West Resistance and the murders at Frog Lake, he convicted and sentenced the Cree and Stoney men for murder. In her dissertation chapter, “Queen’s law,” she quotes Hugh Richardson in an almost verbatim statement: from an 1890 rape trial in Regina: In 1890, Hugh Richardson charged to the jury in the trial of George Evense, a German immigrant accused of raping a young Métis woman: “So long as a woman – be she
Erickson argues that misrepresentation, racist stereotypes and persecution better capture the experience of Aboriginal women in the West in her period.

It is impossible to consider the nature of the contribution of Canadian state policy to the social position of Aboriginal women historically without considering the work of Sarah Carter. Carter situates Western Canada squarely within policies, practices and discourses associated with colonialism, characterizing the North-West Territories as a “colonial dependency of Ottawa.” She argues that the “fundamental features of colonialism were clearly present in the extension of the power of the Canadian state and in the maintenance of sharp social, economic, and spatial distinctions between the dominant and subordinate population.” By way of illustration, Carter points to the “segregationist policies toward the Aboriginal population,” and the manner in which these policies constructed Aboriginal women as “dissolute, dangerous white or black, Negro, Indian or Caucasian – conducted herself properly she was as much entitled to protection as the highest lady in the land.”


57 Carter, Capturing Women, ibid. at 20.

58 Ibid., at 19.
and sinister.” An image of Aboriginal women as immoral emerged, with the active promotion of Canadian officials. Carter is careful to point out that these sentiments and representations were not held universally; indeed, she points to the often good relationships, including marriage, which members of the NWMP enjoyed with First Nations women on the Prairies. While she notes that some Aboriginal women experienced violence at the hands of their Mountie husbands, she also recounts how Supt. W.D. Jarvis was “hastily dismissed” from the Force after a public assault upon his Sioux wife.

Both Erickson and Carter illustrate the important role of Indian officials in this racist colonial process, and Erickson has argued that statements such as those attributed to Rouleau and Richardson only reinforced public perceptions of racial difference. Carter is mindful that the Canadian state was not of a piece, and I want to join her in this and pursue it. It is important to identify the sites and levels of Canadian state policy, the on the ground officials in the Territories and the Ottawa politicians, and their local senior bureaucrats such as Edgar Dewdney. In many ways, the Indian agents were the most powerful people in the lives of Aboriginal women, and their mandated excesses and ‘iron hands’ were the source of much strife and hardship.

But what of the role of the criminal court? In this context it is, arguably significant that a different “colonial” discourse emerged from the white men on the Bench. As I will illustrate below, Richardson deployed language “elevation”

59 Ibid., at 159.
60 Ibid.
and "civilization" when describing the role of Indian Industrial schools in the lives of Aboriginal girls. Roman Catholic priests, such as Father Joseph Hugounard, intervened when they believed that their students had been raped or sexually exploited and cast aside.\(^2\) This was no less an expression of colonialism, and yet in its form, it was an expression that Aboriginal girls and women were entitled to protection by the law. Richardson was harsh in his language, and he could be harsh in his sentences, in relation to Aboriginal men who were to seen to be dragging Aboriginal girls and women down, but he also convicted a Mounted Police officer who engaged in similar activity.

In sum, inspired by the nuances found by Carter, I turn to this contradictory and paradoxically ideological practice and relation: the criminal law's gendering practices in the North West Territories.

The relations expressed in the court records suggest some of the ideological themes identified by Erickson and Carter. Certainly there are files in which Aboriginal women appear to have been badly treated by white men including, including as I have discussed earlier in this chapter, NWMP Constable James Ford who came to a Cree camp outside Regina, kicking tents and "calling for a woman" and who was convicted of theft from the woman who obliged him.\(^3\) On February 18, 1878, John Smith was tried at Fort Carlton before Justice of the Peace Lawrence Clarke on a charge of common assault (with intent to commit adultery).\(^4\) Madeleine

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\(^{01}\) Ibid. at 180-181.

\(^{02}\) Baptiste Robillard (1898), SAB Coll. RG 1286, file #184; Thomas Desjarlais, the younger (1900), SAB Coll. RG 1286, file #228.

\(^{03}\) James Ford (1889), SAB Coll. RG R1286, file #11.

\(^{04}\) SAB, A-G (GR 11-1) CR-Regina, 1\(^{st}\) series, 1876 – 1886, file #24.
Wallace’s husband appears to have been an animating presence in the prosecution, although he was not named as Informant. Her evidence was given in Cree and interpreted by William McKay, who was sworn as Interpreter. Mrs. Wallace testified that John Smith had come to her house on the previous Saturday and told her that her husband was jealous of him last fall and asked her if she would sleep with him and told her that he would give her all the money that she wanted.” Mrs. Wallace characterized his behaviour as an “improper advance.” She apparently sent for her husband, who reported to the justice of the peace Smith had persisted in offering his wife money, troubled her a great deal before she was able to get rid of him, and when he returned that night, she bolted the door and refused him entry. The evidence at trial appears to have addressed the “improper advance” rather than assault (indeed the evidence at trial of an actual assault is thin). Indeed, the most forceful evidence of an assault is contained in a letter sent by the Justice of the Peace to Stipendiary Magistrate Richardson before the trial itself.

Smith was represented by Hayter Reed then of Prince Albert. The theory of the defence was that Smith had come to her home at her invitation, that she was a woman of little virtue, and that he was a good man. The recorded responses of Mrs.

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65 He also acted as the prosecutor in a subsequent case in 1882 in which Madeleine charged that William Mitchell and William Peterson had attempted to rape her. SAB A-G (GR 11-1) CR-Regina, 1st series, 1876–1886, file # 144. The prisoners were committed for trial, but released on bail. The matter seems not to have ever gone to trial.

66 Lawrence Clarke outlined Mr. Wallace’s story and requesting that a policeman be sent if Richardson considered “it right to have the man arrested.” Apparently, this was not Richardson’s view, as Hayter Reed served the summons upon his client.

67 Hayter Reed later became Indian Agent for Battleford, Assistant Indian Commissioner and later Commissioner of Indian Affairs. He was also appointed to the North-West Territorial Counsel. His nickname among the Cree, Saulteaux and Stoney people of the Battleford area was “Iron Heart.” See Walter Hildebrandt, Views From Fort Battleford: Constructed Visions of an Anglo-Canadian West (Regina: Canadian Plains Research Center, University of Regina, 1994), photographic entry after p. 86. I have discussed his role as a legal professional in Chapter Four.
Wallace to his cross-examination, most of them negative, illustrate the line of questioning that Reed pursued, and her rejection of the answers he was suggesting:

He visited me twice before I made this charge. He made improper advances on his previous visits. I do not know what his errand was to my house when he made the improper advances or if he had any errand. I did not meet Smith two days before to invite him to visit my house. I did not ask Smith why he did not visit me. There was no person present when Smith was in my house. I never asked him for ear rings or jewelry as presents. Smith offered me no dress or any other article on that day. I did not ask him to come and see me when alone. Do not remember seeing or speaking with Smith with a week of making this charge.

The theory of the defence was developed further the testimony of one witness for the defence William Giles of Duck Lake, blacksmith, who testified:

I have known the prosecutrix nearly four years. I met her first on the plains. I know of my own knowledge that the woman was of bad character then. I would not estimate her character highly now. I think that any one going to her and making arrangements [to?] could have improper intercourse with her – I saw her cohabiting without the man on the plains – I know the defendant since last fall – he is of good character as far as I know.

The Justice of the Peace appears to have pressed Giles on this, as in response to questions by the Court, he admitted that he had first met Mrs. Wallace when she was single, and conceded "I know nothing against the woman’s character since she has been married." The defendant, being duly cautioned by the J.P. made the following statement under oath in which he acknowledged calling upon Mrs. Wallace and indeed the conversation in which he told her that Mr. Wallace was jealous of him:
At one time I met her she asked me why I did not come to visit ... . I told her that her husband was jealous of me and I did not wish to make any trouble between her and him. She replied that she was not afraid of her husband. Some few nights afterwards I called in to her place. She and her brothers were there. She said there was not much chance for conversation then. She invited me to call upon her when she would be alone two days later. I called according to her invitation and she asked me if I had any more ear rings and said that she owed me for a pair since the fall. She said would like a dress of [???] and I told I would give her money to purchase one. She refused to accept the money.

Smith was convicted at trial by Lawrence Clarke, JP. The less than novel defence strategy of impugning her character, while celebrating his, proved to be unsuccessful. He was fined $5.00, and required to pay $9.20 in costs.

In the Richardson records, the lives of children, regulated primarily by family, or the church and industrial school in the case of Aboriginal children, can be seen, together with the presence of child labour and the vulnerability of girls in domestic service. For young girls on the nineteenth century prairies, a distinct sense of place in combination with the form of the criminal law shaped their experience and ensured that boys and men who assaulted them in barns, stables and hay lofts or alone in their houses while their mothers or employers were away, could usually do without fear of sanction. It must have been as much an empowering experience for such men as it was disempowering for girls – but one instance of criminal law as a gendering practice.

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69 Including $2.00 for the interpreter’s fee.
However, not every man who sexually interfered with a little girl walked free from Richardson’s courtroom. Richardson appears to have been quite prepared to convict when he felt the law (and the evidence) allowed him to do so.

As I have discussed in Chapter Two, he expected a certain standard of behaviour from men, as he reminded Pierre Bourassa on July 8, 1892, when he sentenced him to the mandatory minimum term of five years and twenty stokes of the cat’ o’-nine tails, following his conviction by a jury for unlawful carnal knowledge of Adelaide Trottier, a girl under the age of fourteen. The jury had recommended leniency. As he sentenced Bourassa, he revisited the theme emphasized by Lesley Erickson above, which bears repeating here:

The Schools like the Industrial School where she has been for the last 6 years were established for the purpose of elevating these girls and putting them in a position where would become perfectly civilized and or removing any distinction between as we may say their colour and that of the whites and if ever there was a duty incumbent upon a young man even if she had on that night asked you to cross the prairies with her it was your duty above all to have avoided anything wrong even if she had proposed it herself.

Adelaide Trottier had been educated at the Industrial School in order that she might be elevated from her [Aboriginal] station, and thus become “perfectly civilized” and remove any distinction between her and a white woman. It appears that as far as Richardson was concerned, even if she had acted in a way that cast doubt on the

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70In 1892, unlawful carnal knowledge with girls under the age of fourteen carried a minimum sentence upon conviction of five years. By 1893, following the introduction of the 1892 Criminal Code, the minimum sentence was repealed, and an individual convicted was liable to imprisonment for life and to be whipped. This offence was similar to that of rape, but different in one important respect: lack of consent was not an essential element of the offence. Thus the scope of protection promised by the form of the offence was wide. The scope of protection to older girls was narrower: it was also an offence to seduce girls between the ages of 14 and 16, but only if they were of previously chaste character. However, Parliament effectively nullified any protection by virtue of the corroboration requirement.
extent of her elevation and civilization that was no excuse for Bourassa. He had a duty to avoid anything wrong, even if she had asked him to “cross the prairies with her.”

While the racialized, indeed racist, conceptualization of Aboriginal girls as uncivilized is undeniable, and Bourassa, like the Snake Indian and Motow (Gopher Tom) before him, is another Aboriginal man sentenced to lengthy terms of imprisonment for convictions for forms of sexual offences, it is also the case that young Aboriginal girls fared better than young white girls – at least in terms of the result in court. The protection afforded them was dwarfed by the government led assault on their communities and their way of life – clearly endorsed by Richardson; however, it also the case that in his court, he attempted to level the terrain, to inhibit expressions of male sexual prerogatives, and to send the message when he could that young girls were not to be interfered with. From Madeleine Wallace, to the child, K, Ochakanakis, Harriet Thorne and Adelaide Trottier, among others, some Aboriginal girls and women secured some modest redress in the Court from the men who had abused them.

A later case from the south illustrates a somewhat different set of gendered, and possibly inter-communal, relations. In mid-November, 1901, a Sioux woman informed a staff sergeant of the North West Mounted Police at Wood Mountain that her husband, Ce Tan, had left his camp and gone off with another woman. Ce Tan was charged with deserted his family. His wife’s deposition appears not to have been taken down by the justice of the peace, so we do not know her name or even her own words through an interpreter. But, Staff Sgt. Watson deposed that the man’s wife had
...stated that she had no food for herself and two children and being left
alone with these two children she was unable to support them. First she
was afraid to leave them alone in the tent while she went out to work,
and secondly she was in an advanced state of pregnancy, about seven
months gone, and unable to do any hard work.

It appears that Ce Tan’s wife worked as a cleaner for the NWMP, as Watson further
deposed that he himself had observed her inability to do heavy work: “I know this latter
statement to be a fact as coming here to work she was unable to finish the work and had to
go home and leave it.” Staff Sgt. Watson was unable to locate Ce Tan as many stories
were reported as to his whereabouts. On November 29, on his way to the Willow Bunch,
Staff Sergeant Watson was stopped on the trail by a woman, Mrs. Bokas: “she stated she
wanted her daughter recovered who had run off with Ce Tan. She also informed me that
she had reason to believe that Ce Tan was living with her daughter as man and wife at the
Willow Bunch.” When he arrived at the Willow Bunch, Staff Sgt. Watson told a constable
to go to the Indian camp and tell Ce Tan to return to his wife and family, which the
constable said he did do. Upon his return, the staff sergeant was approached by “Bocas Sr
and his wife” and asked again to endeavour to recover their daughter for them.

Further evidence before the justice of the peace was provided by Fred Brown of
Wood Mountain who indicated that after Ce Tan went away, his family came to Brown’s
place and Brown gave them something to eat. Brown stated that he had known Ce Tan for
twenty years, but could not say that “he is married to the Indian woman”—“only that he
lives with her.” Another deponent was a man named W.H. Ogle:

Well about the time that Ce Tan went away Mr. and Mrs.
Bokas came to me and told me that they wanted to get their
daughter back and what was the best way to go about it. I
told them to
come up to the police post and apply to Dr. Watson through
the Gov’t interpreter which they refused to do and several
days afterwards kept bothering me with the same complaint. They informed me that they considered that they had some claim to my services, it being chiefly through my representations that they sent some of their grandchildren to school, and they considered that being one of the few Indians who had obeyed the wishes of the Govt. in that respect that the Law ought to protect them in the case of their daughter. I went with them and reported to Dr. Watson that they wanted their daughter taken away from Ce Tan.

Ce Tan ultimately returned home under what is described in the court file as “police escort” to face an information that:

...from Nov 13th 1901 until Dec 8th Chaton Sioux Indian in company with Lilla Bokas did visit Willow Bunch & during that time did leave his wife and two children without providing the necessaries of life for them and his wife being in an advanced state of pregnancy he did thereby endanger her health.

When given the opportunity to make a statement at the hearing before the justice of the peace, Chaton is said to have stated: “I am sorry for what I have done and did not understand that I was doing any wrong.” Ce Tan, or Chaton, was committed to stand trial at the next sittings and he was released from custody pending trial on a recognizance signed by W.H. Ogle.

This case may appear to be simply another unreported case, of limited legal significance, and certainly of no precedential value. Indeed, it is not even clear whatever happened, legally or otherwise, to Ce Tan, for although he was committed to stand trial at the next sittings of the NWTSC in Regina, the Court documents contain no endorsement of the Supreme Court justice. There is no record that he ever appeared at court in Regina.
The statistical information contained in the crime reports of the annual Report of the NWMP for 1901 and 1902 reveals that one case (same offence as CeTan) was dismissed.\textsuperscript{71} CeTan's case suggests another modest instance of inter-communal relations, if not norms with different forms of demands and expressions of entitlement to be found. CeTan's wife had been left, and although the formal charge against him relating to his failure to provide her with the necessaries of life, it also appears that the parents of the woman with whom he had gone off were an animating presence in the criminal process. They may not have had a legal claim to the intervention of the police but they appear to have articulated a moral claim, expressing an understanding that the white community owed them something for their loyalty.

5. Conclusion

The focus of this chapter has been on another aspect of the engagement and relationship between Plains Aboriginal people and Canadian criminal law in the last quarter of the nineteenth century -- cases in which Aboriginal people participated as Informants, complainants and witnesses.

In this chapter, I have demonstrated that First Nations leaders, especially in the earlier period, made demands on the law and the police. I cannot say whether they went to the law because they regarded this as an obligation owed to them under the Treaties or simply because the police and the magistrate represented the new way. The fact and implications of Treaty rights and obligations appear to be implicit in some of the cases. For

\textsuperscript{71} The entry Criminal Docket Book for the Supreme Court of the North-West Territories indicates only the
instance, it does seem that Is-pinik-hah-kee-toot was of the view that the police were there
to help him deal with his "non-treaty" brother-in-law who time and again made off with his
late father's horses. The Cree Chiefs and Councillors who acted as Informants, or who
appeared to be supportive of the investigation or prosecution, were advancing the interests
of their band members or the band more generally. Admittedly, Beardy, Chief of the
Willow Crees, was taken to law more often than he went to law, and it is a testament to his
obvious abilities that he appears never to have lost in court. Even Poundmaker's disputed
horse race involved more than his individual loss and complaint. The broader community,
including those who placed wagers on the race, was affected.

Poundmaker's horse race addresses another important issue, that of
inter-community or inter-communal relations. On the basis of my research into the NWT
court records, I argue that it is at best premature to speak of the criminal law and criminal
court as the site of inter-communal norms. But I am interested in relations and
relationships, and the court records discussed in this and other chapters are suggestive of a
fair degree of interaction and communication between the First Nations and the newcomers.
And when these relations were strained or ruptured, as happened with Francis Deschaw,
John Ballendine, James B. Mahoney among others, aggrieved Aboriginal persons,
including Aboriginal women, turned to the criminal law for assistance. Indeed, it is clear
that different forms of intra-community and inter-community matters began to be taken to
court. The Snake Indian's case, Scholastique Cardinal's jury of matrons and Mr. and Mrs.
Bokas' concern about their daughter who had gone off with another woman's husband,
appear to have emerged from within a particular Aboriginal community. However, some of

date that the documents were received at the Court.
the cases discussed earlier in Chapter Four also demonstrate that different forms of inter-community matters began to be taken to court -- as between Cree and Assiniboine neighbours in William Wolf’s complaint against the three men of Chief Mosquito’s band, or between the Cree and Blackfoot nations, in the case of The Only Mountain complaint that his horse had been stolen by Running Crow’s (Cree) son. The Snake Indian’s wife also reminds us of the protocols followed by her people when someone injured or hurt another: her husband, the prisoner, had given her nothing for what he had done to her daughter.

The layers of mediation of the voices are many, and certainly the enormity and complexity of issues of linguistic and cultural interpretation are presented in Tom Lemac’s murder trial. And yet, even through the arguably controversial role and interpretation of Peter Hourie in the trial, we meet Aka Moose and Basil Mozine appearing to do their best to make important things understood by the white judge and jury.

It is of course the case that the numbers of First Nations Informants dropped off considerably after Richardson moved south to Regina. This may have been a matter of demographics, related to the creation and new status of the new NWT Supreme Court, or influenced by the events of 1885, after which time (as I have shown in Chapter Five) the First Nations people were on more of a defensive footing in relation to the criminal court.

I do not suggest that the history of the relationship between the First Nations and Canadian criminal law be recast as a vindication of the rule of law because some appeared to participate in ways other than as accused persons. But, as I have argued throughout this dissertation, a fuller and deeper account of this relationship is made possible by broadening the scope of inquiry beyond a focus on accused persons or through the lens of criminalization, and this is what I have attempted to present in this chapter.
Conclusion

If we suppose that law is no more than a mystifying and pompous way in which class power is registered and executed, then we need not waste our labour in studying its history and forms. One Act would be much the same as another, and all, from the standpoint of the ruled, would be Black. It is because law matters that we have bothered with this story at all. ...It is only when we follow through the intricacies of its operation that we can show what it was worth, how it was bent, how its proclaimed values were falsified.¹

Criminal law is generally understood to be the perfect expression of a coercive legal form, expressing as it does the power of the state to criminalize, to enforce, and to punish. This dissertation, concerned with Canadian criminal law on the nineteenth-century Aboriginal Plains, has argued that even this coercive legal form is replete with contradictions that challenge its ascribed quintessence. That criminal law enforces and reinforces relations of inequality is undeniable. However, that criminal law also mediates and legitimates these relations, and may inhibit the powerful and afford some protection to those with less power -- even in contexts of colonial domination and gross substantive inequality -- has been a central argument.²

I have argued that the criminal law that was dispensed in ordinary lower courts, such as Hugh Richardson's trial courts, has been overlooked by legal historians interested in the relationship and experience of First Nations people with Canadian law. I have


² My indebtedness to Thompson, ibid. at 266 continues.
attempted to demonstrate that ‘low profile’ cases in this lower court allow one to develop a fuller understanding of the dimensions and complexity of that relationship and experience.

To the extent that legal historians characterize the experience of Aboriginal peoples in relation to criminal law as one of being criminalized, it is essential to examine the legal forms that are seen to give rise to this characterization. For the most part, and I find this interesting, the laws that have been identified as criminalizing Aboriginal peoples and their practices are hunting, fishing, liquor, and the anti-potlatch/anti-dancing laws. To the extent that Indian Act offences are implicated in this list, the result is that the Indian Act is understood as criminal law. Why? Because the provisions regulating or prohibiting some forms of dances created offences with punishment, including custodial sentences, upon conviction. This, then, collapses the Indian Act into criminal law, and renders less visible two important developments: first, the increasing coercive nature of the Indian Act, and the correspondingly increased nature of the power and authority of Indian Agents. Of equal importance, the actual extension of criminal law over aspects of social and economic life is also rendered invisible.

The “criminalization” thesis neglects this important aspect of the “criminalization of the Indian Act” – the increasing judicial power of the Indian Agents. The 1876 Indian Act was silent on this, but in 1881, the Indian Commissioner and senior Indian department officials, including Indian agents, were made justices of the peace, ex officio, for the purposes of offences under the Indian Act (39 Vict. c. 17, s. 12). By 1895, this magisterial role had been expanded to empower Indian Agents to hear offences under Parts XIII and XV of the Criminal Code (offences against morality and vagrancy offences), as well as two sections of the Criminal Code dealing with the prostitution of Indian women Indian Act, 58-59 Vict (1895) c. 17, s. 7). The jurisdiction of the Indian Agent to sit as a justice of the peace extended to the entire NWT; in other words, his jurisdiction was not confined to matters involving Indians under his jurisdiction. This significant expansion of the legal powers of the Indian agents may well have reflected some dissatisfaction with the justice enforced and dispensed in the regular criminal courts.

I am indebted in the development of this argument to an early article by Jock Young, a piece that has informed and influenced my thinking and writing from the time I first read it in 1980: “Left Idealism, Reformism and Beyond: From New Criminology to Marxism” in Bob Fine et al, eds. Capitalism and the Rule of Law: from Deviancy Theory to Marxism (London: Hutchinson, 1979) 11.
While the discourse of criminalization has been deployed, incorrectly in my view, to characterize the *Indian Act* offences, the process of actual criminalization has been neglected. For example, the *Indian Act* offence of incitement of Indians to violence, for which Mequaness (The Little Quill) was charged in 1889, actually became an offence in the 1892 *Criminal Code.* This neglect of criminal law is of some consequence when one considers the legal transformation that occurred over a scant thirty years. Prior to 1870, *inter se* offences involving Aboriginal peoples on the Plains were not dealt with by Anglo-Canadian legal processes. By 1899, a Blood man was convicted of polygamy for his marriage to two women according to the custom of his people. In the period between, many forms of customary and/or routine activity were prosecuted as criminal offences.

Through the application of larceny, smuggling, property damage (in respect of wounding and killing animals), carnal knowledge and polygamy sections of the *Criminal Code,* Aboriginal people found themselves in criminal court for conduct ranging from running away from the Industrial School, neglecting to read the notices posted by the pound keeper, failing to return a pony to its owner, killing livestock for food, making off with horses, crossing international boundaries with stolen horses, taking small pieces of silverware from an apparently abandoned house, and so on.

The use of the criminal law to punish and discipline the people of the Plains First Nations, to constrain their traditional practices and way of life, is revealed in a number of the cases, as is their defiance and resistance. But, I have also discussed cases in Chapter

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5 Mequaness (The Little Quill) (1899), SAB Coll. RG R1286, file #10. I discussed this case in Chapter Five. In 1892, the new *Criminal Code, 1892 55-56 Vict.* (1892) c. 29, s. 98 introduced this offence into Canadian criminal law.

Six in which the criminal law was invoked to help and protect. In addition to this, even the few cases in the court files suggest something beyond the role and rule of law: the depth of the material deprivation of the people themselves, if not speaking for itself, in these files, nonetheless is revealed.

Whether one characterizes the alleged activity of Aboriginal accused persons found in the court records as resistance to government policies and practices or as criminalization of aspects of everyday life, or both, one thing is clear from the Richardson records: Aboriginal accused found themselves in a criminal court that emerged almost from nowhere in 1876. As this dissertation has shown, and others have noted, the numbers of Aboriginal accused persons actually prosecuted were not enormous, but they were significant. Unlike those prosecuted for the Potlatch offences under the *Indian Act*, many of those who experienced actual criminal prosecution appeared in court without counsel and fanfare, other than the occasional report in one of the Territorial newspapers.

In sum, I argue that criminalization is an easily asserted label which has become affixed to the wrong areas of law, ignores the *actual* sites of criminalization, and simultaneously neglects the specificity of the transformations of arguably the most fundamental area of legislation affecting Aboriginal peoples, the *Indian Act*. In this dissertation, I have attempted to re-insert criminal law context and content into the discourse of criminalization.

In my view, the offences and prosecutions under the *Indian Act* did not criminalize the First Nations; rather they “Indianized” the First Nations. They were prosecuted as “Indians” - not as criminals - for violating the *Indian Act*, for not
conforming to the behaviour required of Indians by the legislation.

Does the distinction matter? Does it matter to anyone who is not a lawyer? Did it matter to those prosecuted? In my experience, the answer to the last two questions is “perhaps not.” But, the answer to the first question has to be “yes.” Legal analysis must count for something, must contribute something, and this is my contribution. I have sought to identify and to understand the role and contribution of the criminal law to the subordination of Aboriginal people in Western Canada in the historical period I have studied, and to demonstrate it as but one of many legal forms and state practices that were deployed in the late nineteenth century to transform the lives and material conditions of the First Nations of the Plains.

In my view, the low law criminal cases I have studied demonstrate the complexity of the relations and processes: from Poundmaker’s horse race and Peaychew’s lost child, to Buffalo Calf’s brother-in-law who turned him in, and Is-pinik-hah-kee-toot, who was weary of his brother-in-law coming to camp and making off with his deceased father’s horses; from O-chak-a-nakis, who complained successfully about the Mountie who stole money from her after paying for a sexual service, to Lila Bokas’ parents who felt they had a claim on the services and support of a white man to help them reclaim their daughter from Ce Tan; from John Eye, who charged a white man with assault after he was struck by that man for refusing to go to the river for his water, to all the Chiefs - Beardy, Lean Man, Mosquito, Strike Him on the Back, Grizzly Bear’s Head - who turned to law or who found themselves ensnared when they attempted to assist their people. Each case comprises and represents complex relationships.

I believe many of my findings challenge conventional wisdom and conventional
explanations; they have forced me to re-examine many of my own assumptions and to rethink those of others. I believe I have rendered visible the experiences and relations of many people to the criminal law in the period that have not yet been told by legal historians. I regard my work as a beginning. I hope I have laid a good foundation upon which others can build.

What then of my own precarious ledge? What do I claim to have found from the Richardson court files? I draw two, fragmentary images. The first is an image of flexibility, resourcefulness and expectations of good faith on the part of the First Nations peoples who turned to law or who found themselves unwillingly there. For some, Richardson’s court was one possible avenue of redress for injuries and wrongs. Their good faith was not always rewarded, but many seem to have obtained the results they were seeking. They were experiencing relations of inequality, to be sure, but in this dissertation, I have attempted to illustrate the ‘relational’ nature of this inequality. I argue that its contradictory expressions merit, indeed require, identification, analysis and understanding.

The case of Poundmaker’s disputed horse race, perhaps more than any other, also illustrates the ‘inter-communal’ nature of social relations in Battleford in 1878: Poundmaker and his brother Yellow Earth Blanket (Yellow Mud Blanket) were involved in horse races with John Ballendine and Goodwin Marchand. The course of the second race with Ballendine was agreed upon; a wager was struck, sealed with a handshake. The file indicates that a number of men, including Indians, policemen and cooks, had placed bets on the race. When Poundmaker’s horse lost, seemingly through the other man’s dishonesty, several members of the Battleford community appear to have stepped in to
lend him support, including the stipendiary magistrate. The Court file does not suggest great support for Ballendine’s position, whilst providing some evidence of community support for Poundmaker. The Cree, Métis, NWMP and a few prominent individuals of Battleford, all men to be sure, were clearly animated by the race and its aftermath, not least perhaps because the ‘gentlemen’s agreement’ had not been kept and a fair race had not been run.

How are we to interpret the presence of Aboriginal informants and complainants in the court files? I reject the suggestion that, in navigating and negotiating their way, Aboriginal peoples pursued private interests or ‘brokered their own oppression.’ In this dissertation, I have shown that the court records contain desires for justice, expressions of hope, as well as deprivation, disappointment, misery and bitterness. And, of course, there are cases in which Aboriginal witnesses attempted, against the odds of a courtroom setting and court interpreters, to make their values, customs, and way of life understood to the white men sitting in judgment of their fellow Cree, Assiniboines, and Saulteaux. An ability to identify, problematize and analyze human experience, agency, and resistance, is of critical importance in socio-legal scholarship, which is not to say that it is not a difficult and contested undertaking. But, to the extent that agency is offered in juxtaposition to institutional oppression, repression and suppression, it must be recast.

The Richardson records suggest that Aboriginal people turned to criminal law, used it and influenced it when they could, and ran from it when they had to. Sometimes, they experienced a measure of vindication. They were simultaneously victims, actors, informants, interpreters, accused, police guides, and complainants, but in my view, the totality of their involvement in the criminal law (including its lowest courts) needs to be
considered. Oppressive relations are still relations. They participated in the criminal law, violated it, turned to it, and resisted it – but it cannot be said that the peoples of the Plains oiled the wheels of their own oppression.

The second image is shaped by the first. It is one which is inspired by E.P. Thompson, that of the mediating role of (criminal) law in social relations – a legal form which occasionally inhibited the powerful in the interest of and at the behest of the less powerful. This is not the dominant image of the relationship of First Nations people and the criminal law, but it may be that the criminal law, in contrast to the Indian Act, was one area of law in which First Nations people experienced legal subjectivity and a measure of equality in vastly unequal circumstances.

First Nations people did not re-acquire self-determination or self-governance through the rule of law in Richardson’s criminal court. But, the court records suggest that the role of the criminal law was more complex, and even contradictory, than the images most often associated with this criminal court. In the midst of arguably the most transformative and devastating period in the lives of the Plains First Nations, Richardson’s court may have been one of the few sites in the new order that had swept over their land in which they may have been heard.
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The Qu'Appelle Treaty, Number Four

ARTICLES OF A TREATY made and concluded this fifteenth day of September, in the year of Our Lord one thousand eight hundred and seventy-four, between Her Most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners, the Honourable Alexander Morris, Lieutenant Governor of the Province of Manitoba and the North-West Territories; the Honourable David Laird, Minister of the Interior, and William Joseph Christie, Esquire, of Brockville, Ontario, of the one part; and the Cree, Saulteaux and other Indians, inhabitants of the territory within the limits hereinafter defined and described by their Chiefs and Headmen, chosen and named as hereinafter mentioned, of the other part.

Whereas the Indians inhabiting the said territory have, pursuant to an appointment made by the said Commissioners, been convened at a meeting at the Qu'Appelle Lakes, to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and the said Indians of the other.

And whereas the said Indians have been notified and informed by Her Majesty's said Commissioners that it is the desire of Her Majesty to open up for settlement, immigration, trade and such other purposes as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty and arrange with them, so that there may be peace and good will between them and Her Majesty and between them and Her Majesty's other subjects, and that Her Indian people may know and be assured of what allowance they are to count upon and receive from Her Majesty's bounty and benevolence.

And whereas the Indians of the said tract, duly convened in Council as aforesaid, and being requested by Her Majesty's said Commissioners to name certain Chiefs and Headmen, who should be authorized on their behalf to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for their faithful performance by their respective bands of such obligations as shall be assumed by them the said Indians, have thereupon named the following persons for that purpose, that is to say: Ka-ki-shi-way, or "Loud Voice," (Qu'Appelle River); Pis-qua, or "The Plain" (Leech Lake); Ka-wey-ance, or "The Little Boy" (Leech Lake); Ka-kee-na-wup, or "One that sits like an Eagle" (Upper Qu'Appelle Lakes); Kus-kee-tew-mus-coo-mus-qua, or "Little Black Bear" (Cypress Hills); Ka-ne-on-us-ka-tew, or "One that walks on four claws" (Little Touchwood Hills); Cau-ah-ha-chapew, or "Making ready the Bow" (South side of the South Branch of the Saskatchewan); Kii-si-caw-ah-chuck, or "Day-Star" (South side of the South Branch of the Saskatchewan); Ka-na-ca-toose, "The Poor Man" (Touchwood Hills and Qu'Appelle Lakes); Ka-kii-wis-ta-haw, or "Him that flies around" (towards the Cypress Hills); Cha-ca-chas (Qu'Appelle River); Wah-pii-moose-too-siis, or "The White Calf" (or Pus-coos) (Qu'Appelle River); Gabriel Cote, or Mee-may, or "The Pigeon" (Fort Pelly).
Appendix 1

And thereupon in open council the different bands, having presented the men of their choice to the said Commissioners as the Chiefs and Headmen, for the purpose aforesaid, of the respective bands of Indians inhabiting the said district hereinafter described.

And whereas the said Commissioners have proceeded to negotiate a treaty with the said Indians, and the same has been finally agreed upon and concluded as follows, that is to say:-

The Cree and Saulteaux Tribes of Indians, and all other the Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen, and Her successors forever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say:-

Commencing at a point on the United States frontier due south of the northwestern point of the Moose Mountains; thence due north to said point of said mountains: thence in a north-easterly course to a point two miles due west of Fort Ellice; thence in a line parallel with and two miles westward from the Assiniboine River to the mouth of the Shell River; thence parallel to the said river and two miles distant therefrom to its source; thence in a straight line to a point on the western shore of Lake Winnipegosis, due west from the most northern extremity of Waterhen Lake; thence east to the centre of Lake Winnipegosis; thence northwardly, through the middle of the said lake (including Birch Island), to the mouth of Red Deer River; thence westwardly and southwestwardly along and including the said Red Deer River and its lakes, Red Deer and Etoimaini, to the source of its western branch; thence in a straight line to the source of the northern branch of the Qu'Appelle; thence along and including said stream to the forks near Long Lake; thence along and including the valley of the west branch of the Qu'Appelle to the South Saskatchewan; thence along and including said river to the mouth of Maple Creek; thence southwardly along said creek to a point opposite the western extremity of the Cypress Hills; thence due south to the international boundary; thence east along the said boundary to the place of commencement. Also all their rights, titles and privileges whatsoever to all other lands wheresoever situated within Her Majesty's North-West Territories, or any of them. To have and to hold the same to Her Majesty the Queen and Her successors for ever.

And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families; provided, however, that it be understood that, if at the time of the selection of any reserves, as aforesaid, there are any settlers within the bounds of the lands reserved for any band, Her Majesty retains the right to deal with such settlers as She shall deem just, so as not to diminish the extent of land allotted to the Indians; and provided, further, that the aforesaid reserves of land, or any part thereof, or any interest or right therein, or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said
Indians, with the consent of the Indians entitled thereto first had and obtained, but in no wise shall the said Indians, or any of them, be entitled to sell or otherwise alienate any of the lands allotted to them as reserves.

In view of the satisfaction with which the Queen views the ready response which Her Majesty's Indian subjects have accorded to the invitation of Her said Commissioners to meet them on this occasion, and also in token of their general good conduct and behaviour, She hereby, through Her Commissioners, makes the Indians of the bands here represented a present, for each Chief of twenty-five dollars in cash, a coat and a Queen's silver medal; for each Headman, not exceeding four in each band, fifteen dollars in cash and a coat; and for every other man, woman and child twelve dollars in cash; and for those here assembled some powder, shot, blankets, calicoes, strouds and other articles.

As soon as possible after the execution of this treaty Her Majesty shall cause a census to be taken of all the Indians inhabiting the tract hereinbefore described, and shall, next year, and annually afterwards for ever, cause to be paid in cash at some suitable season to be duly notified to the Indians, and at a place or places to be appointed for that purpose, within the territory ceded, each Chief twenty-five dollars; each Headman not exceeding four to a band, fifteen dollars; and to every other Indian man, woman and child, five dollars per head; such payment to be made to the heads of families for those belonging thereto, unless for some special reason it be found objectionable.

Her Majesty also agrees that each Chief and each Headman, not to exceed four in each band, once in every three years during the term of their offices shall receive a suitable suit of clothing, and that yearly and every year She will cause to be distributed among the different bands included in the limits of this treaty powder, shot, ball and twine, in all to the value of seven hundred and fifty dollars; and each Chief shall receive hereafter, in recognition of the closing of the treaty, a suitable flag.

It is further agreed between Her Majesty and the said Indians that the following articles shall be supplied to any band thereof who are now actually cultivating the soil, or who shall hereafter settle on their reserves and commence to break up the land, that is to say: two hoes, one spade, one scythe and one axe for every family so actually cultivating, and enough seed wheat, barley, oats and potatoes to plant such land as they have broken up; also one plough and two harrows for every ten families so cultivating as aforesaid, and also to each Chief for the use of his band as aforesaid, one yoke of oxen, one bull, four cows, a chest of ordinary carpenter's tools, five hand saws, five augers, one cross-cut saw, one pit-saw, the necessary files and one grindstone, all the aforesaid articles to be given, once for all, for the encouragement of the practice of agriculture among the Indians.

Further, Her Majesty agrees to maintain a school in the reserve allotted to each band as soon as they settle on said reserve and are prepared for a teacher.

Further, Her Majesty agrees that within the boundary of the Indian reserves, until otherwise determined by the Government of the Dominion of Canada, no intoxicating liquor shall be allowed to be introduced or sold, and all laws now in force, or hereafter to
be enacted, to preserve Her Indian subjects, inhabiting the reserves, or living elsewhere within the North-West Territories, from the evil effects of intoxicating liquor, shall be strictly enforced.

And further, Her Majesty agrees that Her said Indians shall have right to pursue their avocations of hunting, trapping and fishing throughout the tract surrendered, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining or other purposes, under grant or other right given by Her Majesty's said Government.

It is further agreed between Her Majesty and Her said Indian subjects that such sections of the reserves above indicated as may at any time be required for public works or building of whatsoever nature may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made to the Indians for the value of any improvements thereon, and an equivalent in land or money for the area of the reserve so appropriated.

And the undersigned Chiefs and Headmen, on their own behalf and on behalf of all other Indians inhabiting the tract within ceded, do hereby solemnly promise and engage to strictly observe this treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen. They promise and engage that they will, in all respects, obey and abide by the law, that they will maintain peace and good order between each other, and between themselves and other tribes of Indians and between themselves and others of Her Majesty's subjects, whether Indians, Half-breeds, or whites, now inhabiting or hereafter to inhabit any part of the said ceded tract; and that they will not molest the person or property of any inhabitant of such ceded tract, or the property of Her Majesty the Queen, or interfere with or trouble any person passing or travelling through the said tract, or any part thereof, and that they will assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded.

IN WITNESS WHEREOF Her Majesty's said Commissioners, and the said Indian Chiefs and Headmen, have hereunto subscribed and set their hands, at Qu'Appelle, this day and year herein first above written.

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1 For complete list of signatories and witnesses, see The Qu'Appelle Treaty, Treaty Four (http://www.aicn-inac.gc.ca/pr/trts/hti/imagally/tr4_e.html); see also Alexander Alexander. The Treaties of Canada with the Indians of Manitoba and the North-West Territories (Toronto: Prospero Books, 2000) (Facsimile reprint of the original edition: Toronto: Belfords Clarke, 1880) at 330.
The Treaties at Forts Carlton and Pitt, Number Six

ARTICLES OF A TREATY made and concluded near Carlton on the 23rd day of August and on the 28th day of said month, respectively, and near Fort Pitt on the 9th day of September, in the year of Our Lord one thousand eight hundred and seventy-six, between Her Most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners, the Honourable Alexander Morris, Lieutenant-Governor of the Province of Manitoba and the North-west Territories, and the Honourable James McKay, and the Honourable William Joseph Christie, of the one part, and the Plain and Wood Cree and the other Tribes of Indians, inhabitants of the country within the limits hereinafter defined and described by their Chiefs, chosen and named as hereinafter mentioned, of the other part.

Whereas the Indians inhabiting the said country have, pursuant to an appointment made by the said Commissioners, been convened at meetings at Fort Carlton, Fort Pitt and Battle River, to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and the said Indians of the other.

And whereas the said Indians have been notified and informed by Her Majesty's said Commissioners that it is the desire of Her Majesty to open up for settlement, immigration and such other purposes as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty and arrange with them, so that there may be peace and good will between them and Her Majesty, and that they may know and be assured of what allowance they are to count upon and receive from Her Majesty's bounty and benevolence.

And whereas the Indians of the said tract, duly convened in council, as aforesaid, and being requested by Her Majesty's said Commissioners to name certain Chiefs and Headmen, who should be authorized on their behalf to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for their faithful performance by their respective Bands of such obligations as shall be assumed by them, the said Indians have thereupon named for that purpose, that is to say, representing the Indians who make the treaty at Carlton, the several Chiefs and Councillors who have subscribed hereto, and representing the Indians who make the treaty at Fort Pitt, the several Chiefs and Councillors who have subscribed hereto.

And thereupon, in open council, the different Bands having presented their Chiefs to the said Commissioners as the Chiefs and Headmen, for the purposes aforesaid, of the respective Bands of Indians inhabiting the said district hereinafter described.
Appendix 2

And whereas, the said Commissioners then and there received and acknowledged the persons so presented as Chiefs and Headmen, for the purposes aforesaid, of the respective Bands of Indians inhabiting the said district hereinafter described.

And whereas, the said Commissioners have proceeded to negotiate a treaty with the said Indians, and the same has been finally agreed upon and concluded, as follows, that is to say:

The Plain and Wood Cree Tribes of Indians, and all other the Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges, whatsoever, to the lands included within the following limits, that is to say:

Commencing at the mouth of the river emptying into the north-west angle of Cumberland Lake; thence westerly up the said river to its source; thence on a straight line in a westerly direction to the head of Green Lake; thence northerly to the elbow in the Beaver River; thence down the said river northerly to a point twenty miles from the said elbow; thence in a westerly direction, keeping on a line generally parallel with the said Beaver River (above the elbow), and about twenty miles distant therefrom, to the source of the said river; thence northerly to the north-easterly point of the south shore of Red Deer Lake, continuing westerly along the said shore to the western limit thereof; and thence due west to the Athabasca River; thence up the said river, against the stream, to the Jaspar House, in the Rocky Mountains; thence on a course south-easterly, following the easterly range of the mountains, to the source of the main branch of the Red Deer River; thence down the said river, with the stream, to the junction therewith of the outlet of the river, being the outlet of the Buffalo Lake; thence due east twenty miles; thence on a straight line south-eastwardly to the mouth of the said Red Deer River on the south branch of the Saskatchewan River; thence eastwardly and northwardly, following on the boundaries of the tracts conceded by the several treaties numbered four and five to the place of beginning.

And also, all their rights, titles and privileges whatsoever to all other lands wherever situated in the North-west Territories, or in any other Province or portion of Her Majesty's Dominions, situated and being within the Dominion of Canada.

The tract comprised within the lines above described embracing an area of 121,000 square miles, be the same more or less.

To have and to hold the same to Her Majesty the Queen and Her successors forever.

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada; provided, all such reserves shall not exceed in all one square mile for each family of five, or in that
Appendix 2

proportion for larger or smaller families, in manner following, that is to say: that the
Chief Superintendent of Indian Affairs shall depute and send a suitable person to
determine and set apart the reserves for each band, after consulting with the Indians
thereof as to the locality which may be found to be most suitable for them.

Provided, however, that Her Majesty reserves the right to deal with any settlers within the
bounds of any lands reserved for any Band as She shall deem fit, and also that the
aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of
by Her Majesty's Government for the use and benefit of the said Indians entitled thereto,
with their consent first had and obtained; and with a view to show the satisfaction of Her
Majesty with the behaviour and good conduct of Her Indians, She hereby, through Her
Commissioners, makes them a present of twelve dollars for each man, woman and child
belonging to the Bands here represented, in extinguishment of all claims heretofore
preferred.

And further, Her Majesty agrees to maintain schools for instruction in such reserves
hereby made as to Her Government of the Dominion of Canada may seem advisable,
whenever the Indians of the reserve shall desire it.

Her Majesty further agrees with Her said Indians that within the boundary of Indian
reserves, until otherwise determined by Her Government of the Dominion of Canada, no
intoxicating liquor shall be allowed to be introduced or sold, and all laws now in force, or
hereafter to be enacted, to preserve Her Indian subjects inhabiting the reserves or living
elsewhere within Her North-west Territories from the evil influence of the use of
intoxicating liquors, shall be strictly enforced.

Her Majesty further agrees with Her said Indians that they, the said Indians, shall have
right to pursue their avocations of hunting and fishing throughout the tract surrendered as
hereinbefore described, subject to such regulations as may from time to time be made by
Her Government of Her Dominion of Canada, and saving and excepting such tracts as
may from time to time be required or taken up for settlement, mining, lumbering or other
purposes by Her said Government of the Dominion of Canada, or by any of the subjects
thereof duly authorized therefor by the said Government.

It is further agreed between Her Majesty and Her said Indians, that such sections of the
reserves above indicated as may at any time be required for public works or buildings, of
what nature soever, may be appropriated for that purpose by Her Majesty's Government
of the Dominion of Canada, due compensation being made for the value of any
improvements thereon.

And further, that Her Majesty's Commissioners shall, as soon as possible after the
execution of this treaty, cause to be taken an accurate census of all the Indians inhabiting
the tract above described, distributing them in families, and shall, in every year ensuing
the date hereof, at some period in each year, to be duly notified to the Indians, and at a
place or places to be appointed for that purpose within the territory ceded, pay to each
Indian person the sum of $5 per head yearly.
It is further agreed between Her Majesty and the said Indians, that the sum of $1,500.00 per annum shall be yearly and every year expended by Her Majesty in the purchase of ammunition, and twine for nets, for the use of the said Indians, in manner following, that is to say: In the reasonable discretion, as regards the distribution thereof among the Indians inhabiting the several reserves, or otherwise, included herein, of Her Majesty's Indian Agent having the supervision of this treaty.

It is further agreed between Her Majesty and the said Indians, that the following articles shall be supplied to any Band of the said Indians who are now cultivating the soil, or who shall hereafter commence to cultivate the land, that is to say: Four hoes for every family actually cultivating; also, two spades per family as aforesaid: one plough for every three families, as aforesaid; one harrow for every three families, as aforesaid; two scythes and one whetstone, and two hay forks and two reaping hooks, for every family as aforesaid, and also two axes; and also one cross-cut saw, one hand-saw, one pit-saw, the necessary files, one grindstone and one auger for each Band; and also for each Chief for the use of his Band, one chest of ordinary carpenter's tools; also, for each Band, enough of wheat, barley, potatoes and oats to plant the land actually broken up for cultivation by such Band; also for each Band four oxen, one bull and six cows; also, one boar and two sows, and one hand-mill when any Band shall raise sufficient grain therefor. All the aforesaid articles to be given once and for all for the encouragement of the practice of agriculture among the Indians.

It is further agreed between Her Majesty and the said Indians, that each Chief, duly recognized as such, shall receive an annual salary of twenty-five dollars per annum; and each subordinate officer, not exceeding four for each Band, shall receive fifteen dollars per annum; and each such Chief and subordinate officer, as aforesaid, shall also receive once every year, a suitable suit of clothing, and each Chief shall receive, in recognition of the closing of the treaty, a suitable flag and medal, and also as soon as convenient, one horse, harness and waggon.

That in the event hereafter of the Indians comprised within this treaty being overtaken by any pestilence, or by a general famine, the Queen, on being satisfied and certified thereof by Her Indian Agent or Agents, will grant to the Indians assistance of such character and to such extent as Her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity that shall have befallen them.

That during the next three years, after two or more of the reserves hereby agreed to be set apart to the Indians shall have been agreed upon and surveyed, there shall be granted to the Indians included under the Chiefs adhering to the treaty at Carlton, each spring, the sum of one thousand dollars, to be expended for them by Her Majesty's Indian Agents, in the purchase of provisions for the use of such of the Band as are actually settled on the reserves and are engaged in cultivating the soil, to assist them in such cultivation.

That a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of such agent.
That with regard to the Indians included under the Chiefs adhering to the treaty at Fort Pitt, and to those under Chiefs within the treaty limits who may hereafter give their adhesion thereto (exclusively, however, of the Indians of the Carlton region), there shall, during three years, after two or more reserves shall have been agreed upon and surveyed be distributed each spring among the Bands cultivating the soil on such reserves, by Her Majesty's Chief Indian Agent for this treaty, in his discretion, a sum not exceeding one thousand dollars, in the purchase of provisions for the use of such members of the Band as are actually settled on the reserves and engaged in the cultivation of the soil, to assist and encourage them in such cultivation.

That in lieu of wagons, if they desire it and declare their option to that effect, there shall be given to each of the Chiefs adhering hereto at Fort Pitt or elsewhere hereafter (exclusively of those in the Carlton district), in recognition of this treaty, as soon as the same can be conveniently transported, two carts with iron bushings and tires.

And the undersigned Chiefs on their own behalf and on behalf of all other Indians inhabiting the tract within ceded, do hereby solemnly promise and engage to strictly observe this treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen.

They promise and engage that they will in all respects obey and abide by the law, and they will maintain peace and good order between each other, and also between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians or whites, now inhabiting or hereafter to inhabit any part of the said ceded tracts, and that they will not molest the person or property of any inhabitant of such ceded tracts, or the property of Her Majesty the Queen, or interfere with or trouble any person passing or travelling through the said tracts, or any part thereof, and that they will aid and assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded.

IN WITNESS WHEREOF, Her Majesty's said Commissioners and the said Indian Chiefs have hereunto subscribed and set their hands at or near Fort Carlton, on the days and year aforesaid, and near Fort Pitt on the day above aforesaid.

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1 For a complete list of signatories, witnesses and adhesions by a number of Cree and Stony bands, see The Treaties at Fort Carlton and Pitt, Number Six (http://www.ainc-inac.gc.ca/pr/trts/hti/imgally/tr6_e.html); see also Alexander Morris; The Treaties of Canada with the Indians of Manitoba and the North-West Territories (Toronto: Prospero Books, 2000) (Facsimile reprint of the original edition: Toronto: Belfords Clarke, 1880) at 351.