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# CRIMINAL JUSTICE IN CANADA: A COMPARATIVE STUDY OF THE MARITIMES AND LOWER CANADA 1760 - 1812

By LOUIS A. KNAFLA\* and TERRY L. CHAPMAN\*\*

## I. INTRODUCTION

From the time of the bombardment of Fort Louisburg in the summer of 1758 to the settlement of Nova Scotia and the conquest of Isle Royale, Isle St. Jean and New France by 1761, the British brought under their rule a new series of colonies washed by the Gulf of St. Lawrence. The initial British settlers in the Maritimes arrived in the 1740s and they came largely from the Massachusetts Bay Colony. Later settlers migrated from the remaining New England and Mid-Atlantic provinces. From the American War for Independence in 1775 to the signing of the Peace of Paris in 1783 and the formation of New Brunswick in 1784, larger numbers of British Loyalists fled the American colonies to the new British ones along the St. Lawrence. They were later joined by British and European immigrants. The Loyalist refugees and the immigrants who settled in enclaves between the native Indian and old French inhabitants expanded significantly the population of the colonies, transforming the social institutions and giving shape and substance to a new political and legal order. While much has been written about these people, little has been written about their law, and the questions which are now being asked about the relationship of law — especially the criminal law — to society, make the history of the criminal justice system in early Canada a compelling subject of investigation.

This essay will explore and compare the early history of criminal justice in the first Canadian colonies; the English-settled maritime colonies of Nova Scotia and New Brunswick, and the English-conquered colony of New France, which became Lower Canada from 1760 to 1812. One objective of the essay is to provide the results of initial research of the court records, legal documents and literary sources to facilitate an understanding of the criminal justice systems which were established in these colonies. Another objective is to make a comparison of the systems — including how they operated and what they meant — in order to achieve an understanding of both the interaction and conflict of law and society in the early decades of the Canadian experience. Before beginning, however, it will be useful to define the terms which will be used in this study.

“Crime,” the “substantive criminal law,” “criminal process” and “criminal procedure” are terms which apply to different aspects of the criminal justice system.<sup>1</sup> “Crime” describes two types of actions: 1) *mala in*

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<sup>1</sup> Jobson and Robinson, *The Criminal Law Process* (Victoria: 1975) at 90-92, 57-64. See generally, Parker, *An Introduction to Criminal Law* (Toronto: Methuen, 1977).

se, which are regarded as violating the fundamental values of society and causing significant harm or injury; and, 2) *malum prohibitum*, more specialized acts or offences against rules of conduct which have been proscribed by the institutions of government. The "substantive criminal law" includes those crimes or offences which are defined as wrongs against persons, society or the state by local, provincial or imperial authority as well as the legal defences to liability for such crimes and offences. The "criminal process" refers to the theory and practice involved in the prosecution of an alleged offender from the initial complaint through to the final verdict and sentence, if appropriate. The "criminal process" also involves the balancing of the rights and duties involved in protecting the respective interests of the Crown and the accused. "Criminal procedure" concerns the rules governing the actual conduct of litigation in the courtroom from the arraignment of the accused to the verdict, and includes the law of evidence. These elements (in addition to matters such as the police, informers, bail and pre-trial releases) comprise the criminal justice system which is explored in this essay.

Finally, the question of the reception of English criminal law in Canada raises additional problems of definition. The concern here is with the practical extent to which contemporary courts applied English laws, rules, procedures and practices. The means of reception will not be at issue: whether the criminal law was received because of statutes in force *ex proprio vigore*, because of statutes or common law in force by virtue of a legally determined reception date, because of local legislation modelled upon English statutes not otherwise in force, or because the background and training of the local bench and bar caused English principles to be applied almost subconsciously.<sup>2</sup> All these legally disparate phenomena involve the reception of English law and institutions. The concern here is with what criminal law was received and how it was applied.

## II. THE MARITIMES

The criminal justice system that was established in the Maritime provinces was taken from English models which had evolved in the Massachusetts Bay Colony.<sup>3</sup> The reasons for this historical fact are lodged in Britain's disinterest in the domestic affairs of the islands and peninsulas of the St. Lawrence from the original assumption of rule in Acadia and Newfoundland in 1712 to the bombardment of Louisburg in 1758. Nova Scotia was occupied by Indians and some 5000 French Acadians in 1712, but the British did not attempt to settle it actively until 1748 when a commercial centre was founded at Halifax and Colonel Edward Cornwallis became the colony's first governor. Even then, effective British rule seldom reached further than the hinterland of Halifax.

A major change occurred in 1755 when Parliament, under the leadership of William Pitt, adopted a new, aggressive imperial policy that would terminate French rule in North America and replace it with a series of British colonies north of the original thirteen. From 1760 to 1784, first Nova Scotia, and then the colonies of Cape Breton, Prince Edward Island and New Brunswick

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<sup>2</sup> Coté, *The Reception of English Law* (1977), XV Alta. L. Rev. 29 at 31.

<sup>3</sup> Hindus, *Prison and Plantation: Crime, Justice and Authority in Massachusetts and South Carolina* (Chapel Hill: Univ. of Carolina Press, 1980).

were organized and settled by farmers, labourers, craftsmen, tradesmen, fishermen and merchants. The French Acadians were expelled. (However, many later returned to Nova Scotia and New Brunswick.) Some immigrants came from Scotland, Ireland and parts of Western Europe, but most settlers were from New England.<sup>4</sup>

The British Loyalists formed over one-half of the Maritime population of about 50,000 by 1784. They first came in the late 1740s, attracted by the wealth of the fisheries on the continental shelf. Other Loyalists arrived in 1775-76 at the outset of the rebellion of the American colonies, and again in 1782-83 after those colonies had won their independence. Most of the pre-Revolutionary Loyalists came from Massachusetts, with some from Connecticut and Rhode Island. Most of the post-Revolutionary Loyalists came from New York, some from New Jersey and Pennsylvania. The remainder were from the mid-Atlantic and Southern colonies.

Under the reign of George III, the Tory government of Lord Bute in 1760 set out to establish in North America a new Tory regime based on the royal prerogative, the Anglican Church and a landed aristocracy. But the Loyalists who went to the new colonies came from the old Whig tradition of local, representative self-government, religious toleration and a merchant/trading class. These Loyalists were men who preferred to live in an easy alliance with those whose politics, religion, occupations and social and cultural values bore little resemblance to their own.<sup>5</sup> Thus the institutions which were planned for the Maritime colonies were changed and adapted by the Loyalists who would manage them.

The transfer of English institutions was not an easy task. The land of Nova Scotia, Cape Breton and New Brunswick was not prosperous. The fishing trade was in decline by the 1760s and people worked hard to carve out a subsistence living from a cold, windy and rocky lowland region. Moreover, the inhabitants, were not united, coming from English, Irish, Scottish, French and Indian backgrounds dispersed in small, isolated settlements scattered across the countryside. They were also divided in their views on the role of government. Some had experienced centralized systems of government and others were not accustomed, or receptive, to direct rule in the everyday affairs of life. In fact, the area had never known strong institutions of government. Since the British considered these colonies merely a source of food and trade and a strategic base for the defence of imperial interests, they lacked the will to force their ideas on the local ruling elite. Benign neglect became imperial reality for the colonies bordering the Gulf of St. Lawrence well into the nineteenth century.<sup>6</sup>

The Imperial Parliament adopted a more active policy for the effective government of Nova Scotia with the appointment of Colonel Charles Corn-

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<sup>4</sup> The best historical survey is that of McNutt, *The Atlantic Provinces: The Emergence of Colonial Society 1712-1857* (Toronto: McClelland and Stewart, 1965).

<sup>5</sup> Rawlyk, *Nova Scotia's Massachusetts* (Montreal: McGill-Queen's Univ. Press, 1973) at 193-225; Ells, "Loyalist Attitudes" in Rawlyk, ed., *Historical Essays on the Atlantic Provinces* (Toronto: McClelland and Stewart, 1967) at 44-60 and the series of loyalist genealogies published by the Nova Scotia Historical Society (NSHS).

<sup>6</sup> Bailyn, *The Ideological Origins of the the American Revolution* (Cambridge: Belknap Press of Harvard Univ., 1967).

wallis as governor in 1749. A commission issued to him by the Board of Trade and Plantations gave him the authority to establish courts, appoint judges, and set into motion a full judicial system.<sup>7</sup> This court system was established by 1752, consisting of a General Court which was given the jurisdiction of the English common law courts of King's Bench, Common Pleas and Exchequer and County Courts of General Sessions. The General Court, (changed to Supreme Court in 1754) established circuits of Assize, Gaol Delivery and Oyer and Terminer in 1774. The Supreme Court had exclusive jurisdiction over felonies. The courts of General Sessions, which were presided over by Justices of the Peace, heard the lesser offences. The creation, in the counties, after 1752 of Inferior Courts of Common Pleas to hear minor civil causes and the creation of the courts of Chancery, Probate and Vice-Admiralty completed the structure of legal institutions in Nova Scotia.<sup>8</sup> The colony of Nova Scotia had considerable stability in the operation of its legal system and the criminal courts remained virtually unchanged from 1774 until 1812.

The judges who were responsible for the administration of the criminal law were talented men with good legal backgrounds who came from England or Massachusetts. Jonathan Belcher came from a prominent Boston merchant and legal family and had received degrees from Harvard, Princeton and Cambridge Universities. Educated in common law at the Middle Temple, he was called to the English bar and practised in London and Dublin before assuming the role of Chief Justice of the Supreme Court in 1754.<sup>9</sup> Dupont was a well-known English lawyer who prepared the first edition of the laws of the colony. A judge of the Supreme Court, he became Chief Justice of Prince Edward Island in 1770.<sup>10</sup> John Collier, a retired English army captain with experience in common and civil law, became a Supreme Court judge who fought for the independence of the judiciary from the executive.<sup>11</sup> James Monk, an Englishman educated at Eton College who had mercantile and legal experience in Boston, compiled the first notebook on law cases in Nova Scotia and became Solicitor-General.<sup>12</sup> Richard Gibbons, who was born in London and who was educated at the Inns of Court, first became Solicitor and Attorney-General and later Chief Justice of Cape Breton. He modelled its judicial system after that of Nova Scotia.<sup>13</sup>

The educational background and legal experience of the men who served

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<sup>7</sup> Kennedy, *Statutes, Treatises and Documents of the Canadian Constitution 1713-1929* (Oxford: Oxford Univ. Press, 1930) at 6-8.

<sup>8</sup> See, Townshend, *Historical Account of the Courts of Judicature in Nova Scotia* (Toronto: 1900) at 1-58, which contains, however, numerous inaccuracies. These have been found by research into the original court records at the Provincial Archives of Nova Scotia, Halifax [hereinafter P.A.N.S.].

<sup>9</sup> *Dictionary of Canadian Biography* (Toronto: University of Toronto Press, 1974) Vol. III at 50-54 [hereinafter DCB] and the *Belcher Papers*, P.A.N.S. Details of his career can be found in Townshend, *Jonathan Belcher, First Chief Justice of Nova Scotia* (1914), 28 NSHS Collections 25 at 25-57.

<sup>10</sup> *Supra* note 8, at 34-40 and notes collected by Akins in *Selections from the Public Documents of the Province of Nova Scotia* (Halifax, 1869).

<sup>11</sup> DCB, *supra* note 9, Vol. III at 130.

<sup>12</sup> *Id.* at 457-58 and the Monk family papers, P.A.N.S.

<sup>13</sup> DCB, *supra* note 9, Vol. IV at 292-93. For other provincial officials, see Doull, *The First Five Attorney-Generals of Nova-Scotia* (1945), 26 NSHS Collections 33 and Doull, *Sketches of Attorney-Generals of Nova Scotia 1750-1926* (Halifax: 1964).

on the Supreme Court and its circuits was not shared, however, by the majority of the men who served as Justices of the Peace. Some of the Justices, such as David Mathews, Charles Morris and William Nesbitt, were well-educated and had legal experience. Mathews, who was born in New York City and was educated at Princeton, became mayor of New York and was later a Justice of the Peace in Nova Scotia before becoming Attorney-General of Cape Breton.<sup>14</sup> Morris came from Boston where he was a grammar school teacher. He became Chief Surveyor of Nova Scotia in 1749 and was a Justice of the Peace in Halifax for fourteen years before being appointed to the Supreme Court.<sup>15</sup> Nesbitt, also from Massachusetts, developed a significant law practice in Halifax and was a Justice of the Peace for sixteen years before becoming Attorney-General.<sup>16</sup> Most of the Justices of the Peace, however, were simply merchants or militia officers from Massachusetts.<sup>17</sup> However, the records show that a lack of legal training was compensated for by their honesty and sense of fair play. Many of them carried the hard work and dedication of their occupations to the offices in the institutions of their adopted country.<sup>18</sup>

The development of the criminal justice system in Nova Scotia was a process of adapting English institutions to the situation and conditions which faced the judges and legal officials of the new Maritime colony. The structure of the criminal courts came from Massachusetts while the substantive criminal law was derived from both that colony and England. The reception date for English statute law was 1758, when the colony's General Assembly first met, but there is no evidence that the oppressive game laws and franchise acts of the early eighteenth century were enforced in the colony.<sup>19</sup> Instead, the major prosecutions were for murder, rape, riot and grand larceny, and the most common lesser offences found were assault, defamation, slander, drunkenness, illegal gaming and petty theft.<sup>20</sup> The prosecution of property offences did not predominate as it did in England, while sexual offences were not so prevalent in Nova Scotia as they were in Massachusetts.

Governor Charles Lawrence, Chief Justice Belcher, and several members of the Council represented the English view of the substantive criminal law, but most of the assistant judges and the members of the Assembly followed the Massachusetts tradition.<sup>21</sup> The contest between these views was reflected in the first year of the Assembly when it enacted a major revision of the received

<sup>14</sup> *DCB*, *supra* note 9, Vol. IV at 522-23.

<sup>15</sup> *Id.* at 559-63 and Crathorne, *The Morris Family* (1976), 6 *Nova Scotia Historical Quarterly* 207 at 207-16.

<sup>16</sup> *DCB*, *supra* note 9, Vol. IV at 581-82.

<sup>17</sup> These included James Monk, John Fillis and Charles Morris who served in Halifax, Edward How and Thomas Kilby in Canso, Benoni Danks in Cumberland, Henry Denson in Falmouth and John Doggett in Liverpool.

<sup>18</sup> Many of the criminal files of the Justices of the Peace have not been preserved, however, their work can be seen in the various entry, judgment and minute books: P.A.N.S.

<sup>19</sup> *Supra* note 7, at 15-18. Belcher used English precedents throughout his career in defining and applying the criminal law. See his annotations in Fletcher, ed., *The Perpetual Acts of the General Assemblies of His Majesty's Province of Nova Scotia* (Halifax: 1767).

<sup>20</sup> The records of the Supreme Court are complete for several periods of time. See, in particular, Halifax Supreme Court.

<sup>21</sup> *Supra* note 7, at 9-18.

criminal law. The definition of treason was expanded and the benefit of clergy was withdrawn from a number of personal and property crimes. However, punishment for a number of felonious and non-felonious offences was reduced.<sup>22</sup> Later changes in the substantive criminal law were usually minor ones concerning the redefinition of particular offences, their enforcement and penalties.<sup>23</sup>

The criminal court system was transplanted completely from Nova Scotia into New Brunswick with the formation of the second Maritime colony in 1784.<sup>24</sup> Authorized by the Board of Trade to establish courts, appoint judges and initiate the governing process for the large number of Loyalists who were fleeing the now independent American colonies, Governor Thomas Carleton's Order-in-Council established a court system which was underway by the following year.<sup>25</sup> The Supreme Court had the jurisdiction of the central English common law courts of King's Bench, Common Pleas and Exchequer, while circuit courts held Commissions of Assize, Gaol Delivery, and Oyer and Terminer in the counties. A Supreme Court judge sat on circuit with at least two Justices of the Peace. All decisions made on circuit were reviewed by the Supreme Court before judgement was official and the circuit court could reserve sentence until the case was examined by the higher court. The Clerks of the Crown acted as Clerks of the Peace on circuit. Required to have the status of barrister, the Clerks prosecuted cases before the circuits as well as before the Supreme Court. Non-felonious cases could be heard by the Justices of the Peace in the local Courts of General Sessions and the work of these officials was also supervised by the Clerks of the Crown. The Clerks who often advanced to the office of Solicitor and Attorney-General and from there to judgeships, were the key to the administration of the criminal law. The Governor retained the jurisdiction of equitable causes for his Council and the Inferior Courts of Common Pleas completed the structure of legal institutions in the colony.<sup>26</sup>

The judges who were responsible for the administration of the criminal law in New Brunswick were some of the most well-educated and trained members of the law profession in North America. Again, as in Nova Scotia, they came from the New England colonies, particularly Massachusetts. Descended from long-standing legal families, they had formed the higher echelon of the judicial system of the Bay Colony. Almost all of them were Harvard graduates and some had studied law at the Inns of Court in addition to engaging in legal practice in New England. The early Supreme Court judges

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<sup>22</sup> 1768, Statutes of the General Assembly of the Province of Nova Scotia 32 Geo. 2, c. 3, c. 14 and c. 17-20 [hereinafter S.N.S.].

<sup>23</sup> *E.g.*, 1768, S.N.S. 8 Geo. 3, c. 3 (treasons and felonies); 1774, S.N.S. 15 and 16 Geo. 3, c. 5 (vagrants); 1788, S.N.S. 19 Geo. 3, c. 10 (forcible entry); 1787, S.N.S. 28 Geo. 3, c. 9 (counterfeiting); 1795, S.N.S. 35 Geo. 3, c. 5 (deserters) and 1801, S.N.S. 41 Geo. 3, c. 14 (shipwrecked goods). There were no more major changes or additions until 1825.

<sup>24</sup> The background and courts are discussed by McNutt, *New Brunswick A History: 1784-1867* (Toronto: MacMillan, 1963) at 80-89, 115-17 and 134-36.

<sup>25</sup> *Carleton's Royal Instructions* (1905), 6 New Brunswick Historical Society Collections 406.

<sup>26</sup> Tubrett, *The Development of the New Brunswick Court System 1784-1803* (unpublished M.A. thesis, University of New Brunswick, 1967). The work's main emphasis is on civil litigation.

of New Brunswick included George Ludlow from the Supreme Court of New York, Jonathan Sewell, Attorney-General of Massachusetts and Jonathan Bliss, a barrister who was the leading attorney of the Massachusetts bar.<sup>27</sup> Other prominent Massachusetts lawyers and judges included Ward Chipman, James Putnam and Joshua Upham. Chipman, who was a member of the Massachusetts bar, opened a law office in Saint John in 1784. He trained a generation of future lawyers and judges in his office before becoming a judge of the Supreme Court in 1806.<sup>28</sup> Putnam was an Attorney-General of the Bay Colony who had educated many American lawyers, including John Adams, in his law office. He became the senior judge under Chief Justice Ludlow in 1784.<sup>29</sup> Upham came from the same background and delivered some of the most important decisions of the Supreme Court from 1786 to 1808.<sup>30</sup> These men developed a closely-knit law profession in New Brunswick and by the early nineteenth century the province was educating a native profession that would distinguish itself in North America and provide several judges for the other Canadian colonies.<sup>31</sup>

The Justices of the Peace in New Brunswick were not, on the whole, merchants and militia officers as they were in Nova Scotia. While they represented an even wider range of occupations and backgrounds, most had some legal experience. In a brief study of the 200 men appointed Justices of the Peace in the first twenty years of the province, Tubrett concluded that the range of background and occupations was too wide to permit generalization.<sup>32</sup>

Only a few, such as publisher William Lewis, had no legal training.<sup>33</sup> Most of these men came from clerical, medical or other professions which provided them with some familiarity with the law. Others, had considerable legal experience such as Edward Winslow who, after a time as a Justice of the Peace, moved up the judicial ladder to be a judge of the colony's Supreme Court.<sup>34</sup> Nonetheless, it appears that the great majority of the Justices of the Peace brought legal experience to their roles.

New Brunswick borrowed its criminal justice system from Nova Scotia but its substantive criminal law was different. Ward Chipman's 1786 opinion<sup>35</sup> advised that the reception date for English statute law was the accession of Charles II in 1660. Thus, no English statute enacted after 1660 would apply to

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<sup>27</sup> From the researches of James Lawrence which were completed and revised by Raymond and Stockton and published by Stockton, *The Judges of New Brunswick and Their Times* (St. John: circa 1910) at 18-21, 96-97, 109-66. The interpretations here and below are those of our own.

<sup>28</sup> *Id.* at 169-220.

<sup>29</sup> *Id.* at 39-53.

<sup>30</sup> *Id.* at 80-93.

<sup>31</sup> Notable second generation judges included William Botsford, Ward Chipman, Jr., Robert Parker, William Ritchie and Edward Winslow.

<sup>32</sup> For the local Justices of the Peace and their activities in the Inferior Courts of Common Pleas see Tubrett, *supra* note 26, at 132-69.

<sup>33</sup> *DCB, supra* note 9, Vol. IV at 482-83.

<sup>34</sup> *Supra* note 26, at 119-48 and Raymond, ed., *The Winslow Papers 1776-1826* (St. John: Boston Gregg Press, 1972).

<sup>35</sup> General observations on the laws passed in the first sessions of Assembly of the Province of New Brunswick in Provincial Archives of New Brunswick (hereinafter PANB) C.O. 188/3.



New Brunswick unless it expressly so stated. This opinion was apparently accepted by the English authorities and received judicial confirmation by Justice Chipman (Ward Chipman's son) in the Supreme Court of New Brunswick in 1830. While later legal authority cited New Brunswick cases in which English statutes passed after 1660 were apparently held to be in force, none of these cases involved criminal law statutes.<sup>36</sup> Therefore, the substantive criminal law was decidedly English, but New Brunswick, like Nova Scotia, chose not to enforce the oppressive game and franchise acts of the eighteenth century. New Brunswick also avoided the more Draconian legislation of England which expanded the use of the death penalty for property offences. In the early years of the colony, some of the received criminal law was revised. Local legislation preserved the holiness of the Lord's Day, expanded the definition and operation of the vagrancy laws, provided stiffer penalties for incest and adultery and enacted new laws against the petty theft of agricultural commodities which could be tried summarily.<sup>37</sup> A novel approach was taken to discourage gambling. Instead of enacting banal laws against it, the Assembly voided all debts contracted for gambling losses and allowed the loser to sue for the recovery of such money already paid.<sup>38</sup>

Unlike Nova Scotia, New Brunswick had little difficulty in defining its own substantive criminal law but experienced difficulties with jurisdictional disputes between the central courts and local authorities. The judges of the Supreme Court settled in the Fredericton area and became major landowners. A lack of adequate transportation to the more inaccessible areas of the colony meant they were reluctant to take the court on circuit. Thus commissions of Assize and Gaol Delivery were infrequent in all but coastal towns. The Justices of the Peace, however, believed they could handle the trial of capital offences. Forty-five of the seventy members of the Legislative Assembly were Justices of the Peace and they used this legislative strength to expand the jurisdiction of the Courts of General Sessions over criminal actions.<sup>39</sup> By 1800 the General Sessions had become the chief institution of the local government which reflected the older English and Massachusetts traditions from which they descended. Although the judges of the Supreme Court opposed these measures considering them an attack on their authority, the criminal jurisdiction of the General Sessions increased in the early nineteenth century, resulting in a more decentralised criminal court in spite of the centralisation envisaged at the creation of the colony.<sup>40</sup>

The criminal procedure of the Supreme Courts and their circuit commissions in Nova Scotia and New Brunswick more closely resembled that of England's Court of King's Bench (which heard chiefly civil cases) than the

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<sup>36</sup> Burbidge, *Digest of the Criminal Law of Canada* (Toronto: n.p., 1890) at 12.

<sup>37</sup> 1786, Statutes of the General Assembly of the Province of New Brunswick [hereinafter S.N.B.], 26 Geo. 3, c. 5 and c. 27; 1791, S.N.B. 31 Geo. 3, c. 5; 1807, S.N.B. 47 Geo. 3, c. 5. No more significant acts were passed until 1823.

<sup>38</sup> 1786, S.N.B. 26 Geo. 3, c. 16, ss. 1-7.

<sup>39</sup> The legislation which advanced the jurisdiction of the local courts included 1794, S.N.B. 34 Geo. 3, c. 2; 1801, S.N.B. 41 Geo. 3, c. 2; 1807, S.N.B. 47 Geo. 3, c. 6 and c. 7. The Supreme and Circuit court minute books which reflect this change are PANB RS/30B/1-2 and RS/36A/1-2.

<sup>40</sup> The increasing jurisdiction and growth of the local courts is the thesis of Tubrett, *supra* note 26, at 96-142.

more superficial circuit practice in England.<sup>41</sup> The court records in both colonies reveal careful attention to the framework and fabric of criminal prosecutions.<sup>42</sup> Indictments were very carefully worded and errors or misrepresentations were seldom made. Most trials on indictment, unlike in England, seem to have used the actual facts of the case rather than fictitious data which was more for the convenience of the arresting Justice of the Peace or the clerk than to further the ends of justice and fact-finding. For example, the place where the crime was committed was not listed as the place where the offender was caught, the offender's name, address and occupation were not fictionalized for lack of knowledge and the facts of the offence were set down fully. Warrants and other documents of the judicial process were drafted precisely to stated form, and the depositions of victim, accused and witnesses were taken in detail with considerable care. In fact, the great majority of criminal prosecutions, especially in New Brunswick, had over ten witnesses sworn to give evidence and the witnesses were frequently evenly divided between the two sides. In contrast to the English system, the administration of justice was expeditious; often the time from arrest to verdict and sentencing would span only three to six months. Given the meagre physical and personal resources of the young colonials, justice was well-served in the criminal courts.

Maritimers took their law seriously and procedural matters were the life of the law. Clashes over legal procedure often resulted in heated controversy. For example, in 1800 Judge John Bliss had a pistol duel with Attorney A.F. Street outside the Fredericton Court House over directions given to a jury. Both missed in the closing darkness.<sup>43</sup> And in 1820 George Street, later Supreme Court Judge, shot and killed his opposing counsel George Wetmore on Maryland Hill in the second round of their duel over challenges to the admissibility of evidence. In a landmark decision on the boundaries of malice aforethought, Street was found not guilty of murder because no malice aforethought was proved.

The administration of criminal law in the two colonies was based upon accuracy and full adherence to rules of procedure and the courts actually encouraged full disclosure of the facts before allowing a jury verdict. The courts were particularly concerned with evidence and at times this concern became a fetish. For example, in the trial of Peeter Carceel (a Swiss settler) for the murder of Abraham Goodsides (mariner) in Halifax in 1750, several persons present on the street gave testimony as to what the parties said to one another and how the knife was eventually lodged down to the hilt in the breast of the deceased. Whether blows were offered and parried with open or closed hands and whether the knife came from a front or back stroke seemed terribly impor-

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<sup>41</sup> This is readily apparent from the Assize indictment files of the Home counties in the eighteenth century: Public Record Office, Assize Series 35. The immediate context is described and assessed by Beattie, "Crime and the Courts in Surrey," in Cockburn, ed., *Crime in England 1550-1800* (London: Methuen, 1977) at 155-86.

<sup>42</sup> PANS, Halifax Supreme Court, RG 39/C/1/2-13, 39/C/2/2, 39/C boxes 56-57; Shelburne County, RG 39/154/74; Yarmouth County, RG 39/C box 1; Inverness County, RG 39/C box 1; King's County, RG 39/C box 1. PANB, Supreme Court, RS/30B/1; Circuit Courts, RS/36A/1; and county court proceedings included in the same.

<sup>43</sup> *Supra* note 27, at 268-69. Case materials printed here are used in the absence of extant case files of the original proceedings.

tant for establishing the facts of the case.<sup>44</sup> Likewise when three men were prosecuted for stealing nine gallons of rum, twelve gallons of strongbow and a half pound of Bohea tea from the home of another by dipping into his casks with tin pots over the course of two days. Their hourly activities were documented by witnesses called from throughout the town. While the main facts were not controverted, the various stories were so confused that all three men were acquitted.<sup>45</sup>

All of the facts were considered especially relevant in cases of treason, libel and slander. In one case the issue was whether the accused had said "The King is a damn snotty whelp and by God if I was near him I would stab him for he is nothing but a damn Roman Bastard", or "The King I believe is a damn Roman, and if he was standing now in that corner by God I would shoot him". The meaning of the words was important, not simply their recitation to fit the demands of the indictment. In this instance, the jury did not find the accused guilty of treason or slander, but of profane swearing.<sup>46</sup>

The textbook procedures of the court with a policy of tendering into evidence all the circumstances which surrounded the case acted as a deterrent to excessive complaints and litigation and as an incentive for parties to resolve their own disputes outside of the judicial system.

The criminal process in Nova Scotia and New Brunswick was adapted in such a way as to be significantly in agreement with contemporary values. The common law was revered by the Loyalists and those from the pre-Revolutionary era who had a particular distaste for armies and martial law.<sup>47</sup> Thus in Nova Scotia, for example, martial law was declared to deal with the threat from the Thirteen Colonies in 1775, but it was not used in any judicial proceedings.<sup>48</sup> The impressment of "idle" persons to serve as seamen was another military problem after 1775 and at times led to "press riots". Nevertheless, court-martials were not allowed by the Council to take jurisdiction of such cases and the Attorney-General seldom brought prosecutions against such offenders. When he did, he ordered the common law court to be discreet in handling such a case; juries did not convict many escaping impressed seamen.<sup>49</sup>

Many sailors and captains, however, tried to use the protection of court-martials to defend themselves against prosecutions of rape. This crime was a particularly serious problem in Halifax which had become the supply centre for the British navy in the North Atlantic after 1783. The records of the Supreme Court indicate that sailors and captains attempted to have such prosecutions removed for trial before military tribunals or to stack the witness stand with character referees for the conduct of the accused. The Attorney-General continually denied the transfer of jurisdiction. In an era when it was generally very difficult to gain a conviction for rape, the prosecution was able

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<sup>44</sup> PANS, RG 39/C/1/2-6.

<sup>45</sup> *Id.* at 7-10.

<sup>46</sup> *Justice Perley's Courts Documents* (1894), 1 Collections of the New Brunswick Historical Society 98, [hereinafter NBHS].

<sup>47</sup> Ells, *supra* note 5, at 50-56.

<sup>48</sup> Hannay, *History of New Brunswick* (St. John: 1909) 101-102.

<sup>49</sup> PANS, State Papers 221/61 (Committee report of 8 September, 1782.).

to secure several confessions and some convictions.<sup>50</sup> The judicial arm of the military establishment, then, found it difficult to displace the judicial process of the Maritime colonies. This is even more remarkable when it is remembered that the economy of those colonies was very reliant upon naval stores and provisions.

The criminal process experienced subtle changes in the two colonies in the period from 1760 to 1812, which resulted in contrasting attitudes toward legal values. Nova Scotia expanded the authority of its judges in the pre-trial and trial process. The General Assembly introduced summary trials for thefts under £10 in 1785.<sup>51</sup> The rules for committals were tightened to make them more effective, and they strengthened the process for giving recognizances to individuals charged with capital offences.<sup>52</sup> The colony allowed judges additional discretion to remedy defects in pleas and court processes and to prevent challenges to their judgments.<sup>53</sup> It also prescribed broader conditions for the examination of witnesses, a move that was followed by the younger neighbour, New Brunswick, in her early years.<sup>54</sup> However, the General Assembly of New Brunswick was concerned with different aspects of the criminal process. The rights of citizens, jurors and the accused were developed or expanded. A law was enacted in 1786 to prevent the frivolous arrest of alleged offenders and provided a daily wage to persons who were selected for service on special juries.<sup>55</sup> (Nova Scotia adopted a similar provision for jurors ten years later.<sup>56</sup>) New Brunswick also passed a law that established the circumstances wherein Justices of the Peace could be sued and could sue for the recovery of damages. This law was adopted by Nova Scotia many years later.<sup>57</sup> What is important to note, however, is that the English development in this era of proceeding to trial by judge alone and the concomitant growth of a criminal jurisprudence, was not being followed in her Maritime colonies.<sup>58</sup> The criminal process still hinged on the old principles of indictment and judgment by one's peers.

In the end, the criminal process must be judged by the manner in which parties, lawyers, clerks, judges and jurors used it in the adjudication of offences. The evidence suggests, for example, that the criminal process was used with considerable discretion in favour of the poor and the unemployed where they were involved in lesser property and public offences. The distinction between the word "crime" (an action prohibited by law and against the moral standards of society which should receive corporal punishment) and the word

<sup>50</sup> *King v. Tim Kiefe; King v. John and Mary Russell v. John Dunn*, P.A.N.S.

<sup>51</sup> 1765, S.N.S. 5 Geo. 3, c. 11 and 1785, S.N.S. 26 Geo. 3, c. 2.

<sup>52</sup> 1768, S.N.S. 8 Geo. 3, c. 2 and 1768, S.N.S. 9 Geo. 3, c. 9. New Brunswick later provided apprehension and bail for persons who were found in other counties: 1794, 34 Geo. 3, c. 2.

<sup>53</sup> 1764, S.N.S. 4 Geo. 3, c. 1 and c. 4 and 1764, S.N.S. 5 Geo. 3, c. 1.

<sup>54</sup> 1758, S.N.S. 32 Geo. 2, c. 20; 1784, S.N.S. 25 Geo. 3, c. 2; 1791, S.N.S. 31 Geo. 3, c. 4 and 1786, S.N.B. 26 Geo. 3, c. 20 and 1791, S.N.B. 31 Geo. 3, c. 10.

<sup>55</sup> 1786, S.N.B. 26 Geo. 3, c. 25 and 1786, S.N.B. 26 Geo. 3, c. 6, which was revised by 1805, S.N.B. 45 Geo. 3, c. 9.

<sup>56</sup> 1796, S.N.S. 36 Geo. 3, c. 2 revised by 1805, S.N.S. 46 Geo. 3, c. 15.

<sup>57</sup> 1801, S.N.B. 41 Geo. 3, c. 2 and 1814 S.N.S., 54 Geo. 3, c. 15.

<sup>58</sup> Baker, "The Refinement of English Criminal Jurisprudence, 1500-1848," in Knafla, ed., *Crime and Criminal Justice in Europe and Canada* (Waterloo: Wilfred Laurier Univ. Press, 1981) at 24-27, 29-32, 35-38.

“offence” (a more specialized act prohibited by law that is harmful and dangerous rather than wrongful and is usually punished by fine) seems to have been an undercurrent of the criminal jurisprudence in the Maritimes from the late eighteenth century.

Ward Chipman, who served between 1784 and 1823 in various legal and judicial capacities in New Brunswick, charged the grand jurors on his circuit that “the object of penal jurisdiction is the prevention of crime.” Chipman was reluctant to convict for what we would regard today as social and economic crime and would not commit the poor and unemployed to prison for property offences. He regarded it as the role of society to redress the particular ills of the community which did not stem from the evil in men. He would adhere firmly to the rules of evidence in the conduct of the court’s proceedings and would then advise benefit of clergy, which was allowed especially for grand larceny. If the convicted man was before the court for the second time and clergy could not be given, a sentence of fifty lashes on three different occasions was frequently substituted for imprisonment. Six months in confinement was the usual maximum sentence.<sup>59</sup>

There are frequent examples of those convicted of felonies such as burglary and grand larceny receiving punishments of whipping and branding and those convicted for treason, riot and manslaughter receiving fines and short terms of imprisonment.<sup>60</sup> William Botsford charged his grand juries in the same way as his colleague, Chipman, and he often counselled leniency for offences such as assault and battery, larceny and counterfeiting when the poor and unemployed were involved. In twenty-two years on the Bench, Botsford did not pass a single death sentence.<sup>61</sup>

These attitudes of mercy and leniency in applying the criminal process were also revealed in cases where the accused were Negroes and native people. More than 5000 Negroes settled in Nova Scotia in the pre-Revolutionary period. As legal counsel, Sewell of Nova Scotia, son-in-law of John Quincy Adams, won the first case in the British Empire against slavery in 1769. And Chief Justice Blowers of Nova Scotia ruled against the common law custom of slavery in 1799 holding, with a majority of the court, that slavery could not exist unless it was legislated by the colony.<sup>62</sup> These decisions followed firmly in the New England tradition but, despite the precedents, individuals were always willing to take the law into their own hands. In 1805 Charles Fitzgerald, a Negro who had enlisted in the King’s regiment of York Rangers, was forcibly arrested by a constable of Halifax and carried to the gaol where John Walker later appeared to carry him off as his slave. The Supreme Court issued a long series of writs of *habeas corpus* across the province to find Fitzgerald and restore him to freedom.<sup>63</sup>

The judges showed an equal concern for the welfare of the native Indians who still formed a significant proportion of the inhabitants of these provinces.

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<sup>59</sup> *Supra* note 27, at 315-16. Examples of the theft of boots by labourers, clothes by spinsters, tools by carpenters, etc. are in *Halifax Supreme Court*, P.A.N.S.

<sup>60</sup> P.A.N.B. RS 30/B/6-9 (1785-86) and RS 36/A/1 266-88 (1803-05).

<sup>61</sup> *Supra* note 27, at 285-91.

<sup>62</sup> *Id.* at 70-76.

<sup>63</sup> P.A.N.S. RG 39/C/box 89, items g-q.

An examination of sample years in Nova Scotia indicates that Indians were treated leniently and few were ever prosecuted,<sup>64</sup> the most common charges against them being theft of goods and animals. The trials of those convicted reveal full adherence to the criminal process even when it went against popular feeling. For example, two former soldiers were arraigned in May 1786 for murder in the shooting of an Indian who they had suspected of theft.

The case was tried in Fredericton that June in the midst of a confrontation between the native and white communities. There were several witnesses for both sides. An interpreter was provided for the native people giving evidence. The trial judge found both the accused guilty and they were sentenced to hang. The man who was said to have fired the fatal shot was executed, the other was respited.<sup>65</sup> Despite the great amount of tension, the evidence was thoroughly and dispassionately weighed and justice was dispatched swiftly. Such cases were not unusual. Even in the smaller islands of the Bay of Fundy and the St. Lawrence, Justices of the Peace and jurors were known to apply the law fairly and with discretion exercised in favour of the accused when he was in an inferior position and might not understand the law and its administration.<sup>66</sup>

The criminal justice system was not without its problems in this era.<sup>67</sup> Many crimes were not prosecuted because there was a lack of public sanction to bring the perpetrators to trial and obtain a conviction. Smuggling was a prime example. The failure to convict James Donaldson *et al.* of smuggling 559 gallons of contraband liquor directly into the port of Halifax in 1794 must have brought joy to the local inhabitants.<sup>68</sup> The failure of the authorities in both provinces to enforce such laws<sup>69</sup> was partially attributable to the strength of public opinion.

Immigration of poor Europeans, economic depression and the great speculation in the timber boom from 1807 to 1812 led not only to "economic crime" as theft for survival, but also to "white collar crime" as theft for profit.<sup>70</sup> Convictions were difficult to obtain and, in many instances, Justices of the Peace placed those who were suspected of crime on good behaviour bonds (sometimes with sureties). A survey indicates that this device increased significantly in the second and again in the third decade of the nineteenth century.<sup>71</sup> Based on English custom of the seventeenth century, this "binding over" was introduced gradually as a new form of crime prevention in the Maritime colonies. There was also the problem, however, of what to do with persons who had to be committed to await trial, or to serve sentences. Few

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<sup>64</sup> P.A.N.B., RS 36/A/1-3. *An act protecting Indians against fraudulent dealings* was passed in 1762, S.N.B. 2 Geo. 3, c. 3.

<sup>65</sup> The documents in the case are quoted verbatim in Stockton, *supra* note 27, at 61-64, and the record of the circuit court minute book is in P.A.N.B. RS 36/A/1/15.

<sup>66</sup> *E.g.*, Howe, *Letters and Documents* (1897), NBHS 347-65.

<sup>67</sup> Many of these were on the civil side. See, in general, Brebner, *The Neutral Yankees of Nova Scotia* (Toronto: McClelland and Stewart 1969) at 66-91; McNutt, *supra* note 5, at 99-102 and 123-28; and *supra* note 24, at 115-117, 163-65, 176-78, 185-92, 225-28 and 249-56.

<sup>68</sup> *Halifax Supreme Court*, P.A.N.S.

<sup>69</sup> See examples in Hannay, *supra* note 48, at 302-303 and 336-38.

<sup>70</sup> New Brunswick Legislative Library, Mann Papers, Jan. 28, 1809.

<sup>71</sup> *Circuit Court*, P.A.N.B.

gaols were built in the sparsely populated counties and those that were built were far from secure. Sometimes, a prisoner was sent to Halifax, or even to Kingston, to serve his sentence.<sup>72</sup>

Maritime society sought to impress the citizens with the 'majesty' of the law. While bodies were not cut up English style and hung on the city gates, the public was sometimes clearly reminded of the dire consequences of crime. The pillory stood in the centre of every market place and the men who were brought to it for punishment had an ear clipped off and nailed to the pillory, in addition to being whipped publicly. The gallows in Halifax stood at the quay; a conspicuous landmark well into the nineteenth century.<sup>73</sup> A suicide victim, for example, was ordered to be burned at a crossroads on the highway close to where the act took place, with "a stake to be driven thro' the said body and such other marks of Infamy to be there set up *in terrorem* as has heretofore been used and accustomed in the like cases."<sup>74</sup> Such examples are not prominent, however, in the records of the Maritime provinces. But they would be of major significance to the settlers of that inland British Colony, Lower Canada.

### III. LOWER CANADA

Little, other than a passing reference in published works,<sup>75</sup> has been written on the history of the criminal justice system in Quebec from the time of the Conquest to the early nineteenth century. For the most part, English and French Canadian historians who have studied Quebec (or Lower Canada as it became known in 1791) from 1760 to 1812 have concentrated upon the social, economic and political consequences of the 1759 to 1760 British Conquest.<sup>76</sup> There are, of course, a few exceptions. Early works in English include articles published in the 1920s and 1930s on the origins and struggles over the laws of Quebec, and perhaps most notably Hilda Neatby's book, *The Administration of Justice under the Quebec Act* was published in 1937.<sup>77</sup> In the past twenty years a few French language articles have dealt specifically with the administration of justice in post-Conquest Quebec.<sup>78</sup> And in 1981, Douglas Hay

<sup>72</sup> Examples in Hannay, *supra* note 48, at 191-93 and Tubrett, *supra* note 26, at 160-63. Attempts to build and supervise new gaols were enacted in 1815, S.N.S. 55 Geo. 3, c. 9 and 1807, S.N.B. 47 Geo. 3, c. 5.

<sup>73</sup> *State Papers*, P.A.N.S.

<sup>74</sup> P.A.N.S. MSS 163 (2)/26.

<sup>75</sup> Burt, *The Old Province of Quebec* (Minn.: Univ. of Minn. Press, 1933) at 5, 20-21, 28, 32-35, 88-94, 143-46, 159-61 and 173-74; Eccles, *France in America* (N.Y.: Harper & Row, 1972) and Neatby, *Quebec: The Revolutionary Age 1760-1791* (Toronto: McClelland and Stewart, 1966) at 33-34, 158-59, 199-200 and 213-17.

<sup>76</sup> See, e.g., Burt, *supra* note 75; Creighton, *The Empire of the St. Lawrence* (Toronto: MacMillan Co. of Can., 1956) and Miquelon, ed., *Society and Conquest: The Debate on the Bourgeoisie and Social Change in French Canada, 1700-1850* (Toronto: Copp Clark Publishing, 1977).

<sup>77</sup> Smith, *The Struggle Over the Laws of Canada 1763-1783* (1920), 1 Canadian Historical Review 166; Soward, *The Struggle Over the Laws of Canada 1783-1791* (1924), 5 Canadian Historical Review 314; Johnson, *The Origins of the Law of the Province of Quebec* (1934), 4 Revue du Droit and Neatby, *The Administration of Justice Under the Quebec Act* (Minn.: Univ. of Minn. Press, 1937).

<sup>78</sup> Morel, *La Réaction des Canadiens devant l'administration de la Justice de 1764 à 1774* (1960), 20 La Revue de Barreau de la Province de Québec 53 at 53-63 and *La Réception du Droit Criminel Anglais au Québec, (1760-1892)* (1978), 13 Revue Juridique Thémis 449 at 540 and L'Heureux, *L'Organisation Judiciaire au Québec de 1764 à 1774* (1970), 1 Revue Générale de Droit 266 at 266-331.

published some initial observations from his ongoing research into the Quebec court records, "The Meanings of the Criminal Law In Quebec, 1764-1774."<sup>79</sup> But such studies have been somewhat limited.

An examination of the available published source material indicates that in spite of claims to the contrary, the English criminal justice system was not introduced *in toto* after the British takeover. Although the newly-created courts were based primarily on the English pattern, it was virtually impossible, and indeed would have been sheer folly, for the numerically small British occupants to replace French legal custom with the English common law tradition. While official British policy towards the conquered colony was assimilation and the total transformation of a French colony into a British one, the new British rulers seemed to adopt a conciliatory attitude. They used and transformed some of the existing French legal institutions as they erected their own system with important variations resulting from an English Protestant minority attempting to bring law and order to a French Catholic majority. While the substantive criminal law of the colony was to be English, the justice system implemented several features which incorporated French elements and the Canadian experience.

There were three different legal systems which came together to form the criminal justice system of Quebec by 1812; the civil law regime of France based on the Customs of Paris that was developed in the seventeenth and early eighteenth centuries, British martial law introduced after the Conquest in 1760, and the English common law that was brought in during the years of 1764 to 1777. Any analysis of the criminal justice system of Lower Canada must be based on an appreciation and understanding of these systems and the way in which they were adapted to meet the needs and exigencies of the Anglo-French colony.

During the French regime, the highest and most important court in the land was the Sovereign or Superior Council which was presided over by the Intendant and composed of the Governor, the Bishop, the Attorney-General, the recording clerk and initially five councillors. By 1703, the number of councillors had been increased to twelve. Initially, the Council had both legislative and judicial power but, as time went on, it "restricted itself increasingly to its judicial function, leaving legislation to be enacted by the intendant."<sup>80</sup> On occasion, it heard cases of original jurisdiction for the Quebec district "and criminal cases on appeal for the entire colony."<sup>81</sup> The Council could also hear appeals from civil actions tried in the lower, seigneurial courts. The districts of Montreal, Quebec and Trois Rivières each had their own Royal courts comprised of a judge, recorder and attorney whose decisions once again could be appealed to the Superior Council. Although a Court of the Admiralty was created at Quebec in 1717 to deal with all maritime matters and maintain law and order, the basic institutions of the criminal justice system in New France were the Superior Council, the district royal courts, and the local seigneurial courts.<sup>82</sup>

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<sup>79</sup> Hay, "The Meanings of the Criminal Law in Quebec, 1764-1774," in Knafla, *supra* note 58, at 77-111.

<sup>80</sup> Eccles, *The Canadian Frontier 1534-1760* (Toronto: Holt, Rinehart and Winston, 1969) at 76.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 76, 82, 96 and 113. See also, Eccles, *supra* note 75, at 69, 71, 73 and 137.



According to André Lachance, it was hoped that those individuals involved in administering justice would have some knowledge of French criminal law. Whereas in France the candidate was expected to be licensed and to have successfully completed his barrister exams, in Canada it proved difficult to find individuals who were competent in such matters.<sup>83</sup> Jean-Baptiste Colbert refused to allow lawyers to practise their profession in the colony, and at times bailiffs performed the same function as solicitors in the courts.<sup>84</sup> However, despite such problems, the courts sat frequently and performed their functions efficiently. The Superior Council sat once a week while the lower courts met twice a week. If there was an abundance of cases before the courts, additional sittings were scheduled until the backlog was cleared.<sup>85</sup> It appears that law suits were relatively cheap given that fees were strictly controlled and in cases of a more serious nature the Crown paid for all aspects of criminal procedure.<sup>86</sup> Furthermore, a royal edict issued in 1717 stated that poverty should never bar a person "from seeking justice in the courts."<sup>87</sup>

The criminal process was inquisitorial in nature. The accused, who at times could not even sign his own name, was expected to defend himself personally and to respond directly to the judge's questions.<sup>88</sup> There were, however, few cases and considerable evidence was required for a conviction. In his study of the Quebec, Trois Rivières and Montreal districts, Lachance found that over sixty per cent of those people convicted for a crime during the 1712 to 1748 period experienced some form of corporal punishment. The courts had a variety of punishments at their disposal ranging from whipping, branding and mutilation to time spent in the pillory. The latter appears to have been one of the more popular forms of punishment.<sup>89</sup> As to the ultimate penalty, death, decapitation was the prerogative of the nobility while the rest of society could look to the public gallows.<sup>90</sup>

In one particular case tried at Trois Rivières just before the end of the French regime, the courts used the full range of punishments available to them in sentencing the accused. A woman was found guilty of attempted murder and attempted suicide. The court sentenced her to be publicly beaten, flogged, branded on the right shoulder with the fleur-de-lis, banished from the Trois Rivières area and fined. In appealing the sentence to the Superior Council, the prosecuting attorney argued that the punishment was not severe enough. As a result the woman was sentenced to be hanged at the public gallows, to have her body exposed for two hours and finally to be discarded at the public dump.<sup>91</sup>

Criminal litigation, was the exception rather than the rule for the resolution of disputes in New France. Often the local curé, militia official or seigneur

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<sup>83</sup> Lachance, *La Justice Criminelle du Roi au Canada au XVIIIe Siècle* (Quebec: Les Presses de L'Université Laval, 1978) at 33.

<sup>84</sup> See Eccles, *supra* note 75, at 73 and Baby, "L'Exode des Classes Dirigeantes à la Cession du Canada" in Miquelon, *supra* note 76, at 22-24.

<sup>86</sup> *Supra* note 79, at 85.

<sup>87</sup> *Supra* note 80, at 79. In 1712 Louis XIV instructed the Governor and Intendant at Quebec that "Justice must be rendered alike to rich and poor, strong and weak to the habitant as to the seigneur," *id.*

<sup>88</sup> *Supra* note 83, at 103.

<sup>89</sup> *Id.* at 105.

<sup>90</sup> Eccles, *supra* note 75, at 74.

<sup>91</sup> *DCB, supra* note 9, Vol. III at 430.

would arbitrate a dispute and the alleged offence would be compounded, rather than resort to the exercise of an official legal proceeding.<sup>92</sup> If action was taken through official legal channels, then the appropriate French substantive criminal law was “interpreted and applied by the judge to the particular case.”<sup>93</sup> Care was taken in levying criminal accusations, and the public shame attributed to the accused in a criminal prosecution was in itself a major reason to avoid the legal process wherever possible in both the mother country and the colony.<sup>94</sup>

This world came to an abrupt end with the English Conquest of 1759-1760 and the implementation of martial law. In the winter of 1759, James Murray, then Commander-in-Chief of the British troops in the St. Lawrence area, appointed Colonel Young as the judge to hear all complaints of the residents. Young was to hold these hearings at his home every Tuesday and Friday morning from nine until twelve noon. In January of the following year Murray appointed three judges whose criminal and civil decisions could be appealed to Young.<sup>95</sup> Then on October 31, 1760 Murray announced that he would hear criminal and civil cases himself. According to A.L. Burt, Murray rarely used this prerogative and relied instead on the military courts.<sup>96</sup>

Throughout the military regime, Murray continued to use the institution of the Superior Council which had been so important in the pre-Conquest era. He appointed three French individuals to key positions on the Council. A notary and judge in the French regime was appointed Chief Clerk of the Council,<sup>97</sup> while two Attorneys-General were named for the north and south shores respectively.<sup>98</sup>

On September 8, 1760 Jeffrey Amherst, the overall Commander-in-Chief who was stationed in New York, placed the district of Quebec under Murray's command, Trois Rivières under Ralph Burton's and Montreal under that of Thomas Gage. A proclamation issued by Amherst stipulated that the captain of the Canadian militia in each area or parish could hear complaints but, if the captain was unable to decide the case and it was not serious enough to warrant the Governor's attention, the Canadian officer could refer the cause to the commanding officer of the British troops in the area.<sup>99</sup> The British had renewed the commissions of the captains of militia who had served “as subdelegates of the Intendant and as local police officers”<sup>100</sup> in the French regime and under the British military regime, they became both police officers and magistrates.<sup>101</sup>

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<sup>92</sup> Wade, 1 *The French Canadians, 1760-1967* (Toronto: MacMillan, 1968) at 51.

<sup>93</sup> Neatby, *supra* note 75, at 49.

<sup>94</sup> Burt, *supra* note 75, at 5 and Eccles, *supra* note 75, at 223.

<sup>95</sup> Riddell, *The First British Courts in Canada* (1924), 33 Yale L.J. 571.

<sup>96</sup> Burt, *supra* note 75, at 33. “Proclamation of Governor Murray Establishing Military Courts, October 31, 1760,” in Shortt and Doughty, eds., *Documents Relating to Constitutional History of Canada 1759-1761* (Ottawa: Public Archives 1918) at 44-49.

<sup>97</sup> DCB, *supra* note 9, Vol. IV, 601-603.

<sup>98</sup> Burt, *supra* note 75, at 33. See also *supra* note 92, at 51.

<sup>99</sup> Wiener, *Civilians under Military Justice* (Chicago: Univ. of Chicago Press, 1967) at 38-42 and *supra* note 95, at 573.

<sup>100</sup> *Supra* note 80, at 76.

<sup>101</sup> *Supra* note 92, at 50-51.

W.R. Riddell noted that on October 26, 1760 a Proclamation issued by Brigadier-General Gage allowed an individual to appeal a decision to him, but only after that person had appealed the decision of the officier of the militia to the commanding officer in the area but still did not agree with the latter's judgment. The officers of the militia from the town of Montreal were to meet every Tuesday to hear complaints. A year later, the district of Montreal was divided into five areas at Point Claire, Longueuil, St. Antoine, Point Aux Trembles and Lavallières for the purposes of the administration of justice. The officers of the militia were to meet on the first and fifteenth of every month at these designated centres. Gage also appointed British officers to man three district appeal courts to meet monthly at Montreal, St. Sulpice and Varcanses.<sup>102</sup>

Civilians, as well as military personnel, were subject to court-martials and arbitrary proceedings. Cases ranging from ordinary common law felonies to murder, rape and extortion were heard by the Canadian captains of militia and the British officers to the courts-martial sitting in the three key towns of Montreal, Quebec and Trois Rivières.<sup>103</sup> Despite the creation of this judicial system under the British military regime, one individual at least has concluded that "the people as a rule settled their difficulties among themselves; and did not resort to the military tribunals which were established to administer law."<sup>104</sup>

The military regime ended on August 10, 1764 with the creation of a civil government under Murray, the newly-appointed Governor for the whole area. Once again, Murray used the French concept of a Superior Council. This time his Council was comprised of the Lieutenant Governors of Trois Rivières and Montreal, the Chief Justice, the Surveyor General of the American customs and eight members to be chosen from the residents.<sup>105</sup> As a result of the recommendations made by this Council, (which included no Roman Catholics due to their religious ineligibility to hold office) Murray issued an ordinance on September 17, 1764 to establish civil courts. Bearing in mind that the Proclamation of 1763 allowed the Governor to erect "Courts of Judicature . . . for hearing and determining all Causes, as well as Criminal as Civil, according to Law and Equity, and as near may be agreeable to the Laws of England,"<sup>106</sup> Murray appears to have been somewhat conciliatory to the French, Roman Catholic majority in the colony by reinstating civil courts.

The 1764 Ordinance merged the three districts of the French regime into two, Montreal and Quebec. Generally speaking, the courts which were introduced were strictly English: King's Bench, Common Pleas, the circuit courts of Assizes, Oyer and Terminer and Gaol Delivery, and the Courts of Quarter Sessions. The King's Bench, the highest court in the land, was to be a court of original jurisdiction for major criminal and civil suits but an Ordinance of 1777 stipulated that henceforth the King's Bench would deal solely

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<sup>102</sup> *Supra* note 95, at 573-74.

<sup>103</sup> *Supra* note 99, at 44.

<sup>104</sup> Bourinot, *Local Government in Canada: An Historical Study* (Baltimore: John Hopkins Univ. Press, 1887) at 28.

<sup>105</sup> The eight members included Colonel Hector Theophilus Cramahé, Colonel Paulus Aemelius Irving, Captain Samuel Holland, Walter Murray (a relative of the Governor), Dr. Adam Mabane (surgeon), B. Price and Thomas Dunn (merchants) and Francois Mounier (a French Huguenot); *supra* note 92, at 55.

<sup>106</sup> Shortt and Doughty, *supra* note 96, at 165.

with criminal cases. All civil suits would be heard at Common Pleas. The King's Bench also lost its right to hear appeals from the Court of Common Pleas. Subsequently such appeals would be heard by an appeal court comprised of the Governor, Lieutenant-Governor or Chief Justice and five members of the Council.<sup>107</sup> Then in 1794 the King's Bench had its civil jurisdiction reinstated.<sup>108</sup>

Bound by English substantive criminal law and provincial ordinances and presided over by a Chief Justice, the newly-created King's Bench of 1764 was to meet twice a year, once in Montreal and once in Quebec. But a March 4, 1777 Ordinance concerning the criminal courts increased their sessions to "four times a year in Quebec beginning on the first Tuesdays in May and November, and in Montreal on the first Mondays in March and September."<sup>109</sup> In 1787 the term of the King's Bench was limited to ten days; if the offenders and witnesses were unable to make the sessions at Montreal they could proceed to Quebec for trials.<sup>110</sup> A 1794 measure stipulated that the King's Bench would sit on the first ten days of March and September in Montreal and on the last ten days of the same months in Quebec. At this time a court of King's Bench was also created for the district of Trois Rivières, to be composed of two judges from the King's Bench at Montreal and Quebec plus a judge to be appointed for the district. This court was to meet twice a year from the thirteenth to the last days of March and September. Criminal cases were heard on the first four days, while civil suits were scheduled for the remainder of the session.<sup>111</sup>

The establishment of circuit courts completed the institutional framework for the adjudication of major criminal causes. By the 1764 Ordinance creating civil courts, the Chief Justice of the colony was to hold a Court of Assizes and General Gaol Delivery once a year at Trois Rivières and Montreal after the winter session of the King's Bench. The procedures of the circuit court were similar to those of the King's Bench and the profile of the circuit courts, trying felonies on commissions of Oyer and Terminer and Gaol Delivery, was designed to be as high in Montreal and Trois Rivières as the central court in Montreal, Quebec and, later, Trois Rivières. The intent of this policy was to bring the courts to the people rather than the people being brought to the courts, a principle that was anathema to English legal traditions. It was hoped for, unrealistically, that the circuit courts would serve those who lived in areas distant from Montreal and Trois Rivières.<sup>112</sup>

The judges of the higher criminal courts were drawn exclusively from the English population. French Canadians were barred from serving as judges on

<sup>107</sup> Neatby, *supra* note 75, at 163.

<sup>108</sup> 1793, Consolidated Statutes of Lower Canada 34 Geo. 3, c. 6, ss. 2 and 11, [hereinafter C.S.L.C.] — *An Act for the division of the Province of Lower Canada for amending the Judicature thereof, and for repealing certain Laws therein mentioned.*

<sup>109</sup> Neatby, *supra* note 77, at 299.

<sup>110</sup> 1793, C.S.L.C. 27 Geo. 3, c. 6, s. 11 — *An Ordinance to regulate the proceedings, in certain cases, in the Court of King's Bench, and to give the subject the benefit of Appeal from large fines.*

<sup>111</sup> 1793, C.S.L.C. 34 Geo. 3, c. 6, s. 11 — *An Act for the division of the Province of Lower Canada for amending the Judicature thereof, and for repealing certain Laws therein mentioned.*

<sup>112</sup> L'Heureux, *supra* note 78, at 281-83.

the King's Bench and circuit courts because of the application of the English Test Act and Oath of Supremacy.<sup>113</sup> Thus the court was staffed by English judges of varying competence. In April 1764, Lord Elibank warned his brother, Murray, that "They have saddled you with a Criminal for Lord Chief Justice and an Attorney-General still more infamous."<sup>114</sup> The two men were Chief Justice William Gregory and Attorney-General George Suckling who had practised law without distinction in Nova Scotia. By September 16, 1764 Murray had called them two "ignorant needy lawyers."<sup>115</sup> Neither of these men nor the first sheriff (a Deputy Provost Marshal) spoke or understood a word of French.<sup>116</sup> Gregory and Suckling's replacements in 1766 were not much better. Although the new Chief Justice, William Hey, was a competent jurist, he knew little French law, French customs or indeed the language.<sup>117</sup> At least Cambridge-educated Francis Maseres, the new Attorney-General, was bilingual, but he encountered some difficulties in trying to understand Canadian witnesses.<sup>118</sup> As early as February 1769, Maseres recommended that judges be barristers at law of at least five years standing and should have a working knowledge of the French language.<sup>119</sup>

The late 1770s and 1780s saw a continuation in the appointment of English officials to administer the criminal courts in Quebec. In 1774, James Monk — originally from Boston and educated in Halifax — was elected to the Nova Scotia House of Assembly and became the colony's Solicitor-General. Two years later, he became the Attorney-General of Quebec. In 1777, a Loyalist by the name of Peter Livius, who had been a judge in New Hampshire and a member of the Court of Common Pleas at Montreal since 1775, replaced Hey as Chief Justice for the province. Neither man, however, had a particularly successful career in Quebec. Livius was quickly dismissed after a dispute with Carleton and Monk was fired in 1789 when he launched an attack against corruption and incompetent judges in the court.<sup>120</sup> Monk's belief in the independence of the courts and the rule of law, and his opposition to the excessive use of the royal prerogative made him unpopular with the military rulers and profit-seekers of the colony.<sup>121</sup> From 1778 to 1784 there was no Chief Justice in the Colony. Consequently the King's Bench was presided over by three commissioners.

In an attempt to gain some stability, yet another Loyalist, New Yorker William Smith, was appointed Chief Justice in 1786. Smith came to Quebec

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<sup>113</sup> Eccles, *supra* note 75, at 221.

<sup>114</sup> *Id.* at 222.

<sup>115</sup> *Supra* note 92, at 55.

<sup>116</sup> *Supra* note 79, at 86.

<sup>117</sup> L'Heureux, *supra* note 78, at 310-11.

<sup>118</sup> *Supra* note 79, at 86.

<sup>119</sup> Maseres, "A Draught of an Intended Report of the Governor General and the Council of the Province of Quebec to the King Concerning the State of the Law and the Administration of Justice in the Province," in Shortt and Doughty, *supra* note 96, at 247.

<sup>120</sup> Story, *The Oxford Companion to Canadian History and Literature* (Toronto: Oxford Univ. Press, 1967) at 532. Burt, *The Tragedy of Chief Justice Livius* (1924), 5 *Canadian Historical Review* 196.

<sup>121</sup> *DCB*, *supra* note 9, Vol. III at 457-58; Vol. IV at 185, 229, 345, 400, 451, 581 and 716.

with good credentials. He had served as the Chief Justice of New York and prepared the first digest of colonial law. Concerned with the majesty of English law, Smith ordered "all officers of the court to wear costumes similar to those of the King's bench in Westminster Hall and the lawyers to appear in gowns and bands."<sup>122</sup> Yet Smith, by the time of his death in 1793, had made few improvements in criminal justice, partly because he was preoccupied with the struggles over an elected assembly and the status of civil law.<sup>123</sup> By 1808, Smith's son-in-law, Johnathon Sewell, who came to Quebec from Nova Scotia to serve as Solicitor-General, became Chief Justice. Relatively fluent in French, he wrote a number of articles on French law as it applied in Quebec.<sup>124</sup>

A key problem in the working of criminal procedure was the question of language. Ideally, all evidence was supposed to be presented in, or at least translated into, English. It was widely felt that the exact forms of the indictment should be maintained, and in order to ensure this the use of English was mandatory.<sup>125</sup> As a result, questions of law and evidence were discussed in English. According to Hay, "for the first ten years of English criminal justice in Quebec, the charge to the Grand Jury, the indictment and perhaps the judge's directions to the petty jury were all in English in the principal court of a colony ninety-six per cent French-speaking."<sup>126</sup> It is little wonder then that Hay's research indicates that the Canadiens seemed to avoid the Court of King's Bench.<sup>127</sup> Despite the light calendar of the court and the use of English language, the court's proceedings and records did not reflect the highest standards of English common law tradition.

A major element of English criminal procedure was the jury. Although Canadiens were excluded from acting as judges in the Court of King's Bench, the 1764 Ordinance allowed "all His Majesty's Subjects in this Colony to be admitted on Juries without Distinction."<sup>128</sup> If Roman Catholics had not been allowed to serve as jurors, "it would have erected a handful of Protestants into 'perpetual judges of the lives and property' not only of the new subjects but also of the military."<sup>129</sup> Despite this concession, Canadiens customarily did not serve as jurors on the King's Bench. Hay noted that "the higher part of the Canadians object to the institution (Jury) itself, as humiliating and degrading.

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<sup>122</sup> Neatby, *supra* note 77, at 308.

<sup>123</sup> See also Soward, *supra* note 77, at 314-15 and Upton, *The Loyal Whig: William Smith of New York and Quebec* (Toronto: Univ. of Toronto Press, 1969).

<sup>124</sup> *Supra* note 8, at 147-53.

<sup>125</sup> *Supra* note 79, at 85-86.

<sup>126</sup> *Id.* at 88.

<sup>127</sup> *Id.* at 83-89.

<sup>128</sup> "Establishing Civil Courts, Ordinance of September 17, 1764," in Shortt and Doughty, *supra* note 96, at 206.

<sup>129</sup> Burt, *supra* note 75, at 90. And in Murray's words: "As there are but Two Hundred Protestant Subjects in the Province, the greatest part of which are disbanded Soldiers of little Property and mean Capacity, it is thought unjust to exclude the new Roman Catholic Subjects to sit upon Juries, as such exclusion would constitute the said Two Hundred Protestants perpetual Judges of the Lives and Property of not only Eighty Thousand of the new Subjects, but likewise of all the Military in the Province; besides if the Canadians are not admitted on Juries, many will Emigrate; This Establishment is therefore no more than a temporary Expedient to keep things as they are until His Majesty's Pleasure is known on this critical and difficult point." Shortt and Doughty, *supra* note 96, at 206.

They have no idea of submitting their conduct to a set of men, their inferiors." Such objections did not rest solely with the upper strata of Canadien society. One contemporary stated that "the lower order look upon it . . . as a burden to them." And in 1768 Francis Maseres noted that generally "the French hate to attend upon juries, and it is hard to force them against their wills."<sup>130</sup>

In more practical terms, property qualifications precluded the habitants. When the English had difficulty in finding sufficient numbers of English freeholders in Montreal and Quebec, a fifteen pound household qualification was introduced. This 1787 Ordinance carefully continued the effect of excluding most habitants, but allowed English merchants who owned real estate to qualify as jurors.<sup>131</sup> Two years later in the newly-created districts of Gaspé, Lunenburg, Mecklenburg, Nassau and Hesse, a prospective juror did not have to be a freeholder but had to be an occupant of one hundred acres of land.<sup>132</sup> Recent research suggests that in the first "two years of English justice there may have been no Canadien jurors sworn at all."<sup>133</sup> But as the system evolved, Canadiens were tried *de mediatate*, which meant a jury of six English and six Canadiens. An ordinance dated 1787 guaranteed a defendant "a jury composed of at least half of his own nationality,"<sup>134</sup> and eventually practice changed. By 1802 a jury composed of twelve Canadiens had found one of their own guilty of murder.<sup>135</sup>

The local courts of Quarter Sessions created in 1764 sat in each town in January, April, July and October to hear largely non-capital offences. The Justices of the Peace who made up this particular court were allowed to hear all cases (except treason) which carried the death penalty but only in the presence of the Chief Justice. For the most part, however, the magistrates heard cases of assault and battery, trespasses, petty theft, the illegal sale of liquor and the enforcement of police regulations. Sitting in twos at weekly petty sessions, their names were posted on the doors of the chamber two days before the session.<sup>136</sup> They also enforced the highly unpopular obligations of militia duty and carriage (*corvée*) for the government. In fact, of 488 fines levied in the weekly sittings of the Montreal court of Quarter Sessions from 1779 to 1787, over 200 were for neglect or refusal to fulfil militia duty;<sup>137</sup> the evidence suggests that more Canadiens appeared in the court of Quarter Sessions than the court of King's Bench.<sup>138</sup>

Originally, the magistrates could hear some civil cases up to a value of £30. However, as a result of a study into the administration of justice under

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<sup>130</sup> Morel, *La Réception du Droit Criminel Anglais*, *supra* note 78, at 498-99.

<sup>131</sup> 1786, C.S.L.C. 27 Geo. 3, c. 1, s. 1 — *An Ordinance to regulate the proceedings in certain cases in the Court of King's Bench, and to give the subject the benefit of Appeal from large fines.*

<sup>132</sup> 1788, C.S.L.C. 29 Geo. 3, c. 3, s. 11 — *An Act to continue the Ordinances regulating the Practice of the law, and to provide more effectually for the dispensation of Justice and especially New Districts.*

<sup>133</sup> *Supra* note 79, at 86.

<sup>134</sup> *Id.* at 87.

<sup>135</sup> Borthwick, *History of the Montreal Prison from A.D. 1784 to A.D. 1886* (Montreal: 1886) at 256.

<sup>136</sup> L'Heureux, *supra* note 78, at 276-78.

<sup>137</sup> Neatby, *supra* note 77, at 304.

<sup>138</sup> *Supra* note 79, at 83-89.

the Justices of the Peace, an ordinance dated February 1, 1770 abolished their jurisdiction in property matters. Subsequently they were concerned only with policing designated areas and hearing criminal cases.

The Courts of Quarter Sessions had long court calendars in the late eighteenth and early nineteenth centuries. The most frequent offences prosecuted were assault and battery, offences against bridges and highways, public nuisances, liquor related offences, moral offences, unlawful sports, gaming and idleness. These observations are particularly apparent from the records of the Court in Montreal. For example, in 1787 a person was arrested and convicted of selling liquor without a licence, but he had part of the fine remitted because of his "loyalty and goodness of character."<sup>139</sup> The question of one's loyalty was always paramount. There were several cases of convictions for petty larceny in 1787 and 1788 where the convicted were subjected to a time in the pillory and/or the lash.<sup>140</sup> And in 1809 two women were sentenced to six months in the House of Correction with hard labour "for being loose and disorderly women." It was further ordered that one of them receive twenty lashes for contempt of court.<sup>141</sup> Fines were levied for bathing nude in certain areas as well as for assembling on Sundays and holidays "for the purpose of play and amusement in the streets, squares and other places of the towns and suburbs."<sup>142</sup>

The Justices of the Peace who served in Quarter Sessions were almost uniformly lacking in legal education and training. Required to swear an oath to the Test Act and an Oath of Supremacy, the Justices of the Peace were primarily chosen from an English population of some two hundred and fifty people which represented less than one-half of one percent of the populace.<sup>143</sup> Some of them, however, were competent men. In 1765 Murray appointed a Scottish-born captain of the Twenty-seventh Regiment, John Fraser, to preside over the Court of Quarter Sessions in Montreal. He later became a prominent judge in the Court of Common Pleas.<sup>144</sup> Some Justices of the Peace were English merchants. One merchant who held positions in the post-Conquest judicial system was Thomas Aylwin, an Englishman born in Romsey, Hampshire. In 1764 he was a member of the Quebec grand jury which was chaired by another merchant. In the following year he was appointed a Justice of the Peace. After a long stay in Massachusetts, Aylwin returned to Quebec and was immediately reinstated as a magistrate in 1785 and as a member of the Quebec grand jury in 1787. One year later, as chairman of the same grand jury, he suggested that work programmes should be developed for ex-criminals in the hope of curbing recidivism.<sup>145</sup> Other Justices of the Peace were ex-soldiers like James Cuthbert, a Scottish-born army officer who was also a member of the Quebec Council in 1766,<sup>146</sup> or French Huguenots like Jean Saint-Martin Dumas, who was appointed a Justice of the Peace for the

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<sup>139</sup> *Supra* note 135.

<sup>140</sup> *Id.* at 237-43.

<sup>141</sup> *Id.* at 254.

<sup>142</sup> *Id.* at 251.

<sup>143</sup> L'Heureux, *supra* note 78, at 313-16.

<sup>144</sup> Neatby, *supra* note 75, at 34.

<sup>145</sup> DCB, *supra* note 9, Vol. IV at 37-38.

<sup>146</sup> *Id.* at 190-91.



district of Montreal in 1765. Dumas repeatedly called for the continuation of French law in all but commercial matters.<sup>147</sup>

Murray, however, characterized most of those people who could serve as Justices of the Peace as being “contemptible traders and settlers” and “the most immoral collection of men” he had ever known.<sup>148</sup> Many of them had scant familiarity with the French language, no knowledge of local customs, and little awareness of their functions as Justices of the Peace and often lived far from the area in which they served.<sup>149</sup> A Clerk of the Peace stated in 1784 that several Quebec Justices of the Peace “were either absent from the district or so employed that they were never able to attend to their judicial functions.”<sup>150</sup> These junior but crucial members of the judiciary sometimes exceeded their powers. According to Neatby they:

[W]ere accused of scandalous irregularities: giving out blank writs, including judgements and executions, to be filled in by private persons, summoning defendants to come great distances to court without allowing the option of immediate payment, or allowing so short a time for the return of a writ that the defendant must lose by default.<sup>151</sup>

Supposedly, the Justices of the Peace were assisted in their duties by bailiffs (and sub-bailiffs) who replaced the captains of militia in 1765. The latter were of importance in the French regime and the years of British military rule, but were relieved of their duties in the 1764 Ordinance. Subsequently, each year every parish elected six men from whom the governor would select the bailiffs. According to Burt, “[t]heir duties were to oversee the roads and bridges, to arrest criminals, to serve as coroners when a regular coroner was not available, and to settle by means of arbitration all disputes over the breaking and mending of fences.”<sup>152</sup> A 1777 ordinance reinstated the captains of militia and gave them the power to act as coroners and Justices of the Peace.<sup>153</sup> The French Canadians, therefore, became Justices of the Peace. In 1790 a notary, Jean-Baptiste Bordeaux, was appointed a Justice of the Peace for Trois Rivières,<sup>154</sup> while two years later, Pierre-Joseph Camelin, a militia captain and member of the eighteenth-century business elite, became a magistrate.<sup>155</sup> An ordinance in 1787 further authorized that both captains and sergeants of militia could serve as peace officers.<sup>156</sup>

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<sup>147</sup> *Id.* at 243-44.

<sup>148</sup> Bruchési, “A History of Canada,” in Miquelon, *supra* note 76, at 43.

<sup>149</sup> L’Heureux, *supra* note 79, at 313-16. See also Neatby, *supra* note 75, at 50-51; Bourinot, *supra* note 104, at 28 and Craig, ed., *Lord Durhams Report: An Abridgement of Report on the Affairs of British North America* (Toronto: McClelland and Stewart 1963) at 66-70.

<sup>150</sup> Neatby, *supra* note 77, at 300.

<sup>151</sup> Neatby, *supra* note 75, at 98.

<sup>152</sup> Burt, *supra* note 75, at 90.

<sup>153</sup> *Id.* at 253-54. Also “An Ordinance for Establishing Courts of Criminal Jurisdiction in the Province of Quebec, March 4, 1777,” in Shortt and Doughty, *supra* note 96, at 690-91.

<sup>154</sup> *DCB*, *supra* note 9, Vol. IV at 40-41.

<sup>155</sup> *Id.* at 285-87.

<sup>156</sup> “An Ordinance to Explain and Amend an Ordinance for Establishing Courts of Criminal Jurisdiction in the Province of Quebec, April 30, 1787,” in Shortt and Doughty, *supra* note 96, at 862-63.

The rules of criminal procedures were not uniformly applied. For example, in the Detroit area, which was under Quebec jurisdiction, most criminal trials were summary, few witnesses were called for the prosecution, seldom were they allowed for the defendant, and Canadiens, Scottish fur traders and Indians were all dealt with roughly.<sup>157</sup> As had been illustrated in this paper, judges and magistrates were generally untrained and often ignorant of the law and procedure. Livius, the ill-fated Attorney-General of the mid-1770s, found untrained judges determining cases without the benefit of a jury.<sup>158</sup> At the time he suggested that "only duly qualified lawyers from England, or Scotland, or advocates who had practised in the province three years, should be placed on the bench." Only six judges on the bench would have been qualified to preside.<sup>159</sup>

Despite several ordinances to improve the record-keeping,<sup>160</sup> Quarter Sessions records were for the most part inadequately kept and often too incomplete to be examined for appeals. Given this state of affairs, it is not surprising that many years later, Lord Durham felt obliged to report the "lamentable fact . . . that there does not exist in the minds of the people of this province the slightest confidence in the administration of criminal justice," and that the "law itself is a mass of incoherent and conflicting laws, part French, part English and with the line between each very confusedly drawn."<sup>161</sup>

The haphazard way in which the criminal process was maintained was not unique to the late eighteenth and early nineteenth centuries. The French regime, the British military rule, and civil government in Lower Canada were all marked by rudimentary policing techniques and harsh punishments to control lawlessness and also ineptly seeking to maintain the majesty of the law.<sup>162</sup> In 1711, the Governor and Intendant of New France created a police force consisting of a lieutenant and three helpers, to "keep the peace" of its citizenry and control "drunken Indians."<sup>163</sup> The captains of militia acted as policemen during the French regime and were reinstated in those duties by the British after 1777. In the winter of 1783-84, as a result of an influx of Loyalist soldiers under the command of Colonel St. Leger, the Montreal area experienced a rash of robberies and disturbances. The situation became so bad that the city magistrates complained to St. Leger, and out of that meeting a patrol was instigated comprising a corporal, six soldiers and some civilians. This "Patrolling Guard" was commissioned "to patrol the streets from dusk to dawn" in hopes of curtailing the number of robberies and riots taking

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<sup>157</sup> Riddell, *Michigan Under British Rule: Law and Law Courts 1760-1796* (Lansing: Mich. Historical Commission, 1926).

<sup>158</sup> Neatby, *supra* note 77, at 67.

<sup>159</sup> *Id.* at 84.

<sup>160</sup> 1793, C.S.L.C. 34 Geo. 3, c. 3 — *An Act to provide for the Publication of certain Laws* and 1838 C.S.L.C. 2 Vict., c. 20.

<sup>161</sup> Craig, *supra* note 148, at 69.

<sup>162</sup> This concept is included in the general discussion of the law as ideology of which the majesty, justice and mercy of the law are key elements, see, Hay, "Property, Authority and the Criminal Law," in Hay et. al., ed., *Albion's Fatal Tree* (New York: Pantheon Books, 1975) and Chapman, "The Measurement of Crime in Nineteenth-Century Canada: Some Methodological and Philosophical Problems," in Knafla, *supra* note 58, at 147-57.

<sup>163</sup> *Supra* note 80, at 97.

place.<sup>164</sup> Although the policing of certain boroughs and villages was officially provided in 1818, it was well into the mid-nineteenth century before a bona fide police force was created for the cities of Montreal and Quebec.<sup>165</sup>

Throughout the eighteenth and first part of the nineteenth century the punishments for crime under both the French and English regimes were harsh. In 1774, Governor Carleton declared that "The criminal law they [les Canadiens] have experienced is not so extremely different [from the English law]. The mode of prosecution, the mode of deciding by the law, is very different; but the trial of great crimes . . . is almost entirely the same."<sup>166</sup> Punishments were conducted in public as both regimes attempted to instill by example fear and terror in the inhabitants. Lachance's research has indicated that a crucial element in the thirty-eight public executions which occurred between 1712 and 1748 was their psychological impact on the spectators.<sup>167</sup> Neatby has suggested that even the courts in the French regime "existed possibly as much to terrorize potential evil-doers as to punish vice already discovered."<sup>168</sup>

With the Conquest, the terror and majesty of English law transplanted that of the French. This development can be seen in the first year of the Conquest with the trial of a Canadien for robbery, arson and murder before General Gage on 18 March 1761. After dealing with the accused quickly and summarily, the general ordered the following punishment to be carried out:

[T]o be hanged by the Neck, near the City of Montreal Until his Body be dead. After which his body to be Carried to the place of Execution, to the most Convenient Place near the place where the Horrid Crime was Committed, and there to be Hung in Irons on a Jibbett, in the same manner as practiced in England, Until his Bones shall drop asunder as a Terror to all evil minded People.<sup>169</sup>

Similarly, a case date April 15, 1763 saw a murderess hanged and her body placed in an iron cage "a little west of the Church at Point Levis across the River from Quebec"<sup>170</sup> for the benefit, one would presume, of passers-by. Some years later, the residents of Trois Rivières requested "that a court of king's bench be held in their town and the punishments inflicted on the spot because of the moral effect that would be produced."<sup>171</sup> And in 1803 a man convicted of two petty thefts received a six-month sentence in the House of Correction and two public whippings of thirty-nine lashes each at the market place.<sup>172</sup>

<sup>164</sup> Thomas, "The Loyalists in the Montreal Area, 1775-1784." Paper presented to Canadian Historical Association, Halifax, 1981.

<sup>165</sup> 1816, C.S.L.C. 57 Geo. 3, c. 16 — *An Act more effectively to provide for the regulation of the Police in the Cities of Quebec and Montreal and the Town of Three Rivers, and for other purposes therein mentioned*; 1838 C.S.L.C. 2 Vict., c. 2 — *An Ordinance for establishing an efficient system of Police in the Cities of Quebec and Montreal*; 1820 C.S.L.C. 1 Geo. 4 c. 2, *An Act to repeal a certain Act therein mentioned, and to provide for the Police of the Borough of William Henry, and certain other Villages in the Province*.

<sup>166</sup> Morel, *Les Crimes et les Peines: Evolution des Mentalités au Quebec au XIXe Siècle* (1977-78), 8 *Revue de Droit* 386.

<sup>167</sup> *Supra* note 83, at 136-37.

<sup>168</sup> Neatby, *supra* note 77, at 310.

<sup>169</sup> *Supra* note 99, at 45.

<sup>170</sup> *Supra* note 95, at 579.

<sup>171</sup> Neatby, *supra* note 77, at 310.

<sup>172</sup> *Supra* note 138, at 256.

The Canadien had the added stigma that punishments were heavily clothed in British symbolism. The shackled prisoner had the branding iron thrust in the palm of his hand, and it stayed there until the convict uttered "vive le Roi" three times. The pillory and the stocks were placed on the edge of the market place overlooking Nelson's Monument. When a prisoner was placed in the pillory, he faced the market where he was the recipient of thrown eggs and rotten vegetables. If he turned to avoid the missiles, he was whipped. The gallows too were erected facing the Monument, and the convict's neck was snapped in the presence of the English Lord of the Seas.<sup>173</sup>

The criminal process was subject to some variations due to the peculiarities of the colonial situation but the English substantive criminal law was to be supreme. The English regarded their law as being far superior to the French, which they viewed as totally barbaric, although "it would be hard to imagine a more revolting form of execution than the English hanging, drawing and quartering, although the pains of death on the French wheel would be much more prolonged."<sup>174</sup> Blackstone and many others considered the English criminal law as "savage in its barbarity," but the French criminal law was no better with its arbitrary definitions of crime, brutal evidence-gathering procedures, lack of precedents and arbitrary punishments.<sup>175</sup> During the debates on the *Quebec Act*, Chief Justice Hey stated, "I cannot conceive them so stupid as to wish for the French [criminal] law,"<sup>176</sup> and added that "the Certainty and Lenity of the Criminal Laws . . . are generally known to the Canadians and are high in their Estimation."<sup>177</sup> Lord North added that the English criminal law was "approved of by the Canadians, because it is more refined and a more merciful law than the law of France."<sup>178</sup>

From 1760, criminal justice in Quebec was based on English law expressed in the English language,<sup>179</sup> yet little effort was made by the conquerors to explain English law and procedure to their new subjects. Before the end of 1764, one hundred Canadiens had expressed their willingness to adhere to English laws "when they are made known to us, but how can we understand it, if they do not explain it in our own language."<sup>180</sup> A meagre effort at communication

<sup>173</sup> *Id.* at 1-12.

<sup>174</sup> Neatby, *The Quebec Act: Protest and Policy* (Scarborough: Prentice-Hall of Canada, 1972).

<sup>175</sup> Desaulniers, *Les Peine de Mort dans la Legislation Criminelle de 1760 à 1892* (1977), 8 *Revue Générale de Droit* 48.

<sup>176</sup> *Supra* note 79, at 83.

<sup>177</sup> Hey, *A View of the Civil Government and Administration of Justice in the Province of Canada While it was Subject to the Crown of France* (Montreal: 1776) at 27-32.

<sup>178</sup> McNaught et. al. eds., *A Source-Book of Canadian History* (Toronto: 1959) The Act itself stated:

And whereas the Certainty and Lenity of the Criminal Law of England, and the Benefits and Advantages resulting from the Use of it, have been sensibly felt by the Inhabitants, from an Experience of more than Nine Years, during which it has been uniformly administered; . . . , That the same shall continue to be administered, and shall be observed as Law in the Province of Quebec as well as in the Description and Quality of the Offence as in the Method of Prosecution and Trial; and the Punishments and Forfeitures thereby inflicted to the Exclusion of every other Rule of Criminal Laws.

<sup>179</sup> Morel, *supra* note 78, at 534-38.

<sup>180</sup> *Supra* note 165, at 385.

was the colony's first journal, *La Gazette de Quebec*, published in 1764 which carried ordinances, proclamations, legal briefs and also listed occasional cases describing the accused, the offence, the verdict and the punishment.<sup>181</sup> The pre-eminence of the English criminal law was indelibly impressed upon Lower Canadian society by a visual and sensual awareness of the criminal justice system and through a strict adherence to the language of the English conquerors.

#### IV. CONCLUSION

The criminal justice system of the early Canadian colonies had been designed as a reincarnation of the English courts and criminal process and as a reassertion of the majesty of English law in North America. The Privy Council and the Board of Trade believed that the installation of pure English institutions would secure the loyalty of new English colonies. Institutions devolved from the royal prerogative, and the governors appointed were advised to create such criminal courts as would bring both adherence to, and respect for, the supremacy of English law. The courts established in Nova Scotia and New Brunswick met this objective but did not meet the terms of its instructions. The criminal courts were not those of England, but those of Massachusetts. Tory law and government were replaced by Whig institutions. Judges on the whole were well educated and experienced in the common law and the quality of the Bench extended to the lower courts as well as the higher ones. The centre of the criminal justice system was not the Assizes as in England, but the Court of King's Bench or Supreme Court as in Massachusetts. Thus the courts were more central in the Maritime colonies than in England, and this centralization, especially in New Brunswick, made judicial review and the supremacy of English criminal justice a reality.

The courts of Lower Canada were established on English models during the years of 1764 to 1777, but the result was neither a cohesive court system nor a general respect for English criminal justice. The legacy of the courts and customs of the French civil law regime, and of the French and English use of martial law, remained a critical factor in the judicial system of Lower Canada well into the nineteenth century. Neither the King's Bench, nor the Assizes, had large criminal calendars, while the local courts of Quarter Sessions carried a heavy jurisdictional load. The predominance of the local institutions, coupled with the absence of a genuine process of judicial review, denied to Lower Canada a centrally organized criminal justice system. Since the higher courts lacked a stable group with legal talent or experience and, as the Justices of the Peace were lacking in education and legal knowledge, adherence to, and respect for, the law did not develop in the inland colony. In fact, the men who served as Justices of the Peace and jurors represented less than one per cent of the racial, cultural and social matrix of Lower Canada. This failure of the criminal justice system to reflect a sufficient participation, and identification, of the local populace with the law contributed to the failure of English courts to win the allegiance of the Province.

The substantive criminal law was not adopted consistently in the early colonies. Nova Scotia selected a reception date of 1758, but the evidence reveals that it did not include any of the oppressive criminal statutes of eighteenth-

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<sup>181</sup> The circulation was limited and the readership was small.

century England. It enacted laws which provided for increased leniency in the punishment of felonious and non-felonious offences. New Brunswick, on the other hand, adopted a reception date of 1660, and the substantive criminal law of this colony was practised in accordance with its reception date. Later legislation applied the law more closely to the offences which were prosecuted, and introduced reforms which stemmed from the Enlightenment.<sup>182</sup> Thus, the effect of the substantive criminal law in both colonies was similar, reflecting the criminal law of New England more than that of the mother country. In Lower Canada, however, eighteenth-century English criminal law and attitudes towards crime were prevalent. While none of the same laws appear to have been received, crimes against property, the peace and morals were prosecuted conspicuously and were punished harshly. The substantive criminal law of Lower Canada was different from that of the Maritime colonies not only because of the eighteenth-century English inheritance, but also because of the influence of Bourbon France and the experiences of martial law in both regimes.

Criminal procedure in the two Maritime colonies was in the best common law tradition and was uniformly applied in all criminal courts. The testimony and cross-examination of witnesses and the accused were the centre of the criminal trial. The final judgment in most instances depended on both a grand jury presentment and a petty jury verdict. Records of proceedings were well kept and preserved and provide some of the best sources of the early history of the country.

The judicial officers and judges of Lower Canada did not take as much interest in criminal law procedure. While the evidence on this subject has not been surveyed to date,<sup>183</sup> an initial observation is that criminal procedure in Lower Canada resembled the lower English criminal courts in the eighteenth century; it was haphazard in its application, the evidence of witnesses was not central to the proceedings, and the records of the court were not well kept.

The criminal process was established in the Maritime colonies according to the basic principles of English common law jurisprudence derived from Sir Edward Coke and Sir Matthew Hale, who were the pre-eminent legal authorities for the legal profession of the New England colonies.<sup>184</sup> Pre-trial processes included the preparation of a dossier against the accused. Judges took a firm hand in the trial process and the jury exercised an independent role in reaching a verdict. Sentencing was judicious with motive, intent and degree of violence given due consideration. The trial, conviction and punishment of a criminal offender had a higher profile in Nova Scotia than in New Brunswick, but the latter colony developed a criminal process that adapted more consistently to changing social, religious and economic conditions than the older colony of Nova Scotia.

Lower Canada witnessed the problems of imposing the English criminal process on a conquered society. The lack of learned judges and an active legal

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<sup>182</sup> Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1770) Vol. IV at 9-19.

<sup>183</sup> These assessments may be altered by the current researches of Fecteau and Hay into the judicial records of the province.

<sup>184</sup> See, e.g., Haskins, *Law and Authority in Early Massachusetts* (New York: 1960).

profession, combined with the absence of legal literature and of written laws in the French language, precluded the firm establishment and consistent development of a clearly recognized trial process throughout the province. The use of martial law, summary process and trial by jury, the importance of race, language, politics and religion, and the dominance by a small group of Loyalists over the administration of government and the law were all factors which inhibited the operation of a traditional common law process. The criminal process succeeded in protecting the interests of the Crown in maintaining law and order but at the expense of respect for the system.

The Loyalist societies of Nova Scotia and New Brunswick were not challenged in their rule, and they provided paternalistic government for the Indian, Acadian and European minorities. Preferring representative to prerogative government, the ruling elite instilled a respect for the law which was based on the active participation of the local communities, a careful use of criminal procedure, a belief in the common law process and a humanitarian view of criminal justice. This respect was nurtured by a religious, evangelical movement named the 'Great Awakening' which inculcated the belief that these two colonies would form the foundation of a new Christian society which would escape the corruption and materialism of Great Britain and the new United States.<sup>185</sup>

The Loyalist society of Lower Canada, however, could ill afford the luxury of English paternalistic rule. Faced by a large and disaffected French people who refused to accept British supremacy, by new British lower class immigrants who posed a threat to law and order and by the advent of American expansion in the lower Great Lakes area, the ruling elite failed to adapt English criminal law effectively to the hybrid institutions which they inherited. Lacking a learned and experienced law profession and judiciary, the belief in English criminal process never took firm root in the conquered colony. Living in an age of fear of the present rather than of optimism for the future, by the War of 1812 the criminal justice system of Lower Canada was still searching for an accommodation with those people who occupied the small settlements stretched out along the banks of the St. Lawrence.

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<sup>185</sup> A case study of the leading figure is in Bumstead, *Henry Alline 1748-1784* (Toronto: Univ. of Toronto Press, 1971).