

THE 1838-1839 COURTS-MARTIAL OF PATRIOTES IN LOWER CANADA:

WERE THEY "CONSTITUTIONAL"?

by

MARK ALLEN THORBURN

B.A., California Lutheran University, 1979
J.D., Willamette University College of Law, 1982
M.A., Portland State University, 1993

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Department of History

The University of British Columbia
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ABSTRACT

Title of Thesis:

The 1838-1839 Courts-Martial of Patriotes in Lower Canada:
Were They Constitutional?

The thesis primarily examines the legality of the courts-martial that followed the 1838-1839 rebellion in Lower Canada against the contemporary principles of British jurisprudence and concludes that Sir John Colborne, the acting governor of the colony, and others within the governing political elite of Lower Canada exceeded their authority and violated the British Constitution in order to obtain convictions and executions of Patriotes for the purpose of satisfying their perception of justice and to deter another rebellion. The paper also concludes that what happened in Lower Canada is an example of the "law" being created by one or more of society's segments in favour of the interest of the dominant class or groups over the rest of society. Furthermore, fundamental legal rights are tossed aside when they are deemed an impediment by the dominant class or groups and the rule of law will only prevail when those in authority feel secure from serious threats.

The work looks at the nature of law, its social contexts, and its relationship to power. It also discusses the history of the prohibition in Great Britain against the court-martial of civilians, the entitlement of British colonists and the

inhabitants of "conquered colonies" to the legal rights of British subjects, and the use of courts-martial in the early nineteenth century in Upper Canada, South Africa, and the British Caribbean.

All of the materials used herein were found in the University of British Columbia's Main Library, Law Library, and Sedgewick Library.

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DEDICATION

For my parents, Arthur Gary and Beverly Ann Thorburn, who have always supported me and encouraged me to pursue my dreams, and especially for my dad, who did not live to see the completion of this work.

THE 1838-1839 COURTS-MARTIAL OF PATRIOTES IN LOWER CANADA:
WERE THEY "CONSTITUTIONAL"?

On the morning of 21 December 1838, two men were taken to the gallows located in the courtyard of the new Montreal prison. The first to die was Joseph-Narcisse Cardinal, a leading notary, school trustee, and member of Lower Canada's House of Assembly who served as a brigadier general in the rebel forces during the Patriote uprising earlier that year. The second was Cardinal's former articling student, twenty-three year old Joseph Duquet, who was active in both the '37 and '38 rebellions. Cardinal died quickly, but the hangman botched the job when it became Duquet's turn and the prisoner was violently thrown into the framework of the scaffold when the trap fell; conscious and bleeding profusely, Duquet had to wait another twenty minutes while the executioner attached a new rope to the gallows. The two, who had been convicted on 7 December of high treason, were buried first in the old Montreal cemetery, but twenty years later their remains were removed and placed under a monument to the Patriotes at the graveyard adjacent to the Notre-Dame-des-Neiges. Today, they are regarded as the first martyrs to the cause of Quebec independence. /1/

Cardinal and Duquet, along with eleven others, were tried and convicted of treason in December, 1838 by a military court-martial. The accused were all civilians and the trials

were conducted after the rebellion had ended and while the ordinary civilian courts in the colony were functioning. The defendants' lawyers were not allowed to make any arguments nor to question the witnesses (although they were allowed to submit written statements and to advise their clients). The trials were in English, which few of the defendants understood, the demand for a jury trial was denied, and the motion to transfer the cases to the civilian courts was overruled. /2/ Within the next two months, ten more men would be hanged for treason after being tried by court-martial and, by 6 May 1839, eighty-six others would also be condemned, although they were eventually exiled or set free. /3/ Yet, amazingly enough, these courts-martial have received scant attention in the histories of the Patriote Rebellions and only recently have the imposition and administration of martial law in Lower Canada after the '38 Rebellion received serious attention from historians. /4/

To date, the courts-martial have received extensive study only in F. Murray Greenwood's "The General Court Martial of 1838-39 in Lower Canada: An Abuse of Justice" (1988) and, to a lesser extent, in Greenwood's "L'insurrection apprehendee et l'administration de la justice au Canada" (1980) and "The Chartrand Murder Trial" (1984) and in Jean-Marie Fecteau's essay "Mesures d'exception et regle de droit" (1987). /5/ This study intends to build upon Greenwood's and Fecteau's work and examine the constitutionality of the courts-martial by briefly examining the history and usage of courts-martial across the British Empire up to the time of the

Patriote trials, as well as to study the statutes which permitted the Lower Canadian proceedings to occur and the contemporary interpretation given to the enabling legislation by judges and the Crown's law officers.

Even though courts-martial have their origins in England's medieval Court of the Constable and Marshal, the two situations in which they are utilized, military law and martial law, are based on entirely different concepts. Military law is a legal system consisting of the rules that are necessary to maintain good order and discipline in the military; its jurisdiction is defined by statutory law, it is administered by tribunals known as "courts-martial" that consist of military officers, and it applies primarily to the personnel within the armed services, although those civilians who accompany the military in the field, such as the servants and dependents of soldiers, have also been brought within its gamut. /6/ In contrast, martial law is not a distinct code or set of rules; rather, it is the suspension of the ordinary legal system that is in place and the temporary governance of the civilian population of a country or parts of it by military tribunals which are also known as "courts-martial." /7/ It was the latter that was used in Lower Canada between December, 1838 and May, 1839 to try Cardinal and the others.

To understand the role that courts-martial played and the constitutionality of their usage, one must first examine the nature of law, its social contexts, and its relationship to power. For thousands of years, most legal philosophers subscribed to the natural law theory where the law (both

criminal and civil) is decreed by deities or by the rational and logical deliberation of man; any "law" that contravenes the will of the gods or is inconsistent with human nature is wrong and is really not a "law." The problem to this approach, however, is the question of whose concept or interpretation of morality will govern when there are differences of opinion about the "natural law." In the nineteenth century, the legal scholar John Austin argued that law consists of the commands of a person or authority that is in the habit of giving them to people who are, likewise, in the habit of obeying them. This legal positivism was modified thirty-five years ago by the British jurist H.L.A. Hart who argued that a law was valid if it was created by some means that was communally recognized as authoritative and binding. Finally, in the late nineteenth century, a school of thought, known as "legal realism," rejected all legal philosophy and held that the law is merely what the courts will enforce. /8/

Contemporary legal historians have taken a number of approaches to describe the law. Two schools of thought, the "liberal theory" and the "conflict theory," see the law as a response to various social demands which are collectively known as the "instrumental theories," "positivism," and "structuralism." /9/

The proponents of the "liberal," "consensus," or "value-expression" theory (e.g., Roscoe Pound) argue that the law serves the needs of the entire society. The law satisfies the demands and secures the interests of those who want something from the state and, when the claims of individuals or groups

collide, it rationally adjusts, through delimitations and compromise, the conflicting demands so that the greatest number of, or the most important, interests are served with the least detriment to the "scheme of interests as a whole." In order for an effective adjustment to occur, it is necessary to have a society with the power and will to enforce its decisions. Furthermore, the law and its accompanying determination of what misconduct deserves official retribution reflects the consciousness of a community and, through its power of punishment, it regulates social behaviour by compelling every person to do his part to uphold society's norms and to avoid anti-social conduct. /10/

In contrast, the "conflict" or "social control" theory maintains that the law is not created by the entire society, but by one or more of its segments and that the law favours the interests of the dominant class or groups over the rest. Furthermore, the law changes as social conditions change, new interests emerge, and as concern over the protection of some aspect of life increases within the elite. The criminal law, in particular, defines and condemns those acts which conflict with the interests of whatever segment currently has the power to impose its policies. Diversity, conflict, and coercion, rather than consensus, shape the law. /11/

Traditional Marxists regard the law as a mere reflection of class relations, defending the elite's claims upon resources and labour by defining property and crimes and mediating class conflict with its rules and sanctions, all for the purpose of confirming and consolidating the power of the

upper class. /12/ Orthodox Marxism, however, cannot explain those developments in the law in which capitalist interests are seemingly subordinated, such as the abolition of slavery and the grant of the right for labour to organize and collectively bargain. Some argue that, in the long run, these changes serve the interests of the ruling class while others see them as part of a strategy of "corporate liberalism" in which the elite promotes government social-welfare programmes and business regulations to prevent the political and economic unrest (such as slave revolts, union protests, and chaotic competition) that could destabilize the social order. /13/ However, other Marxist historians, such as Eugene Genovese, have argued that the law is not only an expression of capitalist class interest or the imposition of the elite's viewpoint upon others, but that it also constrains the upper classes; in order to compel social conformity, the law must manifest a sufficient "degree of evenhandedness" to "validate itself ethically in the eyes of the several classes." /14/

British social historians go even further and argue that the criminal law is where class struggles are fought. Douglas Hay held, for instance, that while the law's rules and practices favour one class's domination over the others, the elite cannot have everything its own way and it must maintain the integrity of the legal system in the eyes of the people in order to sustain that system's effective use as an instrument of power. /15/ Accordingly, the elite manipulates the three

aspects of the criminal law (majesty, justice, and mercy) in such a way as to inspire awe, gratitude, and fear among the lower classes and, in doing so, the ruling class uses its power with restraint in order to maintain it. For example, procedural and evidentiary rules must be closely followed and be extremely considerate of the rights of the accused, even to the point of dismissing a case on a technicality, in order to favourably impress the masses and convince them of the merit of the existing order. /16/ Expanding on that point, E.P. Thompson argued that:

The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually being just. /17/ (Emphasis in original.)

Therefore, according to Thompson, the enforcement of the law exemplifies not only a method to settle class conflict to the advantage of the rulers, but also a self-imposed constraint on the ruling class against the exercise of unrestrained force (such as torture and arbitrary imprisonment). Furthermore, the elite believes in its own rules enough to allow, in certain cases, for the law to be an actual forum for particular kinds of class struggle and for individual members of the ruling classes, on occasion, to be defeated in those struggles. This has two effects. First, as Hay also noted, allowing the lower classes to struggle within the legal system and occasionally win actually lessens dissent, consolidates the ruling class' power, and enhances

the elite's legitimacy. Second, by binding itself to its rules against unmediated power, the ruling class limits its own power and those limitations will eventually be considered as constitutional restraints. /18/

Because the positivists reason that the law legitimizes the status quo in response to the needs of society or some segment of it, the central question for them is how this occurs. But for another group of legal historians, class or societal interests are not the driving forces behind the legal system; instead, they argue that why the law acts the way it does is because of the assumptions about politics, economics, and the social hierarchy that are commonly shared by the community. Antonio Gramsci, for instance, defined his notion of "hegemony" as a state when both the ruling class and the other portions of society accept the contemporary situation, with possibly some minor adjustments, as satisfactory or as the best that can be because virtually everyone shares the assumption that things as they exist now are natural and necessary. /19/

These commonly-shared assumptions, or "systems of belief," are the centre of study for other anti-positivist, or post-structuralist, legal historians. To them, it is meaningless to try to understand how the law objectively legitimates the existing order because the "reality" of what the law is and does is a construct of our society, our culture, or ourselves. Furthermore, this construction is connected with other constructions about similar, but nonlegal, clusters of belief. These assumptions are

communicated and shared through language, but the words do not simply describe things; they are laden with values from which people make judgments about the world and which influence how they will subsequently act. /20/ For example, in the United States, "esquire" and "lawyer" both connote a member of the legal profession. The former suggests formality and dignity and possibly the worst connections are with snobbery and a preference for the archaic; it is also used to describe members of the English gentry and candidates for knighthood. The latter, however, denotes, at best, only membership in the legal profession and it often conjures images of trickery and dishonesty. Likewise, to say "I am going to court" has little meaning outside a culture with a legal system where disputes are determined in a formal setting by a neutral party appointed by the state to perform that task.

According to the post-structuralists, the exchange of beliefs or understanding amounts to a "discourse" that is built and maintained in order to make it possible for people to interpret each other's words and actions. Furthermore, the law is only one amongst many clusters of understanding that have been created (or "constructed") to allow us to deal with people whose cooperation is essential but who, without the regulation and sanctions of the law, may harm us. The law (both civil and criminal) sorts out the different interactions between individuals (e.g., crimes, torts, contracts), defines the issues in dispute and what facts are relevant to their resolution, establishes peoples' different rights and obligations and sets out the penalties for the violation

thereof, and, after applying the "relevant" facts to statutory and other formulae, arrives at the legal "truth" and imposes a sanction or a remedy. /21/

Some anti-positivist legal historians (e.g., Robert Gordon) argue that the systems of belief that frame the law were intentionally built by the elites, who "think" they have a stake in "rationalizing" through discourse with other classes in society, in order to reinforce the existing hierarchies and to maintain their dominate position. Others (like Tina Loo) hold that while the discourse of the law is ideological, it is not necessarily so by intent. Also, they argue that discourse is not the only factor that determines people's expectations of the law and authority and that other factors, such as geographical obstacles and historical memory, play a role as well. For example, before the North West Mounted Police were dispatched to the Yukon in the 1890s, there was no government-sanctioned police force or court in the territory; instead, law enforcement and the prosecution of criminal actions were primarily the duty of the individual, judicial decisions were made by a "miners' meeting" that was an assembly of all those local residents who chose to attend, and judgments were reached by consensus and were based more on the offender's personal character and what that individual was expected to do in the future, with the goal of preventing future trouble, than on what the person actually did in a particular instance. This arrangement, according to the post-structuralists, reflected the discourse amongst the residents of the Yukon, who were mostly American miners, and

their experience in the United States with informal frontier justice. However, once the Mounties arrived and imposed their authority, the miners' meetings were displaced. Furthermore, the NWMP represented a distant state authority that determined what the law was and defined the remedies for its violation and the presence of this police force brought the symbols and rhetoric of impersonal British justice to the territory. /22/

Next, to help determine whether the 1838-39 courts-martial were constitutional, it is important to remember that, at the time of the rebellion, British law did not recognize "states of siege" or "states of emergency" during which the powers of the civilian and military authorities were unlimited and not constrained by the law. Instead, when insurgents could not be effectively halted by the ordinary processes of the civilian law courts, it was agreed by the judges and the legal commentators of the period that the government had the right to suppress the rebellion by force, but only in the amount needed to terminate the danger. Obviously, normal legal procedures, such as due process and the rule of evidence, could not handle the effects of sudden and violent uprisings, but the courts and legal commentators also agreed that only the force sufficient to restore order, and not one bit more or less, was permissible and any civilian or military official who used insufficient or excessive force was liable in the ordinary civil courts for their actions once order was restored, and those courts resumed their duties (assuming politics did not interfere and that the Crown could convince a jury of the defendant's guilt). For instance, the above

doctrine was clearly stated by the judge when the Mayor of Bristol was tried, after the 1831 Bristol Riots, for using insufficient measures against the protestors; while the mayor was acquitted, the colonel who refused to order his men to shoot into the crowd committed suicide and his captain was cashiered. /23/

In Britain, emergency legislation was passed in the early 1800s to counter internal emergencies, but no disturbances occurred that were beyond the control of civil authorities when supported by a small military contingent; indeed, by 1837, martial law had not been used in England itself for over a century. Likewise, in Ireland between 1803 and 1916, there were no disturbances sufficiently serious for martial law to be declared because a well-established police force existed which could handle most any situation. /24/

Across the empire, however, the ability to contain public discontent was different. In the 1830s, the Union Jack flew over a wide diversity of colonies, ranging from the penal colony in Van Diemen's Land to Upper and Lower Canada, where partial political autonomy was exercised. In most of these jurisdictions, there were only small military garrisons to support the government in time of civil crisis and, as a result, there was a tendency amongst colonial officials to use exemplary force to counter any threats. /25/ Between 1800 and 1837, martial law was declared eight times in the colonies. Twice, it was declared due to the exigencies of war: in Barbados on 19 May 1805, when the colonial governor was advised that a formidable enemy French fleet was within

sight of the island, and in the eastern districts of the Cape of Good Hope on 3 January 1835, one week after the news reached Cape Town of attacks by native Kaffir warriors against European missionaries and settlers in those regions. /26/ Martial law was also declared in Barbados on 15 April 1816, in Demerara (now part of Guyana) on 19 August 1823, and in Jamaica on 30 December 1831 as the result of uprisings by a portion of each colony's majority slave population and the fear that the rebellions would spread and overwhelm the colonists. (In Barbados in 1817, there were 77,273 slaves, of whom 71,432 were "Barbadians," 5446 were African-born, and the rest were Creoles from other islands, while there were only 16,015 white colonists and 3002 free "coloureds." In Demerara and Essequibo, the two settlements that made up the colony of Demerara, there were in 1824 roughly 77,000 slaves, approximately 55% of whom were African-born, to 3,500 white colonists and 2,500 free "people of colour." In Jamaica in 1832, there were approximately 25,000 white colonists and 35,000 free "coloureds" and free blacks to 323,000 slaves and presumably most, if not all, of the slaves were either black or "coloured.") /27/ Finally, martial law was declared for a short time in St. Lucia, St. Vincent, and Demerara in August, 1816 as soon as each received word of the slave insurrection in Jamaica. /28/

Although the government's ability to maintain order and its use of martial law to that end was different in the empire's overseas possessions than it was in Britain itself, it is safe to assume that, at the time of the 1838 Rebellion,

Lower Canada's civil and military authorities could later be held liable for any actions beyond what was needed to quell the revolt. This would be consistent with what happened in the other colonies when they declared martial law.

In Jamaica in 1831, a militia lieutenant was charged with, and acquitted of, murder when he executed, while martial law was in effect, a rebel slave who had surrendered but had not yet gone to trial. /29/ In 1865, due to a revolt by its black population, martial law was declared again over a portion of Jamaica. During this crisis, a civilian government critic was arrested, taken to an area under martial law, tried by a court martial, and executed. Two years later, both the military commander of the colony and the lieutenant who presided over the court-martial were accused of murder and the colonial governor was arraigned as an accessory before the fact; they did not go to trial because the grand jury refused to issue the "true bill" needed for an indictment against the officers. /30/

It should be noted that, in 1824, after the Demerara slave uprising, a public outcry broke out across England when a white missionary died in prison (of consumption) while his sentence of death, by a court-martial, was under review in London. The slave revolt in Demerara began on 18 August 1823 and martial law was declared on August 19th. Although the revolt was crushed within days, martial law remained in effect until 15 January 1824. During that time, the Reverend John Smith was tried by court-martial for creating dissatisfaction amongst the slaves and having concealed their intention to

revolt (both of which allegedly occurred before the rebellion) as well as for corresponding with a rebel leader (who was also his chief deacon) during the insurrection. On 24 November 1823, Smith was convicted and sentenced to death. A petition from the London Missionary Society to the governor of Demerara pled for Smith's life and asked that he be exiled from the island instead. The governor refused the request, but he did order Smith to prison (where he died three months later) and sent copies of the trial proceedings to London for its consideration and ultimate decision. /31/ After Smith's death, a petition to King George IV was debated in the House of Commons asking him to:

. . . adopt such measures . . . for securing such a just and humane administration of the law in that colony [i.e., Demerara] as may protect the voluntary instructors of Negroes, as well as the Negroes themselves, and the rest of his majesty's subjects, from oppression. /32/

Arguments focused on the constitutionality of Smith's court-martial, but in the end, the members of Parliament who were shocked by the rebellion of slaves in what was regarded as a benevolently-ruled colony were able to defeat the motion by a vote of 146 to 193. /33/ However, this defeat provided no constitutional precedent for the Lower Canadian courts-martial because, unlike Lower Canada in 1837, Demerara in 1824 fitted the legal definition of a "conquered" colony in which English law (both statutory and common) did not yet apply.

The rights of English colonists in "conquered" colonies were determined in a 1774 tax case known as "Campbell v. Hall." In that proceeding, a British plantation owner in

Grenada sued for a refund of a customs and import duty on the ground that there was no lawful authority to impose the tax. The island was conquered during the Seven Years War and was formally ceded by France in February, 1763. On 7 October 1763, a royal proclamation was issued directing the governors of various colonies, including Grenada, to establish local legislatures and, on 9 April 1764, General Robert Melville was appointed governor of Grenada and instructed to summon an assembly as soon as possible. In July, 1764, King George III, by virtue of his prerogative, imposed the customs and import duty without the consent of Parliament or of the colony's local authorities. In his suit, the plantation owner denied that the King could use his prerogative to legislate for a colony ceded in war. He also advanced the alternative argument that, even if the Monarch had the right to make laws for Grenada, he divested himself of such power once he conferred a representative legislature upon the island. England's Court of King's Bench rejected the first point, but agreed with the second. In explaining its decision, the Court addressed the power of the King to legislate for colonies that had been conquered by force or ceded by capitulation and the rights of Englishmen in those possessions. /34/ In particular, the Lord Chief Justice, William Murray, the Baron Mansfield of Mansfield, held that:

A country conquered by the British arms becomes a dominion of the king in right of his crown, and therefore necessarily subject to the legislative power of the parliament of Great Britain.

Laws of a conquered country continue until they are altered by the conqueror . . . [subject to the] exception as to pagans. . . .

The law and legislation of every dominion equally affects all persons and property within the limits thereof, and is the true rule for the decision of all questions which arise there: whoever purchases, sues or lives there, puts himself under the laws of the place, and in the situation of its inhabitants. An Englishman in Minorca or the isle of Man, or the plantations, has no distinct right from the natives while he continues there.

If the king has power (and, when I say the king, I mean in this case to be understood "without the concurrence of parliament") to make new laws for a conquered country, this being a power subordinated to his own authority, as a part of the supreme legislature in parliament, he can make none which are contrary to fundamental principles [of the English Common Law]; none excepting from the laws of trade or authority of parliament, or privileges exclusive of his other subjects. /35/

Nearly one hundred years later, another Lord Chief Justice, Sir Alexander Cockburn, restated the above principles at the 1867 grand jury proceeding against the two officers accused of murdering a civilian under the guise of martial law during the 1865 Jamaica rebellion. Specifically, Cockburn held that:

With regard to such colonies as are acquired by conquest, except so far as [whatever] rights may have been secured by any terms of capitulation, the power of the Sovereign is absolute. The conquered are at the mercy of the conqueror. Such possessions keep, it is true, their own laws for the time, because it would be productive of the greatest inconvenience and confusion if a body of people who had been governed by one law, should have that law, with which they are acquainted, suddenly changed for another of which they are totally ignorant, They therefore preserve their laws and institutions for the time, but subject to this, that they are under the absolute power of the Sovereign of these realms to alter those laws in

any way that to the Sovereign in Council may seem proper: in short, they may be dealt with, legislatively and authoritatively, as the Sovereign may please. /36/

In the case of Demerara, it was originally a Dutch colony that was occupied by the British during the Napoleonic Wars and ceded to the United Kingdom in 1815. At the time of the slave revolt, its local assembly was still the one which was established under the States General. Furthermore, English law had not been expressly introduced by 1824 and Dutch law, subject to King George IV's prerogative power to legislate for the colony, still prevailed. /37/ Therefore, its inhabitants (English and Dutch alike) were not entitled to any of the rights and constitutional liberties of British subjects except the guarantee that the Crown's right, by virtue of its prerogative, to alter old laws and to introduce new ones was subject to both the overriding authority of Parliament and the condition that no changes could be made that violated certain ill-defined fundamental principles of the English Common Law. /38/ However, trying civilians by courts-martial either did not violate those fundamental principles or did not constitute an alteration in Demerara's laws. According to Chief Justice Cockburn, Jamaica in 1865 (just like, as we shall later see, Lower Canada in 1837) was a colony whose inhabitants were entitled to all the rights and liberties of British subjects, including those established by Parliament against the royal prerogative, /39/ and the courts-martial in Demerara, because it was a "conquered" colony, were not a precedent for the legality of establishing martial law in Jamaica since "the

power of the Crown . . . [was] absolute" in Demerara. /40/
In any case, the strong support in Parliament in 1824 for the above-quoted petition to King George IV and the arguments that Smith's court-martial was unconstitutional, despite Demerara's political status, is indicative of the close scrutiny in the early nineteenth century on the use of martial law in the colonies.

Even when London was not concerned about the constitutional use of martial law across the empire, British colonists were distressed by it. In Barbados in 1805, martial law was declared for two days on 19 August, but the information about the arrival of a French fleet upon which that action was based later proved false. Still, on 21 May, the island's governor, Lord Seaforth, extended martial law until 25 May. A statute enacted by the colony's legislature allowed the governor to declare martial law only when an enemy force was within sight of the island. It also decreed that martial law must terminate as soon as the enemy had left and was out of sight. When Barbados' General Assembly met on 29 May, the governor's speech gave no explanation for the original proclamation of martial law nor for its extension. /41/ Members of the Assembly believed that their law had been disregarded and unanimously passed a resolution stating:

1st. Resolved, That the inhabitants of this island are entitled to the same privileges, and enjoy the same rights as other the [sic] loyal subjects of his Britannic Majesty.

2nd. Resolved, That the common law of the United Kingdom of Great Britain and Ireland is in

force in this colony, unless altered by British Acts of Parliament, or the legislative Acts of this island.

.

4th. Resolved, That any attempt to proclaim martial law otherwise than during the existence of the circumstances in the above-recited clause stated [i.e., the 26th clause of Barbados' Militia Act which is summarized above and was quoted in the third resolution], and with the forms thereby prescribed, is highly unconstitutional, contrary to law, and subversive of the dearest rights of the people.

5th. Resolved, That a committee be immediately appointed to prepare a remonstrance to his Excellency the Governor, and the Honourable the Members of his Privy Council, requesting that a communication may be made to this House, stating the grounds of the late proclamation of martial law from the 19th to the 21st instant, and the continuance thereof from the 21st to the 25th instant, and information given why the said proclamations were not prepared and made with the proper legal formalities. /42/

Realizing the criminal implications involved, Seaworth answered when the Assembly met on 18 June that he:

. . . cannot but deeply regret that the Honourable House of Assembly should have thought fit . . . to vote him guilty of acting unconstitutionally, and then to call upon him for an explanation. Called upon for an explanation of his conduct in a proper manner, he should have been very happy to have given such explanation, and is fully conscious he could give one satisfactory to every impartial mind; but situated as he is, he must refer the whole to the Sovereign, in whom alone he acknowledges any jurisdiction competent to find him guilty, and representing whom, he finds himself incapacitated from answering a charge of criminality before any other body. /43/ (Emphasis added.)

Accompanying Seaworth's response were minutes from his Privy Council indicating that while the initial declaration of martial law was due to erroneous information provided by the militia, the extension of martial law was based on the mere

supposition that the threat of an imminent military attack still existed. /44/ The General Assembly was not pleased by what it was told and, when it assembled again on 16 July, it resolved, by a vote of 14 to 1, that:

. . . the answer of his Excellency the Governor to our resolutions and [his] address of the 18th day of June is unsatisfactory, and highly disrespectful to this Honourable House. /45/

and that:

. . . the ground for continuing martial law from the 21st to the 25th of April . . . were not sufficient to justify the same, no such circumstances existing at the time, by their own showing, as the law requires to sanction such a measure. /46/

When answering these latest resolutions, Seaforth observed that he would not be more forthcoming because he had the prerogatives, rights and dignities of the King to protect. Possibly because no arrests, courts-martial, or executions occurred as a result of martial law, nothing further happened for over a year. Finally, on 1 July 1806, Seaforth advised the new General Assembly that the Imperial Government had approved of his actions. /47/

As in Barbados, Demerara, and Jamaica, martial law was declared in Lower Canada as a result of an uprising by a portion of a disaffected majority which the authorities feared would spread and overwhelm the governing minority. In 1837, the Patriotes, who were making thinly-veiled threats of political independence if the British government did not reduce itself to a figurehead role in the colony, held an overwhelming majority in the elected branch of the colonial legislature ("the House of Assembly"), but were nearly shut

out of the appointed branch of the legislature ("the Legislative Council") as well as out of the Executive Council that advised the colony's governor. /48/ Unable to obtain any appropriations from the Assembly, Lower Canada's governor, Lord Gosford, dismissed it on 26 August 1837. In response, the Patriotes became determined to overthrow British rule through civil disobedience, economic boycotts, and eventually armed rebellion. That November, the First Patriote Rebellion broke out and it was not quelled for a month. /49/ Martial law was declared in the district of Montreal on 5 December and was in effect until 27 April 1838, but no courts-martial were held and a general amnesty, subject to a few exceptions, was proclaimed. /50/ Shortly after peace was restored, the British government decided to suspend the Lower Canadian Assembly and Legislative Council until November, 1840 and to create, in their stead, a temporary Special Council that assumed their legislative duties. The Council was prevented, however, from affecting or invalidating any current law in the colony. /51/ In the meantime, Lord Gosford resigned and was replaced with Lord Durham who, in turn, left Canada on 1 November 1838, leaving Lieutenant-General Sir John Colborne as the temporary administrator of the colony. /52/

The second rebellion erupted on the night of 3-4 November 1838, but the Patriote forces were dispersed by 11 November. /53/ On 4 November, General Colborne issued a proclamation for the arrest and punishment of all persons in the district of Montreal:

. . . who have hitherto, and who now are or hereafter may be anywise acting, aiding or assisting in . . . conspiracy and rebellion within the said district of Montreal, according to Martial Law, either by death or otherwise, as to me shall seem right and expedient for the punishment of all rebels in the said district.
/54/

Martial law in the district of Montreal would not be lifted until the following August. /55/

On 8 November, the Special Council approved an ordinance authorizing Colborne to punish all suspected rebels by courts-martial. Although the ordinance was expressly limited to the district of Montreal, it also authorized Colborne to extend its application to other parts of the colony. /56/ Indeed, Colborne placed the district of Saint Francois was placed under martial law on 16 November, five days after the second rebellion had been suppressed. On 28 November, the courts-martial began. /57/

The first question in determining the constitutionality of the courts-martial is whether Colborne had the authority to proclaim martial law. In 1867, in the first legal opinion that explicitly addressed the issue of a colonial governor's authority to declare martial law, Britain's Lord Chief Justice Sir Alexander Cockburn stated:

Now, one thing is quite clear - namely, that the power of a Governor to declare martial law can proceed only from one of two sources. It must either be derived from the commission which he has received from the Crown, or from some statute, either of imperial or of local legislation. It can be derived from no other source. /58/

To determine if General Colborne had any power to declare martial law, it must be remembered that he was the temporary

administrator of Lower Canada, not by virtue of any commission from Queen Victoria, but because, as the senior British officer in the colony, he was in charge until Lord Durham's replacement as Governor of Lower Canada was appointed and, as such, had whatever authority the Queen had originally entrusted in Durham. As stated by Colborne's proclamation declaring his assumption of the administration of the colony's civil government:

WHEREAS by certain letters patent, bearing date at Westminster, the 30th day of March, in the first year of the reign of our Sovereign Lady the Queen [i.e., 1838], our said Sovereign Lady Victoria did constitute and appoint the Right Hon. John George Earl of Durham to be Captain-general and Governor-in-chief in and over our said province of Lower Canada.

And whereas in and by the said letters patent, it is provided, that . . . if, upon the death or absence of the said John George Earl of Durham . . . no person shall be upon the place commissioned and appointed to administer the government of the said province, until the return of the said John George Earl of Durham, from any such absence, or until the royal pleasure could be further made known, the senior military officer, for the time being, in command of the forces within the said province of Lower Canada, should take upon him the administration of the government thereof, and should execute in the said province the said commission [i.e., the letters patent] and the . . . several powers and authorities therein contained, in the same manner and to all intents and purposed as other the Captain-general or Governor-in-chief should or ought to do . . .

. . . under and by virtue of the above provision . . . the administration of the civil government of Her Majesty's province of Lower Canada hath devolved upon me . . . with all and every the powers and authorities by the said letters patent vested in the said Right Honourable John George Earl of Durham . . . /59/

No matter how broadly worded Durham's commission may have been, his prerogative to declare martial law was not

unlimited. As Chief Justice Cockburn explained in 1867, a colonial governor:

. . . assuming . . . that his commission confers on him all the executive power of the Crown in the government of . . . [the colony], can have no further power to declare martial law, as derived from his commission, than that which the Sovereign would have. /60/

And over the centuries, restrictions had been placed upon the Crown's power to impose martial law. For example, in the Magna Carta (1215), it was recognized that a civilian could be tried and punished only by an ordinary court and only for an offence found in the law:

Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terrae. /61/

Later, in 1327, the English Parliament retroactively set aside the death sentence that had been imposed upon Thomas, the Earl of Lancaster, who had been found guilty of treason in 1322 by a court-martial for rebelling against King Edward II. Parliament so acted because, on the date of Lancaster's trial and execution, the ordinary civil courts were still operating and, thus, it was a "time of peace." /62/ Specifically:

. . . idem Thomas errone, & contra legem terrae tempore pacis morti extitit adjudicatus, unde cum notorium fit & manifestum, quod totum tempus, quo impositum suit eidem comiti praedicta mala & facinora in praedictis recordo & processu contenta fecisse, & etiam tempus, quo captus fuit, & quo dictus dominus rex pater recordabatur ipsum esse culpabilem, &c. & quo morti extitit adjudicatus, fuit tempus pacis, maxime cum per totum tempus praedictum cancellaria & aliae placeae curiae domini regis apertae fuerunt, & in quibus lex cuicumque fiebat, prout feiri consuevit, nec idem dominus rex unquam in tempore illo cum vexillis explicatis equitabat, praedictus

dominus rex pater, &c. in hujusmodi tempore pacis
contra ipsum comitem sic recordari non debuit, nec
ipsum sine arrenamento & responsione mortis
ajudicasse. /63/

This principle was reaffirmed by the Court of King's Bench in 1798 in the proceeding commonly known as "Wolfe Tone's case" in which Tone, a British subject from Ireland, had accepted an officer's commission from France, was captured while taking part in an attempted French invasion of Ireland, and was subsequently condemned to death by a British military court. An application for a writ of habeas corpus /64/ was made to the Court of King's Bench on the ground that since the ordinary civil courts were still operating, Tone, not being a member of the British armed forces, was not subject to trial or punishment by a British military court. The writ was immediately granted. /65/

The above principles were frequently ignored by the Monarch until Parliament decided to halt the unlawful practice of bringing English civilians under martial law. /66/ After explicitly stating that "no man ought to be adjudged to death but by the laws established . . . either by the customs of . . . [this] realm, or by acts of parliament," /67/ the Petition of Rights (1627) outlawed the King's use of royal commissions for his agents:

. . . to proceed within the land, according to the justice of martial law . . . and by such summary course and order as is agreeable to martial law, and as is used in armies in time of war, to proceed to the trial and condemnation of such offenders, and them to cause to be executed and put to death according to the law martial.
/68/

The Petition also decreed that "no freeman in any such manner as is before-mentioned [i.e., by a court-martial under a royal commission] [can] be imprisoned or detained." /69/

Sixty years later, the Bill of Rights (1689) further declared that "the pretended Power of suspending Laws, or the Execution of Laws, by regal Authority, without consent of Parliament, is illegal." /70/

As already noted, by the time of the 1838 Rebellion, martial law had not been applied in Britain in over a century. However, the above constitutional restrictions were still in force and were applied across the empire. For example, in 1824, the leading advocate for the position that Smith's court-martial in Demerara was unconstitutional, law professor and former judge Sir James Mackintosh, unequivocally declared in the House of Commons that martial law could be lawful only when the civil courts could no longer perform their duties:

When foreign invasion or civil war renders it impossible for courts of law to sit, or to enforce the execution of their judgments, it becomes necessary to find some rude substitute for them, and to employ, for that purpose, the military, which is the only remaining force in the community.

.

. . . by the law of England it [i.e., martial law] cannot be exercised except where the jurisdiction of courts of justice is interrupted by violence. Did this necessity exist at Demerara [when Smith was tried and convicted] . . . ?

/71/

This principle was restated fourteen years later by the Crown's law officers in London in January, 1838 (ten months before the 1838 Patriote Rebellion) when they wrote,

concerning the Jamaican Rebellion of seven years earlier,
that:

Martial law is stated by Lord Hale [preeminent seventeenth century British judge and legal commentator] to be in truth no law, but something rather indulged than allowed as a law, and it can only be tolerated because, by reason of open rebellion, the enforcing of any other law has become impossible. It cannot be said in strictness to supersede the ordinary tribunals, inasmuch as it only exists by reason of those tribunals having been already practically superseded. /72/ (Emphasis in original.)

This principle was applied in Barbados in 1816. The slave insurrection began on 14 April and martial law was declared the next day. The revolt was effectively crushed within four days and was declared by the government to be at an end on 30 April, but mopping operations against rebels who had not yet surrendered continued until June. Martial law was finally lifted on 12 July and, whether or not they could have resumed their duties beforehand, the colony's ordinary civilian courts did not sit again until that date. /73/

A better example of adherence to the spirit of this principle was the 1831-32 Jamaica Rebellion. The slave uprising broke out on 28 December 1831 and it took until the following February to suppress the movement. Martial law was declared on 30 December 1831 and existed until 5 February 1832. In January, 1832, four missionaries were arrested for inciting the slaves. One was tried by a court-martial and acquitted on 16 January. The other three had to wait until March before their cases were heard, but when they were, it was before an ordinary civilian court. (Two were acquitted and the third was released because the grand jury refused to

issue the "true bill" needed to proceed to trial.)

In addition, captured slaves who were not yet tried before martial law ended were also brought before civilian courts.

/74/

Also according to Sir James Mackintosh during the 1824 Demerara debate:

The only principle on which the law of England tolerates what is called martial, is necessity: its introduction can be justified only by necessity; its continuance requires precisely the same justification of necessity; and if it survives the necessity on which alone it rests for a single minute, it becomes instantly a mere exercise of lawless violence.

.

While the laws are silenced by the noise of arms, the rulers of the armed force must punish, as equitably as they can, those crimes which threaten their own safety and that of society: but no longer; every moment beyond is usurpation: as soon as the laws can act, every other mode of punishing supposed crimes is itself an enormous crime. /75/

These principles were applied in the Cape of Good Hope in 1835 and were restated in the 1867 grand jury proceeding against the two officers accused of murdering a civilian in Jamaica. In 1835, the war against South Africa's Kaffirs had ended long before August, but martial law continued in the eastern districts of the Cape of Good Hope. The matter was brought before the colony's Supreme Court which declared the maintenance of martial law during peacetime to be illegal, forcing the colonial governor to revoke martial law on 18 August. /76/ During the 1867 arraignment of two officers accused of murdering a civilian while Jamaica was under

martial law, Chief Justice Sir Alexander Cockburn instructed the grand jury that:

If it be true that you can apply martial law for the purpose of suppressing rebellion, it is equally certain that you cannot bring men to trial for treason under martial law, after a rebellion has been suppressed.

. . . it never has been said or thought, except perhaps by King Henry VII, that martial law could be resorted to when all the evil of rebellion has passed away, and order and tranquillity had been restored, for the mere purpose of trying and punishing persons [for] whom there was no longer any sufficient cause for withdrawing from the ordinary tribunals and the ordinary laws.

There are, no doubt, some remarkable instances of the application of what is called martial law, but they are instances, not of martial law applied for the purpose of suppressing rebellion, but for the purpose of punishing particular offences or acts which the Government was desirous of preventing; and in every one of them the exercise of martial law was clearly illegal. /77/

The fact that the Lower Canadian courts-martial were held in a colony that had been acquired by military conquest and which was still predominately populated by Francophones did not enhance General Colborne's power to declare martial law. As already noted, England's Court of King's Bench established in 1774, in a case known as "Campbell v. Hall," that the inhabitants of a "conquered" colony are not entitled to the rights and constitutional liberties of British subjects except in so far that the Crown's right, by virtue of its prerogative, to alter the colony's old laws and introduce new ones was subject to both the overriding authority of Parliament and the condition that no change could be made that violated certain ill-defined fundamental principles. /78/

However, in that same decision, the court also determined that once the Monarch had created local assemblies that had the power to enact legislation (subject to the approval of the colonial governor), the inhabitants of the colony "immediately and irrevocably" became British subjects and acquired all of the accompanying rights and liberties, including those limiting the prerogative right of the King. Furthermore, those rights and liberties could only be denied with the consent of Parliament. Finally, the court also held that once a royal proclamation was issued directing the establishment of a local legislature and the colonial governor was instructed to call an assembly, then the Crown's power to legislate for that colony, by way of its prerogative power, was at an end unless that right had been expressly reserved. /79/ (This last principle, however, was qualified in a way that is not relevant to this discussion in the 1938 case known as "Sammut v. Strickland.") /80/

In Lower Canada, such a local assembly had been established. While Campbell v. Hall arose out of a dispute from Grenada, one of the instruments cited by the court as evidence of the King's granting an elected assembly to the island was the same document that granted an elected assembly to Canada; i.e., the Royal Proclamation of 7 October 1763. /81/ In fact, the very provision quoted by the court in its decision applied equally to what would later become Lower Canada:

. . . [and] We have . . . given express Power and Direction to our Governors of our Said Colonies [in Grenada, East Florida, West Florida,

and Quebec] respectively, that so soon as the state and circumstances of the said Colonies will admit thereof, they shall . . . summon and call General Assemblies . . . and We have also given Power to the said Governors, with the consent of . . . the Representatives of the People so to be summoned as aforesaid, to make, constitute, and ordain Laws, Statutes, and Ordinances for the Public Peace, Welfare, and good Government of our said Colonies, and of the People and Inhabitants thereof, as near as may be agreeable to the Laws of England. . . . /82/

Also cited by the court in "Campbell v. Hall" were the instructions contained in the 1764 Royal Commission to Grenada's Governor Robert Melville to call an assembly as soon as the circumstances in the colony permitted. /83/ Similar instructions were given on 21 November 1763 to Quebec's Governor James Murray:

And we, do hereby give and grant unto you the said James Murray full power and authority . . . so soon as the Situation and circumstances of our said Province under Government will admit thereof, and when & as often as need shall require, to summon and call General Assemblies of the Freeholders and Planters. . .

And we do hereby declare that the persons so Elected & Qualified shall be called the Assembly . . . and that you the said James Murray, by & with the advice and Consent of our said Council [i.e., the colony's Legislative Council] and Assembly . . . shall have full power & authority, to make, Constitute or Ordain, Laws Statutes & ordinances for the publick [sic] peace, Welfare, & good Government of our said province, and of the people and Inhabitants thereof . . . which said Laws Statutes and Ordinances are not to be repugnant, but as near as may be agreeable, to the laws & Statutes of this our Kingdom of Great Britain. /84/

Therefore, since Lower Canada had acquired a local assembly in 1763, its inhabitants were entitled to all the rights of British subjects, including those limiting the prerogative of the Crown to resort to martial law. /85/

Thus, General Colborne could not, by virtue of Lord Durham's commission as colonial governor, bring a civilian before a court-martial while the ordinary civil courts were still sitting. Furthermore, he could not bring a civilian to trial under martial law after the '38 Rebellion had been suppressed nor could he try a civilian in a summary court-martial. Finally, Colborne could not suspend any of these customary restrictions without the consent of either the British Parliament or Lower Canada's legislature. However, according to Chief Justice Sir Alexander Cockburn:

. . . if, by virtue of any imperial or local legislation, authority to declare and exercise martial law has been conferred upon . . . [a colonial governor], he would be entitled, on the necessity arising, to act upon that authority.
/86/

When Colborne declared martial law in the district of Montreal on 4 November 1838, there was no such legislation. On 8 November, however, the Special Council of Lower Canada enacted an ordinance providing for the trial by court-martial of insurgents captured during the suppression of the rebellion in that district. /87/ The legislation was retroactive to 1 November and it provided for the arrest and detention of all persons who "have been, or were, or hereafter may be . . . engaged in such rebellion or suspected thereof" regardless of "whether such persons shall have been taken in open arms against Her Majesty, or shall have been otherwise concerned in the said rebellion." /88/ The ordinance also sanctioned the death sentence or whatever other punishment Colborne deemed "expedient for the punishment and suppression of all rebels in

the said district of Montreal." /89/ Furthermore, it specifically stated that if anyone detained under martial law applied for a writ of habeas corpus, then "it shall not be necessary to produce [to the civil courts] the body of the person . . . so detained," thereby making that legal safeguard for the accused totally ineffective. /90/ In addition, the Special Council blocked constitutional challenges to the legislation in the local courts by decreeing that:

. . . no act of this Ordinance, or of the powers thereby granted, which shall be done in pursuance of it, shall be questioned in any of Her Majesty's courts of justice in the said province. /91/

The statute also provided for all persons arrested and detained under its provisions "to be brought to trial in a summary manner by courts martial" that would be organized and assembled as Colborne "shall from time to time direct." /92/ This last provision effectively dispensed with a number of safeguards for defendants in treason trials then in place in the British legal system. Most of these guarantees were adopted by the English Parliament in 1695 to avoid repetition of the miscarriages of justice that had taken place before the Glorious Revolution. Among these protections were:

1) A defendant could not be convicted or acquitted of treason unless by the unanimous verdict of a jury of twelve.

2) The defendant was to be provided a copy of the indictment in the presence of two witnesses ten days before their trial.

3) A copy of the jury panel and of a list of the prosecution's witnesses, including their names, professions, and places of abode, were to be delivered to the defendant at the same time as the copy of the indictment.

4) The defendant would be able to compel the attendance of their own witnesses.

5) The defendant would be entitled to have two lawyers appointed to present his defence on his behalf.

6) The defendant would be entitled to up to 35 peremptory challenges /93/ instead of the 20 allowed in a normal felony trial.

7) No evidence of any overt act that was not expressly laid out in the indictment would be admitted or given.

8) No one, unless they confess, refuse to plead, or challenge preemptorily more than 35 members of the jury panel, could be indicted, tried, or convicted except upon the testimony of two witnesses who either testify to the same overt act or to separate acts to the same treason (e.g., one testifies to the stealing of military secrets and the other to the selling of those secrets).
/94/

Finally, the 1838 ordinance also permitted Colborne to extend the provisions of the legislation to other parts of the colony by pronouncing them to be under martial law. /95/ Indeed, on 16 November, Colborne declared martial law in the district of Saint Francois. /96/ But shortly after the passage of this ordinance, Andrew Stuart, the Solicitor General of the colony, expressed doubts about its legality. Those concerns were expressed to the Colonial Secretary in London, Lord Glenelg, who, in turn, asked Britain's Attorney General John Campbell and Solicitor General Robert M. Rolfe to look into the matter. In January, 1839, they reported that:

. . . in Our opinion the Court Established under the Ordinance in question is competent to try Prisoners under the charge of Treason.

We adhere to the opinion we have repeatedly expressed that the Special Council Established in Lower Canada by 1 Vic. c. 9. is not restrained from passing Ordinances which may alter the

Criminal Law in Canada and make it different from the Criminal Law of England . . .

We conceive that the power of the Special Council to Legislate respecting criminal law and the administration of it in Lower Canada is supreme . . . /97/

Unfortunately, the ordinance was never subject to judicial review and, therefore, it is impossible to say that the courts would have found it unconstitutional. However, another statute adopted by the Special Council was declared unconstitutional by three Lower Canadian judges and, by looking at the circumstances surrounding that situation, it is reasonable to conclude that Campbell and Rolfe were incorrect and that the Council was acting beyond its authority when it authorized the imposition of martial law.

As already noted, the Crown's prerogative to invoke martial law in England had been eliminated by Parliament in 1689. /98/ Imperial legislation was also supreme in any British colony that had obtained some measure of self-government whenever the statute specified that it would be effective in the dependency or in the colonies in general or if it was clear from the legislation itself that it applied to the dependency. Likewise, colonial statutes were ipso facto void if they conflicted with the "fundamental principles" of the English Common Law, although confusion as to actually what those principles were often existed. /99/

The Act of Parliament which created Lower Canada's Special Council stated that the Council could not take any action "to affect or invalidate any Law [,] Statute, or Ordinance now in force [i.e., as of 10 February 1838]" within

the colony. /100/ As provided by the Quebec Act of 1774, the criminal law of England, as it then existed, would be applied in Canada subject to any alterations made by the colonial government subject to being transmitted within six months for royal approbation or disallowance. This included not only Britain's offenses and penalties, but also the criminal law's "Method of Prosecution and Trial." /101/ The above-mentioned protections for the accused in a treason trial were among the provisions that applied to Canada. /102/ What also applied was the Habeas Corpus Act of 1679 which established the procedure for the granting of writs of habeas corpus by the courts. /103/ In 1838, both the above protections in a treason trial and the Habeas Corpus Act were still in effect in Lower Canada.

On 8 November 1838, the same day that the Special Council authorized martial law, it also enacted legislation suspending the right to bail for anyone in custody for high treason, the suspicion of high treason, misprision of high treason, or other "treasonable practices." /104/ On 21 November, two judges of the Court of King's Bench in Quebec City, Philippe Panet and Elzear Bedard, granted a writ of habeas corpus to John Teed, who was in custody on suspicion of high treason. In doing so, they took a literal interpretation of the restriction upon the Special Council's power to "affect or invalidate" any of the laws already existing in Lower Canada and found the ordinance denying bail to be in violation of the Habeas Corpus Act. /105/ On 6 December, another King's Bench judge, Joseph-Remi Vallieres de Saint-Real in Trois-Rivieres,

reached the same conclusion and granted a writ of habeas corpus in favour of Celestin Houde. /106/

These court decisions led to great consternation amongst the colonial government and, for a brief while, it was rumoured that the courts-martial, which were already under way, would be stopped. /107/ Instead of capitulating, however, Colborne counterattacked by firing Panet and Bedard on 10 December and Vallieres on the 27th. /108/ Furthermore, on 21 December, the Special Council adopted an ordinance declaring that the Habeas Corpus Act "is not nor has ever been in force in this province." /109/

This statute of 21 December was disallowed by the British government as beyond the competence of the Special Council. According to Attorney General Campbell and Solicitor General Rolfe:

It purports to enact and declare that the English Statute 31 Car 2 C:2, commonly called the Habeas Corpus Act, is not, nor ever was, in force in the Province of Lower Canada. Now, many of the most important provisions of that Act were undoubtedly introduced into the Province of Quebec by the first Quebec Act 14th Geo 3 C. 83; and at all events it is clearly beyond the power of the Governor and Special Council to put a Legislative construction on the effect of the British Statute. /110/

However, according the Britain's Attorney General John Campbell and Solicitor General Robert Rolfe, it was permissible to declare Panet's and Bedard's actions illegal because the ordinance denying bail merely suspended the right to such a writ:

There could have been no objection in point of law to an ordinance declaring the issuing of

the writs in the case of Teed to have been illegal . . . But the ground for such an enactment ought to have been, not that the Stat. of Charles the Second never formed part of the Law of the province, but that the rights of the subjects to the writ had been duly suspended by the ordinance recently passed, to which the Judges improperly refused to attend. /111/

This was consistent with an earlier opinion by Campbell and Rolfe when, in response to an inquiry from the Colonial Secretary, Lord Glenelg, about the propriety of the judges' decision, they stated that the Habeas Corpus Act had been lawfully suspended by the Special Council:

The two judges have picked out and relied upon a particular expression to be found in this Statute [i.e., the Special Council's enabling statute], instead of looking to the general frame and scope of the Statute and the other enactments which it contains wholly at variance with the Construction they put upon the particular expression. The proviso respecting Acts of the Parliament of Great Britain is evidently to be confined to Acts of the same Nature as those expressly mentioned [i.e., suffrage, the composition of the suspended Assembly, and the appropriation of monies that were in the hands of the colony's Receiver General]; and cannot be supposed intended to prevent the Special Council from passing any Ordinance at all to vary the Criminal Law of Canada from what was the Criminal law of England in the 14th year of King Geo. 3 [i.e., 1774]. If the intended sense were given to the proviso, the Special Council would be wholly inadequate for the purpose for which it is declared to have been created . . . /112/

This conclusion was reached despite the fact that, in the Special Council's enabling statute, the sections governing suffrage and the other matters "expressly mentioned" contained their own prohibitions against tampering by the Council, while the provision in that legislation, upon which Panet, Bedard, and Vallieres relied, constituted an entire article of its own

and contained no limitation as to what other sections it applied to. /113/

While the validity of the ordinance denying bail was never brought again before a court, the public debate in Canada and the United Kingdom over its constitutionality was not over. On 13 June 1839, Lord (Baronet) John Russell called the issue a "topic of irritation" that should not exist when Upper and Lower Canada were eventually united. /114/ Later, on 11 July, he called Panet's, Bedard's, and Vallieres' decisions "fatal to the security of the province" and the constraint in the Special Council's enabling statute on the Council's power to alter existing laws a "defect by which great doubts were suggested in both this country and in Canada." /115/ Therefore, to settle the controversy over the Special Council's ordinance, Russell introduced legislation in the British House of Commons to repeal the limitation in the Council's enabling act against the alteration of existing laws. On 17 August, Russell's bill became law. /116/

Therefore, before Lord Russell's legislation, General Colborne had no power to bring civilians before a military tribunal. So why did the Lower Canadian authorities revert to such measures? It must be recalled that one of the exceptions to the general amnesty granted after the '37 Rebellion were for five individuals who were suspected of murdering Joseph Armand and British Lieutenant George Weir. These men were tried on 6-8 September 1838 but, despite overwhelming evidence, were acquitted by an all-Francophone jury. When news of the verdict reached the public, Patriote sympathizers

across the colony erupted in applause, but colonial officials and their supporters bitterly condemned the acquittal as partisan and saw future jury trials as futile; to them, only a military tribunal could administer impartial justice and many called for the outright abandonment of trial by jury. In addition, after the '38 Rebellion, several amongst Lower Canada's elite believed that this latest insurgency had been caused by the leniency of the local and imperial governments shown after the '37 Rebellion and that, in order to prevent a third revolt, summary military trials and swift executions must occur. Indeed, many Patriots were encouraged to revolt again by the leniency shown after the '37 Rebellion and by the prospect of another amnesty; even after the courts-martial began and the gallows were built, a number of them believed after the '38 Rebellion that no one would actually be hanged or severely punished. /117/

The British government also shared the view that jury trials were no longer efficient tools of justice; on 26 October 1838, one week before the '38 Rebellion began, the Colonial Secretary, Lord Glenelg, unaware of the October 9th resignation of Lower Canada's governor, Lord Durham, /118/ wrote to Durham that:

Your Lordship asserts in your dispatch that, in the present state of the Province, "trial by Jury exists only to defeat the ends of justice and to provoke the righteous scorn and indignation of the community." - This is a picture of a most lamentable state of things, of which the truth I fear must be admitted, and the evil cannot be over-rated.

. . . This state of insecurity imperatively requires a remedy. It is, therefore, the desire

of Her Majesty's Government that an Ordinance should be passed by the Special Council of Lower Canada, constituting a tribunal for the trial of Treason & Murder.

. . . It would not be safe to postpone the formation of such tribunals until a new insurrection may happen to break out . . . /119/

Still, London did not intend for the Lower Canadian government to institute courts-martial; instead, the local authorities were to consider special courts sitting without a jury that would be comprised entirely of judges or of a mixture of military officers and trained lawyers. While it is possible that these instructions did not reach Montreal before the courts-martial began, they certainly arrived before the first executions. General Colborne also ignored suggestions that the defendants be accorded jury trials in the Eastern Townships, or in an adjacent colony, or in England itself. Like the English-speaking elite in Lower Canada, Colborne wanted a particular kind of "justice" and was determined that nothing should go wrong. /120/ The presiding officer at the courts-martial was Major General John Clitherow, the senior military officer of the Montreal district and former member of the Special Council. The fourteen other judges were an assortment of British captains, majors, and lieutenant colonels, all of whom were sworn to keep secret the court's deliberations as well as the reasons for their decisions. The military prosecutor was Captain Edward Muller, but he played a small role in the proceedings and the real prosecutors were Charles Dewey Day, who would later become a judge, and the former Patriote Dominique Mondelet, both of

whom were supposed to act as impartial legal advisors to the court. Furthermore, any legal questions arising during the trials were referred to the colony's law officers, Attorney General Charles Ogden and Solicitor General Andrew Stuart. In at least one instance, the military judges were influenced, to the detriment of the Patriote defendants, by the court's civilian personnel; on 8 December 1838, when the first court-martial convicted and sentenced to death Joseph-Narcisse Cardinal and Joseph Duquet, six others were sentenced to be transported to Van Diemen's Land for life. On 14 December, however, due to a communication from Ogden and Stuart that execution was the only penalty allowed by the law, General Colborne required the court to revise its sentence and condemn the six to death. The tribunal obeyed the command, but in doing so it also recommended that the sentence for the six be commuted to a less severe punishment. /121/

Such a draconian effect upon justice by government impatience and by the perceptions shared by the supporters of the colonial government can also be seen in the courts-martial that were held in 1838-39 in Upper Canada. Like its neighbour, Upper Canada went through a series of internal rebellions in 1837 and '38. These uprisings were initiated by radical democratic reformers long opposed the oligarchic form of government that had been created by the Constitutional Act of 1791, and maintained by the network of officials known as the Family Compact. Unlike the Lower Canadian rebels, however, the insurgents in Upper Canada were supported by a large number of American sympathizers who crossed the border

and participated in the revolts. Two rebellions broke out in early December, 1837, but were crushed by the middle of the month and many of the rebels fled to the United States, where they actively recruited supporters. Beginning on 14 December, a group of Canadians and Americans occupied Navy Island in the Niagara River for one month; the next month, another group briefly occupied Bois Blanc Island in the Detroit River (across the river from the present-day Fort Malden National Historic Site) before attacking Amherstburg. Three more invasion attempts by the rebels and their Yankee allies were made in January and February, 1838, including a major raid on Pelee Island in Lake Erie by a force of Americans that held it until March. Constant rumours of more rebel action kept the colonial government and its supporters on edge throughout early 1838. In June, another band of Americans crossed the border and attacked a calvary unit at St. John's (between present-day Allanburg and Effingham, Ontario) before they were defeated at Short Hills. Rumours of more incursions heightened fears again that fall and, indeed, units consisting almost entirely of Americans attacked that season, and were defeated, in the two last, and bloodiest, encounters of the rebellions; near Prescott in mid-November, and at Windsor in early December. /122/

Despite these attacks, martial law was never declared in Upper Canada. However, while Navy Island was occupied, it was feared that a landing party might reach the Lake Erie shoreline at any time and, if it did, then large numbers of dissatisfied Canadians were expected to rise up to join it.

Furthermore, the Americans involved were in a state of legal limbo: because they were foreigners and not British subjects, they could not be charged with treason; piracy applied only to acts committed on the high seas; and since Britain was at peace with the United States, they were not prisoners of war. To clear up this ambiguity, as well as to deter further American participation and to prevent Canadians from joining them, legislation was adopted creating the new offence of "lawless aggression." /123/ Under the act, any alien whose country was at peace with the United Kingdom, who joined any British subject who was "traitorously in Arms" against the colonial government, and who, after 12 January 1838, continued to commit hostile acts against that government could be tried under:

. . . the Militia Laws of this Province, and upon being found guilty by such Court Martial of offending against this Act [outlawing "lawless aggression"], such person shall be sentenced by such Court Martial to suffer death, or such other punishment as shall be awarded by the Court.
/124/

Furthermore, any Canadians found to have levied war within the colony in the company of such a person were likewise subject to court-martial. Finally, the Crown reserved the right to prosecute any defendants, Canadian or otherwise, for "lawless aggression" in the regular civilian courts. /125/

Before November, 1838, only one person, Thomas Jefferson Sutherland, the American commander of the occupation force on Bois Blanc Island, was tried by court-martial under the new

legislation. Five other Americans were tried for "lawless aggression" in the civilian courts, but only one, James Morreau, the leader of the American force at Short Hills, was hanged; another was acquitted for reason of insanity and the rest were sentenced to transportation. In contrast, at least 800 Canadians were arrested before November, 1838 and they, as well as at least one American citizen who was born a British subject and, therefore, deemed to have a "perpetual allegiance" to the Crown under British law, were charged with various forms of treason and tried in the ordinary criminal courts. /126/

Convicted in April, 1838, and sentenced to transportation for life to Australia, Thomas Sutherland raised so many technical objections to his trial that the colony's lieutenant governor, Sir George Arthur, decided to refer the case to London for instruction. The Colonial Office, in turn, sought a review of the legality of the "lawless aggression" statute because it was concerned whether, under international law, an alien whose country was at peace with Britain could be tried for crimes that were committed only in the furtherance of political objectives. /127/ In response, an opinion was issued on 28 May by the law officers of England that:

We feel it our duty in this case to observe that the Provincial authorities seem to have fallen into an important error with reference to the case of foreigners who have been taken in the Province while participating in the rebellion. They were all clearly guilty of High Treason, just as much as the natural-born subjects of the Queen. From the moment when they came into the Province, they owed to her Majesty a temporary allegiance the violation of which subjects them to the penalties of High Treason. /128/

One month later, the Colonial Secretary, Lord Glenelg, advised Arthur that the home government intended to advise Queen Victoria to disallow the statute, not because it violated international law, but because it made a false distinction between British subjects and foreigners who owed only a temporary allegiance to the Crown. When Arthur received this dispatch, he knew that the Upper Canadian judges had already rejected the idea that United States' citizens owed a temporary allegiance and, therefore, a trial of the Americans for high treason would probably lead to their acquittal. The colonial government decided to regard the statute as operative until the law had been actually disallowed. In fact, on 1 September, the British law officers revised their opinions and the act was never revoked by London. /129/

By October, 1838, one American (Morreau) had been hanged and four others (including Sutherland) had been sentenced to transportation for life for "lawless aggression." In contrast, two Canadians were hanged and over one hundred sent to Kingston Prison or to Van Diemen's Land for treason. It was hoped by the Upper Canadian government that this would be sufficient to deter further rebel insurrections and, indeed, that apparently was the case because, when two groups of Americans (along with a handful of Canadians) crossed the border in November and December, 1838 to raid Prescott and Windsor, there was no domestic support for the raiders. Still, after the attacks at Prescott and Windsor, the public was tired and angry after a year of invasions and rumours of

invasion and took a hard line towards the latest catch of prisoners. The Upper Canadian authorities felt the same and Lieutenant-Governor Sir George Arthur directed that the Prescott and Windsor raiders, Americans and Canadians alike, be court-martialled under the "lawless aggression" statute. Of the 157 men captured near Prescott, 135 were tried, convicted, and sentenced to death by court-martial and eleven, all Americans (including one recent immigrant from Poland), were executed between 8 December 1838 and 11 February 1839. Of the 44 taken at Windsor, one (an American thought to be insane) was acquitted while the others were likewise convicted and sentenced to death, of whom six (three Americans and three Canadians) were hanged between 7 January and 8 February, 1839. By mid-February, most Upper Canadians were repelled by the numerous executions and government officials were inclined to show mercy. Therefore, the 22 Prescott raiders who had not yet gone to trial (nine Americans, six Canadians, five Europeans, and one "cosmopolitan") were released and, of the 124 awaiting the gallows, 60 (57 Americans and three Canadians) were transported to Australia and the rest (all Americans, mostly between 16 and 21 years of age) were deported to the United States. Of the 37 remaining Windsor prisoners, 18 (14 Americans and four Canadians) were sent to Van Diemen's Land, 16 (all Americans, mostly between 15 and 20 years of age) were deported to the United States, two (both Canadians who turned Queen's evidence) were released, and one (a Canadian) escaped. The disproportionate number of Americans who were executed or transported after the battles

at Prescott and Windsor was due to the essentially American nature of the two invasion forces; only nine of the 157 captured at Prescott and only ten of the 44 taken at Windsor were Canadian. /130/

Just as the Upper Canadian trials, what happened in Lower Canada in 1838-39 supports the "social control" theory whereby the law is not only created by one or more of society's segments, but it also favours the interest of the dominant class or groups over the rest of society and it changes as social conditions change. The courts-martial were a weapon which the governing class used to satisfy its anxiety and fears. As already indicated, the political elite in Lower Canada became convinced just before the outbreak of the '38 Rebellion that Francophone juries would never convict Patriote rebels. Furthermore, once the '38 Insurrection was crushed, the elite believed that the second revolt had been encouraged by the leniency shown after the '37 Rebellion and that, to prevent a third revolt, summary military trials were needed. The courts-martial deprived defendants of the customary safeguards for the accused in treason trials that had been adopted over one hundred years before by the English Parliament. The governing group further manipulated the legal system by removing civilian judges who dared to challenge the unconstitutional acts of the Special Council and by restricting the discretion of the military court in the sentences that it could hand down. Conflict and coercion, and not popular consensus, shaped the law.

There is no evidence in the courts-martial for the post-structuralist theory that what the law is and does is connected with other clusters of belief or assumptions of reality that are shared through language. Right up until Cardinal's and Duquet's death, there was no exchange of beliefs or understanding between the colony's governing class and the Patriotes and their sympathizers; the elite demanded blood and the rebels were convinced that none would be shed. If there was any "discourse," it was strictly amongst the colonial officials and between them and the imperial government in an attempt to justify the courts-martial and to maintain the facade of legality that would prevent the members of the colonial government from later being held liable for their repressive actions. The courts-martial were also a message from the elite to potential rebels that armed rebellion would no longer be treated with leniency.

We may hope that Canada will never again see civilians tried in a military court while the ordinary civil courts are still operating. The courts-martial of 1838-39 provide an example of how a constitution that is based upon custom and tradition is open to abuse, but rights that are embedded in a written constitution can be ignored as well. The Charter of Rights guarantees trial by jury for serious offences, but it also gives Parliament and provincial legislatures the power to ignore that guarantee in the case of a national emergency "as can be demonstrably justified in a free and democratic society." /131/ Therefore, if the federal, or a provincial, government should ever determine that the need has arisen, it

can ignore one of our fundamental legal rights while maintaining the air of constitutionality around its actions. This qualification gives the government the power, which did not exist under British law, to recognize "states of siege" or "states of emergency" during which the powers of the civilian and military authorities are unlimited and unrestrained. Furthermore, a written constitution that does not grant the power to override fundamental legal rights when it is deemed necessary to do so by the government provides no stronger guarantee of those rights; as demonstrated by historian F. Murray Greenwood, American courts have done a better job of respecting the guarantees enshrined in the United States Constitution and its Bill of Rights after a crisis is over rather than while it is occurring. /132/ The courts-martial of 1838-39 in Lower Canada merely provide another example of fundamental legal principles being tossed aside when they are deemed an impediment. Thus, it appears, that the rule of law will only prevail when those in authority feel secure from serious threats and that the sacred principle that civilians may be tried only by civilian courts when those courts are functioning is a fragile ideal.

ENDNOTES

- 1 Michel de Lorimier, "Joseph-Narcisse Cardinal," in Dictionary of Canadian Biography, Vol 7 (Toronto: University of Toronto Press, 1988) 147-150; Gerard Filteau, "Joseph Duquet," in DCB, Vol. 7, 264-265.

- 2 Report of the State Trials Before a General Court Martial Held at Montreal in 1838-39: Exhibiting a Complete History of the Late Rebellion in Lower Canada, Vol. 1 (Montreal: Armour and Ramsay, 1839), 20, 72-72, 76-78, 85-88.

The complete transcript of the testimony and pleadings of Cardinal's and Duquet's trial is contained on pages 3-88 of said Report.

- 3 de Lorimier, "Joseph-Narcisse Cardinal," DCB, Vol. 7, supra, note 1, 149-50; Elinor Kyte Senior, "John Clitherow," in Dictionary of Canadian Biography, Vol. 8 (Toronto: University of Toronto Press, 1985) 164; Joseph Schull, Rebellion: The Rising in French Canada 1837 (Toronto: Macmillan of Canada, 1971) 181-189; F. Murray Greenwood, "The Chartrand Murder Trial: Rebellion and Repression in Lower Canada, 1837-1839," in Criminal Justice History and International Annual, Vol. 5 (Westport, CT: Meckler Publishing, 1984), 151-152.

- 4 Vince Masciotra, "Quebec Legal Historiography, 1760-1900," McGill Law Journal 32:3 (July, 1987): 723, 723n38; Jean-Marie Fecteau, "Mesures d'exception et regle de droit: Les conditions d'application de la loi martiale au Quebec lors des rebellions de 1837-1838," McGill Law Journal 32:3 (July, 1987): 466-467, 467n3.

- 5 F. Murray Greenwood, "The General Court Martial of 1838-39 in Lower Canada: An Abuse of Justice," in Canadian Perspectives on Law and Society: Issues in Legal History eds: W. Wesley Pue and Barry Wright, Carleton Library Series, no. 152. (Ottawa: Carleton University Press, 1988), 249-290; Masciotra, supra, note 4, 723n38; Fecteau, supra, note 4, 466-467, 467n3.

See, also, F. Murray Greenwood, "L'insurrection apprehendee et l'administration de la justice au Canada: Le point de vue d'un historien," Revue d'histoire de l'Amerique francaise 34:1 (juin [June], 1980): 57-91; Greenwood, "The Chartrand Murder Trial," supra, note 3, 129-159.

- 6 F.B. Wiener, Civilians under Military Justice: The British Practice since 1689, Especially in North America (Chicago: University of Chicago Press, 1967), 6-7; W.S. Holdsworth, "Martial Law Historically Considered," The Law Quarterly Review 18 (1902): 117, 119-122.
- 7 Richard O'Sullivan, "Introduction," in Military Law and the Supremacy of the Civil Courts, being the Judgment of The Hon. Mr. Justice McCardie in Heddon v. Evans (London: Stevens and Sons, 1921), 22; Holdsworth, supra, note 6, 128.
- 8 Richard A. Yates and Ruth Whidden Yates, Canada's Legal Environment: Its History, Institutions and Principles (Scarborough, Ontario: Prentice Hall Canada, Inc., 1993), 2-7.
- 9 Robert W. Gordon, "New Developments in Legal Theory," in David Kairys (ed.) The Politics of Law: A Progressive Critique, ed: David Kairys (New York: Pantheon Books, 1982), 284-287; Pennie Reddie, "The Crimes of Treason and Sedition in Canada," Laurentian University Review 11:1 (November, 1978): 17-20.
- 10 Gordon, supra, note 9, 284; Reddie, supra, note 9, 18-19; Roscoe Pound, "A Survey of Social Interests," Harvard Law Review 57 (1943): 39.
- 11 Reddie, supra, note 9, 19-20.

F. Murray Greenwood clearly sees the courts-martial of 1838-39 in Lower Canada as a tool of the colony's English-speaking elite to maintain its dominant position. Greenwood, "The General Court Martial of 1838-39," supra, note 5.

It should be noted, however, that unlike the situation in Lower Canada, Greenwood finds a pattern amongst the courts during the 1837-38 rebellions in Upper Canada of first reacting to the crises with firm rigor and then, once the crises are over, with leniency. This is similar to Hay's and Thompson's argument that the elite uses the law to inspire both fear and gratitude in the lower classes in order to maintain its own power. Compare the discussion accompanying notes 15 through 18 with Greenwood, "L'insurrection apprehendee et l'administration de la justice au Canada," supra, note 5.

Another Canadian legal historian who sees the criminal law as an instrument created by the dominant groups in society to protect their way of life is John Weaver who has found a connection between the

increase in crime and the modifications in punishment in Upper Canada during the early Victorian Age, the social upheaval in the colony caused by the Industrial Revolution in Great Britain and the famine in Ireland, and the upper classes' attitudes about crime and punishment during that period. John Weaver, "Crime, Public Order, and Repression: The Gore District in Upheaval, 1832-1851," in Lawful Authority: Readings on the History of Criminal Justice in Canada, ed: R.C. Macleod (Toronto: Copp Clark Pitman, Ltd., 1988), 22-48.

- 12 Martin Horwitz, "The Rule of Law: An Unqualified Human Good?," 86 The Yale Law Journal (1977) 563; E.P. Thompson, Whigs and Hunters: The Origin of the Black Act (New York: Pantheon Books, 1975), 259.

- 13 Gordon, supra, note 9, 285.

For a neo-Marxist view of the 1838-39 courts-martial in Lower Canada, see Fecteau, "Mesures d'exception et regle de droit: Les conditions d'application de la loi martiale au Quebec lors des rebellions de 1837-1838," supra, note 4.

A variation of the Marxist view of the role of the criminal law in history can be found in Neil Boyd's "The Origins of Canadian Narcotics Legislation: The Process of Criminalization in Historical Context," in Lawful Authority: Readings on the History of Criminal Justice in Canada, ed: R.C. Macleod (Toronto: Copp Clark Pitman, Ltd., 1988), 192-218.

- 14 Eugene D. Genovese, The World the Slaveholders Made: Two Essays in Interpretation (New York: Pantheon Books, 1969), 27.

- 15 Douglas Hay, "Property, Authority and the Criminal Law," in Douglas Hay, et. al., Albion's Fatal Tree: Crime and Society in Eighteenth-Century England (New York: Pantheon Books, 1975), 33.

- 16 ibid., 27-31, 32-34, 40-47, 49-51.

Canadian legal historian Paul Craven has found Hay's analysis of the function of the criminal law to be similar to many of the conclusions in his own study of the Toronto Police Court of the mid-nineteenth century. Paul Craven, "Law and Ideology: The Toronto Police Court, 1850-1880," in Essays in the History of Canadian Law, Vol. 2, ed: David H. Flaherty (Toronto: University of Toronto Press, 1983), 248-307.

(continued)

See, also, discussion regarding F. Murray Greenwood's "L'insurrection apprehendee et l'administration de la justice au Canada" in note 11.

17 Thompson, supra, note 12, 263.

18 ibid., 264-265.

In a study whose conclusions are reminiscent of Thompson's analysis about the nature of law, Canadian legal historian William N.T. Wylie has argued that the leading merchants, and later the administrators, of early Upper Canada tried, for the purpose of maintaining the compliance of the lower classes, to create a judicial system that was seemingly independent from manipulation, but failed to achieve the perception of objective justice and equal access to the courts. William N.T. Wylie, "Instruments of Commerce and Authority: The Civil Courts in Upper Canada, 1789-1812," in Essays in the History of Canadian Law, Vol. 2, ed: David H. Flaherty (Toronto: University of Toronto Press, 1983), 3-48.

See, also, discussion regarding F. Murray Greenwood's "L'insurrection apprehendee et l'administration de la justice au Canada" in note 11.

19 Gordon, supra, note 9, 286-287.

20 ibid., 287-288; Tina Loo, Making Law, Order, and Authority in British Columbia, 1821-1871 (Toronto: University of Toronto Press, 1994), 6-12

21 Gordon, supra, note 9, 288; Loo, supra, note 20, 7-8, 11.

22 Gordon, supra, note 9, 288; Loo, supra, note 20, 7-8, 11; Thomas Stone, "The Mounties as Vigilantes: Perceptions of Community and the Transformation of Law in the Yukon, 1885-1897," in Historical Perspectives on Law and Society in Canada, eds: Tina Loo and Lorna R. McLean (Toronto: Copp Clark Longman Ltd., 1994), 111-115, 120-127.

So far, no one has applied the post-structuralist approach to the 1838-39 courts-martial in Lower Canada. For the application of this approach to the 1838-39 courts-martial in Upper Canada, see Barry Wright, "The Ideological Dimensions of Law in Upper Canada: The Treason Proceedings of 1838," chap. in Criminal Justice History: An International Annual Vol. 10 (Westport, CT: Meckler Publishing, 1989), 149-167.

Another Canadian legal historian who is a post-structuralist is Rainer Baehre who considered

crime and insanity as specialized forms of popular resistance to the social order in his "Imperial Authority and Colonial Officialdom of Upper Canada in the 1830s: The State, Crime, Lunacy, and Everyday Life," chap. in Law, Society, and the State: Essays in Modern Legal History, ed.s: Louis A. Knafla and Susan W.S. Binnie (Toronto: University of Toronto Press, 1995), 181-207.

Lawrence M. Friedman, who is perhaps the eminent American legal historian of today, subscribes to the "post-structuralist" theory about the criminal law and its role in society. He does argue, however, that while the rich and powerful generally make the decisions about what constitutes "crime," the poor and the weak do have a say (albeit, a small one) in defining the criminal law. Lawrence M. Friedman, Crime and Punishment in American History (New York: BasicBooks, 1993), 2-9.

For a brief survey of post-structuralism's influence on Canadian legal historiography between 1979 and 1985, see Louis A. Knafla's "Recent Historiography in the History of Crime and Criminal Justice in England and Canada," in Crime and Criminal Justice in Europe and Canada, ed: Louis A. Knafla, revised edition (Waterloo: Wilfrid Laurier University Press, 1985), vii-xxix.

- 23 Charles Townshend, "Martial Law: Legal and Administrative Problems of Civil Emergency in Britain and the Empire, 1800-1940," The Historical Journal 25 (1982): 171.
- 24 *ibid.*, 167-168.
- 25 *ibid.*, 168; Fecteau, *supra*, note 4, 474.
- 26 Robert H. Schomburgk, The History of Barbados; Comprising a Geographical and Statistical Description of the Island; a Sketch of the Historical Events since the Settlement; and an Account of its Geology and Natural Productions (London: Longmans, Brown, Green, and Longmans, 1848; reprint ed., London: Frank Cass and Company, Ltd., 1971), 361-362.
- G.E. Cory, The Rise of South Africa: A History of the Origin of South African Colonisation and its Development Towards the East from the Earliest Times to 1857, Vol. 3 (London: Longmans, Green and Company, 1919; reprint ed., Cape Town: Struik, 1965), 60-80, 92-93.

- 27 Hilary Beckles, Black Rebellion in Barbados: The Struggle Against Slavery, 1627-1838 (Bridgetown, Barbados: Antilles Publications, 1984), 87-89; Great Britain, Parliament, Hansard's Parliamentary Debates (Commons), New [2nd] series, Vol. 11 (1824): 964-968; W.J. Gardner, A History of Jamaica From Its Discovery by Christopher Columbus to the Year 1872 3rd edition (London: Frank Cass and Company, Ltd., 1971), 273-282; Michael Craton, "Proto-Peasant Revolts? The Late Slave Rebellions in the British West Indies, 1816-1832" Past and Present 85 (November, 1979) 101n8, 105n23, 109n30; Helen Taft Manning, British Colonial Government After the American Revolution, 1782-1820, Yale Historical Publications, Miscellany, Vol. 15 (New Haven: Yale University Press, 1933), 369.
- 28 Beckles, supra, note 27, 89; Times (London), 5 June 1816.
- 29 Gardner, supra, note 27, 273-282.
- 30 Townshend, supra, note 23, 169-170, 172.
- 31 Hansard's Parliamentary Debates (Commons), New [2nd] series, Vol. 11 (1824), supra, note 27, 406-408, 964-968, 990, 1208, 1231; Craton, supra, note 27, 106, 108-109.
- 32 Hansard's Parliamentary Debates (Commons), New [2nd] series, Vol. 11 (1824), supra, note 27, 1206.
- 33 ibid., 1314; Craton, supra, note 27, 108-109.
- 34 "The Case of the Island of Grenada; in relation to the Payment of Four and one-half in the Hundred of Goods exported therefrom; between ALEXANDER CAMPBELL, esq. Plaintiff, and WM. HALL, esq. Defendant, in the Court of King's-Bench, before Lord Chief-Justice Mansfield: 15 GEORGE III. A.D. 1774," quoted in its entirety in Vol. 20, A Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanors from the Earliest Period to the Year 1783, with Notes and Other Illustrations: Compiled by T.B. Howell, Esq. F.R.S. F.S.A. including, in Addition to the Whole of the Matter Contained in the Folio Edition of Hargrave, Upwards of Two Hundred Cases Never Before Collected, compiled by T.B. Howell (London: T.C. Hansard, 1816), 239-240, 320-322.

The court's decision in "Campbell v. Hall," with slight variations in the text, can also be found in Adam Shortt and Arthur G. Doughty, editors, Documents Relating to the Constitutional History of Canada 1759 - 1791, Second and Revised Edition, Part 1 (Ottawa:

J. de L. Tache, Printer to the King's Most Excellent Majesty, 1918), at 522-531. However, unlike the Complete Collection of State Trials, Shortt and Doughty do not include the text of the original complaint in the case, the arguments of the attorneys that were made before the Court of King's Bench, or the text of the discussion regarding the case found in Volume 2 of Baron Maseres' "Canadian Freeholder."

35 "Campbell v. Hall," Complete Collection of State Trials, supra, note 34, 322-323.

36 Sir Alexander Cockburn, Charge of the Lord Chief Justice of England to the Grand Jury at the Central Criminal Court, in the Case of The Queen Against Nelson and Brand [hereinafter R. v. Nelson and Brand], Frederick Cockburn (ed.) (London: William Ridgway, 1867), 10-11.

37 Manning, supra, note 27, 367-375.

38 D.B. Swinfen, Imperial Control of Colonial Legislation 1813-1865 (Oxford: Oxford University Press, 1970), 53.

39 Cockburn, supra, note 36, 13-19.

40 ibid., 19nl.

41 Schomburgk, supra, note 26, 362-363.

42 Resolutions of the Barbados' General Assembly, adopted 29 May 1805, quoted in ibid., 363nl.

43 Address of Lord Seaforth to the Barbados' General Assembly, 18 June 1805, quoted in Schomburgk, supra, note 26, 364.

44 Schomburgk, supra, note 26, 364.

45 Resolutions of the Barbados' General Assembly, adopted 16 July 1805, quoted in ibid., 365.

46 Resolutions of the Barbados' General Assembly, adopted 16 July 1805, quoted in Schomburgk, supra, note 26, 365.

47 Schomburgk, supra, note 26, 365.

48 Two Patriotes were appointed to the Legislative and Executive Councils. The first, Denis-Benjamin Viger, served in the Legislative Council for only one month in 1831. The second, Dominique Mondelet, was appointed to the Executive Council in November, 1832. His appointment was attacked by the radical wing of the

Patriotes with whom Mondelet had split earlier that year. The radicals were anticlerical and nationalistic and favoured the implementation of American republican ideals while the moderates concentrated on righting abuses and defending traditional Quebec institutions. By the end of 1834, the radicals had taken over the Patriote movement and Mondelet's break with their cause was complete. Mondelet was later one of the prosecuting attorneys in the 1838-39 courts-martial in Lower Canada. Michel de Lorimier, "Denis-Benjamin Viger," in Dictionary of Canadian Biography, Vol. 9 (Toronto: University of Toronto Press, 1976) 810-811; Elizabeth Gibbs, "Dominique Mondelet," DCB, Vol. 9, 559-560; Sonra Chasse, Rita Girard-Wallot, and Jean-Pierre Wallot, "John Neilson," DCB, Vol. 7, supra, note 1, 647-648.

- 49 Fecteau, supra, note 4, 477-478; Margaret Conrad, Alvin Finkel, and Cornelius Jaenen, History of the Canadian Peoples: Beginnings to 1867, Vol. 1 (Toronto: Copp Clark Pittman Ltd., 1993) 412-416.
- 50 Fecteau, supra, note 4, 481-482; Greenwood, "The Chartrand Murder Trial," supra, note 3, 129-130.
- 51 An Act to make Temporary Provision for the Government of Lower Canada (U.K.), 1838, 1 Vict., c.9, art.s 1-3 and 6, in Vol. 78, The Statutes of the United Kingdom of Great Britain and Ireland (aka Statutes at Large) (London: Her Majesty's Printers, 1838), 36-39.
- 52 Colborne to Glenleg, 27 February 1838, quoted in its entirety in British Parliamentary Papers: Colonies Canada, Vol. 9 (Shannon, Ireland: Irish University Press, 1969), 199; Colborne to Glenleg, 2 November 1838, quoted in its entirety in British Parliamentary Papers: Colonies Canada, Vol. 10 (Shannon, Ireland: Irish University Press, 1969), 245; Proclamation of Sir John Colborne, on the 1st day of November 1838, declaring His Assumption of the Administration of the Civil Government in Lower Canada, quoted in its entirety in British Parliamentary Papers: Colonies Canada, Vol. 10, 245.
- 53 de Lorimier, "Joseph-Narcisse Cardinal," DCB, Vol. 7, supra, note 1, 149-50; Michel de Lorimier, "Chevalier de Lorimier" in DCB, Vol. 7, supra, note 1, 513-514; Senior, "John Clitherow," DCB, Vol. 8, supra, note 3, 164.
- 54 Proclamation of Sir John Colborne, on the 4th day of November 1838, declaring Martial Law in the District of Montreal, Lower Canada, quoted in its entirety in

British Parliamentary Papers: Colonies Canada, Vol. 10, supra, note 52, 252.

55 G.W. Wicksteed, Tables of the Provincial Statutes and Ordinances in Force or Which Have Been in Force in Lower Canada, in Their Chronological Order (Toronto, Stewart Derbshire and George Desbarats, 1857) 77.

56 An Ordinance for the suppression of the Rebellion which unhappily exists within this Province of Lower Canada, and for the protection of the persons and properties of Her Majesty's faithful subjects within the same (Lower Canada), 1838 (3rd session, Special Council), 2 Vict., c. 3, art.s 1 and 5, in Vol. 10, British Parliamentary Papers: Colonies Canada (Shannon, Ireland: Irish University Press, 1969), 256-257.

57 Fecteau, supra, note 4, 477; Greenwood, "The Chartrand Murder Trial," supra, note 5, 151; Wicksteed, supra, note 55, 77.

58 Cockburn, supra, note 36, 9.

59 Proclamation of Sir John Colborne, on the 1st day of November 1838, declaring His Assumption of the Administration of the Civil Government in Lower Canada, quoted in its entirety in British Parliamentary Papers: Colonies Canada, Vol. 10, supra, note 52, 245.

60 Cockburn, supra, note 36, 20.

61 Magna Carta (England), 1215, art. 39.

Translation:

No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land.

Original Latin text and English translation are printed, side-by-side, in J.C. Holt, Magna Carta (Cambridge: Cambridge University Press, 1965), 326-327.

The text quoted is from the surviving original copy of the Magna Carta known as "Cii." Ci and Cii contain minor differences from the other two original copies, none of which are relevant to this study. Holt, Magna Carta, 313-315.

62 Sir Matthew Hale, Historia Placitorum Coronae: The History of the Pleas of the Crown, Now first published from his Lordship's Original Manuscript, and the several References to the Records examined by the

Originals, with large Notes, Sollom Emlyn (ed.) Vol. 1
("In the Savoy:" E. and R. Nutt, R. Gosling,
T. Woodward, and C. David, 1736), 344-347, 499-500.

63

Claus. 1 Edw. 3 part. 1. M. 21. (England), 1327,
[also found at Parl. II. E. 3. p. 1. M. 17. Stat. 1.
Edw. III.], quoted in its entirety, except for
Parliament's recitation of the record of the Earl of
Lancaster's court-martial in 1322, in *ibid.*, 345-346.

Translation:

. . . the said Thomas erroneously and against the
law of the land, in time of peace, was sentenced to
death; by reason whereof, because it is notorious and
manifest that the whole time in which it was charged
against the said Earl, that he committed the aforesaid
offences and crimes in the aforesaid record and
proceeding contained, and also the time when he was
taken, and when the said lord the king's father, &c.
caused it to be recorded that he was guilty, and when
he was sentenced to death, was time of peace; in
particular because, throughout the whole time
aforesaid, the chancery and other places of the courts
of the lord the king were open, and in them law was
done to every one as it used to be done.

Translation found in "Proceedings against Thomas,
Earl of Lancaster, for Treason," Vol. 1, A Complete
Collection of State Trials and Proceedings for High
Treason and other Crimes and Misdemeanors from the
Earliest Period to the Year 1783, with Notes and Other
Illustrations: Compiled by T.B. Howell, Esq. F.R.S.
F.S.A. including, in Addition to the Whole of the
Matter Contained in the Folio Edition of Hargrave,
Upwards of Two Hundred Cases Never Before Collected,
compiled by T.B. Howell (London: T.C. Hansard, 1816),
46.

64

A writ of habeas corpus is a legal device
primarily used to release a prisoner from unlawful
confinement. The issuance of such a writ does not
determine the person's guilty or innocence, but only
that he is being illegal held. Henry Campbell Black,
Joseph R. Nolan, and M.J. Connolly, Black's Law
Dictionary: Definitions of the Terms and Phrases of
American and English Jurisprudence, Ancient and Modern,
5th ed. (St. Paul: West Publishing Company, 1979), 638.

65

"Trial of THEOBALD WOLFE TONE for High Treason,
before a Court Martial holden at Dublin on Saturday,
November 10th, together with the Proceedings in the
Court of King's Bench on Monday, November 12th:
39 GEORGE III. A.D. 1798," quoted in its entirety in
Vol. 27, A Complete Collection of State Trials and

Proceedings for High Treason and other Crimes and Misdemeanors from the Earliest Period to the Year 1783, with Notes and Other Illustrations: complied by T.B. Howell, Esq. F.R.S. F.S.A. and continued from the Year 1783 to the Present Time, complied by T.B. Howell (London: T.C. Hansard, 1820), 624-626.

66 Cockburn, supra, note 36, 25-45.

67 The petition exhibited to his Majesty by the lords spiritual and temporal, and commons, in this present parliament assembled, concerning divers rights and liberties of the subjects, with the King's majesty's royal answer thereunto in full parliament (England), 1627, 3 Car. 1, art. 7, in Vol. 2, The Statutes at Large of England and of Great-Britain: From Magna Carta to the Union of the Kingdoms of Great Britain and Ireland, edited by John Raithby (London: George Eyre and Andrew Strahan, Printers to the King's Most Excellent Majesty, 1811), 727-728.

68 *ibid.*, art.s 7 & 10(5).

69 *ibid.*, art. 10(3).

70 An Act declaring the Rights and Liberties of the Subject, and settling the Succession of the Crown (England), 1689, 1 W. & M., Sess. 2, c.2, in Vol. 3, The Statutes at Large of England and of Great-Britain: From Magna Carta to the Union of the Kingdoms of Great Britain and Ireland, edited by John Raithby (London: George Eyre and Andrew Strahan, Printers to the King's Most Excellent Majesty, 1811), 275-278.

71 Hansard's Parliamentary Debates (Commons), New [2nd] series, Vol. 11 (1824), supra, note 27, 1046, 1049.

72 Opinion of attorney-general and solicitor-general, 16 January 1838, Jamaica Rebellion file, P.R.O. W.O. 32-6235, quoted in Townshend, supra, note 23, 171-72.

73 Beckles, supra, note 27, 87-89; Schomburgk, supra, note 26, 39.

74 Mary Reckord, "The Jamaica Slave Rebellion of 1831," Past and Present 40 (July, 1968): 120-123; Gardner, supra, note 27, 273-282.

75 Hansard's Parliamentary Debates (Commons), New [2nd] series, Vol. 11 (1824), supra, note 27, 1046-1048.

76 Cory, supra, note 26, 330.

- 77 Cockburn, supra, note 36, 29.
- 78 See text accompanying notes 34 through 40.
- 79 "Campbell v. Hall," Complete Collection of State Trials, supra, note 34, 325-326, 327-330.
- 80 An abridged version of "Sammut v. Strickland," [1938] A.C. 678, Judicial Committee of the Privy Council, can be found in O. Hood Phillips, Leading Cases in Constitutional and Administrative Law, Third Edition (London: Sweet and Maxwell, 1967) at 419-423.
- 81 "Campbell v. Hall," Complete Collection of State Trials, supra, note 34, 328.
- 82 Royal Proclamation of 7 October 1763, quoted in its entirety in Shortt and Doughty, Documents Relating to the Constitutional History of Canada 1759 - 1791, supra, note 34, 165.
- 83 "Campbell v. Hall," Complete Collection of State Trials, supra, note 34, 329.
- 84 Commission of Captain-General & Governor in Chief of the Province of Quebec, 21 November 1763, quoted in its entirety in Shortt and Doughty, Documents Relating to the Constitutional History of Canada 1759 - 1791, supra, note 34, 175-176.
- 85 Swinfen, supra, note 38, 54.
- 86 Cockburn, supra, note 36, 9.
- 87 An Ordinance for the suppression of the Rebellion which unhappily exists within this Province of Lower Canada, and for the protection of the persons and properties of Her Majesty's faithful subjects within the same, supra, note 17, art. 1.
- 88 *ibid.*
- 89 *ibid.*
- 90 *ibid.*, art. 3.
- 91 *ibid.*, art. 2.
- 92 *ibid.*, art. 1.
- 93 A party may call into question, or "challenge," the capability of a person to serve on a jury. A peremptory challenge is a challenge for which no reason has to be given to the court to keep a person

from serving on the jury. In contrast, a challenge for cause requires the party to provide the court with a satisfactory reason (such as bias) as to why the prospective juror should not be seated and, before it acts, the court must be convinced that the reason is compelling. Black, Black's Law Dictionary, supra, note 64, 209, 769.

- 94 An Act for regulating of Trials in Cases of Treason and Misprison of Treason (England), 1695, 7-8 W., c. 3, art.s 1-2, 7-8, and 10, in vol. 3, The Statutes at Large of England and of Great-Britain: From Magna Carta to the Union of the Kingdoms of Great Britain and Ireland, edited by John Raithby (London: George Eyre and Andrew Strahan, Printers to the King's Most Excellent Majesty, 1811), 384-386.

See, also, An Act for improving the Union of the Two Kingdoms (Great Britain), 1708, 7 Anne, c. 21, art. 11, in vol. 4, The Statutes at Large of England and of Great-Britain: From Magna Carta to the Union of the Kingdoms of Great Britain and Ireland, edited by John Raithby (London: George Eyre and Andrew Strahan, Printers to the King's Most Excellent Majesty, 1811), 27.

- 95 An Ordinance for the suppression of the Rebellion which unhappily exists within this Province of Lower Canada, and for the protection of the persons and properties of Her Majesty's faithful subjects within the same, supra, note 56, art. 10.

- 96 Fecteau, supra, note 4, 477; Wicksteed, supra, note 55, 77.

- 97 Campbell and Rolfe to Glenelg, c. 26 January 1839, in Arthur G. Doughty, ed., Report of the Public Archives for the Year 1932 (Ottawa: F.A. Acland, Printer to the King's Most Excellent Majesty, 1933), Appendix A, 509.

- 98 See text accompanying notes 60 through 69.

- 99 Arthur B. Keith, The Constitution of England from Queen Victoria to George VI, Vol. 1 (London: Macmillan and Company, 1940), 3, 8; Swinfen, supra, note 38, 54-56.

- 100 An Act to make Temporary Provision for the Government of Lower Canada (U.K.), supra, note 51, art. 6.

- 101 An Act for making more effectual Provision for the Government of the Province of Quebec in North America (Great Britain), 1774, 14 Geo. III., c. 83, art.s 12

and 15, in Documents Relating to the Constitutional History of Canada 1759 - 1791, supra, note 34, 574-575.

- 102 Entry regarding Crown v. Jean-Bapiste Bizette and Etienne and Joseph Girard dit Provencale, Attorney General Sewell's Calendar, March, 1797, Canadian Archives, Series Q, Vol. 79-1, 30, in Douglas Brymner, "French Republican Designs on Canada," chap. in Report on Canadian Archives 1891 Being an Appendix to Report of the Minister of Agriculture (aka Public Archives of Canada 1891) (Ottawa: S.E. Dawson, Printer to the Queen's Most Excellent Majesty, 1892), Note D, 76-78.
- 103 An Act for the better securing the Liberty of the Subject, and for Prevention of Imprisonments beyond the Seas (England), 1679, 31 Car. II., c. 2, art.s 2-21, in Vol. 3, The Statutes at Large of England and of Great-Britain: From Magna Carta to the Union of the Kingdoms of Great Britain and Ireland, edited by John Raithby (London: George Eyre and Andrew Strahan, Printers to the King's Most Excellent Majesty, 1811), 233-236.
- 104 An Ordinance to authorize the apprehension and detention of Persons charged with HIGH TREASON, SUSPICION OF HIGH TREASON, MISPRISION OF HIGH TREASON and TREASONABLE PRACTICES, and to suspend, for a limited time, as to such Persons, a certain Ordinance therein mentioned, and for other purposes (Lower Canada), 1838 (3rd session, Special Council), 2 Vict., c. 4, art. 1, in Vol. 10, British Parliamentary Papers: Colonies Canada (Shannon, Ireland: Irish University Press, 1969), 257-258.
- 105 The separate decisions of Judges Panet and Bedard were printed, in their entirety, in Le Canadien (23 novembre [November] 1838).
- 106 Judge Vallieres' decision is printed, in its entirety, in Le Canadien (10 decembre [December] 1838).
- 107 C. Grey to Lord Grey, 12 December 1838, in William Ormsby, ed., Crisis in the Canadas: 1838-1839 - The Grey Journals and Letter (Toronto: Macmillan of Canada, 1964), 168-169.
- 108 Claude Vachon, "Philippe Panet," DCB, Vol. 7, supra, note 1, 678; Claude Vachon, "Elizear Bedard," DCB, Vol. 8, supra, note 3, 62; James H. Lambert and Jacques Monet, "Joseph-Remi Vallieres," DCB, Vol. 8, supra, note 3, 880.
- 109 An Ordinance to declare that the Second Chapter of the Statute of the Parliament of England, passed in the thirty-first year of the reign of King Charles the

Second, is not nor has ever been in force in the Province, and for other purposes (Lower Canada), 1838 (3rd session, Special Council), 2 Vict., c. 15, art. 1, in Vol. 12, British Parliamentary Papers: Colonies Canada (Shannon, Ireland: Irish University Press, 1969), 4-5.

110 Campbell and Rolfe to Glenelg, 6 February 1839, in Doughty, supra, note 97, Appendix A, 513-514.

111 ibid., 514.

112 Campbell and Rolfe to Glenelg, c. 25 January 1839, in Doughty, supra, note 97, Appendix A, 507-508.

See, also, An Act to make Temporary Provision for the Government of Lower Canada (U.K.), supra, note 51, art.s 3-4.

113 An Act to make Temporary Provision for the Government of Lower Canada (U.K.), supra, note 51, art.s 3-4 and 6.

114 Great Britain, Parliament, Hansard's Parliamentary Debates (Commons), 3rd series, vol. 48 (1839): 208.

115 Great Britain, Parliament, Hansard's Parliamentary Debates (Commons), 3rd series, vol. 49 (1839): 178.

116 See, An Act to amend an Act of the last Session of Parliament for making temporary Provision for the Government of Lower Canada (U.K.), 1839, 2-3 Vict., c. 53, art. 4, in Vol. 79, The Statutes of the United Kingdom of Great Britain and Ireland (aka Statutes at Large) (London: Her Majesty's Printers, 1839), 342-343.

117 Greenwood, "The Chartrand Murder Trial," supra, note 3, 129-130, 145-151; Greenwood, "The General Court Martial of 1838-39," supra, note 5, 249-251.

Examples of Patriotes and their sympathizers being encouraged to revolt again by the leniency shown after the 1837 Rebellion and by the prospect of another amnesty can be found in Greenwood, "The Chartrand Murder Trial," supra, note 3, 149-150.

118 Fernand Ouellet, "John George Lambton, 1st Earl of Durham," in DCB, Vol. 7, supra, note 1, 479.

119 Glenelg to Durham, 26 October 1838, in Arthur G. Doughty, ed., Report of the Public Archives for the Year 1931 (Ottawa: F.A. Acland, Printer to the King's Most Excellent Majesty, 1932), Appendix A, 492.

- 120 Greenwood, "The Chartrand Murder Trial,: supra, note 3, 150; Greenwood, "The General Court Martial of 1838-39," supra, note 5, 252-253, 281n38.
- 121 Report of the State Trials, supra, note 2, 17-18, 73-76, 111; Greenwood, "The General Court Martial of 1838-39," supra, note 5, 252-254; Filteau, "Joseph Duquet," in DCB, Vol. 7, supra, note 1, 264; Senior, "John Clitherow," in DCB, Vol. 8, supra, note 3, 163-164; Gibbs, "Dominique Mondelet," in DCB, Vol. 9, supra, note 9, 560.
- 122 Barry Wright, "The Ideological Dimensions of Law in Upper Canada: The Treason Proceedings of 1838," supra, note 22, 132-138; Edwin C. Guillet, The Lives and Times of the Patriots: An Account of the Rebellion in Upper Canada, 1837-1838, and The Patriot Agitation in the United States, 1837-1842 (Toronto: Thomas Nelson and Sons, Ltd., 1938), 71; Colin Read and Ronald J. Stagg, eds., The Rebellion of 1837 in Upper Canada: A Collection of Documents Ontario Series in the Publications of the Champlain Society, no. 12 (Toronto: The Champlain Society, 1985), xxi-lxxxvi, xcv-xcvii.
- 123 R.C. Watt, "The Political Prisoners in Upper Canada, 1837-8," The English Historical Review 41:163 (July, 1926): 531; Wright, supra, note 22, 146, 174n76.
- 124 An Act to protect the Inhabitants of this Province against lawless aggressions from Subjects of Foreign Countries, at Peace with Her Majesty (Upper Canada), 1838, 1 Vict., c. 3, art. 1, reprinted in the Upper Canada Gazette, 18 January 1838.
- 125 ibid., art.s 2 and 3.
- 126 Wright, supra, note 22, 136-138, 170n29; Watt, supra, note 123, 536; Read and Stagg, supra, note 122, lxxxviii; Lillian F. Gates, "Thomas Jefferson Sutherland," DC, Vol. 8, supra, note 3, 851-853.
- 127 Wright, supra, note 22, 136, 169n19-20, 174n76; Gates, supra, note 126, 853; Watt, supra, note 123, 536-537.
- 128 Report of the Law Officers, 28 May 1838, quoted in Watt, supra, note 123, 537.
- 129 Watt, supra, note 123, 537, 543-545; Colin Read, "The Short Hills Raid of June, 1838, and its Aftermath," Ontario History 68 (June, 1976): 103-104.

130

Guillet, supra, note 122, 139-141, 150, 186, 276-279, 285-286; Read, supra, note 129, 108; George F.G. Stanley, "Invasion: 1838," Ontario History 54 (June, 1962): 247-248, 251; Wright, supra, note 22, 138-139, 171n35; Greenwood, "The Chartrand Murder Trial," supra, note 3, 150.

Age seems to have been a major factor in determining the fate of the prisoners taken at Prescott and Windsor. Of the eleven captured at Prescott who were executed, four were in their forties, three were in their thirties, two were 28 years of age, and the last was 21. Of the four captured at Windsor who were executed and whose ages are known, they were 21, 26, 27, and 32 years old. Amongst those Prescott and Windsor prisoners who were transported to Australia, the majority were in their early or mid-twenties, and of those who were deported to the United States, the majority were in their teens. Guillet, supra, note 122, 140-141, 150, 186, 276-279, 285-286.

131

Canada Act 1982 (U.K.), 1982, 30-31 Eliz. 2, c. 11, Schedule B, Part One, sect.s 1, 11(f), and 33(1), in pt. 1, vol. 1, Public General Acts and General Synod Measures, 1982 (London: Council of Law Reporting, n.d. [1983 or 1984]), pp. 84-96.

132

Greenwood, "The General Court Martial of 1838-39," supra, note 5, 274, 290n210.

BIBLIOGRAPHY

a. Statutes

(In chronological order)

Magna Carta (England), 1215. Original Latin text and English translation in Magna Carta, pp. 316-337. By J.C. Holt. Cambridge: Cambridge University Press, 1965.

Claus. 1 Edw. 3 part. 1. M. 21. (England), 1327. [Also found at Parl. II. E. 3. p. 1. M. 17. Stat. 1. Edw. III.] Original Latin text in its entirety, except for Parliament's recitation of the record of the Earl of Lancaster's court-martial in 1322, in Historia Placitorum Coronae: The History of the Pleas of the Crown, Now first published from his Lordship's Original Manuscript, and the several References to the Records examined by the Originals, with large Notes. Vol. 1, pp. 344-347. By Sir Matthew Hale. Edited by Sollow Emlyn. "In the Savoy:" E. and R. Nutt, R. Gosling, T. Woodward, and C. David, 1736.

Claus. 1 Edw. 3 part. 1. M. 21. (England), 1327. [Also found at Parl. II. E. 3. p. 1. M. 17. Stat. 1. Edw. III.] In English, in its entirety, in "Proceedings against Thomas, Earl of Lancaster, for Treason." In A Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanors from the Earliest Period to the Year 1783, with Notes and Other Illustrations: Compiled by T.B. Howell, Esq. F.R.S. F.S.A. including, in Addition to the Whole of the Matter Contained in the Folio Edition of Hargrave, Upwards of Two Hundred Cases Never Before Collected. Vol. 1, pp. 39-48. Compiled by T.B. Howell. London: T.C. Hansard, 1816.

The petition exhibited to his Majesty by the lords spiritual and temporal, and commons, in this present parliament assembled, concerning divers rights and liberties of the subjects, with the King's majesty's royal answer thereunto in full parliament (England), 1627, 3 Car. 1. In The Statutes at Large of England and of Great-Britain: From Magna Carta to the Union of the Kingdoms of Great Britain and Ireland. Vol. 2, pp. 727-728. Edited by John Raithby. London: George Eyre and Andrew Strahan, Printers to the King's Most Excellent Majesty, 1811.

- An Act for the better securing the Liberty of the Subject, and for Prevention of Imprisonments beyond the Seas (England), 1679, 31 Car. II., c. 2. In The Statutes at Large of England and of Great-Britain: From Magna Carta to the Union of the Kingdoms of Great Britain and Ireland. Vol. 3, pp. 232-236. Edited by John Raithby. London: George Eyre and Andrew Strahan, Printers to the King's Most Excellent Majesty, 1811.
- An Act declaring the Rights and Liberties of the Subject, and settling the Succession of the Crown (England), 1689, 1 W. & M., Sess. 2, c.2. In The Statutes at Large of England and of Great-Britain: From Magna Carta to the Union of the Kingdoms of Great Britain and Ireland. Vol. 3, pp. 275-278. Edited by John Raithby. London: George Eyre and Andrew Strahan, Printers to the King's Most Excellent Majesty, 1811.
- An Act for regulating of Trials in Cases of Treason and Misprison of Treason (England), 1695, 7-8 W., c. 3, art.s 1-2, 7-8, and 10. In The Statutes at Large of England and of Great-Britain: From Magna Carta to the Union of the Kingdoms of Great Britain and Ireland. Vol. 3, pp. 384-386. Edited by John Raithby. London: George Eyre and Andrew Strahan, Printers to the King's Most Excellent Majesty, 1811.
- An Act for improving the Union of the Two Kingdoms (Great Britain), 1708, 7 Anne, c. 21, art. 11. In The Statutes at Large of England and of Great-Britain: From Magna Carta to the Union of the Kingdoms of Great Britain and Ireland. Vol. 4, pp. 25-27. Edited by John Raithby. London: George Eyre and Andrew Strahan, Printers to the King's Most Excellent Majesty, 1811.
- An Act for making more effectual Provision for the Government of the Province of Quebec in North America (Great Britain), 1774, 14 Geo. III., c. 83. In Documents Relating to the Constitutional History of Canada 1759 - 1791, pp. 570-576. Edited by Adam Shortt and Arthur G. Doughty. Second and Revised Edition. Part 1. Ottawa: J. de L. Tache, Printer to the King's Most Excellent Majesty, 1918.
- An Act to make Temporary Provision for the Government of Lower Canada (U.K.), 1838, 1 Vict., c.9. In The Statutes of the United Kingdom of Great Britain and Ireland (aka Statutes at Large). Vol. 78, pp. 36-39. London: Her Majesty's Printers, 1838.

An Act to protect the Inhabitants of this Province against lawless aggressions from Subjects of Foreign Countries, at Peace with Her Majesty (Upper Canada), 1838, 1 Vict., c. 3, art. 1. In the Upper Canada Gazette, 18 January 1838.

An Ordinance for the suppression of the Rebellion which unhappily exists within this Province of Lower Canada, and for the protection of the persons and properties of Her Majesty's faithful subjects within the same (Lower Canada), 1838 (3rd session, Special Council), 2 Vict., c. 3. In British Parliamentary Papers: Colonies Canada. Vol. 10, pp. 256-257. Shannon, Ireland: Irish University Press, 1969.

An Ordinance to authorize the apprehension and detention of Persons charged with HIGH TREASON, SUSPICION OF HIGH TREASON, MISPRISION OF HIGH TREASON and TREASONABLE PRACTICES, and to suspend, for a limited time, as to such Persons, a certain Ordinance therein mentioned, and for other purposes (Lower Canada), 1838 (3rd session, Special Council), 2 Vict., c. 4. In British Parliamentary Papers: Colonies Canada. Vol. 10, pp. 257-258. Shannon, Ireland: Irish University Press, 1969.

An Ordinance to declare that the Second Chapter of the Statute of the Parliament of England, passed in the thirty-first year of the reign of King Charles the Second, is not nor has ever been in force in the Province, and for other purposes (Lower Canada), 1838 (3rd session, Special Council), 2 Vict., c. 15. In British Parliamentary Papers: Colonies Canada. Vol. 12, pp. 4-5. Shannon, Ireland: Irish University Press, 1969.

An Act to amend an Act of the last Session of Parliament for making temporary Provision for the Government of Lower Canada (U.K.), 1839, 2-3 Vict., c. 53. In The Statutes of the United Kingdom of Great Britain and Ireland (aka Statutes at Large). Vol. 79, pp. 341-343. London: Her Majesty's Printers, 1839.

Canada Act 1982 (U.K.), 1982, 30-31 Eliz. 2, c. 11, Schedule B, Part One, sect. 11(f). In Public General Acts and General Synod Measures, 1982. Part 1. Vol. 1, pp. 79-115. London: Council of Law Reporting, n.d. [1983 or 1984]

b. Court Cases

(In chronological order)

"The Case of the Island of Grenada; in relation to the Payment of Four and one-half in the Hundred of Goods exported therefrom; between ALEXANDER CAMPBELL, esq. Plaintiff, and WM. HALL, esq. Defendant, in the Court of King's-Bench, before Lord Chief-Justice Mansfield: 15 GEORGE III. A.D. 1774." In A Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanors from the Earliest Period to the Year 1783, with Notes and Other Illustrations: Compiled by T.B. Howell, Esq. F.R.S. F.S.A. including, in Addition to the Whole of the Matter Contained in the Folio Edition of Hargrave, Upwards of Two Hundred Cases Never Before Collected. Vol. 20. Compiled by T.B. Howell. London: T.C. Hansard, 1816. 239-354.

"Trial of THEOBALD WOLFE TONE for High Treason, before a Court Martial holden at Dublin on Saturday, November 10th, together with the Proceedings in the Court of King's Bench on Monday, November 12th: 39 GEORGE III. A.D. 1798." In A Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanors from the Earliest Period to the Year 1783, with Notes and Other Illustrations: compiled by T.B. Howell, Esq. F.R.S. F.S.A. and continued from the Year 1783 to the Present Time. Vol. 27. Compiled by T.B. Howell. London: T.C. Hansard, 1820. 614-626.

"Crown v. Jean-Bapiste Bizette and Etienne and Joseph Girard dit Provencale." Attorney General Sewell's Calendar. March, 1797. Canadian Archives. Series Q, Vol. 79-1, 30. In Douglas Brymner, "French Republican Designs on Canada." Chap. in Report on Canadian Archives 1891 Being an Appendix to Report of the Minister of Agriculture (aka Public Archives of Canada 1891) Ottawa: S.E. Dawson, Printer to the Queen's Most Excellent Majesty, 1892. Note D.

Report of the State Trials Before a General Court Martial Held at Montreal in 1838-39: Exhibiting a Complete History of the Late Rebellion in Lower Canada. Vol. 1. Montreal: Armour and Ramsay, 1839.

"Sammut v. Strickland." [1938] A.C. 678. Judicial Committee of the Privy Council. Quoted in part in Phillips, O. Hood. Leading Cases in Constitutional and Administrative Law. London: Sweet and Maxwell, 1967.

c. Other

- Baehre, Rainer. "Imperial Authority and Colonial Officialdom of Upper Canada in the 1830s: The State, Crime, Lunacy, and Everyday Life." In Law, Society, and the State: Essays in Modern Legal History, pp. 181-207. Edited by Louis A. Knafla and Susan W.S. Binnie. Toronto: University of Toronto Press, 1995.
- Beckles, Hilary. Black Rebellion in Barbados: The Struggle Against Slavery, 1627-1838. Bridgetown, Barbados: Antilles Publications, 1984.
- Black, Henry Campbell, Nolan, Joseph R., and Connolly, M.J. Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern. 5th ed. St. Paul: West Publishing Company, 1979.
- British Parliamentary Papers: Colonies Canada. Vols 9-10 and 12. Shannon, Ireland: Irish University Press, 1969.
- Brown, George W., and others, eds. Dictionary of Canadian Biography. Vols. 7-9. Toronto: University of Toronto Press, 1976-1988.
- Cockburn, Sir Alexander. Charge of the Lord Chief Justice of England to the Grand Jury at the Central Criminal Court, in the Case of The Queen Against Nelson and Brand. Frederick Cockburn, ed. London: William Ridgway, 1867.
- Conrad, Margaret; Finkel, Alvin; Jaenen, Cornelius. History of the Canadian Peoples: Beginnings to 1867. Vol. 1. Toronto: Copp Clark Pittman Ltd., 1993.
- Cory, G.E. The Rise of South Africa: A History of the Origin of South African Colonisation and its Development Towards the East from the Earliest Times to 1857. Vol. 3. London: Longmans, Green and Company, 1919; reprint ed., Cape Town: Struik, 1965.
- Craton, Michael. "The Late Slave Rebellions in the British West Indies, 1816-1832." Past and Present 85 (November, 1979): 99-125.
- Doughty, Arthur G., ed. Report of the Public Archives for the Year 1931. Ottawa: F.A. Acland, Printer to the King's Most Excellent Majesty, 1932.
- _____. Report of the Public Archives for the Year 1932. Ottawa: F.A. Acland, Printer to the King's Most Excellent Majesty, 1933.

- Fecteau, Jean-Marie. "Mesures d'exception et regle de droit: Les conditions d'application de la loi martiale au Quebec lors des rebellions de 1837-1838." McGill Law Journal 32:3 (July, 1987): 465-495.
- Flaherty, David H., ed. Essays in the History of Canadian Law. Vol. 2. Toronto: University of Toronto Press, 1983.
- Friedman, Lawrence M. Crime and Punishment in American History. New York: BasicBooks, 1993.
- Gardner, W.J. A History of Jamaica From Its Discovery by Christopher Columbus to the Year 1872. 3rd edition. London: Frank Cass and Company, Ltd., 1971.
- Genovese, Eugene D. The World the Slaveholders Made: Two Essays in Interpretation. New York: Pantheon Books, 1969.
- Gordon, Robert W. "New Developments in Legal Theory." In The Politics of Law: A Progressive Critique, pp. 281-293. Edited by David Kairys. New York: Pantheon Books, 1982.
- Great Britain, Parliament, Hansard's Parliamentary Debates (Commons), New [2nd] series, vol. 11 (1824).
- Great Britain, Parliament, Hansard's Parliamentary Debates (Commons), 3rd series, vol.s 48-49 (1839).
- Greenwood, F. Murray. "L'insurrection apprehendee et l'administration de la justice au Canada: Le point de vue d'un historien." Revue d'histoire de l'Amerique francaise 34:1 (juin [June], 1980): 57-91.
- _____. "The Chartrand Murder Trial: Rebellion and Repression in Lower Canada, 1837-1839." In Criminal Justice History and International Annual. Vol. 5. Westport, CT: Meckler Publishing, 1984: 129-159.
- _____. "The General Court Martial of 1838-39 in Lower Canada: An Abuse of Justice." In Canadian Perspectives on Law and Society: Issues in Legal History. Edited by W. Wesley Pue and Barry Wright. Carleton Library Series, no. 152. Ottawa: Carleton University Press, 1988: 249-290.
- Guillet, Edwin C. The Lives and Times of the Patriots: An Account of the Rebellion in Upper Canada, 1837-1838, and The Patriot Agitation in the United States, 1837-1842. Toronto: Thomas Nelson and Sons, Ltd., 1938.

- Hay, Douglas. "Property, Authority and the Criminal Law."
In Albion's Fatal Tree: Crime and Society in
Eighteenth-Century England, pp. 17-63. By Hay, Douglas;
Linebaugh, Peter; Rule, John G.; Thompson, E.P.; and
Winslow, Carl. New York: Pantheon Books, 1975.
- Holdsworth, W.S. "Martial Law Historically Considered."
The Law Quarterly Review 18 (1902): 117-132.
- Holt, J.C. Magna Carta. Cambridge: Cambridge University Press,
1965.
- Horwitz, Martin. "The Rule of Law: An Unqualified Human
Good?," 86 The Yale Law Journal (1977): 561-566.
- Keith, Arthur B. The Constitution of England from
Queen Victoria to George VI. Vol. 1. London: Macmillan
and Company, 1940.
- Knafla, Louis A., ed. Crime and Criminal Law in Europe and
Canada. Revised Edition. Waterloo: Wilfrid Laurier
University Press, 1985.
- Le Canadien (23 novembre [November] and 10 decembre [December]
1838).
- Macleod, R.C., ed. Lawful Authority: Readings on the History
of Criminal Justice in Canada. Toronto: Copp Clark
Pitman, Ltd., 1988.
- Manning, Helen Taft. British Colonial Government After the
American Revolution, 1782-1820. Yale Historical
Publications, Miscellany, Vol. 15. New Haven: Yale
University Press, 1933.
- Masciotra, Vince. "Quebec Legal Historiography, 1760-1900"
McGill Law Journal 32:3 (July, 1987): 712-732.
- Ormsby, William, ed. Crisis in the Canadas: 1838-1839 -
The Grey Journals and Letter. Toronto: Macmillan of
Canada, 1964.
- O'Sullivan, Richard, ed. Military Law and the Supremacy of
the Civil Courts, being the Judgment of The Hon.
Mr. Justice McCardie in Heddon v. Evans. London:
Stevens and Sons, 1921.
- Pound, Roscoe. "A Survey of Social Interests," Harvard Law
Review 57 (1943): 1-39.
- Read, Colin. "The Short Hills Raid of June, 1838, and its
Aftermath." Ontario History 68 (June, 1976): 93-115.

- Read, Colin, and Stagg, Ronald J., eds. The Rebellion of 1837 in Upper Canada: A Collection of Documents. Ontario Series in the Publications of the Champlain Society, no. 12. Toronto: The Champlain Society, 1985.
- Reckard, Mary. "The Jamaica Slave Rebellion of 1831." Past and Present 40 (July, 1968): 108-125.
- Reedie, Pennie. "The Crimes of Treason and Sedition in Canada." Laurentian University Review 11:1 (November, 1978): 17-25.
- Schomburgk, Robert H. The History of Barbados; Comprising a Geographical and Statistical Description of the Island; a Sketch of the Historical Events since the Settlement; and an Account of its Geology and Natural Productions. London: Longmans, Brown, Green, and Longmans, 1848; reprint ed., London: Frank Cass and Company, Ltd., 1971.
- Schull, Joseph. Rebellion: The Rising in French Canada 1837. Toronto: Macmillan of Canada, 1971.
- Shortt, Adam, and Doughty, Arthur G., eds. Documents Relating to the Constitutional History of Canada 1759 - 1791. Second and Revised Edition. Part 1. Ottawa: J. de L. Tache, Printer to the King's Most Excellent Majesty, 1918.
- Simmons, Thomas Frederick. Remarks on the Constitution and Practice of Courts Martial. 2nd ed. London: F. Pinkney, 1835.
- Stanley, George F.G. "Invasion: 1838." Ontario History 54 (June, 1962): 237-252.
- Stone, Thomas. "The Mounties as Vigilantes: Perceptions of Community and the Transformation of Law in the Yukon, 1885-1897." In Historical Perspectives on Law and Society in Canada, pp. 111-137. Edited by Tina Loo and Lorna R. McLean. Toronto: Copp Clark Longman Ltd., 1994.
- Swinfen, D.B. Imperial Control of Colonial Legislation 1813-1865. Oxford: Oxford University Press, 1970.
- Thompson, E.P. Whigs and Hunters: The Origin of the Black Act. New York: Pantheon Books, 1975.
- Townshend, Charles. "Martial Law: Legal and Administrative Problems of Civil Emergency in Britain and the Empire, 1800-1940." The Historical Journal. 25 (1982): 167-195.

Watt, R.C. "The Political Prisoners in Upper Canada, 1837-8."
The English Historical Review 41:163 (July, 1926):
526-555.

Wicksteed, G.W. Tables of the Provincial Statutes and
Ordinances in Force or Which Have Been in Force in
Lower Canada, in Their Chronological Order. Toronto,
Stewart Derbyshire and George Desbarats, 1857.

Wiener, F.B., Civilians under Military Justice: The British
Practice since 1689, Especially in North America.
Chicago: University of Chicago Press, 1967.

Wright, Barry. "The Ideological Dimensions of Law in
Upper Canada: The Treason Proceedings of 1838."
In Criminal Justice History: An International Annual
Vol. 10. Westport, CT: Meckler Publishing, 1989.

Yates, Richard A., and Yates, Ruth Whidden. Canada's Legal
Environment: Its History, Institutions and Principles
Scarborough, Ontario: Prentice Hall Canada, Inc., 1993.