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Department of  

The University of British Columbia  
Vancouver, Canada  

Date  5 July 1990  

DE-6 (2/88)
The central concern of this dissertation is to understand the nature of political authority in pre-Confederation British Columbia through an examination of the colony's law and its courts. In British Columbia, as in other parts of the Anglo-North American world, the law was closely associated with maintaining and upholding political authority, by contributing to both its institutional and ethical foundations. The ability of states to do acts of a specified nature and to impose sanctions if impeded -- its authority -- rests on consent to the "rule of law." The rule of law encompasses the idea that everyone is subject to the same rules of conduct, sanctions and rewards regardless of his condition. Ultimately, the rule of law guarantees equality in an otherwise inequitable world.

Commentators have pointed out that the rule of law is a fiction. Law is normative, and hence the authority it upholds is as well. In British Columbia the rule of law was firmly tied to the market, not the moral economy. British Columbia's law and courts bore the imprint of the colony's commercial economy and its geography. Colonial law and the courts provided a rule-bound arena in which to resolve disputes in a predictable, efficient and standardized manner that suited the demands of a market economy. Capitalism also profoundly shaped the ethical basis on which political authority in British Columbia rested. Commerce involved people in complex relationships. Trials to resolve commercial disputes reflected this complexity. They were lengthy affairs which generated masses of detailed and often technical information. If the demands of the commercial
economy for predictable, efficient and standardized conflict resolution were to be met, the intervention of experts, like lawyers, who could impose order on this mass of information was necessary. Political authority in British Columbia became less paternal and resident in the person of the judge, and more textual and embedded in printed statutes, precedents and legal texts, as well as the experts who could interpret them.
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INTRODUCTION

In the wake of a series of controversies over the actions and decisions of the Supreme Court, British Columbia's Attorney-General, Henry Crease, took a rare moment to reflect on the colony's legal administration. "Everything," he complained to the Colonial Secretary in 1868, "which affects the condition of the law vibrates through every fibre of the body politic....The safety, the very existence of life, limb & property in a new Gold Colony so recently placed as British Columbia...depends entirely on a thread, the mere sentiment of obedience to the majesty of British Law." In the years prior to Confederation in 1871 the law was the focal point of debate and criticism aimed at the colonial government. The connection Crease made between law, the gold economy and political authority ("the mere sentiment of obedience") is one which I am concerned to explore in this dissertation.

British Columbia's law and courts bore the imprint of the colony's commercial economy and its geography, and the system of authority that was reconstructed on these far western shores of the British Empire reflected the influence of both. Throughout the colonial period, British Columbians possessed an instrumentalist conception of the law, viewing it as a tool for economic development. Colonial law and the courts provided a rule-bound arena in which to resolve disputes in a predictable, efficient and standardized manner that suited the demands of a market economy. Capitalism also profoundly shaped the ethical basis on which political authority in British Columbia rested. Commerce involved
people in complex relationships. Trials to resolve commercial disputes reflected this complexity. They were lengthy affairs which generated masses of detailed and often technical information. If the demands of the commercial economy for predictable, efficient and standardized conflict resolution were to be met, the intervention of experts, like lawyers, who could impose order on this mass of information was necessary. Political authority in British Columbia became less paternal and resident in the person of the judge, and more textual and embedded in printed statutes, precedents and legal texts, as well as the experts who could interpret them.

***

Authority is a term that needs explanation, and since it is the focus of this study, I would do well to define it now. I take authority to mean simply the legal power to do acts of a specified nature, and to impose sanctions if its exercise is impeded. In this study, I am concerned with political authority. This is the power of states to do the same, and rests on particular institutional and ethical foundations. The law is tied closely to political authority, for it is through law (the state's rules) and legal institutions that the state exercises its power. Though law regulates behaviour through commands and by empowering certain individuals over others, it also provides the ethical basis of political authority. People must obey the state's commands or its authority is meaningless. Obedience can be secured by coercion, but using force can endanger the legitimacy of authority. In the Anglo-North American world, obedience rests instead on consent to the "rule of law."
The rule of law encompasses the idea that all individuals are subject to regulation by the law regardless of their status, condition or belief. Under the rule of law, individuals are protected from the arbitrary dictates of men because conflict is resolved according to established rules and procedures (due process). Because the law is distinct and independent of the interests of any particular group, the rule of law makes justice possible in a world of inequities. The perception and the reality of the rule of law lends coherence and stability to the body politic and is an integral part of the political culture and self-definition of the English and Anglo-North American world.

The laws and legal institutions that rule take a variety of forms which change over time, and the political authority they uphold is also a historical construct. Historians have been concerned, as I am, with understanding the kind of political authority which characterized past societies and what this can tell us about politics and social relations. For instance, medieval trial by ordeal was built on the premise that "divine intervention would prevail on behalf of the innocent." Thus, this form of dispute resolution reflected a society in which the judgement of God was the source of all law and the ultimate authority. David Flaherty's work on colonial Massachusetts reveals that the Commonwealth's laws reflected an overwhelming concern with establishing and maintaining conformity and consensus, the basis of political authority underlying the Puritan ideal of community. E.P. Thompson's study of the Black Act shows eighteenth-century English criminal law was used by the Whig oligarchy to protect their property and
to buttress their social and political status at the head of a hierarchical and paternal system of authority.®

Paternalism is the dominant form of authority described by historians of the law. Part of this emphasis is due to the temporal focus of much of legal history, which looks at the pre-industrial period, particularly eighteenth-century England. Much of the emphasis on paternalism is, however, due to legal history’s almost exclusive concentration on criminal law. Because criminal law involves using the state apparatus for the prosecution and punishment of state-defined offences, the coercive and paternalistic aspect of the law is the one most visible. The most influential model that deals with the relationship between law and political authority is one that combines both these temporal and topical foci. Douglas Hay’s "Property, Authority and the Criminal Law" (1975) looks at the role criminal law played in upholding paternal authority in eighteenth-century England.®

Hay argues that the English courts were theatres in which status was displayed in ritual fashion and the political ideals of paternalism and rule of law were dramatized through the vehicles of "Terror, Justice, Majesty and Mercy."® These four devices worked simultaneously to distance the law from any overt class interest and to reinforce the ascendancy of the English patrician ruling class. The spectre of capital punishment for over two hundred offences (Terror) and the technical nature of law (Justice) detached the law from its human origins and gave it a veneer of just omnipotence. At the same time, the ritual nature of the trials, with their processions, pageantry and costumes (Majesty), served as a metaphor for the hierarchical nature of English society and the rightful place of
the ruling class at its head. The merciful discretion of the judges (Mercy) in
pardoning those convicted of capital crimes -- that is, of not exercising the terrible
power of the law even when they had the right to do so -- served to legitimate the
position of the ruling class further and to reinforce their paternal authority.

In essence, Hay sees social relations in eighteenth-century England as
mediated by two things: by paternalism, and the sense of mutual obligation
between the powerful and the powerless that sprang from it; and by the law,
which though it appeared to be a detached body of rules that transcended the
arbitrary dictates of men and embodied a neutral and natural idea of justice, in
actual fact was "the cornerstone of a premodern world of paternalism."

Applying this model or the concept of paternal authority to a nineteenth-
century context is problematic. Applying it to nineteenth-century British North
America merely compounds the problem. In the English world of the nineteenth
century, the market, rather than the moral economy prevailed and transformed
the role of law in mediating social relationships. The moral economy emphasized
reciprocal obligation between English "patricians and plebians." This mutuality
reflected a particular understanding of the world in which society was composed
of a variety of parts unequal in power. Despite the inequities, each was equally
necessary, however, and the cooperation of all was essential for the integrity and
well-being of the social whole. The powerful occupied their positions by virtue of
their social status, but status carried with it the responsibility for the welfare of
the powerless. If the ruling class failed to fulfil their obligations they ran the risk
of losing their power and authority.
Conversely, nineteenth-century law was shaped by laissez-faire ideas and the market economy. I will make much of laissez-faire and its influence on law and political authority in the chapters that follow, and it would be useful to explain what I mean when I use the term, particularly because it is one fraught with controversy.\textsuperscript{11} Laissez-faire is a phrase of great polemical value but little clear meaning. Nevertheless, I will venture some remarks. Along with the free market, it provides the underpinnings of a capitalist economic system. Capitalism rests on the idea that voluntary, self-interested transactions between freely-contracting producers and consumers -- the free market -- are natural and promote the general welfare of nations. Such an assumption raises questions regarding the proper role of government. That role is expressed by the policy of laissez-faire, or non-intervention. But because it is impossible for government to absent itself completely from the public sphere, the question of intervention is one of degree and not of kind.\textsuperscript{12} As a result, as Arthur Taylor notes, "one man's laissez-faire is another man's intervention."\textsuperscript{13} Taylor argues that because of the lack of clarity surrounding the idea of laissez-faire, its importance in shaping nineteenth-century public policy was more prescriptive than analytical; that is, non-intervention was more a principle designed to meet the exigencies of particular political and economic situations than a hard-and-fast law of nature that could be used to diagnose and treat social ills.\textsuperscript{14} That said, when I use the term laissez-faire, I mean a government policy aimed at enhancing the free market and individual enterprise by maintaining fair play in economic competition. Such a policy involved a degree of state regulation, but government intervention to
achieve these ends was not motivated out of a sense of paternalism. The invisible and impersonal hand of the free market set prices, wages and profits, rather than the arbitrary dictates of those occupying the seats of power.

The best example of the influence of laissez-faire capitalism and individualism on the law is in the area of contracts. Under the nineteenth-century law of contracts, obligation was limited, of a specific nature and existed as a result of a voluntary agreement between individuals who intended to take on such responsibility. Social status and power were irrelevant to the issue of obligation. The law upheld this emphasis on the individual. Instead of imposing its will and dictating the terms or the substance of obligation, the state, through the law, allowed individuals to "realize their wills." Enforcement of the law of obligations was not considered paternal interference but an extension of the private arrangements of individuals, the manifestation of individual wills. The law had nothing to say about the justness of such arrangements -- about just price or just wage, for instance -- as it would under a system of paternal authority.

Apart from the differences in the relationship between law and political authority in the eighteenth and nineteenth centuries, there are also problems in applying the concept of paternal authority to the British North American context. British North American colonies lacked the social and economic structure of paternalism, even though they received its undercarriage in the form of English law. Immigrants to British North America were drawn from a narrow range of social classes and the frontier conditions of the new world only served to reduce stratification further. Gone were the material trappings of status and class. Gone
too was much of the collective sense associated with it. The people who came to British North America did so to make their own lives better -- to realize their individual wills. They were individualistic and entrepreneurial -- not the sort of characteristics that would foster the recreation of paternal authority. Additionally, the notion, if not the reality, of material abundance in British North America did little to encourage a moral economy from taking root. A moral economy is built at least partly on the assumption that social, economic and political resources are scarce, and provides a rationalization for the resulting inequities through the idea of mutuality. English plebians may not have been powerful, but they were as necessary to the constitution and functioning of society as those more favoured by social and economic circumstance. In a world of abundance no such rationale was necessary because individual equality appeared possible.

Most useful for Canadian historians of the law than the concept of paternalism is the work of three American legal historians. Beginning with James Willard Hurst, American legal historians have consistently noted the strong connections between law, economy and political culture. In a short but sweeping piece, Hurst argued that Americans possessed an "instrumentalist" view of the law, seeing it as a tool of economic development. Nineteenth-century American law shed its eighteenth-century preoccupation with protecting the property and hence the power of the few and instead "promoted the release of individual creative energy." "We were," Hurst wrote, "a people going places in a hurry."

Men in that frame of mind are not likely to be thinking about the condition of their brakes....Prevailing nineteenth century attitudes...made private property pre-eminently a dynamic, not a static institution....We did not devote the prime energies of our legal
growth to protecting those who sought the law’s shelter simply for what they had; our enthusiasm ran rather to those who wanted the law’s help positively to bring things about.  

By protecting and promoting individual capitalist initiative the law contributed to the overall development and prosperity of the United States.

William E. Nelson found what Hurst predicted in his study of legal change in Massachusetts from 1760 to 1830. As the Bay colony grew and became entangled in the trans-Atlantic commercial economy to a greater degree, the "ethical unity" and consensus that characterized the colony and that was symbolized by its "Christian, utopian, closed, corporate communities" broke down and was replaced by diversity and competition. Developments in the common law reflected this. Nelson documents the emergence of a legal order in which property replaced morality as the basis of authority and in which competition and individual gain were legitimated and aided by the law. Morton Horwitz takes much the same view, but goes further than Nelson to argue that judges used their rulings to promote social and economic change actively, rather than merely legitimating new forms of property and competition. To Horwitz, the common law, even more than legislation, was responsible for the creation of a political order that was organized according to the principles of a market economy. All three of these authors tie instrumentalism closely to America’s emerging individualist creed, which infected its political institutions with a spirit of creativity.

David Flaherty suggested that Hurst’s work could inform Canada’s legal history. Though some have heeded his advice, it has produced mixed results.
R.C.B. Risk viewed "the encouragement of private initiative, change, and the public and private interests" as central themes in the statute and common law of nineteenth century Ontario.\(^{25}\) In the same vein, Peter George and Philip Sworden argued that Upper Canadian "law and its enforcement constituted important infrastructural elements contributing to economic efficiency."\(^{26}\) Yet despite these Hurstian sentiments, the same authors are careful to point out the differences separating the Ontarian and American experiences, underscoring the greater judicial conservatism of Canadian judges. Unlike their American counterparts, Risk concluded, Ontario courts "did not participate in change and innovation even vicariously."\(^{27}\) Anthropologist David Howes went further, arguing that applying Hurst's approach would "elide many important cultural differences between Canada and the U.S." Upper Canadian jurists, he contended, conceived of the law as "establishing boundaries and setting limits to actions"\(^{28}\) rather than "promoting the release of creative energy."

Risk's and Howes's emphasis on the conservatism of the Canadian courts is informed by the prevailing historical orthodoxy regarding political culture in Upper Canada. Despite the regional focus, historians have applied the Upper Canadian model to all of British North America, describing political authority there as "conservative,"\(^{29}\) "liberal, with a tory touch,"\(^{30}\) "court," "statist,"\(^{31}\) and most recently, as arising from "a providentially-mandated world view."\(^{32}\) Though the labels are different the resulting picture is fairly homogeneous: authority in Canada was rooted in the conservative tradition's structured and organic
hierarchy. Flowing from this came the country's collectivism, its deference to authority and its preoccupation with law and order.

While one could take issue with applying such labels to British Columbia, a colony created at a different time and under different circumstances, to do so exclusively would be to miss an equally important point. That is, that the instrumentalism Hurst describes is not incompatible with a jurisprudence which conceives of the law as, to quote David Howes again, "establishing boundaries and setting limits to actions." The economic freedom that Hurst argues characterized nineteenth-century America was a freedom circumscribed by law; freedom under the law. As Hurst himself noted, American courts recognized that "limitations on official power were very important."

But so too was a complicated affirmative use of the law to furnish instruments and patterns of dealing. In this respect, our [America's] nineteenth-century policy involved a good deal less of simple laissez-faire than has been claimed for it.33

I would argue that there is much more similarity between the colonial courts of British Columbia and perhaps British North America and those of the nineteenth-century United States than has been claimed by scholars like Risk and Howes. Their work might be accused of over-emphasizing the Loyalist influence and over-reacting to the close associations Hurst and those who followed him made between instrumentalism and a particular brand of American individualism.

More recently, and quite apart from the work described above, social historians have cast a critical eye on the rather generalized, undifferentiated and elite-centred assessment of Canadian political authority. These scholars explored the normative aspect of law and the social order it reflected and contributed to.
The law may have upheld a "conservative," "tory," "court," "statist," and "providentially-inspired" system of authority, but it was also sexist, racist and class-based. The European fragments that were transplanted to British North American soil contained old world political ideas as well as old world prejudices. We have learned, for instance, that nineteenth-century Canadian rape law was framed on the premise that rape was an offence against the property rights of the woman's father or husband (the property being her reproductive capacity), rather than a crime against her person. We also know that law was an integral part of the anti-Orientalism that characterized British Columbia in the period to the Second World War, and continues both to provide the framework of oppression that helps keep Native people marginal and to legitimate that oppression.

Michael Katz's work on law enforcement in nineteenth-century Hamilton and Judith Fingard's study of Victorian Halifax reveal that the law was not blind to socioeconomic differences. If the prison populations in these two cities are at all typical, poverty and criminality were closely associated.

No coherent picture of authority emerges from these fragmentary pieces of evidence, however. There has been no attempt on the part of social historians to link their narrowly-focused studies of legal bias into a broader conception of politics and political authority. That is what this study aims to achieve. Unlike other social histories of the law, Canadian and non-Canadian, this one focuses primarily on civil rather than criminal law. If the object is to understand the ethical and institutional bases of political authority it seems reasonable to focus on the kind of law that most people experienced. Throughout the colonial period,
British Columbians had very little to say about crime or criminal law. All of the debate and controversy surrounding the colonial legal administration dealt with the regulation of private economic transactions: civil law concerns.  

This leads me to the central premise underlying this study. Law and political authority were part of a particular cultural matrix, and any analysis of the two must take into account the effects of society, economy and geography. In England, the law was part of a system of authority that was buttressed by an agrarian, pre-industrial economy and one in which property, in the form of land, was a political rather than an economic commodity. A stratified and rigid social hierarchy also contributed to this system of authority which has been called "paternal." When the British North American colonies were created in the late-eighteenth and nineteenth centuries they received the framework of political authority in the form of English law, but not much of the substance that gave it meaning. Property was a dynamic commodity, took many forms and was exchanged for economic gain rather than accumulated for political power. England’s nineteenth-century North American colonies were firmly tied to the emergent and competitive world of commercial capitalism, and had been since the first Portuguese fishermen salted their cod on Newfoundland’s beaches in the sixteenth century. Given this context, political authority in the colonies had to be different from that which characterized England. New links were forged between English law and the new world’s economy and geography. The authority that was reconstructed in the colonies reflected local conditions as much as it did its European inheritance.
Though the chapters that follow are roughly chronological in their order, each takes a thematic focus. The scale of analysis shifts back and forth from the broad brush strokes of an aggregate quantitative analysis to the more detailed and textured picture that emerges from a narrowly focused case study. Whatever the magnification, however, each chapter represents an attempt to outline one facet of the relationship between law, economy and authority.

I begin my exploration of colonial law and the reconstruction of political authority by looking at the beginnings of the European presence in the area that became British Columbia. Chapter One deals with the legal legacy of the Hudson’s Bay Company. Although the company was a highly specialized fragment of European culture, the close linkages between law and economy that characterized the colonial period had their roots in the fur trade. Law was narrowly focused under the HBC, and was concerned primarily, if not exclusively, with the regulation of the fur trade labour force. Though the company became the proprietary governor of the colony of Vancouver Island in 1849 they saw no need to alter their private corporate practices in framing public policy. The first five years of the company’s tenure as proprietor were marked by intense agitation over the constitution of legitimate political authority, which is the subject of Chapter Two. The debate between the independent settlers (independent of the company) and the HBC government focused on Vancouver Island’s land laws and its Supreme Court. It was framed in terms of laissez-faire economics, and centred on the legitimacy of monopoly, again underscoring the close association between law, economy and political authority.
It was in the mainland colony, however, that the influence of the market economy on the law, legal institutions and political authority was most visible. The remaining chapters deal primarily with developments in British Columbia. Chapter Three discusses the relative unimportance of land and the dominance of commercial capital in the mainland economy through a quantitative analysis of civil litigation. Though law and economy were still linked, property was a dynamic commodity, whose value was realized through its exchange. The law and the civil courts protected and promoted its exchange by providing sure routes for dispute resolution and in this way minimized the risk inherent in economic development. Civil litigation also revealed an aspect of colonial society that had implications for understanding the role the law played in creating an ethical base for political authority. British Columbia was a bondless society and because it was, the law and the courts came to play an important part in bringing people together. The heightened importance of the law in social relations added to British Columbians' interest in legal developments. The administration of the law had implications for both the material welfare of the colony and its social cohesion.

Having discussed the influence of the commercial economy on the law and hinted at its contribution to the ethical basis of authority, I turn in Chapter Four to a discussion of the role of geography in the administration of the law. The colony's sparse and scattered population, its rugged terrain and poor routes of communication made it difficult for the government to administer the law. These physical obstacles themselves created another barrier to the extension of authority. Isolation allowed a variety of meanings to become attached to the law.
In the Cariboo gold fields the law was part of "common sense," which, despite the transcendence implied by its name, was actually part of local knowledge. The meaning of the law was thus geographically limited. The consequences of this are explored through an examination of three mining cases which led to open defiance of the colonial magistracy in the Cariboo. The "Grouse Creek War" (1867) was motivated out of conflicting definitions of the law and the authority it upheld.

Common sense was too limited to work as a foundation for political authority. Instead, British Columbians rooted authority in legal texts and the specialized knowledge of the experts who could interpret and apply them. This is the theme of Chapter Five, and it is taken up through Cranford v. Wright, an 1862 court case for breach of contract and debt. The political authority revealed by this law suit was not paternal and best represented by the judge, but textual and resident in the expert.

Chapter Six looks at the courts as the institutional manifestations of the twin influences of economy and geography. If the commercial economy provided the courts with their raison d'etre, British Columbia's geography influenced the ambit of their powers. The economic freedom the law and the courts promoted was not without limit, however. These limits were most visible in the execution of the criminal law, which is the focus of Chapter Seven.

The final chapter concludes the study and explores, in speculative fashion, the consequences of the rule of law in nineteenth-century British Columbia.

A Brief Constitutional History of Vancouver Island and British Columbia
Though I touch upon aspects of the constitutional development of Vancouver Island and British Columbia in Chapters Two and Three, I do not give it full treatment anywhere. It may be useful to do so here to provide a context for the developments in both colonies' legal administration.

The Governors of the Hudson's Bay Company were made the "true and absolute lords and proprietors" of Vancouver Island by virtue of a Royal Charter issued on 13 January 1849. In return for the proprietorship of the Island the HBC agreed to settle the colony, defray the expenses of constructing a civil and military establishment there and construct other public services using the revenue generated from land sales. After five years the charter came up for review, and the crown could, if it were dissatisfied with the company's progress in colonization, revoke the HBC's privileges without compensation. After ten years, the company's exclusive licence to trade with the Native population expired and the crown, on reimbursing the HBC for its expenses, could resume control of Vancouver Island.

Though a separate act provided for the administration of justice on Vancouver Island, the colony's constitution was derived from the instructions and commission issued to Richard Blanshard, its first governor. These called for the creation of a seven-man Council (including the Governor) and a General Assembly, both of which would enact legislation together. When Blanshard arrived in March 1850 he discovered that there were not enough freeholders to justify an elected assembly. Instead, he established the Council and relied on a clause in his commission which allowed him to "enact laws with the advice and consent of the said Council" to govern the colony. Or at least he attempted to govern it.
From his arrival at Fort Victoria, the London barrister found himself at odds with the real political authority on Vancouver Island: the Hudson's Bay Company. Though he was the crown's representative, his authority was ineffectual in a colony populated primarily by HBC employees. After a stormy nine month tenure he resigned and the crown appointed HBC Chief Factor James Douglas as governor. Though the Colonial Office reminded Douglas repeatedly of his responsibility to create an elected assembly, the Governor continued to legislate with the aid of his appointed Council until 1856.

Up to that point, Vancouver Island's government had encountered few problems enacting laws primarily because it did so rarely. However, when Douglas and the Council proclaimed an act creating a Supreme Court of Civil Justice in 1854, the Colonial Office, perhaps tired of the delays in establishing representative institutions on the Island, declared the act invalid. Without an elected assembly, as stipulated in his instructions and commission, the governor and Council could not enact any legislation. The Colonial Office's declaration threw all acts of the government of Vancouver Island into doubt, and because it continued to debate this point with Victoria until 1856 the problem was compounded. Orders-in-Council establishing the Supreme Court of Civil Justice and validating all past acts of the governor and Council of Vancouver Island finally solved the immediate problems, and in 1856 Douglas made arrangements for elections to be held and a General Assembly formed.

From 1856 to 1863, a crown-appointed governor, an appointed Council and an elected General Assembly governed Vancouver Island. Though the Council
possessed both executive and legislative functions (as it had since Blanshward first created it in 1850), its role was unclear. Until the 1858 Fraser River gold rush, the Council sat infrequently and at the call of the governor to advise him and to enact legislation. After that time, however, the Council ceased to assume any executive functions and existed as only as a legislative body which sat concurrently with the assembly. The consultative role of the council was fulfilled through informal and private meetings between the governor and the heads of the principal government departments. The General Assembly considered the Council a strictly executive institution, and resented its incursions into the legislative sphere, particularly in its initiation of bills of supply. As a result, in 1861 the government asked London for permission to created an Executive Council, consisting of the heads of each of the principal government departments, and a Legislative Council, composed of all other members of the existing Council. The Colonial Office complied, but not until 1863, after it had sorted out the constitutional arrangements of the new and neighbouring colony of British Columbia.

From 1863 until the union of the island and mainland colonies in 1866, the governor, Executive Council, Legislative Council and General Assembly presided over Vancouver Island. The Executive Council represented the formalization of Douglas' earlier informal and private consultations with his department heads. Its membership consisted of the Colonial Secretary, the Attorney General, the Treasurer and the Surveyor General, and its role was advisory. The Legislative Council had eight members, including the Chief Justice, the members of the Executive Council and up to four other people appointed by the governor.
In the immediate wake of the Fraser River gold rush, British Columbia was created as a separate colony in August 1858 with James Douglas, Vancouver Island’s chief executive, serving as its first governor. Two factors shaped the constitutional development of the mainland colony. The first was the Colonial Office’s fears of the large American element in its population, and the second consisted of its desire to unite the two colonies as soon as possible. Both conspired to prevent the creation of representative institutions in British Columbia until the eve of Confederation in 1870. Instead, from 1858 to 1864 all executive and legislative power was vested in the hands of the Governor, James Douglas. Douglas did rely informally on the advice of the colony’s Supreme Court Judge, Matthew Baillie Begbie, in matters involving the creation and administration of the colony’s laws, however. In fact, Begbie framed many of the most important pieces of colonial legislation, including the Gold Fields Acts, the Small Debts Act, 1859 and the Pre-Emption Act, 1860.

From the beginning of Douglas’ tenure as governor of British Columbia, mainland residents expressed their opposition both to the form of the colony’s government and to the fact that Douglas was also the chief executive of a rival colony. Many of those most vehemently opposed to the constitution of the government of British Columbia had emigrated from the maritimes and Canada West, where they were accustomed to more representative and responsible institutions. The continual protests and petitions led Douglas to recommend the creation of a fifteen member unicameral legislature in 1863.
The Colonial Office concurred with the governor's assessment, but also recognized that much of the political agitation in British Columbia stemmed from the fact that mainlanders perceived Douglas to be favouring island interests over their own. As a result, and with an eye to preventing any further antipathy that could make the eventual union of the colonies difficult, London removed James Douglas as governor of both colonies and replaced him with two men: Arthur Kennedy on Vancouver Island and Frederick Seymour in British Columbia. That done, the Colonial Office approved the creation of an Executive and a Legislative Council for British Columbia. The latter institution would satisfy calls for representative institutions but was not as unwieldy an obstacle to union as an elected assembly would be.

The Legislative Council consisted of fifteen members, five of whom (with provision for more as the population grew) were elected. Despite its appearances, British Columbia's Legislative Council was not truly a representative institution. The Colonial Office considered it a crown council because though its elected members were chosen by the population, they sat by virtue of a crown appointment. Thus, all members of the Legislative Council, appointed and elected, occupied their posts at the pleasure of the crown and could not alter the rules governing the composition of the institution in which they sat. This was just a further measure on the part of London to limit the potentially unruly influence of the American component of the colonial population.

The appointment of separate governors for Vancouver Island and British Columbia in 1864 precipitated a great deal of anger and concern on the island.
Islanders felt that without Douglas and his pro-island bias they would suffer economically. The same result would also occur, however, if the colonies were united: Victoria would likely lose its status as the capital city and a free port. These fears, combined with an economic recession in both colonies in 1864 and 1865, stirred the General Assembly to rash action. It decided to embark upon a series of obstructionist tactics aimed at driving out the new governor, Arthur Kennedy, and making the Colonial Office reconsider its actions. The only effect the assembly had was to make London very angry, and in 1865, when it became clear that they were having no effect, its members asked the Colonial Office to unite the two colonies.

London complied in November 1866, and the new united colony of British Columbia was formed. As a result of the actions of the "lunatic House of Assembly," the Colonial Office reorganized the constitution of the new colony, eliminating the institutional framework of Vancouver Island's government entirely, replacing it with that of British Columbia. Thus, the united colony possessed a governor, an Executive Council, and an expanded Legislative Council, but no elected assembly. Though the Act of Union set out the constitution of the new colony, it did not deal with the administration of justice. This omission, as will be discussed in Chapter Six, caused a great deal of controversy.

In 1868 Governor Frederick Seymour modified the constitution of the Legislative Council by appointing three additional members who were unconnected with the government, and suggested that the elected membership might also be expanded. Though the Colonial Office pointed out that as a crown
council the Legislative Council had no authority to make such an amendment to its own constitution, interest in establishing representative government continued among the elected members of the Legislative Council. Seymour's successor, Anthony Musgrave, used this interest in representative government to secure British Columbia's entry into Confederation. In return for their support for Confederation, Musgrave promised his Executive Councillors that he would secure their pensions under Dominion government and delay the advent of representative government.

The Executive Council agreed and set out to draft the terms of Confederation, which were debated and accepted by the Legislative Council. While this occurred, London passed the British Columbia Government Act, 1870, which replaced the existing Legislative Council with one that was based on true principles of representation. This was the form the colonial government had when it ratified the terms of Confederation in January 1871.
NOTES


8. Ibid., .


33. Hurst, Law and the Conditions of Freedom, 32.


37. As Richard Sparks noted, criminal law is only important "at the margins of social life;...in day-to-day affairs it is not all that important to the maintenance of late-industrial capitalism's social order...give me the law of contracts (including contracts of employment), and you can have the rest of the statute book....The most generally useful laws are likely the ones that define...ownership and control [of the means of production], and not some ancillary laws that promise to thump individuals for rather trivial kinds of tampering with those means." Richard Sparks, "A Critique of Marxist Criminology," *Crime and Justice: An Annual Review of Research* 2(1980):159; cited in John H. Langbein, "Albion's Fatal Flaws," *Past and Present* 92(1983):119.


40. Hendrickson, 247.


42. An Act to establish a Supreme Court of Civil Justice in the Colony of Vancouver's Island and its dependencies, 2 December 1853.

43. For these Orders-in-Council see *Revised Statutes of British Columbia* 1979, Appendix Part B, 25.

44. An Act to provide for the Government of British Columbia, 22 & 23 Vic. c. 99 (1858).


46. An Act for the Union of British Columbia and Vancouver Island, 29 & 30 Vic., c. 67 (1866).

47. Hendrickson, 259.
CHAPTER ONE

HUDSON'S BAY COMPANY LAW IN BRITISH COLUMBIA, 1821-1849

The overwhelming influence commercial capitalism had on law and political authority in British Columbia is the central theme of this dissertation. If we take law to mean the regulation of behaviour by the state or an institution acting like a state, then the influence of capitalism on law is evident from the beginnings of the European presence in the area that became British Columbia. European penetration of this area had its origins in the fur trade. Though American John Jacob Astor’s Pacific Fur Company, the Russian American Company and the Montreal-based Nor’westers had established posts between the Continental Divide and the Pacific Ocean, the Hudson’s Bay Company had the largest and most enduring presence there. The HBC’s posts, some 9000 miles away from their London-based headquarters, were an administrative achievement of no small significance. With their employees, supplies, raw materials and markets spread over an immense geographic area, the company found itself confronted with some sizeable obstacles to its economic efficiency. Add to this the volatile international market for a staple resource like furs, and the simple longterm viability of an enterprise like the HBC takes on astonishing proportions.

Given the variety and the magnitude of these barriers to profit-making, the Hudson’s Bay Company, like any other business, attempted to limit as much of the uncertainty associated with its operations as it could. While its economic monopoly went a fair distance to doing this, the HBC also concerned itself with
regulating the conduct of its employees. The company's success depended as much on the cooperation of its own servants as it did its Indian suppliers. Two recent articles by Hamar Foster focus on how the company and imperial authorities attempted to deal with violent clashes (particularly murder) between fur traders or fur traders and Indians within the framework of English criminal law.² Both the Canada Jurisdiction Act (1803) and the 1821 Act for regulating the fur trade specified that individuals accused of serious crimes in unorganized Indian territories were to be conveyed along with the necessary witnesses to Upper or Lower Canada, where the proper colonial tribunals could deal with them.³ "Long-distance justice" proved unworkable and unjust in the absence of any other means of conflict resolution; and Foster concludes that these two acts were mere gestures designed to justify the HBC's dominion over a large part of British North America.⁴

Though violent behaviour was an issue for the Hudson's Bay Company for the political reasons Foster points out and because of the destabilizing effects it could have on the conduct of its trade, the company was more concerned with regulating the commercial conduct of its employees. This was the realm of Hudson's Bay Company law, which was narrowly focused on maintaining a disciplined and orderly labour force and aimed at protecting its own economic monopoly and profits. The company had four methods of achieving these ends, two formal and two informal: through the imperial statutes mentioned above; through its contracts with its servants; through its corporate organization; and, finally, through a system of "club law," or corporal punishment. It would be
incorrect to assume that the Hudson's Bay Company controlled its servants, however. These formal and informal mechanisms of regulation were a loosely-knit matrix which, like formal, positive law, bounded the fur trade labour force but did not always intersect with it. Nevertheless, the fact that the law was so tied to capitalism from the beginnings of the European presence in British Columbia had important ramifications for our understanding of the ethical foundations on which the political authority of governments rested.

For the company's governors and its field officers, the inhospitable conditions its servants worked in exacerbated the problem of imposing labour discipline. Service in the Hudson's Bay Company was gruelling and difficult, but conditions in British Columbia made engagements there particularly demanding. New Caledonia (mainland British Columbia) was particularly despised for its "misery and privation" and "poverty...of fare." Chief Factor John Tod recalled that in HBC Governor George Simpson's day (1820-1860) the district was "looked on in the light of another Botany Bay Australia; the men were in dread of being sent there." So loathe were the company's men to serve in the region that in 1827 Simpson proposed to raise the district's wages by £2 to counter the loss of labour precipitated by the retirement of "a great many of the New Caledonia men from the Service" and "to compensate those that remain for the extra work they will have to do." The sheer isolation and ruggedness of the New Caledonian posts contributed greatly to the district's poor reputation. Simpson described McLeod's Lake post in 1829 as simply "the most wretched place in the Indian Country," perhaps because of the "surround[ing] mountains which almost exclude the light
of day," and snow storms "so violent and long continued as to bury the establishment." The coastal location of Fort McLoughlin did little to ameliorate service there, as Charles Ross' letter to his sister revealed:

Than our way of life in this dreary wilderness nothing can be more dark and insipid. The posts we occupy, though many, are far between, and seldom have any intercourse with each other, oftener than once a year and then for the most part is for the purposes of exchanging cargoes for furs. There is no society—that is the person in charge must divert himself the best way he can with his own thoughts.

In addition to the isolation and rugged geography, conditions in New Caledonia were made more difficult by the periodic failures of the salmon fishery, which led to famine for both HBC men and Indians. In 1827 the fishery failed in the Chilcotin, effectively preventing the establishment of a post there. Two years later Simpson reported another salmon shortfall in the area of McLeod's Lake. Upon reaching the fort in the course of his tour of inspection, Simpson found its complement of men "starving, having nothing to eat for several weeks but berries." Their faces, he noted, "were so pale & emaciated that it was with difficulty I recognized them." Generalized famine also led to theft and to increased confrontations between fur traders and Indians. Even under better conditions the native population was viewed with suspicion and hostility. The company's sentiments were not without basis, as the murders of its servants and officers demonstrated. In 1823 the complement of men at Fort St. John were "massacred" and the fort abandoned. Further south at Fort George two HBC workmen were "done to death by two Fraser Lake Indians" in the same year. In 1828 a company interpreter was killed by two Babine Indians, and in 1848
refractory HBC servant Alexis Belanger was murdered. Garnering particular notice were the murders of HBC officers and clerks: Chief Factor Samuel Black in 1841, postmaster William Morwick at Fort Babine in 1843, and half breed clerk John McIntosh of Fort Chilcotin in 1844.

Company servants liked the Columbia district better, but it too posed peculiar dangers and discomforts to the HBC's servants posted there. Initially celebrated for the "salubrity of its climate and excellence of its soil," the Columbia quickly fell into disfavour because of the dangers posed by navigating the "tortuous channels" of its rivers, its hostile Indian population and the malaria or influenza which struck the district with regularity in the 1830s and 1840s. Low fur returns added to the company's disenchantment and with the district. "Everything appears to me in the Columbia on too extended a scale except the Trade," wrote George Simpson with some frustration:

and when I say that that is confined to four permanent Establishments the returns of which do not amount to 20,000 Beaver and Otter altho' the Country has been occupied upwards of fourteen years and immense Sums of Money expended therein I feel that we have done little more than commence operations on this side of the Continent.

At least some of the dangers that characterized the district were thought to be due to the unruly American population, some of whom were "people of the worst character, runaways, from jails and outcasts from Society, who take all their bad qualities along with them." "This motley crew," wrote Simpson, "acknowledge no master, [and] will conform to no rules or regulations."

In addition to the physical dangers posed by the inhospitable environment, wages and provisions were also the cause of dissention between the HBC and its
employees. Following the economic restructuring precipitated by its merger with the North West Company, George Simpson wrote to the Governor and Committee in London, informing them that it was impossible to reduce servants' wages and deny them certain supplies "without running very serious risks of mutiny." "Generally speaking," Simpson wrote, "they are dissatisfied with the new order of things."24 Much to Fort Vancouver Chief Factor John McLoughlin's chagrin, the high price of company goods caused several of Peter Skene Ogden's men to desert in 1827. "[A]s we had only a precarious tenure of the Country," he wrote, "we ought therefore to have allowed the trappers have their supplies at as low a price as possible so as to get while in our power all the furs we could."25 The aptly-named company chaplain Herbert Beaver considered the company's "inferior servants" "ill-treated, especially in the article of food," and from the number of complaints received, he was likely correct.26 In 1830, eight apprentices complained that "they had not a sufficiency of Bread," but company authorities felt their allowance of "4 lbs. Biscuit & 2 lbs. flour p. Week" and potatoes in the winter or "fresh provisions" in the summer was adequate.27 To "prevent a general strike and desertion" James Douglas gave Fort Victoria's European servants "2 ozs. of Tea and 1 lb. of Brown sugar weekly" in 1850.28 Such "luxuries" were in limited supply, and, according to Innis, "smuggling was in many cases the result."29 Even the water served to the company's servants did not escape complaint in 1851. A fresh supply was ordered, but the company's servants refused to get it until "an extra glass of 'grog' [was given] to all hands." Douglas
then sentenced fifteen of them to twelve weeks imprisonment for their part in the "conspiracy."³⁰

With such miserable working conditions, it was not surprising that many of the HBC's servants tried to improve their situations by engaging in some private trading with Indians to fill their stomachs or, as Chief Trader James Murray Yale put it, by entering into the exchange of "more smutty commodities."³¹ Such activities could and often did result in violent conflict. Even if they did not, however, they could still bring the censure of the company because of the threat they posed to the company's monopoly and the security of its supply of furs and provisions. Officially, anyone trading on his own account was to forfeit treble the value of such moneys goods and merchandize so traded for, and...be immediately discharged and made incapable of serving this company in any Office or place whatsoever, and that the said forfeiture...do redound, three fourths parts for the use and benefit of the company in general, and one fourth part to such person or persons as shall discover the same.³²

Unofficially, however, the company dealt with transgressors far more informally. For instance, in 1826 at Fort Kilmaurs, clerk William Brown attempted to drive down the Indians' price for salmon. Unfortunately, his men "were in every corner endeavouring to trade one or two from them," rendering Brown's efforts "to appear to dispise [sic] their salmon" and thus drive down the price ineffective.

This [the illicit trade] I for some time winked at until I saw it was going too far, then caught Gilbeau who was coming out of one of the Lodges with a Parcel he had traded, for which I gave him a severe scolding and made him go and throw them in the River. At this same time I gave the whole party to understand that the first I saw enter a lodge or have any communication with the Indians I would split his head with my sword--this proceeding put an end to their traffic...³³
A French Canadian cook's plan to trade with the neighbouring Tsimshian in 1853 proved to be doubly threatening to the company's interests. "Leon" not only engaged in private trading, but also offered the Tsimshian a particularly dangerous item in return for their furs: his knowledge of how to turn the large quantities of potatoes which the Tsimshian, Haida and Bella Bella Indians raised into "whiskey." In doing so Leon violated the conditions of his contract and endangered the post's food supply, its supply of furs and general safety. Indian potatoes were both an indigenous staple as well as an item of trade. HBC posts were provisioned by these potatoes, and Leon's plans to diversify the Indians' economy by teaching them how to manufacture home brew were not appreciated by the company's authorities and its employees who were often faced with food shortages. Liquor also created disorder, and, as the Bishop of Columbia noted, the HBC did not use liquor as a trade item because it "ministered to the wild incentives of their nature." "In consideration of his previous good behaviour," Leon was offered "another situation in the company's employ, provided he would make a full confession and tell how far the scheme had progressed. Otherwise he should be dismissed immediately." Although Leon did confess, he made his escape the next day but was captured shortly after and "bound hand and foot" was sent to Victoria and out of the district.

Relations with Indian women and family responsibilities were also the cause of disputes in the fur trade. "Improper familiarity with their [Indian] Women" was singled out by George Simpson as one of the causes of "serious differences...between the Natives and the people of our Establishments" in "nine
cases out of ten. At New Year's celebrations in 1829, Archibald McDonald of Fort Langley discovered "the drunken sot Dilenais had contrived to haul up an Indian woman by one of the Portholes." After confirming the servant's guilt, McDonald called him in and told "that had there been irons he should have felt the weight of them, for three months to come." Instead, Dilenais (or Debinais) was fined half his wages -- £11 -- for his "unpardonable [sic] crime," and told "to taste no liquor...during the present year of our Lord." Two years later at Fort Vancouver, clerk Francis Ermatinger "got into disgrace" when he instructed the post's interpreter to cut off the tip of the ear of an Indian who had had "an intrigue with his woman." McLoughlin noted that

though in a civilized world such an act will appear harsh,...if the Indian had not been punished it would have lowered the Whites in their estimation, as among themselves they never allow such an offence to pass unpunished.

Separation from their families also underlay some servants' discontent. Finan McDonald, a "very careful and economical trader but not bright," expressed some "anxiety about his Family" and was allowed to retire in 1827, because Simpson contended, "no one should...be pressed to remain in the Columbia of a discontented turn of mind as the feeling spreads like a contagion." "Family affairs," he continued, "are a source from whence much of this evil arises." William Brown, another Fort Vancouver servant, was not as fortunate. In 1837 Brown's term of service expired, but instead of being allowed to retire he was ordered to go back to Fort Langley. Brown took his complaint to Herbert Beaver, telling him he "had a child of eight months old, the mother being dead, and that he was unwilling to remain unless he should receive £20 per annum,
Instead of the £17 his former wages." Before Beaver could intercede, a boat arrived to convey Brown and others to the Fraser River. Brown refused to board the vessel and was flogged the next day.

He was stripped and tied up to one of the Great Guns, which stand at the foot of the messroom steps, the usual place and mode of administering corporal punishment, and ordered to receive two dozen lashes with a cat o' nine tails, the messwaiter, a very powerful man, being according to custom, the executioner, and a very severe left-handed flogger. On the sixth lash, which, but that reason and the awkwardness of the inflictor, fell across the heart, the poor man, whose courage now failed, said he was ready to go whither they pleased him, provided they released him, which was accordingly done. Chief Factor McLoughlin and Chief Trader Douglas, who superintended the punishment, no medical man, although one is stationed at the Fort, being present, telling him that they were sorry to inflict it upon a man, who bore a uniformly excellent character, but that orders must be obeyed.

Though these conflicts with the company arose from the misery and privation experienced by its employees, they also reflected the HBC's priorities. The company sought to regulate only that behaviour which threatened its economic interests. To do so, they had at their disposal two formal legal instruments: the 1803 and 1821 imperial statutes regulating the fur trade and the contracts of engagement each servant signed upon entering the company's service.

From 1821 to 1859 the administration of justice in the politically unorganized "Indian territories" under the control of the Hudson's Bay Company was provided by two imperial statutes: the Canada Jurisdiction Act (1803) and the Act for regulating the Fur Trade (1821). The Indian territories referred to included all of British Columbia, the Northwest Territories, Saskatchewan and northern Alberta, and were distinct from Rupert's Land, whose government was derived
from King Charles II's Charter of Grant (1670) to the Hudson's Bay Company. The 1803 act was an attempt on the part of the imperial government to deal with the violent clashes between the Hudson's Bay Company and its rival, the Northwest Company. It extended the jurisdiction of the courts of Upper and Lower Canada over the Indian territories and empowered the governor of Lower Canada to appoint territorial justices who would commit all offenders until they could be conveyed to the Canadian courts for trial. Violence also spawned the 1821 act. Its provisions limited the violent clashes between the two companies by granting one of them -- the Hudson's Bay Company -- a monopoly in trade over the Indian territories for twenty-one years. It also extended the provisions of the 1803 act to cover all the territories under HBC control and further empowered the Upper Canadian courts to take cognizance of all suits originating in the Indian territories with the exception of those involving land title, which were to be referred directly to England.44

No territorial justices were ever appointed under the 1803 or 1821 acts and there is only one known instance in which offenders and witnesses were conveyed to Lower Canada for trial.45 Given the great distances and great expense involved, the two acts were unworkable, and disputes were settled locally, within the confines of company, rather than statutory, authority.

The company's failure to adhere to the provisions of the 1803 and 1821 acts became an issue in the 1857 Select Committee investigation into the affairs of the Hudson's Bay Company. The company's monopoly came under attack by a Liberal government committed to the principles of laissez-faire, and the Select Committee
members took a dim view of what they perceived to be the HBC's efforts to hide behind their Charter when it came to protecting its trade, and to shirk the duties concomitant with the granting of the monopoly. Of particular interest to the Committee was the administration of justice. Company critics like James Edward Fitzgerald charged that the HBC had failed to adhere to the 1803 and 1821 acts and, in so doing, had created conditions in which revenge, rather than justice underlay dispute settlement in the territories under its jurisdiction. Under insistent questioning by the Committee, Sir George Simpson asserted that justice was administered "as nearly as possible according to the laws of England," and noted that the provisions of the 1803 and 1821 acts had been adhered to despite the "great difficulty and great expense" of removing the accused to Canada for trial. Not satisfied, the Committee members pressed Simpson, hoping to reveal the company's failure to provide adequate legal administration:

Q. How many criminals do you suppose are annually tried at Assinibola [Simpson had stated previously that prisoners were often conveyed to Red River for trial]?

A. I think the whole of the criminal cases within my recollection are but 19 in the 37 years [of his governorship].

Q. And that you call administering justice in that country?

A. Yes.

Q. We may take that as a specimen of the administration of justice in those countries under the rule of the Hudson's Bay Company?

A. Of the absence of crime, I should hope; we claim to ourselves great credit.

Q. Do you mean to say that in your tenure of office there for 37 years there have been only in fact 19 criminals in that country?
A. I think so.

Q. Are those serious cases or minor offences?

A. Serious cases.

Q. Take murders: do you mean to say that in all your term of office of upwards of 30 years, there have been only 19 murders committed in the whole of Hudson's Bay territory?

A. There were 11 people killed in this particular case [Simpson had cited one case in which three prisoners were accused of murdering eleven people and were conveyed to Canada for trial] which I am referring to.

Q. Do you mean to say that in the 37 years of your government of that country there have been only 19 murders committed?

A. Nineteen cases; I said there were 11 murders in that first case which I spoke of.

Q. I want to ascertain what has been the administration of justice in that country; I want to know how many persons have been brought to justice; you tell me 19?

A. Since 1821 there have been 19 cases of homicide in which the Hudson's Bay Company people were concerned; in 11 punishment was inflicted; one prisoner was tried and acquitted; one was a case of justifiable homicide; three accused parties died before being captured, and in three cases there was no evidence to proceed against them; those are the nineteen cases.

Q. Do you say that fairly represents the state of crime in that country?

A. I do.

While Simpson attempted to persuade the Committee that the company had adhered to the acts governing the administration of justice in its territories, his superior Edward Ellice (who was both a director of the company, the author of the legislation in question, and on intimate terms with some of the committee members) testified that the responsibility for judicial administration lay with the
Governments of Canada and Great Britain. The Hudson's Bay Company was under no legal obligation to establish courts or convey prisoners to Upper or Lower Canada for trial. Instead, contended Ellice, the responsibility for the administration of justice in the fur trade territories belonged to the governments of Upper and Lower Canada, not the Hudson's Bay Company.

Although formal procedural justice as stipulated in the acts of 1803 and 1821 may indeed have been "theoretical," as Hamar Foster suggested, the absence of its machinery did not mean that the Hudson's Bay Company lacked the means to regulate behaviour. The contracts HBC servants signed when they joined the company imposed certain terms of service and obligations on them that were enforced. The HBC's labour contracts were the chief means by which the company regulated its servants, and their content was symptomatic of the extent to which the demands of commercial capitalism influenced the regulation of conduct. The contracts defined licit and illicit behaviour in terms of private economic interests rather than any notion of a public good. While this is hardly surprising behaviour for a private business, not all nineteenth-century businesses were imperial powers that would form the basis of colonial governments like the Hudson's Bay Company did in Red River and Vancouver Island.

Throughout the fur trade period the Hudson's Bay Company used a form contract to engage its servants. The most notable characteristic of the document was its extensive protection of the company's monopoly and property. Not only was a servant of the "Honourable Company" expected to "devote the
whole of his time and labour in their service and for their sole benefit," and act
"with courage and fidelity," he was also expected to

defend the property of the said Company and their Factories and
settlements; and will not absent himself from the said service, nor
engage, or be concerned with any trade or employment whatsoever,
except for the benefit of the said Company and according to their
orders.53

In addition,

all goods obtained by barter with the Indians or otherwise, which
shall come to the hands or possession of the said [servant] shall be
held by him for the said Company only, and shall be duly delivered
up to the said Governors or other of their Officers or Agents...without
any waste, spoll or injury thereto.54

By protecting their monopoly, the company criminalized the one activity -- barter
-- that could have given its servants a certain degree of independence. The
independent mobility of servants was not allowed; however, the company took
care to engage servants for "the Department generally,"

...that they be subject to the inconvenience, or have the benefit of
being moved about or transferred from one part of the country to the
other at pleasure....55

Regulation of the labour force was further guaranteed by the terms of release:
 servants were required to give notice "one year or upwards before the expiration
of the said term...of his intention to quit the service," and upon doing so were
required to leave the company's territories.56 In this way the company assured
itself of a predictable labour supply and rid itself of potential competition. The
HBC retained the right to dismiss any of its employees from their service and
imposed a penalty amounting to a year's wages for desertion, neglect or any
failure to discharge the proper duties. From this penalty, the contract stipulated, "there shall be no relief either in law or in equity."\textsuperscript{57}

In addition to the formal means of regulation which the HBC had at its disposal, its corporate organization provided an informal, but immediate and palpable framework that constrained its labourers' behaviour. Centralization and hierarchy were the two chief characteristics of this organization following its merger with the North West Company in 1821. While ultimate control remained in London with the Governor, Deputy Governor and Committee of seven directors, the company's North American "field structure" became increasingly centralized, particularly under the administration of George Simpson (1820-1860), Governor-in-Chief of all the HBC territories in North America.\textsuperscript{58} The company's territories were organized into four departments, the affairs of which were overseen by the Governor and the company's chief factors at the annual meeting of the Council of the Northern Department. The dominance of the Council, according to Frederick Merk, signalled the end of an era of aggressive and undisciplined individualism that had characterized the pre-1821 period of competition between the HBC and the North West company:

The old semi-feudal freedom and individualism of the fur trade had become a thing of the past; "wintering partners" were no longer, as in the days of the North West company, "lords of the lakes and forests." They had become cogs in an efficient machine, the levers of which were in the firm grasp of the Governor of the Northern Department of Rupert's Land.\textsuperscript{59}

The potential for regulation offered by the centralization of the fur trade under Simpson was reinforced by the company's occupational structure, which reflected its belief in the stabilizing and ordering powers of hierarchy.\textsuperscript{60}
Employees were of three types: commissioned officers, clerks and servants. Servants comprised the bulk of the company’s employees, and included, in order of the "degrees which were implicitly recognized," interpreters, mechanics, guides, steersmen, bowmen or boutses, fishermen, middlemen ("common boatmen"), and apprentices. For this group "promotion was naturally out of order, each man pursuing the vocation his abilities or training fitted him for." Clerks, like servants, were engaged by the company for a fixed number of years (usually five), but differed from servants primarily in their education. They were, as their occupation suggests, literate, and were employed in letter-writing and accounting. At the end of their five year apprenticeship they were eligible to be given the charge of less important and smaller posts, and could eventually be promoted to the ranks of the officer class. Despite the often similar social and economic circumstances from which the clerks and servants were drawn, "the lines between the different classes in the service were strictly drawn:"

...The clerks, even when in a subordinate position in an important establishment, sat at the officers’ mess and, as a rule, had rooms in the same house. They were called gentlemen, and in letters were addressed as "Mr."

The commissioned officers -- the chief factors and chief traders -- formed what Morice called "a veritable oligarchy." Although they too were engaged for a fixed period, officers held shares in the company -- valued at an average of £350 each -- (chief factors held two and chief traders one), thus tying them even more directly to the company’s economic fortunes. By doing this, the company ensured the fiscal accountability of its officers. As a further check, the HBC held each of its officers responsible for all the goods sent to his post and for the wages
of the men in his charge. Every year each post turned in accounts for every man in the company's employ and took an inventory. The results of these were used as a guide for apportioning provisions and goods for the following season; thus, a mistake or a lack of productivity by the officer in charge could have far-reaching, as well as immediate, implications for the profitability of his post and the size of his own purse.

In addition to the wages and greater responsibilities of the officer class, a variety of symbols and ritual display also served to delineate in a very tangible way the company's occupational hierarchy. Dress was an important means of distinction, as clerk, and eventually chief trader J.W. McKay's description of a chief factor illustrates:

This exalted functionary was lord paramount; his word was law; he was necessarily surrounded by a halo of dignity, and his person was sacred, so to speak. He was dressed every day in a suit of black or dark blue, white shirt, collars to his ears, frock coat, velvet stock and straps to the bottom of his trousers. When he went out of doors he wore a black beaver hat worth forty shillings. When travelling in a canoe or boat, he was lifted in and out of the craft by the crew; he still wore his beaver hat, but it was protected by an oiled silk cover, and over his black frock he wore a long cloak made of Royal Stuart tartan lined with scarlet or dark blue bath coating. The cloak had a soft Genoa velvet collar, which was fastened across by mosaic gold clasps and chains. He had also voluminous capes.

Such sartorial splendour was impossible for the company's servants who were issued "2 striped cotton shirts and two yards of common cloth." In fact, dress was considered so effective in eliciting respect and maintaining order that in 1825 Governor Simpson wrote to the Governor and Committee in London, requesting Your Honors permission to introduce an uniform to be worn by every person coming under the denomination of Gentleman both in the Honble Coys Sea and Land Service,...The object for suggesting this
uniform are that it will add to the respectability of the Service in a certain degree in the estimation of our Servants the Natives & Strangers, That it will tend to introduce a certain Esprit du Corps which is much required....

The physical space of the company's posts was also apportioned in a manner which reflected its strict occupational hierarchy. The most significant building at HBC posts was the officers' residence. Usually the largest building on the site, the officers' residence, or "Big House," as it was called at Fort Langley, dominated the landscape, its whitewash, trim, twelve windows, wide sills and hipped roof setting it apart from the post's other unpainted and otherwise unadorned buildings. At Fort Langley the Big House was situated at "the back of the fort on an upward incline from the river [the Fraser] provid[ing] a view of the river and McMillan Island directly in front of the fort." Its importance was further accentuated because visitors had "to walk the length of the fort square before reaching the Big House." Servants, on the other hand, lived communally in barracks, the exteriors of their dwellings almost indistinguishable from the warehouses and barns that comprised the rest of the post's structures. The interior social space of the officers' residence was divided into private quarters for the use of the Chief Factor and his subsidiary officers and a more communal ceremonial space used for dining. Dinner was an occasion to display status publically, as Thomas Jefferson Farnham's 1839 description of the dining hall at Fort Vancouver demonstrates:

The dining room is a spacious room on the second floor, ceiled with pine above and at the sides. In the south-west corner is a large close stove, giving out sufficient caloric to make it comfortable.

At the end of a table twenty feet in length stands Governor McLaughlin [sic, McLoughlin], directing guests and gentlemen from
neighbouring posts to their places, at distances from the Governor according to their rank in the service. Thanks are given to God, and all are seated. Roast beef and port, boiled mutton, baked salmon, boiled ham; beets, carrots, turnips, cabbage and potatoes, and wheaten bread, are tastefully distributed over the table among a dinner-set of elegant queen's ware, burnished with glittering glasses and decanters of various-colored Italian wines. Course after course goes round, and the Governor fills to his guests and friends; and each gentleman in turn vies with him in diffusing around the board a most generous allowance of viands, wines, and warm fellow-feeling. The cloth and wines are removed together, cigars are lighted, and a strolling smoke about the premises, enlivened by a courteous discussion of some mooted point of natural history or politics, closes the ceremonies of the dinner hour at Fort Vancouver.\textsuperscript{74}

The arrivals and departures of chief factors and other persons of importance were also occasions for ritual display. McKay explained that "salutes were fired on his departure from the fort and on his return,"\textsuperscript{75} while Archibald McDonald provided this 1828 description of George Simpson's arrival at Fort St. James:

The day as yet being fine, the flag was put up; the piper in full Highland costume; and every arrangement was made to arrive at FORT ST. JAMES in the most imposing manner we could, for the sake of the Indians. Accordingly, when we came within about a thousand yards of the establishment, descending a gentle hill, a gun was fired, the bugle sounded, and soon after, the piper commenced the celebrated march of the clans "Si coma leum cogadh na shea," (Peace: or War, if you will otherwise.) The guide, with the British ensign, led the van, followed by the band; then the Governor, on horseback, supported behind by Doctor Hamlyn and myself on our chargers, two deep; twenty men, with their burdens, next formed the line; then one loaded horse, and lately Mr. McGillivray (with his wife and light infantry) closed the rear. During the discharge of small arms and wall pieces from the Fort, Mr. Douglas met us a short distance in advance, and in this order we made our entrée into the Capital of Western Caledonia.\textsuperscript{76}

But as McKay noted, while "All this ceremony was considered necessary; it had a good effect on the Indians; it added to his [the chief factor's] dignity in the
eyes of his subordinates," it "sometimes spoiled the chief factor." The ceremony also created tensions between and among the different classes of employees, and led Governor Simpson to report in 1822 that

a considerable degree of reserve approaching to coolness appears to exist between the Chief Factors and the Chief Traders, arising, in my opinion, from the circumstances of the former being desirous to make a wider distinction in the rank than is either necessary or proper.

Provisions were also a source of distinction between the company's employees. The officers' "roast beef and port, boiled mutton, baked salmon, and boiled ham" contrasted markedly with the servants' allowance of "3 lb. of Salt fish and 2 lb. of potatoes" which was the prescribed "dietary of the Country for the company's establishments west of the Mountains."

These examples convey important messages about the nature of every day life in the fur trade. The ordered and hierarchical nature of post society contributed to the regulation of the labour force by reinforcing the authority of company officers and by emphasizing the proper place of labouring men. Both Farnham's and McKay's descriptions are noteworthy for their emphasis on rank. In the first, "guests and gentlemen" were seated "at distances from the Governor according to their rank," and in the second, the horsed Simpson, preceded only by a piper and the British ensign, led a group of mounted and provisioned attendants who were arranged in an orderly fashion. As well, costume served to segregate the company's officers. It was a direct badge of importance in the case of McKay's chief factor, and in Simpson's case "the piper in full Highland costume" set him off from the others in his party. Horses were also important bracketing
devices. From the lofty height of a company charger, HBC officers commanded a wider view of the landscape -- commensurate, perhaps, with their status in the company, which integrated them more intimately into the larger trans-Atlantic world of the fur trade. Mounted, the company's field officers gazed down -- both actually and symbolically -- at their inferiors. McLoughlin's position at the head of the Fort Vancouver dining table was also revealing. It underscored his position as head of the establishment as well as the paternal role he occupied with respect to his men. The HBC's officers did often act as parents, acting as providers, meting out punishment and attempting to regulate the conduct of their charges.

Corporal punishment, the final means that the company used to regulate its labour force, was in many ways a natural outgrowth of both the paternal relationship that existed between HBC officers and servants and the isolated geographic context in which disputes occurred, which encouraged local and immediate solutions to problems. The company's treatment of its workers was also sanctioned by the use of corporal punishment in English criminal law as well as being informed by more general attitudes toward the labouring classes and ethnic prejudices. Rough treatment at the hands of HBC officers was the subject of much complaint. Though Chief Trader James Douglas admitted in 1838 that "the most unpleasant of our duties is the enforcement [sic] of order," he defended the use of "strong measures in repressing insolence and arresting the dangerous progress of insubordination," because the company had to deal with

a class of men with whom obedience is the result, neither of upright principle, nor the dread of legal penalties; but, in almost every case,...from a high degree of respect for their officers.
Other contemporary commentators ascribed the "hard usage" of the company's servants to the "autocratic" nature of HBC officers and their tendency to make status distinctions. For instance, "Irascible" William Thew of Fraser Lake "was too prone to believe a gentleman against a plebian," and often beat his servants cruelly when they complained. These status distinctions were based on the company's assumptions about the nature of their workforce. Labouring men had to be taught how to work and, in Governor George Simpson's estimation, needed to be "managed" and "moulded" into industriousness. As such, the company preferred to engage young men. Older servants, he contended,

cannot shake off their indolent and luxurious habits, whereas by good management we can mould young men to our wishes with little difficulty. But it is absolutely necessary that they be stout and healthy as weak and puny men are not to us worth the provisions they consume.

Ethnic stereotypes also influenced the company's treatment of its labourers. The HBC considered Orkneymen "a close, prudent, quiet people, strictly faithful to their employers," "avaricious," and who acted with great "propriety" around the native population. French Canadians, on the other hand, were "a volatile and inconsiderate race of people, but active, capable of undergoing great hardship and easily managed." Red River Metis were a cheap source of labour and an effective one, but only if they were introduced into the service "at a sufficiently early period of life." Otherwise, they tended to be of "changeable disposition and unsteady habits." Such attitudes were encapsulated in Simpson's remarks about the company's methods of disciplining its workers. Whereas European labourers "are
not accustomed to receive corporal chastisement and we would not consider it would be proper to introduce it," he wrote.

with Canadians it is different; they stand more in awe of a blow than a fine, and altho' we reprobate this mode of discipline generally and discountenance it as much as possible it is nevertheless highly necessary on extraordinary occasions.\(^8\)

Despite these sentiments, in an 1853 letter to Donald Manson, chief factor in charge of New Caledonia, Simpson made his disapproval of such attitudes clear. Charges of ill-treatment continued to surface, providing George Simpson with "ample evidence" of "a system of 'club law.'"

We duly appreciate the necessity of maintaining discipline and enforcing obedience; but that end is not to be attained by the display of violent passion and the infliction of severe and arbitrary punishment in hot blood. When a servant is refractory or disobeys orders he should be allowed a full hearing, his case examined fairly and deliberately, and if guilty, either taken out to the depot, put on short rations or under arrest--in fact, almost any punishment rather than knocking about or flogging.\(^9\)

As should be apparent by the examples scattered in this chapter, there was little evidence to show that Simpson's calls for the fair and deliberate examination of misconduct were heeded. Dispute resolution in the fur trade period continued to be characterized by "a system of violence" rather than peaceful remedy.

We are traders, and apart from more exalted motives, all traders are desirous of gain.

-- Chief Factor John McLoughlin\(^9\)

The international staple trade in furs, and later in gold, brought both men and the structures of government to British Columbia. If economic activity provided the region with its raison d'etre, it also profoundly shaped the nature of
law there. From the beginnings of the European presence in British Columbia the regulation of behaviour was intimately associated with securing the gain that people like Fort Vancouver Chief Factor John McLoughlin sought. The fur trade, like other commercial enterprises, required a reliable and well-disciplined labour force if it wanted to succeed. The context in which the HBC's servants worked made the problem of regulation difficult, however. Not only were the formal institutions of dispute resolution far-removed from the isolated reaches of most British Columbian posts, but that isolation and the harsh environment in which the company's servants worked were themselves the causes of discontent and disorder.

Nevertheless, this chapter has presented evidence that indicates the company did enforce its strictures on private trading and other types of behaviour it deemed threatening to its monopoly and profits. Apart from the imperial statutes that made formal provision for the resolution of disputes in British Columbia, the company's employees were bounded by the terms of their contracts which made them entirely dependent upon the HBC for food, shelter, clothing and wages. Once engaged in the company's service, servants were subtly constrained by the HBC's administrative organization which enveloped them in a web of ordered authority and a visibly structured hierarchy. As well, they were subject to the less subtle and certainly more painful authority that came from "the use of the lash and cutlass, supported by the presence of the pistol."
Though it was a highly specialized fragment of European society, the Hudson's Bay Company established what would be a long association between law and commercial capitalism in British Columbia.
NOTES

1. In 1849 the HBC became the proprietor of the newly-formed colony of Vancouver Island, hence the end-date. Yet the mainland remained a fur trade preserve of the company until it too became a colony in November 1858.


3. "An Act for extending the Jurisdiction of the Courts of Justice in the Provinces of Upper and Lower Canada, to the Trial and Punishment of Crimes, and Offences within certain parts of North America adjoining to the said Provinces" (1803), 43 Geo. III, c. 138; and "An Act for Regulating the Fur Trade and establishing a Criminal and Civil Jurisdiction within certain parts of North America" (1821), 1 & 2 Geo. IV, c. 66.


13. Ibid., fo. 7.


15. Simpson to the Governor and Committee, York Factory, 10 August 1824, HBCA-NAC. MG 20 D. 4/87 fo. 45-46; Simpson to the Governor and Committee, York Factory, 1 September 1825, MG 20 D. 4/88 fo. 59; Minutes of Council held at York Factory Northern Department of Rupert's Land, 2 July 1825, MG 20 D. 4/88 fo. 104; and Morice, A History of the Northern Interior of British Columbia (Toronto, 1907), 138.

16. Simpson to the Governor and Committee, Fort Vancouver, 1 March 1829, HBCA-NAC. MG 20 D. 4/94 fo. 11.


20. Ibid., 185.


22. Simpson to the Governor and Committee, Fort George, 10 March 1825. HBCA-NAC. MG 20 D. 4/88 fo. 17.


36. McKay, 14.

37. The other was the use of liquor. Simpson to the Governor and Committee, York Factory, 1 September 1825. MG 20 D. 4/88 fo. 60.

38. Archibald McDonald. *Journal of the Hudson's Bay Company kept at Fort Langley*, 103-104.


41. Servants' Character and Staff Records, 1832. HBCA-NAC. MG 20 A. 34/1 fo. 106.


44. Sections V and VI.

45. Foster, "Sins against the Great Spirit."


49. Ellice’s son, Edward Ellice, and Robert Lowe were Ellice Senior’s allies on the committee. When asked "how a free-trade liberal could defend monopoly,...Ellice answered that monopoly could never be defended when an alternative existed. Looking over his company’s holdings, he named Vancouver Island as a place where an alternative did exist. He thought Rupert’s Land a different situation entirely....[H]e gave a dismal account of the present state and the future prospects of the settlement along Red River. He said that settlers would never flock in great numbers to the lands south of Lake Winnipeg so long as better land remained unclaimed in Minnesota to the south or Upper Canada to the east. Hardy souls who did venture into company territory along the Red River would find that their only practical route of communication with the outside world would be through the United States. He warned that if Canada undertook to administer the region, she would soon tire of the expense and ask to be relieved. If Britain decided instead to set the region up as a separate colony, then the taxpayers of Britain would be asked to make an unprofitable and dangerous investment....Ellice drew the conclusion that however much the continuance of the company’s monopoly might violate the abstract principles of political economy, that monopoly did, nevertheless, protect the interests of British subjects and keep the peace in British North America ([James Winter, *Robert Lowe* (Toronto, 1976) 122]

For more information on Ellice, see James M. Colthart, "Edward Ellice," *Dictionary of Canadian Biography*, (Toronto, 1976) v. 9, 233-239.

50. *Select Committee on the Hudson’s Bay Company*. Testimony of The Right Hon. Edward Ellice, MP, 23 July 1857; responses to question 5889 [338-339] and 6014 [348]. The act, Ellice noted, "...only gave to the Crown and the Canadian authorities power to appoint justices to bring parties within the jurisdiction of the courts in England or Canada, which
power they never have exercised by the appointment of any justice. I put in those clauses myself, in order that the Crown or Canada might have the power of appointing justices under it; but it has never appointed any, therefore the clause is inoperative....Sending them [the accused] to Canada depends, I believe (I have not looked at the Act lately), upon the requisition of the authorities in this country [Great Britain] so to send them. There is nothing imperative in the Act of Parliament requiring the company to send for adjudication of anything within our own territories."


52. The following is an example of a contract of engagement [Servants' Contracts. HBCA-NAC. MG 20, reel 404 A. 32/37, fo. 52 (Charles LaFleur).]

AN AGREEMENT made this day of in the year one thousand eight hundred and between aged years, formerly of the Parish of in the County of of the one part, and the Governor and Company of Adventurers of England, trading into Hudson Bay, represented by of the other part as follows. The said hereby contracts and agrees to serve the said Company in North America in the capacity of for the term of to be computed from

and for such further term as hereinafter mentioned,

and devote the whole of his time and labour in their service and for their sole benefit and that he will do his duty as such and perform all such work and service, by day or by night, for the said Company as he shall be required to do, and obey all orders, which he shall receive from the Governors of the Company in North America, or other their Officers or Agents for the time being; and that he will with courage and fidelity in his said station, in the said service, defend the property of the said Company and their Factories and settlements; and will not absent himself from the said service, nor engage, or be concerned in any trade or employment whatsoever, except for the benefit of the said Company and according to their orders. And that all goods obtained by barter with the Indians or otherwise, which shall come to the hands or possession of the said shall be held by him for the said Company only, and shall be duly delivered up to the said Governors or other their Officers or Agents for the time being, without any waste, spoil or injury thereto, and in case of any willful neglect or default herein, he shall make good to the said Company all such loss or damage as they shall sustain thereby, to be deducted out of his wages. And that the said will faithfully obey all laws, orders and regulations established or made by the said Company for the good government of their settlements and territories; and all times during the residence of the said in North America, he will defend the rights and privileges of the said Company and aid and support their
Officers and Agents in the utmost of his power; and the said further engages and agrees that in case he shall omit to give notice to the Governor or Officers of the said Company in North America, one year or upwards before the expiration of the said term of years, of his intention to quit their service and return to then that he hereby promises and engages to remain one year longer upon the like terms as are contained in this contract; And the said on behalf of the said Company hereby engages, That upon in like manner as aforesaid, but not otherwise; the said shall receive from the said Company after the rate of per annum, to commence on and be computed from aforesaid and provided always, and it is hereby expressly agreed between the said parties hereto, that it shall be lawful for the Governor or other Officers or Agents of the said Company in North America, at any time during the said term of years or such additional term as aforesaid, to dismiss the said from their service and direct his return to in such case his wages are to cease from the day of [his dismissal] and further that in case the said at any time desert the service of the said Company, or otherwise neglect or refuse duly to discharge his duty as such hired Servant as aforesaid, then he shall forfeit and lose all his wages, for the recovery whereof, there shall be no relief either in law or in equity. In witness whereof the said parties have hereto set their hands at

Signed in the presence of

53. See previous note.

54. Ibid. Servants' wages would be deducted in the case of any damages.


56. Ibid.

57. Ibid.


59. Merk, Fur Trade and Empire, xlv.

61. Morice, 104.

62. Ibid. Interpreters received £25 per year, mechanics, guides, steersmen, bowmen, middlemen and labourers received £17 per year. See Merk, Fur Trade and Empire, "Introduction to the First Edition," xlii-xlii; this, however, differs from what is recorded in the Northern Department's Minutes of Council as the suggestion of London:

- Steersmen and bowmen £22 10s.
- Ordinary labourers £15

For Canadians,

- Bowmen 600 livres "Montreal money"
- Middlemen 400 "

Tradesmen and mechanics were paid "according to merit," but could receive no more than £40 per year. Interpreters were paid "in proportion to ability and steadiness" to £50 per year. [Fleming, ed., Governor and Committee to Simpson, Hudson's Bay House, London, 27 February 1822, 305-306.] These suggestions were, for the most part complied with, although Simpson did increase the wages of the Company's Canadian servants, noting the "very serious risk of Mutiny" which may have followed the application of the wage scale suggested. In the Columbia, wages were as follows:

- Boutes Out & in 1200 livres
- Milieu Do. 900 "
- Boutes resident 1000 "
- Milieu Do. 700 "

In addition, boutes and received one 3 point blanket, one two and half point blanket, 2 striped cotton shirts, two yards of common cloth and nine pounds of tobacco. Milieux received the same as boutes, but only three pounds of tobacco. [Ibid., Simpson to Governor and Committee, 31 July 1822, 346-347].

In 1824 a new wage scale was instituted which recognized, through a differential scale, the very different conditions under which the Company's employees worked. In New Caledonia and the Columbia the following wages existed [Ibid, Minutes of Council 1 July 1824, 65-66]:

**New Caledonia:**
- Boutes £27
- Milieux £22

**Columbia:**
Boutes £22
Milleux £17

In 1836 wages for New Caledonia were adjusted again (check the intervening years!) [Minutes of Council, Northern Department 21 June, 1836, in E.H. Oliver, ed. The Canadian North-West (Ottawa, 1914), v. 2, 749]:
New Caledonia, Millbank, Nass and Stikine:
Boutes £24
Middlemen £19
(note: "boutes" were the "steersmen and bowsmen of canoes", and milieux were middlemen. See ibid.).

63. Clerks received £20 in their first year, £5 more in the two subsequent years of service and £10 more in the last two years of their apprenticeship. "If they behaved satisfactorily then £75 was given for a term of three years. This again was increased to £100 per year." [See Roderick Finlayson, The History of Vancouver Island and the Northwest Coast (Victoria, 1878). H.H. Bancroft Collection, NAC. MG 29 C15, v. 2, c-15, 36] Salaries of clerks ranged from £50 to £100 in the mid-1830s. See Morice, 105.

64. After their apprenticeship clerks were graded into four classes, "according to their Education and abilities." In 1822 clerks' wages were set as follows [Fleming, ed. Minutes of Council, Northern Department, "Simpson to the Governor and Committee, 31 July 1822, 346-347.]:
1st class £100
2nd class £75
3rd class £60
4th class £40

65. Ibid., 104 and 106.
66. Ibid., 106.
68. Innis, The Fur Trade in Canada, 410-413.
69. Ibid., 318.
70. J.W. McKay, cited in Morice, 110. J.W. McKay was employed in the HBC's Vancouver Island posts of Fort Nanaimo and Victoria. There is no date given for his description of the chief factor (who, given the tartan, was probably John Stuart, the head of the New Caledonia district [see Shirlee Ann Smith, "John Stuart," Dictionary of Canadian Biography (Toronto, 1988), v. 7, 907-908]. McKay's description certainly fits with the assessment of Stuart given by Governor
George Simpson, who wrote in 1832 that although Stuart "had not the advantage of a good Education",

but being studious improved himself very much and having a very retentive Memory is superficially conversant with many subjects. Is exceedingly vain, a great Egoist, swallowing the grossest flattery, is easily cajoled, rarely speaks the truth, indeed I would not believe him on Oath; lavish of his own Means, extravagant and irregular in business and his honesty is always questionable. [HBCA-NAC. MG 20. A 34/2 fo. 3, Servants' Character and Staff Records, 1832. Reel HBC 423]

71. Simpson to Governor and Committee, 31 July 1822, in Fleming, ed. Minutes of Council, Northern Department, 346-347.


75. Morice, 106-111.


77. J.W. McKay, cited in Morice, 110.

78. Simpson to Governor and Committee, York Factory, 1 September 1822. HBCA-NAC. MG 20, reel 3M42, D. 4/85 fo. 90.

79. James Douglas to Archibald Barclay, Fort Victoria, 16 November 1850. In Bowsfield, ed., Fort Victoria Letters, 130-131. Servants could also be given (depending on where they were stationed) six pounds of fresh salmon or codfish and one and a half pounds of flour, or four dried salmon and two pounds of potatoes; or ten pounds of fresh salmon or codfish; or eight pounds of fresh venison, as their daily ration. In the Spokan district of the Columbia department, the style of life was such at some posts that it did not escape the notice of George Simpson, who noted in 1825 that
The good people of the Spokan District I believe of the interior of
the Columbia generally have for a length of time shown an
extraordinary predilection for European provisions without
sufficiently considering the enormous cost....[F]or several years past
Five and sometimes Six Bouts have been sent and these principally
loaded with Eatables Drinkables and domestic concerns....The
articles of provisions and Luxuries are in themselves at Prime cost
of little value but when the expence of conveying them to their
destinations is taken into account their acquired value becomes a
matter of serious consideration....I do not know any post of the
Country on the East side of the Mountains that offers such resources
in the way of living as Spokan District; there is an abundance of fine
Salmon besides a variety of other Fish to be had quite at home,
plenty of Potatoes if trouble is taken to raise them, Game if required
in short every thing in the way of necessaries that an inhabitant of
the Indian Country has a right to look for; why therefore squander
large Sums of money in this manner? [Simpson to Governor and
Committee, Fort George, 10 March 1825. HBCA-NAC. MG 20,
D. 4/88, fo. 11.]

John McLoughlin's Letters from Fort Vancouver, First Series, 1825-1838, 247.

81. "Hard usage" from McLoughlin to the Governor and Committee, 20 November
Series, 1844-1846 (London, 1944), 100. "Autocratic officers" from Morice,
112-113.

82. Peter Skene Ogden, quoted by Morice, 200-207.

83. Simpson to Governor and Committee, York Factory, 10 August 1824, MG 20
D 4/87 fo. 24-25.

84. Simpson to the Governor and Council, 23 June 1823, cited in R.H. Fleming,
ed., Minutes of Council, Northern Department, xxiv.

85. Simpson to Donald Manson, Norway House, 18 June 1853, cited in Morice,
281-282.

86. McLoughlin to the Governor and Committee, Fort Vancouver, 15 November
1843. In E.E. Rich, ed., The Letters of John McLoughlin from Fort Vancouver to the
Governor and Committee of the Hudson's Bay Company, Second Series, 1839-44
(London, 1943), 118.

87. Beaver to Benjamin Harrison, Fort Vancouver, 15 November 1836, Reports
and Letters of Herbert Beaver, 1836-38, 20:
CHAPTER TWO

LAW AND AUTHORITY ON VANCOUVER ISLAND, 1849-1866:
OF PASTORS, PIGS AND PETITIONS

In 1865, English adventurer and journalist Charles Aubrey Angelo recalled his introduction to Vancouver Island during the Fraser River gold rush in 1859 with a bitterness suggestive of deeper tensions in the young colony. "In my unsophisticated innocence," he wrote, "I foolishly imagined that I was entering a Colony governed by British Institutions."

but I was quickly undeceived: it was far worse than a Venetian oligarchy, -- a squatocracy of skin traders, ruled by men whose life had been spent in the wilderness in social communion with Indian savages; their present daily occupation being the sale of tea, sugar, whisky, and the usual et ceteras of a grocery, which (taking advantage of an increased population) they sold at the small advance of five hundred per cent.;.....I found these "small fry" claiming under some antediluvian grant, not only Vancouver Island, but a tract of country extending from the Pacific to the Atlantic Ocean! The onward march of civilization was checked,.....And a country which might now be teeming with a hardy, industrious population, was crushed and blasted, by a set of unprincipled autocrats, whose selfish interests, idle caprices, and unscrupulous conduct, sought to gratify their petty ambition by trampling on the dearest rights of their fellow man.¹

Angelo's sentiments were symptomatic of the bitter debate over the constitution of legitimate political authority in Vancouver Island following its creation in 1849 as a proprietary colony of the Hudson's Bay Company. At a time when laissez-faire principles informed much of British policy and suffused public sentiment, the HBC's position as a monopolistic business enterprise and a colonial proprietor rested on insecure foundations.
For five years, from 1849 to 1854, Vancouver Island's independent settlers (independent, that is, from the HBC) voiced their opposition in a series of petitions to the company's attempts to turn its economic monopoly into a political and social one. Of particular concern to the independent settlers was the HBC's use of the law and the courts to buttress its position. To the independents, not only were the colony's land laws detrimental to its settlement and economic development, but they also had the effect of extending the HBC's rigid occupation-based social hierarchy over the island and, because of the land-based franchise, of concentrating political power in company hands. In framing the colony's courts, the HBC also drew on its fur trade experience. Equating law with the regulation of its work force, the company appointed men who had experience in managing large numbers of labourers as justices of the peace: its farm bailiffs. These appointments did not attract much attention, but when Fort Victoria Chief Factor and Vancouver Island Governor James Douglas named his brother-in-law and the manager of the company's coal mines Chief Justice of the Supreme Court in 1853 the independents took action and petitioned the Colonial Office and the Queen for relief.

The language of the rule of law and of laissez-faire economics informed and shaped the debate over political authority on Vancouver Island. Both the colony's land policy and the appointment of David Cameron compromised the idea that the law was above the arbitrary dictates and prejudices of men and served some loosely-defined human good. But overlaid on the independent settlers' concerns for the rule of law and their criticisms of HBC government on this basis was a
rejection of economic monopoly. The independents considered the political authority of the company illegitimate not only because its policies contravened the rule of law, but also because of the growing illegitimacy of monopoly in the Anglo-North American world of the mid-nineteenth century. The intersection of these two discourses -- rule of law and laissez-faire economics -- thus illustrates the continuing association of law, authority and capitalism in nineteenth-century British Columbia.

From the beginning, tensions existed between the island's *de jure* civil authority and the *de facto* authority of the Hudson's Bay Company. Despite the arrival in March 1850 of a colonial governor unconnected with the HBC, effective control of Vancouver Island remained in the hands of the company. Richard Blanshard found himself both superfluous and unwanted from the moment he arrived. Like a poor relation, the inexperienced barrister found he was completely dependent upon the company's generosity. Food he received; but shelter proved a contentious issue throughout Blanshard's short tenure. When Blanshard arrived, he was forced to live aboard H.M.S. *Driver* because construction on a Governor's residence was unfinished. Though he was given a room at the Fort, Blanshard grew increasingly annoyed at his lack of appropriate lodging, interpreting it as a sign of his insignificance. By June the Governor was positively cranky, and informed Chief Factor James Douglas that he considered "the labour of a single man [on his "Cottage"]...a mere mockery." Blanshard's problems ran deeper than his petty exchanges with the HBC indicated. Although the Crown's representative of British authority in the colony, Blanshard was a ruler without
subjects. Though the new governor had jurisdiction in "the administration of civil government and military affairs," he complained that "there [was] little indeed to do except settle disputes between representatives of the Company and their employees." Even in this capacity Blanshard was ineffectual. As the events at Fort Rupert in 1850 showed, the Hudson's Bay Company was a state within a state. With two parallel authorities in the colony, financing the construction of his cottage was to prove the least of his problems.

In 1850, the "miserable affair" at Fort Rupert illustrated the degree to which company control and civil government were indistinguishable. Located on the northeast coast of Vancouver Island, Fort Rupert was a coal mining and a fur trade post. Like its other servants, Fort Rupert's miners were contracted by the Hudson's Bay Company; however, because they were skilled workers, the Ayrshire miners' contracts stipulated that their labour was to be confined to the diggings. They were not, like the company's other servants, subject to performing whatever task its employers might order. When the Fort's officers tried to make the miners do so, they promptly struck. Fearing a breakdown of authority in an area populated heavily by apparently "hostile" natives, Blanshard commissioned John Sebastian Helmcken, the company surgeon, as Justice of the Peace for Fort Rupert and sent him north. Shortly after Helmcken arrived, the bodies of three British seamen -- deserters from the British barque England -- were discovered near the fort, murdered, it was presumed, by the neighbouring Newitty Indians. Unable to secure the cooperation of the servants at the fort, who charged the company with instigating the murders, or of its officers, who "asserted that [they]
owed no obedience except to the Hudson's Bay Company; Helmcken tendered his resignation. The episode, which ended relatively peacefully for the Europeans, convinced Blanshard of "the impropriety of making appointments among the company's servants," who

Even after retiring from the service...are in a great measure subject to the same influence as they receive certain allowances which may be forfeited if they act in any manner that is considered as prejudicial to the company.

The situation Blanshard found himself in was unworkable, and in the wake of the Fort Rupert incident, he tendered his resignation in November, only nine months after his arrival.

Blanshard's concerns about "the impropriety of making appointments among the company's servants" were echoed shortly after his resignation when the crown named Fort Victoria Chief Factor James Douglas the new governor of the colony. Fifteen independent settlers signed a petition protesting the appointment. "We and we alone represent the interests of the Island as a free and independent British Colony," they insisted.

for we constitute the whole body of the independent settlers, all the other inhabitants being in some way or other so connected with and controlled by the Hudson's Bay Company...

We beg to express in most emphatical and plainest manner our assurance that impartial decisions cannot be expected from a Governor who is not only a member of the Company sharing in its profits, but is also charged as their chief Agent, with the sole representation of their trading interests in this Island and the adjacent coasts.

Because the Hudson's Bay Company was pre-eminently a business enterprise the independent settlers assumed its actions would be motivated by self-interest. While this was rational behaviour for private companies and
individuals, it was illegitimate for mid-nineteenth century governments. The role of government in a laissez-faire age was to provide a regulatory framework which would promote individual gain without impinging on the rights of others to do so. Monopolies and governments based on monopoly, like the proprietary government of Vancouver Island, were anathema to this view. According to the petitioners, under Hudson’s Bay Company rule the welfare and prosperity of the colony and the petitioners themselves was compromised. There was no "security that the interests of the Hudson’s Bay Company shall not be allowed to outweigh and ruin those of the colony in general."\textsuperscript{16} Even those closely associated with the company had doubts about is impartiality. "We are taught that a man cannot serve two masters," wrote Chief Factor Peter Skene Ogden,

\begin{quote}
but their Honours are of a different opinion -- vide Douglas' new appointment not only two but three: C.F. [chief factor] in the Fur Trade, Agent for the Puget Sound Coy. [the HBC’s agricultural arm] and Gov. of Vancouver’s Island; if there be not a clashing of interests in the management of these different interests -- I wonder.\textsuperscript{17}
\end{quote}

But motivated by its own concern for economy, and recognizing the fact that the HBC was the \textit{de facto} authority on the Island for the majority of its inhabitants, the Colonial Office was unmoved.

The colony’s land laws and the appointment of David Cameron as Chief Justice were the next flashpoints of political discontent on the Island. These two problems and the petitions they spawned made explicit the issues at stake in the company’s attempt to govern based on its corporate experience as a private monopoly. Those who signed the anti-land laws and the anti-Cameron petitions opposed the company because its policy decisions had the effect of turning its
economic monopoly into a political one, and in the process compromised the rule of law.

The 1849 grant was conditional on the company's successfully colonizing the Island within five years.\(^\text{18}\) Retired company servants were an obvious source of prospective colonists, not only because the company would not have to bear the expense of conveying such settlers to Vancouver Island, but because their familiarity with the native population acted to safeguard the relatively peaceful relations between the two.\(^\text{19}\) Free grants of land like those given in the American territories were not used to attract settlers to Vancouver Island. Instead, the company embarked on a plan of systematic colonization guided and shaped by the ideas of Edward Gibbon Wakefield.\(^\text{20}\)

Central to Wakefield's theory was the means by which colonial lands were disposed. The anaemic state of many English colonies was due to their abundance of land and their small population. These two factors resulted in a shortage of labour, as few colonists would choose to work the lands of others when they could so easily become their own masters. This labour shortage, in turn, would deter investment by monied individuals in the colonies, and thus was responsible for the slow development of commerce, as the capital accumulation necessary for the development of economies of scale was impossible. The solution, according to Wakefield, lay in balancing labour and land. By selling land at a "sufficient price," -- that is, at a price low enough to attract prospective colonists, but high enough to prevent all from becoming independent land owners -- the preconditions for successful colonization would be met.\(^\text{21}\) Moreover, Wakefield's plans for
systematic colonization had an element of social engineering. By replicating Britain's social hierarchy in her colonies social order would be assured. This was done by pricing lands on a sliding scale, each price corresponding to a different "class" of settler.

The London Governors of the Hudson's Bay Company were taken by Wakefield's ideas and recommended them to James Douglas. "The object of every survey system of colonization," confided HBC Governor Archibald Barclay to Douglas in 1849,

should be not to re-organize Society on a new basis, which is simply absurd, but to transfer to the new country whatever is most valuable and most approved in the institutions of the old, so that Society may, as far as possible, consist of the same Classes, united together by the same ties, and having the same relative duties to perform in one country as in the other. The Committee [of the HBC] believes that some of the worst evils that afflict the Colonies have arisen from the admission of persons of all descriptions; no regard being had to the character, means or views of the immigrants. They have therefore established such conditions for the disposal of lands, as they trust will have the effect of introducing the just proportion of labour and capital, and also of preventing the ingress of squatters, paupers and land Speculators. The principle of Selection, without the invidiousness of its direct application, is thus indirectly adopted. 22

Douglas was confident that "almost every one of the Company's labouring servants would also gladly avail themselves of the opportunity of settling on British Territory, and spending the declining years of life, under the protection of their native Flag," and because they were "a hardy tractable, laborious, class of men...they would certainly form an excellent nucleus for a new settlement." 23 On Vancouver Island, land was divided into three classes, each reflecting a different
social class: town lots (£10), suburban lots (five acre sections at £15) and country lands (£1 per acre, with a minimum purchase of twenty acres).  

Political power was reserved for settlers who could afford to buy twenty acres of country land, and for those who aspired to hold office themselves, ownership of a minimum of 300 acres of country land was necessary. Given, as we saw in Chapter One, that the average wage of HBC labourers was £17 per year, while that of Company officers ranged from £100 for clerks to £360 for Chief Factors, effective power in the new colony mirrored the division of power in the HBC hierarchy. Thus, the replication of the social and corporate order of the Hudson's Bay Company was one of the animating principles of colonial land policy.

Measured in terms of actual settlement, the company's scheme of systematic colonization was successful, with town and suburban lots and country lands being purchased by the appropriate -- in Wakefieldian terms -- social classes. If, however, the HBC's efforts at settling the Island are measured in terms of its success as a colonization scheme -- that is, in terms of its success in attracting immigrants -- then the assessment must be less favourable. For despite the Victorian optimism of Barclay and the Governors of the Hudson's Bay Company, the population of Vancouver Island grew slowly. Many attributed Vancouver Island's sluggish development to the high price charged for land, as the 1853 petition from the "landed proprietors and inhabitants of Vancouver Island" showed. "The attempt at colonizing Vancouver Island may, so far, be considered a failure," they wrote:
one principle cause of which is the high price charged for land, while in Oregon, but a few miles distant...the United States Government makes liberal gratuitous grants to actual settlers.\footnote{28}

Company land laws were squarely to blame for the "manifest hopelessness of its settlement within any reasonable period," rather than the colony's "natural properties." Vancouver Island's settlers were not the labouring classes of England, whose numbers inspired Wakefield to formulate his scheme of systematic colonization. Rather, as the petitioners pointed out, and the company's land records indicate, those who purchased land in Wakefieldian proportions were already in the colony, brought there by the fur trade or by the company in its capacity as proprietor to work its farms. "Although there may be now fifty or sixty purchasers of land," they wrote,

> these persons were, almost without a single exception, previously upon the Island, or in the immediate neighbourhood, and connected strongly with it by their engagements in the service of the Hudson's Bay Company.\footnote{29}

To the petitioners, the only solution to the company's mismanagement and the progress of the colony was the intervention of the imperial government.

There was more to the petitioners' concerns than just economic development. On Vancouver Island, Wakefield's plan had the effect of extending the company's rigid occupation-based social hierarchy over the colony -- something that the independent settlers thought they left behind when they emigrated from England. More importantly, however, land and political authority were linked. By controlling land alienation, the HBC also controlled political power. Land reform went hand-in-hand with political reform. Not only did the petitioners call for a reduction in the price of land to "no more than 10 s. per acre"
from £1, they also demanded a change in the franchise qualifications. If the petitioners had their way, electors would include "all persons possessed, for their own use and benefit, of land in the counties worth £10 sterling, or in the towns worth £20 sterling, or occupying houses paying rent to the amount of £10 sterling per annum." As a logical extension of these demands, the petition also contained a call for an elected Council and Assembly, as well as "reliable courts of justice."

Although some company officials dismissed the land petition as the work of "two or three contemptible propagandists," the American press did not. The Olympia-based *Columbian* reprinted it along with an editorial in October 1853, and in doing so must have raised the spectre of American annexation in the minds of Douglas and the London Governors of the Hudson's Bay Company. "The language of the petition is very similar to that which our own immortal sires used in their beseeching through vain appeals to the same government," noted the *Columbian*. "When Great Britain shall turn her back on her natural-born sons, we will take them to ourselves, foster them as our own and the consequences be upon her head...American enterprise would thunder a welcome to the STATE OF VANCOUVER."

David Cameron's appointment as Chief Justice of the newly-created Supreme Court came on the heels of the anti-land laws petition and sparked yet another round of petitioning. Cameron's appointment and the agitation that ensued was just the end of a series of smaller problems that plagued the construction of Vancouver Island's legal system, however, and which illustrate the difficulties the company encountered in trying to extend its corporate experience
into the civil sphere. The limitations of company authority that were revealed in the course of the construction of the colony's courts did nothing to make the HBC's position as proprietor more palatable to the island's independent settlers. For not only was the company a monopoly -- an illegitimate form of association in the mid-nineteenth century -- but it also appeared to be inept when it came to administering the law!

Even before it was granted proprietorship of Vancouver Island, and through much of the colonial period, the HBC equated the institutions of the law with the regulation of labour. Although there is not evidence that they were appointed, the London Governors of the company put forward the names of fourteen HBC officers as "gentlemen...well-qualified to hold commissions of the Peace under the Act of 1st and 2d Geo. 4th ch 66" for Vancouver Island.32 Despite his difficulties with the company, and his warning that "to appoint [representatives of the HBC] magistrates would be to make them judges in their own causes,"33 Governor Richard Blanshard's first civil appointment was to the HBC surgeon, John Sebastian Helmcken. The medical officer was made magistrate for Fort Rupert "as the miners and laborers there have shown a disposition to riot."34 The trend of appointing company officers to judicial positions continued under Governor and Chief Factor James Douglas. In March 1853 he named three company bailiffs -- managers of the HBC's farms -- justices of the peace.35 Kenneth McKenzie, bailiff of Craigflower Farm, and Thomas James Skinner, bailiff of Constance Cove Farm, were JPs for "the Peninsula", while the manager of Colwood Farm, Edward Edwards Langford, was given jurisdiction in Esquimalt. The JP for Metchosin,
Thomas Blinkhorn, was not an HBC employee, but did work as a bailiff on a 300 acre farm belonging to Captain James Cooper, formerly of the company's maritime service, then an independent merchant. In September, David Cameron, a manager of the company's collieries at Nanaimo and James Douglas' brother-in-law, was added to the colony's complement of justices of the peace. The JPs held petty sessions on the first Thursday of each month, and a general session four times a year. Though there are few records of the proceedings of Vancouver Island's courts prior to 1858, those that have survived bear testimony to the accuracy of Richard Blanshard's early impression of the nature of legal activity in the colony. Most of the suits involved disputes between company employees: claims for wages, breach of contract, or desertion. Company servants could also be found on the criminal side of the early court's business, charged with assault or drunkenness.

Though they appeared to be well-equipped to handle these cases, it soon became apparent that the Justice's Courts were neither sufficient nor competent to handle all the legal business of the colony. Although the English laws relating to Justices of the Peace were received in Vancouver Island in 1849 and were not amended prior to the appointment of the first JPs, the colony's magistrates appear, from the surviving court records, to have assumed wide-ranging powers inconsistent with their statutory jurisdictions and responsibilities. In June of 1853, for instance, Thomas James Skinner was convinced by an "American adventurer," Webster, to issue what amounted to an injunction to stop two ships from receiving spars at Sooke. Webster's motive in seeking this injunction was
to secure a monopoly on timber exports from Vancouver Island. After ordering the vessels to be released from custody and dissuading both masters of the ships in question from launching proceedings against his justice of the peace, Douglas chastised Skinner for his "rash and ill-considered" behaviour.\textsuperscript{42} His warning seems not to have had any effect, for in September of the same year Skinner awarded damages of $2213 and costs to the same Webster in another case against the Muir family of Sooke.\textsuperscript{43} Spurred on by his success, Webster launched yet another case against the Muirs, but left the colony when it became apparent that he would not receive as favourable treatment from the colony's new Supreme Court of Civil Justice as he had from Skinner.

The establishment of the Supreme Court of Civil Justice of Vancouver's Island with David Cameron as its judge on 2 December 1853 was, as James Douglas wrote, a direct result of

certain irregularities, in the practice of the Justices Court, arising from the inexperience of the Magistrates....It was therefore resolved to limit the Jurisdiction of the Justices Court in civil cases, to such simple matters as our Justices are competent to deal with....\textsuperscript{44}

The jurisdiction of justices of the peace in civil matters was limited to cases involving sums up to £50, with all other cases falling under the jurisdiction of the superior court. Although the act establishing the Supreme Court was disallowed by the Law Officers of the Crown in January 1854, it is unclear whether this affected its operation.\textsuperscript{45} Certainly the colonists continued to consider David Cameron Vancouver Island's Chief Justice, though his appointment and the Supreme Court itself were not confirmed until April 1856. Though he had no formal legal training, Cameron drafted the rules and regulations governing the
Supreme Court, which gave it jurisdiction in civil matters as well as the power to sit as a court of appeal, bankruptcy, equity, probate and revision. These were passed by an Imperial Order-in-Council in February of 1857. Criminal jurisdiction was granted to the Supreme Court in April 1860.\(^46\)

The colonial government established an "Inferior Court of Civil Justice," designed to further limit the jurisdiction of the justices' courts in civil matters and in response to the "comparatively numerous" suits for "petty debts," in 1857.\(^47\) Essentially, this was a small debts court modelled on the English county courts as established by the 1846 Act for the More Easy Recovery of Small Debts and Demands in England.\(^48\) But unlike the situation in England, there was only one Inferior Court of Civil Justice, based in the main population centre of Victoria, and presided over by David Cameron. The Minor Offences Act, 1860 and the Vancouver Island Jury Act 1865 further modified the procedure of the inferior courts in order to accommodate the Island's transient and sparse population.\(^49\) The first act gave two justices of the peace the powers of justices sitting as a court of quarter sessions in criminal cases where a material witness was unable to wait until the next sitting of the court of quarter sessions. Furthermore, cases tried under the Minor Offences Act could be heard with a jury of eight, rather than twelve men. The Vancouver Island Jury Act amended the manner of taking verdicts in civil cases. Instead of unanimity, judges were authorized to accept verdicts passed by a majority of six eighths of the jury, given that the jury in question had been retired for a minimum of three hours.\(^50\) In recommending the bill, Vancouver Island's Attorney General thought that "in so small a community as that of the
Figure 2-1: Vancouver Island's Courts, 1866
Showing routes of appeal and jurisdiction.
Colony where few individuals are absolutely unknown to each other" verdicts were harder to obtain. No doubt he was right: given Vancouver Island's factionalization, reaching any consensus must have been difficult.

By far the most important act dealing with the inferior level of courts on Vancouver Island was the District Court Act, 1866. This act allowed for the creation of several "Inferior Courts of Civil Justice" -- like the one established in Victoria -- for the recovery of small debts. Each district court was presided over by one justice of the peace, whose jurisdiction was limited to cases involving sums up to $250. By 1866 Vancouver Island's court system looked like Figure 2-1.

The evolution of Vancouver Island's courts is suggestive of the limitations of Hudson's Bay Company authority. The inability of the JPs to handle civil cases -- something their HBC experience did not prepare them for -- led directly to the formation of both the Supreme Court of Civil Justice and the Inferior and later, the District, Courts. Despite his comments about the incompetency of the bailiff-JPs, old HBC-hand and Governor James Douglas must have held fast to his belief that the authority conferred by the company could still be effective, because he named David Cameron to the superior court. Cameron was equally, if not more unqualified for the post than his brother magistrates. According to the independents, not only was he untrained in the law, but his "improperly close family connexion" with James Douglas and his "commercial situation as Clerk of the Honble Hudson's Bay Company's coal mines at Nanymo [sic]" also disqualified him for the office of Chief Justice. Cameron, wrote the Victoria-based British Colonist,
Instead of being versed in the profound commentaries...of Blackstone on the Common law, was -- so far as can be inferred by his occupation -- only versed in the *blackstone* of the Nanaimo mines. Jefferies may have benefitted from the lucubrations of Coke the compeer of Bacon, but our Chief Justice possibly benefitted from the *coke* derived from coal.  

Governor Douglas's appointment of his brother-in-law and a former company employee did little to dispel the fears that Vancouver Island's proprietary government rested on a political monopoly as well as an economic one. Unlike the earlier conflict over the colony's land laws, however, Cameron's appointment struck a more direct blow to the idea of the rule of law. Given his past association with the HBC and his familial ties to the governor, each time Cameron took the bench his presence was a symbolic contradiction of the very notion of impartial justice. Moreover, the Chief Justice's occasional outbursts did not aid his own cause. Cameron, as a Colonial Office memorandum stated, "conducted himself on one occasion in Court, shortly after his appointment as J.P. in so disgraceful a manner that the other three magistrates passed a resolution censuring him in the strongest measures....[H]is conduct was so gross that the whole of those in Court soon actually hissed him."  But Cameron was more than just a symbol. His powers of sanction and reward as Chief Justice were real, as those who came before him realized. Fines or confinement in irons in the north bastion of the fort made company rule palpable to the colonists in a way qualitatively different than the colony's governorship or its land policy.

It was David Cameron's exercise of his very real judicial powers that precipitated the last flurry of petitioning in the winter of 1853-54. His actions in *R. v. Robert John Staines* (1853) revealed the social, as well as the political,
dimension of the debate over the law and legitimate political authority on
Vancouver Island.

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"A man full of frills," Robert John Staines arrived at Fort Victoria on March
17, 1848 to take up his position as HBC chaplain. Six years later to the month,
Staines died off Cape Flattery, Washington, when his overloaded ship, the
Duchess of San Lorenzo bound for San Francisco, sank. Elected by some of the
Island's colonists to act as their emissary, Staines was on his way to London,
carrying with him two petitions -- one addressed to the Duke of Newcastle, and
the other to the Queen herself -- signed by sixty-nine of the "most dutiful and
loyal" inhabitants of Vancouver Island. In these two petitions, the colonists
complained about the Island's legal system, and particularly about the Chief
Justice of the Supreme Court of Civil Justice, David Cameron. "Groaning under
the grievances inflicted by the Local Government of this Colony of Vancouver's
Island," the petitioners complained that

[T]here can be no sound basis for happiness amongst a People
where the Courts of Justice are not pure, efficient and reliable. We
regard this as a fundamental Maxim of Government unshaken and
eternal.

It is our most anxious wish to have the laws of our country ably
and impartially administered amongst us by men of adequate
integrity, ability, learning, and experience, in whom we can repose
our entire confidence, and towards whom we can cordially extend
our deserved respect.

We therefore most humbly intreat that your majesty would
graciously cause a strict inquiry to be immediately instituted into the
circumstances of the recent creation of a Court entitled "The
Supreme Court of Civil Justice" for Vancouver's Island,...and the
appointment of Mr David Cameron, the Governor's Brother-in-law,
as Judge of the same as...we cannot consider our safety to depend
upon our innocence or the rectitude of our cause.
Certainly, their emissary, Staines, could relate to the sentiments contained in the petitions. Though he did not sign either document, during his short tenure on Vancouver Island Robert John Staines clashed with its colonial administrators, and had himself been the victim of Cameron's "notorious and gross partiality, acrimony, malice, and indecorum."56 R. v. Staines (1853) precipitated both petitions and, despite his death, initiated a protracted discussion of the colony's legal system. Yet despite their lofty rhetoric of justice, the petitions and the documents sent by the Island's colonial administration in response had much more humble origins.

On a Saturday morning in the middle of November 1853, George Hawkins, the bailiff of Staines' farm who had arrived on the Norman Morison two years earlier, called on Emanuel Douillet, the managing bailiff of Cloverdale, William Fraser Tolmie's farm.57 Hawkins told Douillet he had heard that there were pigs on the farm which belonged to him, and which he had come to claim. While Douillet admitted that he had two pigs which did not belong to Cloverdale, he later noted that Hawkins could not pick them out of the herd. Nevertheless, Douillet turned over the two. As he was leaving, Hawkins spotted another familiar pig, and told the bailiff that he would return the following day with a man who knew the animals better and would claim the remainder of his wayward animals. True to his word, Hawkins returned on Sunday at eleven o'clock, armed, and accompanied by James McFadden, a labourer and also an employee of Staines. The bedridden Douillet was roused up and told to turn over the animals. He refused, saying that the only two pigs that were not his had already been
returned. Hawkins and McFadden accused the bailiff of stealing and left the house without another word. After searching the farm, Hawkins remarked to McFadden that he had discovered three sows that were his. However, the two left without them.

On Monday, Staines, Hawkins, McFadden, James Graham (another labourer) and an unidentified Indian returned to Douillet's, this time armed with a search warrant issued by Thomas James Skinner. With Douillet's neighbours, Adolphus Fearon, Baptiste Jollibois and Jacob Low present, Staines ordered James Graham to read the warrant. The illiterate Graham stumbled, so Staines did the job himself. He then ordered Jacob Low to read the warrant to Douillet in French, but as Douillet later recalled, the warrant said "nothing about pigs." The mounted pastor then proceeded to drive all the pigs into the yard, and after picking out five, warned the bailiff not to interfere. He would forgive Douillet once, but not twice.

Staines was particular about his pigs. His farm in the vicinity of Mount Tolmie yielded large quantities of wheat and oats, and the pastor himself exhibited a penchant for livestock breeding. Thus, when he discovered that some of his prized pigs had escaped and, possessed of indiscriminate tastes, had lodged themselves on the farm of an HBC surgeon, Staines felt "wrathy," and applied to Skinner for a search warrant. True to his judicial form, Skinner "issued a simple order, for the removal of certain pigs...without summoning the party charged with the offense to appear before him, or taking any steps to ascertain the
truth. This most arbitrary proceeding excited a general feeling of indignation, and I was not a little vexed," wrote James Douglas

that Mr. Skinner should have so inconsiderately violated in that instance, the forms prescribed by the Law, without any evident necessity, as Douillet [sic], whether guilty or otherwise was entitled to a hearing in his own defence. Douillet reported the incident to Governor Douglas, and swore a complaint to David Cameron on December 5. Cameron then issued a summons for Staines, Hawkins and Graham to appear in three days to answer charges of "illegal trespass and forcible taking and carrying away of...property." Douillet's three neighbours, Fearon, Jollibois and Low, as well as Fearon's wife Susan Grant, were examined, and after hearing their depositions and the answers of the defendants, Cameron concluded that there was sufficient evidence to proceed. The three were released, each on his own recognizance of £20, and the pigs taken into the custody of the court. On the 17th James McFadden and George Richardson were summoned to answer the same charges, but were, it appears, released: Richardson because he claimed to be "a looker on," and McFadden because he was acting on Staines's instructions. Because of insufficient evidence, the crown did not proceed with the case and the rest of the defendants were released January 5. Not satisfied with his exoneration, Staines laid charges against Douillet for theft. Found guilty, the bailiff was fined and imprisoned in the north bastion of Fort Victoria, and the pigs returned to their proper pastoral surroundings on Mount Tolmie.

"Highly indignant because Mr Cameron received and acted upon the complaint of Douillet [sic]." Staines "did everything in his power to create an
impression that in so doing, Mr Cameron was animated solely by motives of personal hostility." Ninety of the Island's residents signed a petition complaining about Cameron's appointment even before Staines' January hearing. Calling Cameron's appointment "a measure so obnoxious to the Community at large," the petitioners outlined their case against the Chief Justice. The office should, they considered, be "reposed only in men of the highest repute for honor, honesty, & impartiality." David Cameron, the petitioners argued, shared none of these characteristics. "Mr Cameron," they continued,

has barely resided Six months among us, and in that brief space he has not so conducted himself as to have obtained the respect of the Community; he during the short time he has officiated as a Magistrate, has most singularly failed in impressing us with a sense of his integrity and uprightness, he has in the position proved himself most singularly cast and indecorous in his language; he has exhibited the most profound ignorance of the duties attaching to the Commission of the Peace and is tolerably void of the little practical knowledge necessary to conduct the business of a Magisterial Court as have made him a laughing stock; and indirectly brought scorn on the proceedings of the whole Bench of Magistrates.

When the Governor turned them away "with scorn", the petitioners gathered at independent merchant James Yates' house. There they elected a five-man committee consisting of independent merchants Yates, William Banfield and James Cooper and JPs Edward Langford and Thomas Skinner, and raised $400 to send Staines to England to present their grievances.

Not to be outdone, those who supported the HBC's proprietorship drafted a petition of their own in response, countering the charges against David Cameron. The Chief Justice, they argued, was "a Gentleman of business habits and considerable colonial experience,...the fittest man here of those not already
professionally occupied to preside in such a Court." In contrast, "but few of the Subscribers to that [anti-Cameron] petition have property at stake in the Island."

We are further of opinion, that if in this Colony, where there is perfect freedom of action, where life and property are as yet secure, where the market is so extensive and remunerative, and where the produce is so lamentably small, the labouring and industrious classes were to employ their time more in raising wheat and potatoes, constructing houses to live in &c., &c., and suffer themselves less, to be led away into discussions upon abstract political questions; all would gain by the alteration, progress become more decided, and foreigners and visitors, whose good opinion we respect, would say more for our common sense.⁶⁵

After the trial and the imprisonment of Douillet, the two petitions that Staines carried with him to the bottom of the Strait of Juan de Fuca were drafted, bearing further testimony to "the strong feeling in the public mind against this abortion of a court."⁶⁶

***

This obscure trial and the events that led to it reveal much about the nature of litigation and social tensions in the colony. Though the immediate issue at law was narrow in scope -- exactly five pigs wide -- the case involved people from the very top of the colonial social hierarchy to the very bottom. But Staines's pigs also managed to transcend the merely provincial to reveal both the political and social dimensions of the debate over law and political authority. Those who petitioned against Cameron saw his connection with the company as a conflict of interest which defeated the notion of the rule of law. "We cannot," they wrote, "consider our safety to depend upon our innocence or the rectitude of our cause."

With Cameron as Chief Justice, the HBC's political monopoly was considerably
strengthened and it also gained a veneer of impartiality through its control of an institution that was traditionally neutral.

But the trial and the petitions that followed also revealed the social polarization that underlay political agitation on the island. Figure 2-2 is a graphical representation of the social alliances the Staines case illustrated. Those who opposed the Chief Justice and company government were late arrivals to the colony and were independent of any HBC affiliation. Like typical mid-nineteenth century emigrants to British North America, they came to Vancouver Island to improve their economic situation, but found themselves confronted with obstacles to achieving that end: namely, a colonial government whose economic interests were not favourable to their own, and which, through the law and the courts, could act in its own interests from a position of considerable strength.
As Chief Factor, James Douglas had clashed with Staines over the funding of the company school, and suspected the pastor was responsible for a series of anonymous letters which appeared in Oregon newspapers criticizing the government of the colony. Staines was among fifteen colonists who signed the 1851 petition protesting Douglas' appointment as governor, and he was suspected of being the organizing force behind the 1853 land petition. Against this backdrop of political agitation, it is not surprising that Douglas gave Douillet a sympathetic hearing and that Staines read this as a confirmation of the partiality of the colony's proprietary government.

Skinner and the other PSAC bailiffs were often at odds with Douglas over the management of the four company farms. As company agent, Douglas was
concerned over the failure of the PSAC farms to return a profit, and blamed the
failure on the mismanagement and extravagance of the farms' bailiffs. As well,
in the June and September prior to the Staines case, Douglas had been openly
critical of Skinner's conduct as a Justice of the Peace -- conduct which, as we
have seen, led to the formation of the Supreme Court of Civil Justice. Given this,
it is not surprising that Skinner aligned himself with Staines, signing the petitions
and sitting with his fellow JP and bailiff Edward Langford and Yates, Cooper and
Banfield, on the anti-Cameron committee struck in December 1853.

More interesting are the alliances between those of lower status. Those who
supported Douillet were both his immediate neighbours and shared a bond forged
during their years as Hudson's Bay Company servants. All French Canadian,
Douillet and Jollibois had served at Fort Vancouver before being transferred to
Victoria, and they, plus Adolphus Fearon, had been relatively long-serving
company employees. They were thus knit together by their shared experience,
which included a familiarity with James Douglas who, as Chief Trader, later Chief
Factor and still later as Governor, had also been posted at Vancouver and Vic-
toria. On the other hand, those allied against Douillet had no such longstanding
HBC connection. All were English immigrants and later arrivals to the colony,
with Hawkins and Richardson -- as well as Skinner -- arriving on the Norman
Morison in 1851 and 1853. Perhaps sensing the disadvantage incurred by the lack
of a company connection, they associated themselves with Staines, Skinner and
the anti-company faction as the group which best represented and protected their
interests.
These alliances are borne out by an analysis of those who signed the two March 1854 anti-Cameron petitions, as well as a January 1854 pro-Cameron petition.\textsuperscript{73}

**TABLE 2-1: ANTI AND PRO-CAMERON PETITIONERS, 1854.**

<table>
<thead>
<tr>
<th></th>
<th>ANTI-CAMERON</th>
<th>PRO-CAMERON</th>
</tr>
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<tbody>
<tr>
<td>N</td>
<td>70</td>
<td>55</td>
</tr>
<tr>
<td>Literate</td>
<td>66</td>
<td>26</td>
</tr>
<tr>
<td>Illiterate</td>
<td>3</td>
<td>29</td>
</tr>
<tr>
<td>British</td>
<td>65</td>
<td>20</td>
</tr>
<tr>
<td>French Canadian</td>
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<td>26</td>
</tr>
<tr>
<td>Other</td>
<td>1</td>
<td>8</td>
</tr>
<tr>
<td>Unknown nationality</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>arrived pre-1849</td>
<td>1</td>
<td>37</td>
</tr>
<tr>
<td>arrived post-1849</td>
<td>65</td>
<td>15</td>
</tr>
<tr>
<td>HBC officer</td>
<td>6</td>
<td>17</td>
</tr>
<tr>
<td>HBC servant</td>
<td>49</td>
<td>38</td>
</tr>
<tr>
<td>Independent</td>
<td>8</td>
<td>0</td>
</tr>
<tr>
<td>Unknown occupation</td>
<td>3</td>
<td>0</td>
</tr>
</tbody>
</table>

Those who signed the petitions against David Cameron tended to be literate British servants of the Hudson's Bay Company (many of whom worked on its subsidiary's -- the Puget's Sound Agricultural Company -- farms) who arrived in the colony after 1849; that is, after the Island ceased to be a fur trade preserve and became a colony. For although the anti-Cameron petitioners were technically company servants they did not, as those whose association preceded the HBC's proprietorship, consider their interests protected by the company. Unlike the fur trade-era servants, these later arrivals were brought over specifically as settlers to fulfill the conditions of the company's proprietary agreement.\textsuperscript{74} As such, they
had rather different expectations for their life in the colony. Not only did they expect that the colony would possess the familiar institutions and well-articulated political conventions of British rule, but they also -- as emigrants -- expected to better their economic position. With such expectations it is not surprising that they considered the HBC proprietorship the antithesis of proper government and legal administration in a British colony, and aligned themselves against the representatives of the company.

Pro-Cameron petitioners drew their support from the ranks of HBC employees who had arrived during the fur trade period. The allegiance of company officers is not surprising, but Cameron had support among the HBC's servants as well. Two of these were Emanuel Douillet and Baptiste Jolliet, who were obviously unswayed by their treatment at the hands of company justice, perhaps because French Canadians in the Oregon Territory had received worse from the American government. Having been with the company when it was solely a commercial concern, the pro-Cameron servants did not have the same expectations as those who arrived later as settlers. For them little changed with the HBC proprietorship.

The politics of Vancouver's Island just now are disagreeable: but the proceedings of the opposition are so far from formidable, that I really believe had there been a Punch-and-Judy show here to divert the people while the snow was on the ground all this petitioning would never have occurred and the saving in foolscap would have been considerable....The key to the matter is this: two or three contemptible propagandists...represent the Company as a sort of huge monopoly -- a gross fraud -- an incubus that broods over the fortunes of the colony, and then we have a parcel of people going about the place roaring British Subject!...As in the old fable, it
doesn't require much penetration to detect the ass beneath this pseudo-British Lion's skin.

-- Colonial Surveyor J.D. Pemberton, 1854

From 1849 to 1854 the small European community on the southern tip of Vancouver Island was rocked by rancorous debate over the constitution of legitimate political authority. As Pemberton's comments indicate, the colony's independent settlers saw the island's government as a simple extension of the Hudson's Bay Company's economic monopoly, and therefore as antithetical to their rights as British subjects. Law was a focal point of the "politics" the Colonial Surveyor observed. Vancouver Island's land laws had the effect of extending the HBC's corporate hierarchy over island society and of concentrating political power in the hands of those highly placed in the company. Instead of encouraging settlement and economic development, the island's land laws served the "petty ambitions" of the "squatocracy of skin traders" who governed the colony.

The construction of the colonial courts provided further evidence of the Hudson's Bay Company's attempts to rule the island using its corporate experience as a private monopoly. Viewing the law as the regulation of behaviour, James Douglas named the HBC's farm bailiffs justices of the peace and appointed his brother-in-law and the manager of the company's collieries as Chief Justice. David Cameron's appointment was beyond the pale of acceptable behaviour in the opinion of the island's independent settlers, however, because it contradicted the notion of impartial justice. It was, to the anti-Cameron petitioners, "an abortion" of the rule of law to have someone so closely connected with a business interest dispensing the law.
Although the petitions used the language of rule of law to criticize the authority of Vancouver Island's proprietary government, that language and the notion of impartiality was intimately associated with another equally powerful discourse: that of laissez-faire capitalism. The debate over political authority on Vancouver Island was all about the legitimacy of monopoly as a form of economic, social and political organization. The very first petition against Douglas's appointment as governor illustrated the interpenetration of these two discourses:

The Hudson's Bay Company being, as it is, a great trading body, must necessarily have interests clashing with those of independent colonists, most matters of a political nature will cause a contest between the Agents of the Company and the colonists. Many matters of a judicial nature also, will undoubtedly arise in which the colonists and the Company (or its servants) will be contending parties, or the upper servants and the lower servants of the Company will be arrayed against each other.

We beg to express in most emphatical and plainest manner our assurance that impartial decisions cannot be expected from a Governor who is not only a member of the Company sharing in its profits, but is also charged as their chief Agent, with the sole representation of their trading interests in this Island and the adjacent coasts.

Self-interested economic behaviour was fine for individuals, and in fact was the basis of the general happiness of a nation in laissez-faire thinking, but it was not consistent with good government. The anti-Douglas petitioners were not convinced that "a great trading body" could act impartially.

The language of the anti-land laws petition is also suggestive of the close association between law and economy. The petition contended that prospective settlers on Vancouver Island were not rewarded for their individual endeavours because of "administrative causes" rather than any "natural" obstacles. The administrative causes referred to were, of course, the HBC's land laws; and they
were deemed unnatural because they prevented individuals from reaping the fruits of their own labours. Such criticisms were ones that classical liberal economists like Adam Smith would have shared.

Equally revealing were the petitions generated by the appointment of David Cameron. Both those who supported Cameron and those who opposed him linked his ability to execute his office to his economic associations and his business abilities. In addition to their belief that his close association with James Douglas and the Hudson's Bay Company disqualified him for the Chief Justiceship, one anti-Cameron petitioner, Bailiff-JP E.E. Langford, also charged that Cameron was a bad businessman, having left a trail of bankrupt enterprises in Scotland and Demerara before he arrived in Vancouver Island. Conversely, but using the same economic standard, Cameron's supporters called attention to his "business habits" (likely in his capacity as manager of the company's collieries) and "considerable colonial experience" as qualifying him for the post.

The juxtaposition of these two frames of reference, one provided by the rule of law (impartiality) and the other by laissez-faire, points to the different ethical basis for political authority in this British North American colony. Unlike their English counterparts of an earlier century, Vancouver Island's independent settlers did not ask that their laws and government adhere to a moral standard that bound powerful and powerless together in a unified social whole and ensured some level of distributive justice. Instead, they rejected the paternal and discretionary authority that came from a moral economy, preferring the rule of laws that would allow them to realize their own individual ambitions. The role of
law and of governments in formulating and administering it was to allow people to pursue their individual wills by providing a rule-bound arena in which competition could occur without unfair advantage or interference. This was the essence of authority in a society tied to and shaped by a market economy.
NOTES

1. Charles Aubrey Angelo (Chaos). *Idaho: A Descriptive Tour and Review of its Resources and Route, prefaced by a sketch of British Misrule in Victoria, V.I.* (San Francisco, 1865), 8-9. Angelo was an Englishman (b. London, 1810; d. San Francisco 30 May 1875) who before coming to Victoria in 1859 had worked in China and India as a journalist. In Victoria, he worked as a customs house clerk and ran afoul of the law in the summer of 1859. He was indicted and convicted of embezzlement at the August 1859 Victoria assizes. Angelo was fined £200 and sentenced to two months imprisonment [Calendar or List of Prisoners tried at a Court of General Gaol Delivery held at Victoria before David Cameron Esquire, a Justice of Our Lady the Queen in Indictments Preferred by the Grand Jury for the District of Victoria on Thursday the Eleventh day of August A.D. 1859, enclosed in Cameron to Douglas, Victoria, 22 October 1859, British Columbia. Colonial Secretary. Colonial Correspondence (hereafter Colonial Correspondence). British Columbia Archives and Records Service [hereafter BCARS]. GR 1372, reel B-1313 f 259/3]. A petition calling for Angelo's pardon and release was signed by "numerous gentlemen" of Victoria. Despite this, Cameron advised Douglas against granting it, and recommended only that the remainder of Angelo's sentence be remitted [Colonial Correspondence. BCARS. GR 1372. reel B-1313, f 259/4, Cameron to Douglas, Chambers, Court House, Victoria, 4 November, 1859]. After his release, Angelo left the colony for San Francisco, where he worked again as a journalist for the *Daily Alta California* before joining the Boise, Idaho gold rush in 1863.

2. As W. Kaye Lamb pointed out: "The price scale at which an individual could purchase goods depended on his relationship to the company. For this purpose, Blanshard was considered completely independent and was therefore charged the highest tariff. In 1850 this was high indeed, as it was based upon the peak prices prevailing during the gold rush in California. The consequence was that Blanshard found the cost of living ruinous, and it would seem that Douglas and the company might well have made a generous concession under the circumstances." "The Governorship of Richard Blanshard," *British Columbia Historical Quarterly* 14(1950):5.


11. Blanshard to Grey, Victoria, Vancouver Island, 18 August 1850. In Vancouver Island. *Despatches: Governor Blanshard to the Secretary of State, 26 December 1849 to 30 August 1851*, 5.

12. Less so for the Newitty, whose village was shelled by HMS Daphne, "with the happiest effects, so filling their minds with terror, that they made no attempts at reprisals." Douglas to Grey, Fort Victoria, Vancouver's Island, 31 October 1851. In Hartwell Bowsfield, ed. *Fort Victoria Letters, 1849-1851* (Winnipeg, 1979), 227.


16. Ibid.


20. Wakefield presented his scheme of systematic colonization as a solution to the dual problems of unemployment and poverty in England and the under-development and sluggish commerce of English colonies. "In Great Britain all classes suffer from the want of room," he wrote in The Art of Colonization (1849),

By a want of room I mean a want of the means of a comfortable subsistence according to the respective standards of living established among the classes, and obviously rising from the competition of the members of one class with another. Whatever the fund for the maintenance of any of the classes, it is divided amongst too few people; there are too many competitors for a limited fund of enjoyment.

Competition among the country's excessive numbers of labourers held out the threat of "political disturbance." Wakefield did not have to go far to find real examples. He considered English "Chartism and socialism representatives of discontent," and cited the example of the French Revolution as a warning to those who did not take him seriously. Given the historical precedent and developments at home, he concluded that "it is well worthwhile to try colonization, or anything that affords a chance of reducing that competition amongst the working classes that is the cause of their political discontent."

21. Wakefield's ideas were taken up eagerly by Herman Merivale, a senior member of the British Colonial Office, whose tenure coincided with the formation of both the colonies of Vancouver Island and British Columbia. Merivale stated the principles of systematic colonization in a most succinct way:

1. That the prosperity of new colonies mainly depends upon the abundance of available labour at the command of capitalists, in proportion to the extent of territory occupied.
2. That this abundance is to be secured by introducing labourers from the mother-country, and other well peopled regions, and taking measures to keep them in the condition of labourers living by wages for some considerable time; at least two or three years....
3. That the revenue derived from the sale of new land is the fund out of which the cost of introducing them is best defrayed.
4. That the most convenient way of preventing them from rising too rapidly from the condition of labourers is to sell the land at a sufficiently high price.
5. That the entire proceeds of land sales ought to be devoted to purpose of obtaining emigrants; and that only by devoting the whole, and not any portion, will the exact equilibrium between land, labour, and capital be secured....

22. Barclay to Douglas, 17 December 1849, Hudson's Bay Company Archives, A. 6/28, fo. 91. Cited in Ormsby, "Introduction," *Fort Victoria Letters*, lli-liii. The HBC colonization plan was as follows:

"Colonization of Vancouver's Island."

1st. — That no grant of land shall contain less than twenty acres.
2nd. — That purchasers of land shall pay to the Hudson's Bay Company, at their House in London, the sum of One Pound per acre for the land sold to them to be held in free and common soccage.
3rd. — That purchasers of land shall provide a passage to Vancouver's Island for themselves and their families, if they have any; or be provided with a passage (if they prefer it) on paying for the same at a reasonable rate.
4th. — That purchasers of larger quantities of land shall pay the same price per acre, namely one pound, and shall take out with them five single men, or three married couples, for every hundred acres.
5th. — That all minerals, wherever found, shall belong to the Company, who shall have the right of digging for the same, compensation being made to the owner of the soil, for any injury done to the surface; but that the said owner shall have the privilege of working for his own benefit any good mine that may be on his land, on payment of a royalty of two shillings and sixpence per ton.
6th. — That the right of fishing proposed to be given to the Hudson's Bay Company in the grant as printed in the Parliamentary Papers relative to Vancouver's Island having been relinquished, every freeholder will enjoy the right of fishing all sorts of fish on the seas, bays, and inlets of, or surrounding, the said Island; and that all the ports and harbours shall be open and free to them, and to all nations, either trading or seeking shelter therein. [NAC--HBCA MG 20 A. 37/42. "Deeds and Agreements, etc., Relating to Vancouver Island, 1849-1896." Reel HBC 436, fo. 13]


26. The population of Vancouver Island was as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>1848</td>
<td>32</td>
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<tr>
<td>1849</td>
<td>104</td>
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<td>774</td>
</tr>
<tr>
<td>1862</td>
<td>2884</td>
</tr>
<tr>
<td>1865</td>
<td>5-6000</td>
</tr>
</tbody>
</table>


32. They were: Rev. Robert John Staines; Peter Skene Ogden; James Douglas; John Work; Archibald McKinlay; William Fraser Tolmie; James Murray Yale; Alexander Caulfield Anderson; Richard Grant; John Tod; Donald Manson; George Traill Allan; John Kennedy; and Dugald McTavlsh. Pelly to Grey, Hudson's Bay House, 13 September 1848. NAC. MG 11. CO 305/1, reel B-233, 263.

33. Blanshard to Grey, Victoria, 10 July 1850. NAC. MG 11, CO 305/2, reel B-233, 67.

34. Blanshard to Grey, Victoria, VI, 10 July 1850. Vancouver Island. Despatches, 4.


October 6 she noted a "Court day, which happens to be the first Thursday in every month."

38. Blanshard testified to the 1857 Select Committee on the Hudson's Bay Company that as governor he had "very little indeed [to do] except to regulate the disputes between the Hudson's Bay Company's officers and their servants." Testimony of Richard Blanshard given to the Select Committee on the Hudson's Bay Company, 15 June 1857. Great Britain. House of Commons. Report from the Select Committee on the Hudson's Bay Company, together with the proceedings of the committee.... (London, 1857), 289.

39. Vancouver Island. Notes of Proceedings, 3 October 1853-20 April 1857. BCARS. MS.

40. English law relating to justices of the peace were not amended except with respect to that touching on the property qualification. This was waived. Douglas and his Executive Council also authorized the Island's magistrates to charge twenty shillings per day for their services because of "the absence of a wealthy class, who might afford to devote their time gratuitously to the public office." Douglas to Newcastle, Victoria, Vancouver's Island, 11 April 1852. CO 305/4. NAC. MG 11, reel B-234, 21.


42. Ibid.

43. Ibid.

44. Douglas to Newcastle, Victoria, Vancouver's Island, 7 January 1854. CO 305/5, reel B-235, 15.

45. The Law Officers of the Crown disallowed this ordinance and put into question the validity of those that preceded it because:

   according to the Instructions under the Sign Manual accompanying the Patent and by those Instructions the power of legislation is vested (as by Law it must be) in the Governor, Council and General Assembly [my italics], we do not therefore think that the ordinance or the Act in question can be properly assented to by the Crown or that it would have the force of Law.

See Bethell to Grey, Temple, 20 December 1853. NAC, MG 11. CO 305/5, reel B-235, 186.

The Colonial Office reassured Douglas that though the position of the colony's laws and superior court was serious, "there will be no permanent difficulty, in as much as the Act 'to Provide for the administration of Justice in Vancouver's Island' 12th and 13th Vict: ch:48, reserves powers to the Crown to
take all necessary steps for the administration of justice I have therefore directed the preparation of an Order-in-Council, embracing the important provisions to the invalid Act, and giving power to the Court to make necessary rules and regulations for its own conduct." See Newcastle to Douglas [confidential], 5 April 1854. NAC, MG 11. CO 305/5, reel B-235, 193-195. The Order-in-Council was passed in February 1857.

46. Up to that time the Supreme Court of Civil Justice sat as a Court of Oyer and Terminer and General Gaol Delivery by virtue of commissions issued by the Governor. In England, assize judges heard criminal cases not by virtue of the Letters Patent naming them judges, but by virtue of Commissions of Oyer and Terminer and General Gaol Delivery. These allowed them to "hear and deliver" (oyer and terminer) all assize criminal cases and to "deliver the jails" (general gaol delivery) of all other prisoners awaiting trial for minor criminal offences. These commissions were granted on Vancouver Island until 1860, when the Supreme Court of Civil Justice was granted permanent jurisdiction in criminal matters. A Colonial Office opinion written on Douglas' letter to Newcastle, Victoria, Vancouver's Island, 13 March 1854 [CO 305/5, NAC. MG 11, reel B-235, 42] noted that the Governor of Vancouver Island was empowered, through his commission, to appoint judges and issue commissions of oyer and terminer.

47. Cameron to Douglas, Belmont, Vancouver's Island, 30 May 1857. CO 305/9, NAC. MG 11, reel B-237, 32-33.

48. 9 & 10 Vic. c. 95.


50. T.L. Wood to the Colonial Secretary, Attorney General's Office, Victoria, 14 September 1865. British Columbia. Colonial Correspondence. BCARS. GR 1372, box 147, file 56/13a. Also see Wood to the Colonial Secretary, Attorney General's Office, Victoria, 15 May 1865, box 147 file 55/21.


52. Written on the back of Labouchere to Douglas


54. James Cooper, E.E. Langford, T.J. Skinner, William Banfield and James Yates to Newcastle, Victoria, Vancouver Island, 20 April 1854. NAC. MG 11. CO 305/5,

55. Petition to the Queen's Most Excellent Majesty, dated 1 March 1854. CO 305/5, NAC. MG 11, reel B-235, 276-280.


57. The following account is taken from Vancouver Island. Supreme Court. Notes of Proceedings, October 3, 1853-April 20, 1857, BCARS. MS.


60. Ibid.

61. Unless otherwise noted, the information in this paragraph is taken from Vancouver Island. Supreme Court. Notes of Proceedings, October 3, 1853-April 20, 1857.


63. Ibid.

64. Petition to His Excellency James Douglas, December 1853, enclosed in Labouchere to Douglas, 8 July 1856. NAC. MG 11, CO 305/7, reel B-236, 438-439.


66. Ibid.


69. Great Britain. House of Commons. *Report from the Select Committee on the Hudson's Bay Company, together with the proceedings of the committee....* (London, 1857), copy of a petition addressed to Richard Blanshard, Governor of Vancouver's Island, [1852], 293. It was signed by James Yates; Robert John Staines; James Cooper; Thomas Munroe; James Sangster; John Muir, sen.; William Fraser; Andrew Muir; John Muir, jun.; Michael Muir; Robert Muir; Archibald Muir; and Thomas Blinkhorn.


71. Jean Baptiste Jollibois was born in Laprairie (Lower Canada) in 1796, and joined the HBC in 1813, at the age of 17. He first appears on the Fort Vancouver servants' accounts in 1827. In 1831 he is listed as being employed as a boute at Fort Vancouver. He was transferred to Fort Simpson in 1837, where he remained until 1846, when he was moved to Fort Victoria. At the time of the Staines case Jollibois had been in the Company's employ for forty years. The principal in the case, Emanuel Douillet (also Douillette or Douilet) first appears in the Fort Vancouver accounts in 1841, where he was listed as being 18 years of age, from "Canada," and posted in the Thompson River district of New Caledonia, where he was a middleman. He had joined the Company in 1839, at the age of 15. He remained in the Thompson until being transferred to Victoria in 1846. At the time of his involvement with the Staines case he had been with the HBC for 14 years. We know much less about Adolpus Fearon (also Ferron), who is listed in the Fort Victoria account book as being previously employed in the Montreal Department. Jacob Low is also listed in this account book, but no indication of service prior to 1846 is given [see Hudson's Bay Company Archives (hereafter HBCA). Fort Vancouver, Abstracts of Servants' Accounts, 1827-1844. B. 223/g/1-8. NAC. MG 20, reel HBC 1M796, 1M797; and Fort Victoria Account Book, 1846-1853. B. 226/d/3a. NAC. MG 20, reel 1M628].


73. Petition to the Queen's Most Excellent Majesty [1 March 1854], CO 305/5. NAC. MG 11, reel B-235; Petition to the Duke of Newcastle, [1 March 1854], CO 305/5. NAC. MG 11, reel B-235, 281-288; Petition to James Douglas, 11 January 1854, CO 305/5. NAC. MG 11, reel B-235, 136-138.

74. See A.N. Mouat, ; Coyle, 13.


78. Olympic Columbian, 29 October 1853.

CHAPTER THREE
"A CALIFORNIA PHASE": CIVIL LITIGATION AND SOCIETY IN BRITISH COLUMBIA

The 1858 gold rush diverted the attention of the Colonial Office and the inhabitants of Vancouver Island away from their internal political wrangling and toward the banks of the Fraser River on the mainland. On April 25 the Commodore deposited the first boatload of fortune seekers -- 400 in all -- in Victoria. They were, according to Vancouver Island Governor James Douglas, "a specimen of the very worst of the population of San Francisco -- the very dregs of society." Nevertheless, he admitted, despite the "many temptations to excess in the way of drink," "quiet and order prevailed." These four hundred were followed in the same year by an additional 25,000, 10,000 of whom arrived in British Columbia between May 1 and June 15, precipitating the formation of the separate colony of British Columbia on 2 August, with James Douglas doubling as its governor.

"Vancouver's Island," wrote Duncan Macdonald in 1862, "is manifestly not British Columbia." Differences between the island and the mainland drew the attention of colonial observers and continue to be the subject of commentary. From the beginning, Vancouver Island was a settler society, characterized by a more measured pace of social and institutional development. Before the 1858 rush, Victoria was, according to one historian, "a tranquil little hamlet...clustered about a fur trade depot." Little changed even after the temporary dislocation of the gold rush. At least part of Vancouver Island's character was due to the
nature of its population. It was considered the more "British" of the two colonies, while the mainland was more "Canadian." Justice of the Peace Gilbert Malcolm Sproat called the "native-born British" and the Canadians "the two great parties in the colony." "The British," he wrote in 1867,

include the Hudson's Bay Co.'s men, the Government officials and the largest merchants. These are socially at the top. Politically they are rather an inactive party, though when roused and united, they are powerful. Necessarily all past governments have been socially at least, and to some extent politically, connected with this party....

The Canadians on the other hand are the most numerous, though not the best educated, or the richest. They are the most active politicians, and have the press at their hands....Feeling that they are a little 'outside', as it were, socially and politically, and that few Canadians hold office, they have little sympathy with the Government.7

Though Sproat's observations reflected the conventional wisdom in the colonial and, later, the provincial period, his analysis obscures a more fundamental difference between the island and the mainland, and one which has far more significance for understanding political authority in British Columbia. Of itself, national origin was less important than it would appear to be from Sproat's categorization. Instead, what was "British" about Vancouver Island was the connection between land and authority. Because land was the basis of political and social organization, it provided a focal point for the debate over legitimate authority on the island. What was "Canadian" about British Columbia was the fact that land could not play the same role. However, property was still important in shaping the institutional and ethical basis of authority; but on the mainland it did so as commercial capital rather than land.
An overview of British Columbia's land laws and a quantitative analysis of civil litigation reveals the centrality of commercial over real property in the mainland economy. Property was a dynamic commodity, whose value was realized through exchange rather than simple accumulation. The courts protected and promoted this exchange by acting as reliable institutions for the resolution of disputes arising from private economic transactions. Civil litigation also sheds light on the role the law played in creating an ethical foundation for political authority. The disposal of civil cases suggests that British Columbia was a bondless society, and that the law played an important part in establishing a degree of social cohesion in the colony as well as acting as a means to secure property.

When James Douglas issued a proclamation in December of 1857 declaring the rights of the Crown with respect to the gold found "within the limits of Fraser's and Thompson's River Districts" he knowingly overreached his jurisdiction as Governor of Vancouver Island, fearing that the "country would become the scene of lawless misrule." Though the Colonial Office's Undersecretary of State Herman Merivale pointed out that the Crown possessed "the machinery for keeping things in order [through 1 & 2 George IV c. 66]...without creating a colony," British Columbia came into being in August 1858. The "Herculean task" of creating "a great social organization" out of "a wilderness of forest and mountain" began with the articulation of a land policy.
Permanent settlement would generate the social order lacking in British Columbia as well as create the revenue needed to fund the colony’s civil establishment. As in the neighbouring colony of Vancouver Island, British Columbia’s colonial administration embarked on a policy of systematic colonization based on the ideas of English political theorist Edward Gibbon Wakefield. But British Columbia’s colonial government soon discovered that Wakefield’s careful balance between land and labour could not be achieved in a colony located so close to the United States, where a system of free grants existed. Priced at one pound per acre initially, country lands did not sell, and the government, in the hope of attracting "an English element in the population" as well as "sturdy yeomen...from Canada, Australia and other British Colonies [who might otherwise] be driven in hundreds across the frontier to seek for homes in the United States Territories," reduced the price to 10s. 4d. in February 1859.

As a further incentive to settlement, Douglas granted aliens the full rights of possession held by British subjects. Land alienation policy moved further away from Wakefieldian principles and toward an American model in 1860 and 1861, when the government instituted a pre-emption system. The American Donation Act "bear[s] testimony favourable to a liberal land system," wrote Douglas to the Duke of Newcastle in 1860.

The settlement of British Columbia, is, I believe, dependent on the same wise policy, and must be fostered and promoted by the same means, or emigrants will be forced into the neighboring Territories of the United States....

In tracing the effects of the two systems, I would remark, that there is obviously no period of a settlers career when capital is more useful, or more pressingly wanted for carrying on his operations than at his first start in a new Country....In no case can it be advisable to
allow the whole of the settlers capital to be absorbed in the purchase of land, for that would be depriving him of the means of improving and bringing the land into cultivation.\textsuperscript{14}

As a result, country lands were further reduced in price to 4s. 2d. per acre.\textsuperscript{15}

Despite these liberal amendments to British Columbia's land alienation policy, growth was slow and land sales even slower.\textsuperscript{16} But while the colony's proximity to American territory was one reason for the lack of permanent settlement, the more lucrative opportunities offered by mining were equally detrimental. "The purchase of Country land is considered a most unprofitable method of investing money in this country," Douglas informed the Colonial Office, because "a high rate of interest is derived from investing money in other real estate, or in mining or mercantile enterprise." Unfortunately, the Governor continued,

The miner is at best a producer and leaves no traces but those of desolation behind; the merchant is allured by the hope of gain; but durable prosperity and substantial wealth of States is no doubt derived from the cultivation of the soil. Without the farmers aid British Columbia must for ever remain a desert.\textsuperscript{17}

In British Columbia as in other parts of the British North American world landholding could not be the basis of political, economic or social organization. Instead, it was replaced by commercial capital.

British Columbia's courts reflected the dominance of commercial capital and of private economic exchange. The colony's Supreme Court devoted only one-fifth (18.7\%) of its time to criminal trials (see Figure 3-1). Most of the remainder of its energies was expended in civil matters, including civil litigation (22.9\%), business in chambers (17.7\%), probate (7.3\%) and bankruptcy (28.9\%). The rest of the Supreme Court's time was devoted to "administrative" functions (4.4\%). The single
Supreme Court of British Columbia
Types of Activity, 1858-1871

Figure 3-1: % of Time Spent
largest portion of the Supreme Court's time was occupied sitting as a Court of Bankruptcy. These proceedings dealt with the seizure and administration of the bankrupt's property by a court-appointed trustee and the distribution of that property among the bankrupt's creditors. Activities conducted in the judge's chambers consisted largely of hearing motions (for example applications to change the venue of trials, to delay proceedings or motions to appeal), issuing writs or orders, and in assessing costs. As a Court of Probate, the Supreme Court oversaw the probate of wills and the administration of estates. Naturalizing aliens, settling land title under the *Town Lots Leases Act*, and settling corporate affairs under the *Companies and Winding-Up Acts* were the court's administrative duties in the colonial period.

The bulk of litigation, both civil and criminal, occurred in the two lower courts, and it is these that are the focus of this chapter. The Small Debts or County Courts and the Mining Courts dealt most directly with securing property and with the most people.\(^\text{18}\) The majority of the cases were suits for debts; not an unusual state of affairs in a frontier setting. As Douglas McCalla and Graeme Wynn demonstrate, merchants played an important role in the development of the Canadian frontier.\(^\text{19}\) By advancing credit, these merchants absorbed much of the risk and the cost of resource extraction and settlement. On the British Columbia mining frontier the same process can be seen at work. Attracted by the possibility of profiting from the influx of miners into the colony's interior, Victoria and New Westminster merchants engaged in a rush of their own as each scrambled to get his consignment of goods upcountry. In May 1860 Magistrate E.H. Sanders
reported that "the business at Yale is rapidly assuming a California phase (and a bad one), viz. a pure credit system. Miners and upcountry traders seldom pay for goods as ordered, but require time, in many cases six and eight months." By August, Sanders noted that the credit system had gained ground: "even the Chinamen have their pass-books in trading with white merchants whilst amongst themselves credit is almost unlimited." The colony's law officers expressed concern over this liberal extension of credit, and dismay over the speculative activities of these merchants. "The real cause of the depressed state of affairs is the partial exhaustion of the Gold Mines [and] the failure of the Miners and others to meet the unlimited and ruinous credit that had been so freely extended to them," wrote Stipendiary Magistrate William Cox in 1867. From New Westminster, Police Magistrate Chartres Brew confessed, "I do not know...a single Merchant who commenced business with Capital," all obtained their Stock in trade on credit -- payment within sixty days to be considered Cash -- after that 2 per cent a month interest to be charged on the debt. Merchants who were thus set up in business instead of using their returns in clearing off their indebtedness continued paying this ruinous interest which no reasonable profits could support, and applied their receipts in extending their business prospecting -- placer diggings -- artesian Mining -- Bed rock drain -- Bed rock flume -- Steam Boat and other Companies scarcely one of which has proved hitherto remunerative....The result of such a system was inevitable, failure must come sooner or later, and it has come upon many: Numbers of the embarrassed Merchants in Victoria must know that their difficulties are to be attributed either directly or indirectly to dabbling in Mining Stock -- many of them went largely into it themselves, and others gave extensive credit to men who ruined themselves and those who trusted them, by entering into that uncertain and hazardous speculation.

The business of the colony's courts reflected a preoccupation with the regulation of the economic activity that stemmed from the gold rushes. The
Gold Production and Civil Suits in British Columbia, 1858-1871

Figure 3-2

Legend
- Gold Production
- County Court Plaints
Cariboo was the heart of mining activity in the colonial period and thus generated most of British Columbia's civil litigation. Although Barkerville was the largest settlement, Richfield, to the south on Williams Creek, was the district's administrative centre. If we take the Richfield County Court as typical, then civil cases comprised almost three-quarters of the litigation in British Columbia. The number of plaints entered at the county court level peaked in 1863-64 and 1867-69, coinciding with an increase in mining activity and an extension of credit in the wake of the Cariboo (1862) and Kootenay (1865) gold rushes (Figure 3-2).

In civil cases in the nineteenth century, plaintiffs took the initiative in commencing actions. In county court proceedings, prospective plaintiffs had to file an affidavit stating the reasons for their claim with the Judge or Court Registrar. Leave to commence a county court action was left entirely to the discretion of these legal officials. Once the judge granted permission to proceed, the action commenced with the entry of the "plaint" in the court's record book. A summons to appear, containing the names of the plaintiff and defendant, the nature of the claim and the date of the hearing, was issued by the court and "served," or presented to the defendant.

Service of the summons was carried out by the sheriff, or more often in British Columbia, by a constable attached to the district. The document had to be given to the defendant directly, unless he worked at a mine, in which case the summons could be left with the person in charge. If the summons could not be served because the plaintiff had mis-stated the name, residence or place of business of the defendant, or if the defendant had moved, the action ceased.
Another one, at additional cost, could be initiated if sufficient information was available.

Once the summons was in the hands of the defendant, he had a variety of options. If he admitted his debt as stated in the summons, called "confessing the plaintiff's claim," he had to deliver his confession to the court at least five days before the date of the hearing. If, instead, he and the plaintiff could come to some agreement as to the amount and method of payment, such an agreement had to be registered with the court before the hearing. No appearance in court was then necessary. In either case, the amount admitted and a proportion of the costs had to be paid into the court by the defendant.

The defendant could, however, choose to defend himself. If he did, he had to inform the court five days before the hearing. In addition, he had to file details of his defence with the Registrar, who would deliver them to the plaintiff. Notices of defence could only be received by the court upon payment of court fees for entering and transmitting such information. The defences available included anything from a complete denial of the claim to proposing a "set-off"; that is, proposing to pay a lesser sum to the plaintiff. Defendants also pleaded the statute of limitations, coverture, infancy and bankruptcy as their defences.

Prior to the hearing, parties to the action could ask the court for leave to examine their opponents or for certain documents to be deposited with the court as evidence. Any time before or during the trial plaintiffs could withdraw their actions or defendants could confess or otherwise settle the action.
With few exceptions (2.7%), the actions brought forward in the colony's Small Debts and County Courts throughout the period were launched to recover debts (Table 3-1). Three-fifths (60.3%) were a direct result of merchants extending credit for goods sold and delivered (37.0%) or by individuals extending credit in the form of promissory notes (23.3%). While mining activity was dependent on the extension of this kind of credit, the county court records also reveal a second kind of economy in operation in the gold fields. What might be called a "service sector" grew up around

### TABLE 3-1: COUNTY COURT ACTIONS, 1858-1871.

<table>
<thead>
<tr>
<th>ACTION</th>
<th>N</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>N/A</td>
<td>305</td>
<td>8.9</td>
</tr>
<tr>
<td>PROVISIONS</td>
<td>1254</td>
<td>37.0</td>
</tr>
<tr>
<td>MINING</td>
<td>33</td>
<td>1.0</td>
</tr>
<tr>
<td>SERVICES</td>
<td>94</td>
<td>2.8</td>
</tr>
<tr>
<td>PROMISSORY NOTE</td>
<td>789</td>
<td>23.3</td>
</tr>
<tr>
<td>BUILDING MATERIALS</td>
<td>76</td>
<td>2.2</td>
</tr>
<tr>
<td>ROOM &amp; BOARD</td>
<td>170</td>
<td>5.0</td>
</tr>
<tr>
<td>DAMAGES</td>
<td>93</td>
<td>2.7</td>
</tr>
<tr>
<td>FREIGHT</td>
<td>37</td>
<td>1.0</td>
</tr>
<tr>
<td>JUDGEMENT</td>
<td>57</td>
<td>1.7</td>
</tr>
<tr>
<td>LABOUR</td>
<td>363</td>
<td>10.7</td>
</tr>
<tr>
<td>MISCELLANEOUS</td>
<td>119</td>
<td>3.5</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>3389</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Source: see Appendix.

the mines and was responsible for many of the suits launched. Actions for unpaid bills for board, medical attention, legal services, and, occasionally, a hair cut or the rental of a billiard table, point to the existence of a less transitory community in the Cariboo that was the locus of permanent settlement and whose inhabitants initiated many county court actions.
The regulation of gold mining received early attention from the colonial government. Created in August 1859, Gold Commissioner's, or Mining Courts heard all mining disputes arising within a given district. A single Assistant Gold Commissioner armed with "the same power and authority [to enforce decisions] as...exercised in the Supreme Court of Civil Justice of British Columbia" rendered decisions summarily. Additional rules and amendments to the Gold Fields Acts were made in the next five years. As well as sitting in judgement over mining disputes, Assistant Gold Commissioners issued mining licences, collected the various licensing fees, monitored the productivity of the diggings and presided over locally-elected Mining Boards which drafted bylaws regulating the operation of the local mines.

Despite their "litigious" label, miners did not resort to the Mining Court as frequently as might be expected. Mining Court cases comprised only 20% of the total litigation in Richfield, the only district for which mining court records are extant for the colonial period. Though the court was established to deal with disputes that grew out of mining activity, just over two-fifths of its caseload consisted of disputes not directly a result of mining activity(Table 3-2).
TABLE 3-2: RICHFIELD MINING COURT: ACTIONS, 1864-1871.

<table>
<thead>
<tr>
<th>ACTIONS</th>
<th>N</th>
<th>%</th>
<th>TOTALS</th>
</tr>
</thead>
<tbody>
<tr>
<td>JUDGEMENT</td>
<td>11</td>
<td>1.6</td>
<td></td>
</tr>
<tr>
<td>WAGES</td>
<td>165</td>
<td>23.7</td>
<td></td>
</tr>
<tr>
<td>NON-MINING</td>
<td></td>
<td></td>
<td>41.7</td>
</tr>
<tr>
<td>MATERIALS</td>
<td>52</td>
<td>7.5</td>
<td></td>
</tr>
<tr>
<td>MONEY</td>
<td>8</td>
<td>1.2</td>
<td></td>
</tr>
<tr>
<td>TRADESMEN'S SERVICES</td>
<td>14</td>
<td>2.0</td>
<td></td>
</tr>
<tr>
<td>ASSESSMENT</td>
<td>56</td>
<td>8.1</td>
<td></td>
</tr>
<tr>
<td>DAMAGES</td>
<td>21</td>
<td>3.0</td>
<td></td>
</tr>
<tr>
<td>DISOBEYING COURT ORDER</td>
<td>7</td>
<td>1.0</td>
<td></td>
</tr>
<tr>
<td>DRAINAGE</td>
<td>27</td>
<td>3.9</td>
<td></td>
</tr>
<tr>
<td>MINING</td>
<td></td>
<td></td>
<td>58.3</td>
</tr>
<tr>
<td>INTEREST IN A CLAIM</td>
<td>61</td>
<td>8.8</td>
<td></td>
</tr>
<tr>
<td>PARTNERSHIP</td>
<td>1</td>
<td>0.1</td>
<td></td>
</tr>
<tr>
<td>OBSTRUCTING CLAIM</td>
<td>47</td>
<td>6.8</td>
<td></td>
</tr>
<tr>
<td>RIGHT OF WAY</td>
<td>5</td>
<td>0.7</td>
<td></td>
</tr>
<tr>
<td>TRESPASS</td>
<td>152</td>
<td>21.9</td>
<td></td>
</tr>
<tr>
<td>WATER</td>
<td>28</td>
<td>4.0</td>
<td></td>
</tr>
<tr>
<td>MISCELLANEOUS</td>
<td>40</td>
<td>5.8</td>
<td>5.8</td>
</tr>
<tr>
<td>TOTAL</td>
<td>695</td>
<td>100.0</td>
<td>100.0</td>
</tr>
</tbody>
</table>

'Source: See Appendix.

These were actions for debt, not unlike those heard in the county court. In fact, suits launched for mining-related wages made up the single largest type of action (23.7%).

The presence of non-mining suits in the Richfield Mining Court is further evidence of the overlapping functions of the various parts of the colony's legal system. But these actions are suggestive of more than the unspecialized nature of the emerging legal apparatus, because they can tell us something of the behaviour of plaintiffs within the system of colonial courts. Why were those non-mining disputes heard before the mining court and not the usual venue for such actions, the county court? Before 1866 county court jurisdiction was limited to
£50 ($250). Cases involving sums greater than that had to be tried in the Supreme Court, unless -- and this is the crucial point -- they were somehow related to mining. The *Gold Fields Acts* were silent on just what kind of action was considered under the jurisdiction of the Mining Court, leaving that to the discretion of the Assistant Gold Commissioner. Given that the commissioner and the county court judge were the same person, it is unlikely that a strict distinction was made between the mining and non-mining disputes. Instead, the disposal of these non-mining cases was largely dependent on the actions of the plaintiff. When they had the choice, plaintiffs chose the Mining Court over the County Court because of the attractiveness of their summary proceedings, which likely were faster and less expensive than a county court action. In addition, because of the large amount of money at stake in many mining court actions, the choice open to the plaintiff was not between the mining court and the county court, but between the mining court and the Supreme Court. Given the higher schedule of fees in the superior court and its relatively ponderous proceedings, it is not surprising that plaintiffs opted for the inferior court, where their cases were treated with greater dispatch before a magistrate with whom they were familiar.

Turning to the value of the suits launched in the county courts, it is clear from Table 3-3 that despite the extension of the court's jurisdiction from £50 ($250) to £100 ($500) in 1866, over one-third (37.6%) of the cases heard were actions for sums of £10 ($50) or less, and 60.9% were for £20 ($100) or less. Suits launched in the "Lower Country" (that is, below Lillooet) courts exhibited a pattern different from those
TABLE 3-3: VALUE OF COUNTY COURT ACTIONS, 1858-1871.

<table>
<thead>
<tr>
<th>VALUE ($)</th>
<th>TOTAL</th>
<th>LOWER COUNTRY</th>
<th>UPPER COUNTRY</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(N=3389)</td>
<td>(N=1164)</td>
<td>(N=2225)</td>
</tr>
<tr>
<td>0</td>
<td>0.3</td>
<td>0.8</td>
<td>0</td>
</tr>
<tr>
<td>1-50</td>
<td>37.6</td>
<td>43.5</td>
<td>34.6</td>
</tr>
<tr>
<td>51-100</td>
<td>23.3</td>
<td>20.0</td>
<td>24.9</td>
</tr>
<tr>
<td>101-200</td>
<td>23.7</td>
<td>21.2</td>
<td>25.0</td>
</tr>
<tr>
<td>201-300</td>
<td>10.7</td>
<td>10.8</td>
<td>10.6</td>
</tr>
<tr>
<td>301-400</td>
<td>1.8</td>
<td>1.2</td>
<td>2.1</td>
</tr>
<tr>
<td>401-500</td>
<td>2.5</td>
<td>2.0</td>
<td>2.8</td>
</tr>
<tr>
<td>500+</td>
<td>0.2</td>
<td>0.5</td>
<td>0</td>
</tr>
<tr>
<td>MEDIAN</td>
<td>$61-70</td>
<td>$41-50</td>
<td>$71-80</td>
</tr>
</tbody>
</table>

Source: See Appendix.

launched in the "Upper Country." With a bit of variation, the farther away one got from the population and administrative centre of New Westminster, the higher the value of the suit. The median value of lower country suits was $41-50, while in the upper country the median value ranged from $71-80, some 60-75% higher. In New Westminster itself, actions for sums less than $50 constituted almost two-thirds (63.6%) of the business of that court, while suits for $50-100, $100-150 and $150-200 comprised 17.4%, 7.3% and 3.4% of the plaints entered. Conversely, at Richfield, in the upper country, actions for less than $50 made up only 37% of the business of that court. This pattern likely reflects the relative ease with which cases were brought forward in New Westminster, and the lower cost of goods there.30 Because county courts in the interior of the colony served larger geographic areas, individuals who wished to launch actions were often required to travel some distance, thus making suits for debts at the lower end of the scale too costly to pursue. As well, because transporting goods to the gold fields added
substantially to their cost, cases launched to recover debts occasioned by the purchase of provisions were necessarily of greater value than similar ones initiated at settlements closer to New Westminster.

Unlike the county court, the mining court's jurisdiction was not limited to suits below a certain sum, even though the same magistrate served as both county court judge and assistant gold commissioner. Given the higher value of mining property and the higher wages in the gold fields, the average value of mining court actions was $523, almost five times that in the county court. The median value of mining court cases was two and a half times that for the county court ($187). Actions for wages in the mining court averaged $278 (median $179).

Much has been made of the costs of going to court in the past, mainly in an attempt to demonstrate that the formal mechanisms of the law were beyond the means of the majority of the population, and hence that the historian is better employed in the task of recovering the more informal practices of dispute resolution. But was this the case? My data suggest that costs were not prohibitive. Court costs were higher in the upper country, as Table 3-4 indicates, but the median costs were not that different.
Without reference to income levels this discussion of the value and the costs associated with launching a suit lacks meaning. However, because data on standards of living and wages for the colonial period do not exist, I can only venture some informed guesses based on two sources: estimates of wage rates in the Colonial Office Blue Books of Statistics on British Columbia and contemporary comments of the colony’s legal personnel. There was a difference in income between the upper country gold districts and the communities below Lillooet. From the Colonial Office estimates, lower country unskilled labourers averaged between $40 and $50 per month from 1860 and 1870, while skilled tradesmen (carpenters and blacksmiths, for instance) could earn double that or more. At the same time, labourers in the gold fields could earn from $50-75 per month, while a miner’s income was estimated at $10 per day in 1864, and $6 to $8 per day in 1867-1870. Less systematic, though probably no less accurate, were the occasional comments of the colony’s law officers, who often complained of the high wages that could be commanded in the gold fields. During his tour of the
Fraser at the beginning of the 1858 rush, James Douglas noted that it was "impossible to get Indian labour at present as they are all busy mining, and make between 2 and 3 dollars a day each man." Three years later, in 1861, the situation had not improved. "[T]he labourers who can be commanded are very few,...[f]or the large proportion of miners cannot be induced to work a mine for wages at all or otherwise than as owners," Matthew Baillie Begbie reported.

The rates of wages, viz. $10 for mining, and $8 for ordinary work, hewing logs &c. indicate the high rate of production in the mines. So do the rates of all the articles beyond the first necessaries. When a man will give $12 for a bottle of American Champagne, his gold must be a burthen to him....

These figures, rough as they are, put the value of suits launched in the county courts in some perspective. Three-fifths (59.3%) of the suits launched were for sums greater than the highest average monthly income for labourers. Put another way, the median value of a county court suit ($41-50 in the lower country and $71-80 in the upper country) was equivalent to one month's income for a labourer, and about ten day's returns for a miner: a substantial sum. This statistic acquires increased significance given the seasonal nature of mining and the uneven returns experienced even when the mines were in operation. The high and fluctuating cost of provisions, which according to Magistrate Thomas Elwyn, were "crippling every man in the mines," only underscored the fact that much was at stake in the outcome of a county court suit in British Columbia. When the potential gains were as great as they were, it seems unlikely that median court costs of $4.50-5.00 -- approximately 10% of a labourer's monthly income, or less than a day's work for a miner -- were prohibitive to prospective suitors.
So far we have ascertained that creditors had much to gain and debtors much to lose in the litigation process. But there is more. The disposal of county court cases reveals three things (Figure 3-5): first, that plaintiffs were successful in recovering debts owed them. Three of every five plaints entered were resolved in favour of the complainant. Conversely, defendants were successful less than one in every ten times (7%). Third, and equally striking, are the number of cases settled out of court. Whereas most actions initiated today are settled out of court, almost nine-tenths (87.1%) of the cases in nineteenth-century British Columbia were resolved by court intervention. A closer look reveals some important subtleties (Table 3-5). Of the decisions resolved
## TABLE 3-5: COUNTY COURT DECISIONS, 1858-1871.

<table>
<thead>
<tr>
<th>GENERAL DECISION</th>
<th>SPECIFIC DECISION</th>
<th>N</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>N/A</td>
<td></td>
<td>126</td>
<td>3.7</td>
</tr>
<tr>
<td>FOR THE P</td>
<td></td>
<td>1174</td>
<td>34.6</td>
</tr>
<tr>
<td>CONFESSIONED</td>
<td></td>
<td>461</td>
<td>13.6</td>
</tr>
<tr>
<td>DEFAULT</td>
<td></td>
<td>202</td>
<td>6.0</td>
</tr>
<tr>
<td>PAID</td>
<td></td>
<td>52</td>
<td>1.5</td>
</tr>
<tr>
<td>SATISFIED</td>
<td></td>
<td>14</td>
<td>0.4</td>
</tr>
<tr>
<td>FOR DEFENDANT</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FOR THE D</td>
<td></td>
<td>89</td>
<td>2.6</td>
</tr>
<tr>
<td>WITHDRAWN</td>
<td></td>
<td>102</td>
<td>3.0</td>
</tr>
<tr>
<td>NON SUIT</td>
<td></td>
<td>47</td>
<td>1.5</td>
</tr>
<tr>
<td>OTHER</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SETTLED</td>
<td></td>
<td>206</td>
<td>6.1</td>
</tr>
<tr>
<td>NO APPEARANCE</td>
<td></td>
<td>155</td>
<td>4.6</td>
</tr>
<tr>
<td>DISMISSED</td>
<td></td>
<td>106</td>
<td>3.1</td>
</tr>
<tr>
<td>NO SERVICE</td>
<td></td>
<td>68</td>
<td>2.0</td>
</tr>
<tr>
<td>STRUCK OUT</td>
<td></td>
<td>44</td>
<td>1.3</td>
</tr>
<tr>
<td>ADJOURNED</td>
<td></td>
<td>36</td>
<td>1.1</td>
</tr>
<tr>
<td>POSTPONED</td>
<td></td>
<td>33</td>
<td>1.0</td>
</tr>
<tr>
<td>SUMMONS ONLY</td>
<td></td>
<td>22</td>
<td>0.6</td>
</tr>
<tr>
<td>OTHER</td>
<td></td>
<td>16</td>
<td>0.5</td>
</tr>
<tr>
<td>SETTLED OUT OF COURT</td>
<td></td>
<td>436</td>
<td>12.9</td>
</tr>
</tbody>
</table>

TOTAL 3389 100.0

Source: See Appendix.

In the plaintiff's favour, 34.6% were straight judgements for the plaintiff; 13.6% were "confessed" (that is, a formal and full admission of the charge was made by the defendant); and 6% were resolved in the plaintiff's favour because the defendant did not appear to stand trial. Only 2.6% of the cases resolved in the defendant's favour resulted from a judgement of the court. In fact, defendants won more cases by default (4.5%); that is, when the plaintiff withdrew his suit, failed to appear or had a non-suit declared. Finally, under the category of "other"
decisions two figures are especially notable: those for no appearance and no service. 4.6% of all cases did not proceed because the plaintiff or both the plaintiff and the defendant did not appear, and 2.3% did not proceed because proper service of the writ of summons was not or could not be executed.

These figures reveal some interesting patterns. First, judges awarded plaintiffs at least eight times as often as defendants (56.1% v. 7.1%), indicating that the courts favoured the security of property. Despite their poor chances, however, defendants chose to settle out of court just a little more than once every ten times (12.9%), placing their faith instead on court intervention (87.1%). In fact, actions went to a full trial at least four times in ten! This willingness on the part of defendants to abide by the forms of legal process is further supported by the figures for actions which were ended by failure to serve the summons (indicating that the debtor absconded; 2.8%), by default (6.8%), or by the non-appearance of the plaintiff and/or the defendant (4.6%). In total, just 14.2% of all actions were decided in one way or another by a failure to appear. British Columbians usually came to court to answer their creditors' claims.

Decisions in the mining court mirror those seen for the county court (Table 3-6).
### TABLE 3-6: RICHFIELD MINING COURT: DECISIONS, 1864-1871.

<table>
<thead>
<tr>
<th>DECISION</th>
<th>N</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>N/A</td>
<td>15</td>
<td>2.2</td>
</tr>
<tr>
<td>FOR PLAINTIFF</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>285</td>
<td>41.0</td>
</tr>
<tr>
<td></td>
<td>9</td>
<td>1.3</td>
</tr>
<tr>
<td></td>
<td>81</td>
<td>11.7</td>
</tr>
<tr>
<td>FOR DEFENDANT</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>63</td>
<td>9.1</td>
</tr>
<tr>
<td></td>
<td>19</td>
<td>2.7</td>
</tr>
<tr>
<td></td>
<td>16</td>
<td>2.3</td>
</tr>
<tr>
<td>SETTLED OUT OF COURT</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>29</td>
<td>4.2</td>
</tr>
<tr>
<td>OTHER</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ADJOURNERED</td>
<td>17</td>
<td>2.4</td>
</tr>
<tr>
<td>DISMISSED</td>
<td>90</td>
<td>12.9</td>
</tr>
<tr>
<td>NO APPEARANCE</td>
<td>5</td>
<td>0.7</td>
</tr>
<tr>
<td>PAID</td>
<td>5</td>
<td>0.7</td>
</tr>
<tr>
<td>POSTPONED</td>
<td>3</td>
<td>0.4</td>
</tr>
<tr>
<td>SATISFIED</td>
<td>1</td>
<td>0.1</td>
</tr>
<tr>
<td>SETTLED</td>
<td>40</td>
<td>5.8</td>
</tr>
<tr>
<td>OTHER</td>
<td>17</td>
<td>2.4</td>
</tr>
<tr>
<td>TOTAL</td>
<td>695</td>
<td>100.0</td>
</tr>
</tbody>
</table>

*Source: See Appendix.

Cases were rarely settled out of court or withdrawn after an action had been initiated. Equally rare were cases where the principals did not appear: default judgements and non-appearances comprised only 2% of all cases, suggesting — as was the case with the county courts — that the miners' proverbial transiency was not as much of a problem as might be expected.

British Columbia's inferior courts showed themselves to be protectors of property, rewarding plaintiffs in almost 60% of the cases launched. The courts' actions would be meaningless, however, if they could not enforce their decisions. Unfortunately, there is little information about the execution of court orders. The
colony's sheriff, whose job it was to carry out the decisions of the courts, left behind no records. Given British Columbia's sparse population and the limited numbers of constables, enforcement would appear to be problematic. On the criminal side of the law, difficulties in enforcement were a constant source of worry to Begbie and his fellow magistrates. Despite these concerns, few suitors voiced complaints. Only 1.7% of county court actions were launched to enforce previous judgements of that court (see Table 3-1). The comments I have gleaned seem to indicate that the courts were successful in executing their decisions. On Vancouver Island, David Cameron seized Robert Staines' pigs with the aid of a constable sworn in especially for the occasion. It was an expensive endeavour, costing nearly $140, or about one-third of the Chief Justice's annual income. When Malvina Jane Toy, a Clinton innkeeper, succeeded in winning her suit against Francis Barnard in 1867, an angry Barnard complained to the Attorney General. The County Court did not grant him sufficient time to comply with its verdict, and seized his property. The sheriff took Barnard's coach and horses and assumed possession of his real estate at Clinton. Had his lawyer not "paid the money under protest my stage would have been stopped for several days and myself put to great inconvenience."

Imprisonment was also an option exercised by the court against debtors it considered likely to abscond before a trial, as well as those unable to pay their debts following a judgement against them. Incarceration was no small matter. John and Robert Cranford, whose case I will discuss in Chapter Five, were arrested in 1862 for debt and imprisoned for eighty-four and sixty-six days
respectively. The "Debtors' Prison," which was part of the New Westminster jail, where the Cranfords were held was a notorious place, thanks to the critical editorials published by the *British Columbian*. John Robson, the newspaper's editor, had been an inmate of the jail after the Cranfords' stay. The night he spent there left a deep impression on him, punctuated as it was by "the shrieks of a dying maniac" and the smells of "noxious effluvia."36 British Columbians were particularly sensitive to the whole issue of imprisonment for debt in late 1862. In the weeks just prior to the Cranfords' trial, and Robson's imprisonment, British Columbians had been regaled with stories of the horrors of New Westminster's debtors' prison, which culminated in the death of one of its inmates, James Locke.37 Such sentiments must have touched British Columbia's colonial administrators, because shortly afterwards the law respecting bankruptcy and insolvency was amended and imprisonment for debt outlawed.

Although the courts had the power to enforce their decisions, their effectiveness still relied on the willingness of both parties, especially the defendants, to abide by its rules and proceedings. At least part of the reason for this willingness lay in the barriers to mobility in the gold fields. People could not readily escape a court action. The miners were a transient group of labourers, but the ease with which they could move has perhaps been exaggerated. The *Gold Fields Acts* placed restrictions on the length of time a claim could remain unworked before it was considered abandoned, and hence subject to be claimed by other miners. Aside from these statutory restrictions, miners could have a substantial amount of time and capital invested in their claim that they could not
leave behind easily. And of course there was always the eternal optimism of the gold fields -- the ever-present hope of striking it rich -- that could be the heaviest anchor of all tying a miner to his claim.

Miners were not the only people who appeared before the courts, however. More than half (53.6%) of Richfield's County Court plaintiffs, who were likely miners, appeared only once. However, these "one shot players," to use Marc Galanter's terminology,

**TABLE 3-7: NUMBER OF APPEARANCES BY RICHFIELD PLAINTIFFS, 1862-1870.**

<table>
<thead>
<tr>
<th>APPEARANCES</th>
<th>( N_p )</th>
<th>( %_p )</th>
<th>( N_c )</th>
<th>( %_c )</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>254</td>
<td>53.2</td>
<td>254</td>
<td>18.4</td>
</tr>
<tr>
<td>2</td>
<td>93</td>
<td>19.5</td>
<td>186</td>
<td>13.4</td>
</tr>
<tr>
<td>3</td>
<td>35</td>
<td>7.3</td>
<td>105</td>
<td>7.6</td>
</tr>
<tr>
<td>4</td>
<td>23</td>
<td>4.8</td>
<td>92</td>
<td>6.6</td>
</tr>
<tr>
<td>5</td>
<td>20</td>
<td>4.2</td>
<td>100</td>
<td>7.2</td>
</tr>
<tr>
<td>6</td>
<td>14</td>
<td>2.9</td>
<td>84</td>
<td>6.1</td>
</tr>
<tr>
<td>7</td>
<td>7</td>
<td>1.5</td>
<td>49</td>
<td>3.5</td>
</tr>
<tr>
<td>8</td>
<td>7</td>
<td>1.5</td>
<td>56</td>
<td>4.0</td>
</tr>
<tr>
<td>9</td>
<td>2</td>
<td>0.4</td>
<td>18</td>
<td>1.3</td>
</tr>
<tr>
<td>10</td>
<td>1</td>
<td>0.2</td>
<td>10</td>
<td>0.7</td>
</tr>
<tr>
<td>11-15</td>
<td>5</td>
<td>1.0</td>
<td>73</td>
<td>5.3</td>
</tr>
<tr>
<td>16-20</td>
<td>6</td>
<td>1.3</td>
<td>70</td>
<td>5.1</td>
</tr>
<tr>
<td>21+</td>
<td>10</td>
<td>2.1</td>
<td>287</td>
<td>20.7</td>
</tr>
</tbody>
</table>

**TOTAL** 477 100.0 1384 100.0

Source: See Appendix.

\( N_p = \text{number of plaintiffs} \)
\( \%_p = \text{percentage of plaintiffs} \)
\( N_c = \text{number of cases} \)
\( \%_c = \text{percentage of cases} \)

accounted for only 18.4% of the county court cases launched in Richfield. 38

"Repeat players" (those appearing more than once) are responsible for the
remaining four-fifths. Of the cases involving these repeat players, over one-quarter (25.4%, or 20.7% of the total) were initiated by ten individuals, or just 2.1% of the plaintiffs; and almost half (45.5%, or 37.1% of the all cases) were initiated by just 30 (5.9%) people. These 30 individuals might be considered Richfield’s "litigious class." Of these, 19 (63.3%) were merchants and 4 (13.3%) were saloonkeepers. The predominance of merchants is not surprising, and conforms to contemporary opinions about the extension of credit on the resource frontier.

Richfield defendants comprised a larger pool of the general population (777 versus 477 people). As with the plaintiffs, however, although "one-shot" defendants made up over two-thirds of all defendants, they accounted for only 37.8% of all cases.
TABLE 3-8: NUMBER OF APPEARANCES BY RICHFIELD DEFENDANTS, 1862-1870.

<table>
<thead>
<tr>
<th>APPEARANCES</th>
<th>N_p</th>
<th>%_p</th>
<th>N_c</th>
<th>%_c</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>523</td>
<td>67.3</td>
<td>523</td>
<td>37.8</td>
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<tr>
<td>2</td>
<td>125</td>
<td>16.1</td>
<td>250</td>
<td>18.1</td>
</tr>
<tr>
<td>3</td>
<td>58</td>
<td>7.5</td>
<td>174</td>
<td>12.6</td>
</tr>
<tr>
<td>4</td>
<td>21</td>
<td>2.7</td>
<td>84</td>
<td>6.1</td>
</tr>
<tr>
<td>5</td>
<td>20</td>
<td>2.6</td>
<td>100</td>
<td>7.2</td>
</tr>
<tr>
<td>6</td>
<td>11</td>
<td>1.4</td>
<td>66</td>
<td>4.8</td>
</tr>
<tr>
<td>7</td>
<td>7</td>
<td>0.9</td>
<td>49</td>
<td>3.5</td>
</tr>
<tr>
<td>8</td>
<td>2</td>
<td>0.3</td>
<td>6</td>
<td>1.2</td>
</tr>
<tr>
<td>9</td>
<td>3</td>
<td>0.4</td>
<td>27</td>
<td>1.9</td>
</tr>
<tr>
<td>10</td>
<td>3</td>
<td>0.4</td>
<td>30</td>
<td>2.2</td>
</tr>
<tr>
<td>11+</td>
<td>4</td>
<td>0.5</td>
<td>65</td>
<td>4.7</td>
</tr>
<tr>
<td>TOTAL</td>
<td>777</td>
<td>100.0</td>
<td>1384</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Source: See Appendix.

N_p = number of defendants
%_p = percentage of defendants
N_c = number of cases
%_c = percentage of cases

16% of the actions involving repeat defendants are accounted for by only 12 (1.6%) individuals. This "debtor class" consisted of a surprising mix of people. Instead of miners, Richfield's most frequent debtors were doctors, lawyers, saloonkeepers, boarding house operators, merchants and carpenters. These people were even less mobile than the miners because of the nature of their occupations. The gold rush had brought them to the colony's interior, but when the gold claims were played out they were left with a ledger-full of credit notes and debts of their own.

Perhaps the most important reason why British Columbians resorted to the courts is suggested by the disposal of cases. In both the County and the Mining
Courts few actions were settled out of court. The intervention of a formal arbiter was necessary for most disputes to be settled because of the nature of colonial society. British Columbia lacked the social cohesion necessary to make informal settlements work, and people resorted to the courts because they were the only common denominator of communication. In a colony as new as British Columbia, and with a diverse population scattered over a wide geographic area engaged in an economic activity that encouraged transiency and instability, social interaction was not easy. In this context, the law was one of the few experiences British Columbians shared. It was the social cement that bound colonists together -- at least momentarily -- to solve problems that in more settled communities might be worked out outside formal institutions.

There were three aspects of colonial society that contributed to the "bondlessness" suggested by this pattern of civil litigation: its demography, geography and economy. From its beginnings as a gold colony, British Columbia was a place dominated by single men. Despite the best efforts of the colonial government to attract women to the colony, the ratio of men to women was skewed throughout the nineteenth century. At the height of the Cariboo rush the ratio of men to women was 20:1, and by Confederation it had improved only to 8:1. Unlike other societies where the sex ratio was more even, British Columbia was not knit together by kin ties. It took a long time to overcome the imbalance, and the process was not helped by the continual immigration of greater numbers of men than women.
If the colony’s demography did not lend it much internal cohesion, neither did its settlement pattern. Outside the administrative centres of Victoria and New Westminster there were few permanent settlements. The colony’s thin population was scattered in isolated farms on Vancouver Island, while on the mainland it was located in impermanent mining camps. Governor Frederick Seymour found the situation demoralizing and complained to the Colonial Office. "It would be difficult to imagine a post more hard to fill than the one I now occupy," he wrote.

Where on the Fraser 12,000 or 13,000 white men washed up Gold, a solitary Chinaman working his "rocker" represents the population for the mile of river.  

The scattered nature of the population, combined with the colony’s rugged geography and poor road system did not favour social interaction. Life in British Columbia was often solitary and lonely. British Columbia’s upcountry miners may have boasted that they were "free and easy as Lords," but their letters home belied their confident sentiments. The new El Dorado was not as adventurous or romantic as it was supposed to be: in fact, it was fairly tedious. A miner often spent his days slogging through mud and rock, stopping only for meals of "bread, beans and bacon with an occasional mess of very tough beef." The delights of Barkerville were not frequently experienced -- especially when the miner’s claim did not produce. The upcountry miner was not the only person who suffered the frontier blues, however. British Columbia’s colonial administrators were not immune to bouts of homesickness. Their letters to each other spoke wistfully of "Home" and of their own efforts to overcome the loneliness of life in the "imperial stump-field." Englishmen like interim Governor Arthur Birch dealt with life in
the far corners of the Empire by recreating the familiar rituals associated with his social station, as this letter to his brother showed.

We are very religious in our regulations, having passed a law for White Ties every day at dinner....This is one of the only ways of keeping up civilization in a place like this.\(^{48}\)

Matthew Begbie's letter to an English friend also underscored the emptiness many Europeans felt. "When you write," he told his friend, "you should write gossip."

Why is the *Times* so much better than the *Evening Mail*? -- because it has more gossip -- even births, d[eaths] & m[arriages] are interesting out here, though you never read them at home. Police reports, law reports, letters from indignant correspondents -- those are what one likes out here.\(^{49}\)

Apart from the particular ways these British Columbians dealt with their environment, the language they used is suggestive: British Columbia is referred to as "out here," and the virtues and civility of life at "home" are contrasted with "a place like this." These British Columbians, like so many others, looked beyond the colony and the sea to define themselves. Because their emotional ties, like their economic ones, lay outside British Columbia the colony's internal coherence suffered.

Perhaps most importantly, the nature of the colonial economy retarded the development of permanency and stability. The gold economy, like the other mineral, timber and fishing economies that followed it, was volatile and beyond the control of British Columbians to alter. These staple economies required a labour force that was mobile and increasingly specialized, but could employ them for only part of the year. The demands of such an economic system worked against the creation of a permanent, stable and integrated society. Even after the
colonial period, British Columbia remained an archipelago of settlements unconnected to each other, populated by people who had come to service a particular staple economy but were left behind when the gold or silver, copper, lead or zinc, the trees or the fish were exhausted. Unlike the money that financed resource exploitation and the men whose labour carried it out, people like Barkerville's blacksmith William Winnard or Clinton innkeeper Malvina Jane Toy were not mobile. Their limited means had allowed them one chance to take advantage of the opportunity the staple economy held out, but no more. When the mines petered out, William and Malvina were more or less stuck, left to make a living in communities left in the wake of an international economy over which they had little control, and perhaps, if Governor Seymour was any indication, little understanding.

Hope is 'played out.' Lytton languishes. Princeton contains one occupied house. But Barkerville in Cariboo has made considerable progress. Yale flourishes. New Westminster has not retrograded since I have known it. But Victoria, the largest of our towns, has lost all confidence in herself. Things are dull and depressed....

My great grievance with the colony is this determination of people to leave it. Let them set themselves in opposition to the Government. That is fair in an unprospering colony. But the opposition shewn by selling off furniture and nailing up doors and windows and leaving the Colony is one, I confess, to which I cannot be indifferent....

I hardly know what remedy to suggest.50

Together, demography, geography and economy conspired against permanency and stability. British Columbia was a society without the cohesion lent by kin, neighbour or workplace. As a result, it was not a place that developed the strong informal or formal institutional ties that consolidated the non-native presence in other British North American societies and gave them an internal
focus. The transient nature of its population worked against the formation of fraternal organizations like the Orange Lodge, and cultural institutions like natural history societies, museums, or theatres developed late, were limited to Victoria and, to a lesser degree, New Westminster, and were like Arthur Birch's "White Ties at dinner," a manifestation of the English colonial elite.

"The history of British Columbia is brief. Gold made it and gold unmade it." The pithy comment English traveller W.A. Baillie-Grohmann made at the turn of the century encapsulated two fundamental realities of colonial life: the dominance of the economy in British Columbia and its precariousness. The pattern of litigation confirmed and elucidated both these aspects. Civil rather than criminal matters preoccupied British Columbia’s courts, and actions for debt comprised the bulk of civil litigation in its inferior tribunals, something the colony shared with other jurisdictions. Both the extent and types of debt cases illustrated that commerce was an important part of the frontier economy and that land was not. Cases involving disputed land title or trespass were almost unknown in the County Courts; and while they did comprise the 22% of Mining Court actions, mining properties were part of a larger system of commercial and industrial capitalism rather than a settled agrarian economy. The colony’s courts further underlined the importance of commercial property by favouring the plaintiff/creditors in their decisions.

Despite the tendency of British Columbia’s courts to secure property, few defendants chose to settle out of court. The resolution of most cases required the
intervention of the court, and at least half of the actions commenced went to trial. The degree to which the courts were called on to intervene indicates that they were truly institutions of dispute resolution and says something about the character of colonial society and the role the law played in providing the ethical foundations for political authority. With little social cohesion to facilitate the mutual understanding necessary for out-of-court settlements British Columbians turned to formal institutions to bridge the communication gap between them. The heightened importance the law had in nineteenth-century British Columbia, as a means to secure property and as a sort of social glue, meant that British Columbians took an active interest in its administration for both material and emotional reasons. Maladministration of the law threatened to endanger the colony's prosperity as well as rent its very loosely-knit social fabric, and because of this, political authority in the colony rested on very shaky ground.
NOTES


2. Margaret Ormsby. *British Columbia: A History* (Toronto, 1958), 140. Prior to becoming a separate colony, British Columbia, or New Caledonia, as it was known, was a fur trade preserve of the HBC.


6. For instance, Emily Carr considered Victoria in the 1870s "was like a lying-down cow, chewing."

   She had made one enormous effort at upheaval. She had hoisted herself from a Hudson's Bay Company Fort into a little town and there she passed, chewing the cud of imported fodder, afraid to crop the pastures of a new world, for fear she might lose the good flavour of the old to which she was so deeply loyal. Her jaws went rolling on and on, long after there was nothing left to chew [Emily Carr, *The Book of Small* (Toronto, 1942), 139].


9. Douglas to Lytton, Victoria, Vancouver's Island, 26 October 1858. NAC. MG 11, CO 60/1, reel B-77, 245-255.

11. Proclamation respecting the method to be pursued with respect to the alienation and possession of Agricultural Lands, and of Lands proposed for sites for Towns, in British Columbia...., 14 February 1859. Unless otherwise noted, all statutes cited are from Micromedia's collection of Pre-Confederation Canadian Statutes. Douglas to Lytton, Victoria, Vancouver's Island, 19 February 1859. CO 60/4, reel B-80, 174.

12. An Act to enable Aliens to hold and transmit Real Estate, 1861.

13. Proclamation relating to the Acquisition of Land in British Columbia, 4 January 1860; and Proclamation respecting occupation of Pre-empted Land, 28 May 1861.


16. Only 1696 pre-emption claims were made by 1868 (ten years after the creation of the colony), and not more than 6000 acres were under cultivation. In the New Westminster district [the oldest area of settlement] only 27,797 acres of land were purchased by 1868, and of this less than 250 acres were under cultivation. See Mikkelsen, 2, 163.

17. Douglas to Lytton, Victoria, Vancouver's Island, 18 October 1859. CO 60/5, reel B-81, 184.

18. The Small Debts Courts were created in 1859 to deal with the many suits for debt generated during the Fraser River gold rush. They sat in the principal settlements along the river and had colony-wide jurisdiction to hear cases involving sums less than L50. A Stipendiary Magistrate, who was also the Assistant Gold Commissioner, sat in judgement over these cases. The Mining, or Gold Commissioner's Courts were also created in 1859 and sat in the primary mining settlements. They had jurisdiction to hear all mining or mining-related cases and to determine them summarily. The Assistant Gold Commissioner also issued mining licences and collected the various associated fees.


21. Sanders to Young, Yale, 8 August 1860. BCARS. GR 1372, reel B-1362, f 1554.

22. W.G. Cox to the Colonial Secretary, New Westminster, 18 January 1867, enclosed in Seymour to Carnarvon, New Westminster, 18 March 1867. CO 60/27. NAC. MG 11, reel B-97, 414.

23. Brew to the Colonial Secretary, New Westminster, 21 January 1867, enclosed in Seymour to Carnarvon, New Westminster, 18 March 1867. CO 60/27. NAC. MG 11, reel B-97, 401-402.

24. The Richfield County Court is the only one for which data for civil and criminal cases is strictly comparable. Because civil cases from this County Court comprise almost half (45.8%) of the cases in the period 1858-1871, I have assumed that it is "typical."


26. The Gold Fields Act, 1859 [31 August 1859].


29. A Proclamation to afford a clear and speedy method of recovering small Debts and Demands in British Columbia, 10 December 1859. Its provisions were amended in 1866 by An Ordinance amending the procedure of the County Courts of the Colony of British Columbia, 5 April 1866.

30. As was noted in the Colonial Office's Blue Books of Statistics, prices "increase as you proceed into the Interior, and at the Mines Flour, Sugar, Tea, Coffee, Wines are as much as 2 to 5 times the...figures [for New Westminster." British Columbia Blue Books of Statistics. CO 64/6. NAC. MG 11, reel B-199, 135.

32. Ibid., for 1864 CO 64/5. NAC. MG 11, reel B-199, 105; for 1867-70, CO 64/8, 118, CO 64/9, 115, CO 64/10, 120, and CO 64/11, 117; all on reel B-200.


35. Isabel Bescoby, "Some Aspects of Society in the Cariboo from its Discovery to 1871," University of British Columbia B.A. Essay (history), 1932, 58. For the cost of provisions, see the British Columbia Blue Books of Statistics, "Average Prices of various Produce and Merchandise, &c." NAC. MG 11, reel B-199: CO 64/1, 113; CO 64/2, 113; CO 64/3, 161; CO 64/4, 97; CO 64/5, 107; and CO 64/6, 135. NAC. MG 11, reel B-200: CO 64/7, 112; CO 64/8, 120; CO 64/9, 117; CO 64/10, 122; and CO 64/11, 119.


39. There was one auctioneer, one expressman (stagecoach) and four plaintiffs of unknown occupation.

40. 1 carpenter, 2 doctors, 1 lawyer, 2 boarding house keepers, 3 saloonkeepers, 1 livery stableman, 1 merchant and 1 repeat defendant of unknown occupation.


42. Throughout the colonial period, the ratio of men to women was more skewed on the mainland than the Island. At Confederation, for instance, the ratio of men to women on the Vancouver Island was 1.5:1 -- still skewed, but not as markedly as the society across the Georgia Strait.
43. In fact, the proportion of native-born British Columbians only exceeded that of immigrants in 1981.

44. Seymour the Buckingham and Chandos, New Westminster, 17 March 1868. CO 60/32, reel B-99, 111.

45. From James Anderson's (a.k.a. "Sawney") poem describing a miner's shanty in the Cariboo:

The bakin' board hangs on the wa';
Its purposes are twa-fold-
For mixin' wi' yeast or dough
Or panning out the braw gold!
A log or twa in place o' stools,
A bed without a hangin'
Are feckly all the furnishin's
The little house belongin';
The laird and tenant o' this sty
I canna name it finer
Lives free and easy as a Lord
Tho' but an honest miner.

Cited in Isabel Bescoby, "Some Aspects of Society in Cariboo to 1871," University of British Columbia B.A. Essay (history), 1932, Appendix E.

46. Robert Harkness to Sabrina Harkness, Richfield, 10 June 1863. Cited in Richard Thomas Wright, Discover Barkerville (Vancouver, 1984), 34.

47. As New Westminster was called. H.H. Bancroft, History of British Columbia (San Francisco, 1890), 415; cited in Ormsby, British Columbia: A History, 201.

48. Birch to John Birch???

49. Begbie to Birch, 24 June 1865. Birch Family Papers, v. 7. BCARS. MS.

50. Seymour to Buckingham and Chandos, New Westminster, 17 March 1868. CO 60/32, reel B-99, 111, 119-120. The Colonial office called the letter "a protracted groan" that "requires no answer."


52. John Dickinson, writing on New France, noted that "les litiges civils constituent 90 a 95 pour 100 de l'activité globale des officiers de justice....A l'encontre de la criminalité qui met en évidence les aberrations des comportements, l'une minorité la justice civile s'attache un normatif et aux transactions de la vie quotidienne qui touchent l'ensemble d'une population." Dickinson reported that cases for debt comprised the largest proportion (20-30%)
of all civil suits. See his *Justice et justiciables: la procedure civil à la prevote de Quebec, 1667-1759* (Laval, 1982), 3, 123. Evelyn Kolish looked at the civil courts in Lower Canada, and found that actions to recover debts accounted for 80-90% of all civil litigation from 1785-1840. See "Some Aspects of Civil Litigation in Lower Canada, 1785-1825: Towards the Use of Court Records for Canadian Social History." *Canadian Historical Review* 70(1989): 351. Clinton Francis' study of the English common law courts from 1740-1840 revealed that debt collection accounted for 90% of actions. See his "Practice, Strategy and Institution: Debt Collection in the English Common Law Courts." *Northwestern University Law Review* 80(1986):810. John Wunder's monograph on law in Washington Territory noted that actions for debt made up almost 93% of all civil cases that came before the lower courts. See his *Inferior Courts, Superior Justice: A History of the Justices of the Peace on the Northwest Frontier, 1853-1889* (Westport, CT, 1979), 149.
The centrality of commercial capital in the economic and legal life of British Columbia was a characteristic it shared with other British North American colonies, one which Harold Innis pointed out in very broad terms in *The Fur Trade in Canada*. He also argued that the dominance of staple economies in Canada created "a unity of structure in institutions...and centralized control." However, the geographical context in which the law operated placed limits and constraints on its execution and prevented the easy extension of authority and control envisioned by Innis.

Despite its detached nature, the law gained much of its meaning through the very localized experiences people had with it. At a local level the execution of the law was inextricably tied to the personalities of the disputing individuals and those of the people who sat in judgement over them. As such, the law was anything but detached. This posed certain problems for those charged with administering it. Magistrates in particular were caught between the demands of local circumstance and those of a colonial government bent on maintaining a certain standard of order through the law. Douglas Magistrate John Boles Gaggin certainly felt the pull of these two "levels of law" in 1862, when he was confronted with a party of one hundred starving and broken miners who had commandeered a steamer to take them out of the gold districts and away from their failed enterprise. Despite the obvious illegality of the miners' actions, Gaggin advised
the master of the *Henrietta* to "take the men on, and on arrival at New Westmin­
ster, apply to the proper authorities for redress." He took this course of action,
believing, as he wrote to the Colonial Secretary in 1862, that

to attempt coercion with a force unable to command it would have
weakened the apparent power of the Law;...[and] that the getting of
these men out of Douglas was in every way desirable,...any attempt
to arrest would have provoked a riot, perhaps bloodshed, and I
believe I acted prudently in avoiding the least risk of this.³

In an effort to further justify his actions, Gaggin closed his report on a defiant
note with this telling observation.

Magistrates in these up country towns have a delicate game to play,
and I believe we are all of opinion that to avoid provoking resistance
to the Law is the manner in which we best serve the interests of His
Excellency, the Governor....[A]s it is the matter passed off without
riot and without defiance of the Magistrate, though the Master of the
steamer...was somewhat annoyed -- I shall be very sorry if the
cautious way I acted, with such quiet results, does not meet His
Excellency's approval, but I acted for the best.⁴

The colonial government chastised the magistrate for his "want of nerve and
judgment" in allowing "the occurrence of so lawless a proceeding."⁵ "It appears,"
noted Colonial Secretary W.A.G. Young,

that you consider yourself vested with discretionary power to
temporize with your duties, and that you are unaware that, while
rigidly dispensing the laws for the protection of life and property, a
Magistrate may act with perfect temper and discretion.⁶

This brief episode raises questions about the social meaning of the law
which I am concerned to address. Gaggin considered law to be the preservation
of order -- "quiet results" -- and told his superiors so. From his vantage point in
Victoria, Governor James Douglas saw things rather differently. The law, through
its rigid application, served a more particular end by securing life and property.
There was yet another perspective. Both Gaggin and Douglas considered the miners' actions "lawless," but those who boarded the *Henrietta* likely did not feel the same way.

From their arrival, British Columbia's miners possessed a reputation as a self-conscious and vocal interest group with a penchant for self-government which they learned in California's gold fields. Despite their impermanent character, California's gold mining camps developed an elaborate system of informal regulation centred on the Miners' Meetings. These were elected tribunals of local miners who drafted the rules which governed behaviour in a specific locale. Their regulations covered a wide range of activities, from claim size, the technicalities of ditch widths and water rights to the use of alcohol and firearms in the camps. This experience instilled the miners with a taste for local government and a certain degree of independence. It was this independence that made those who streamed northward to British Columbia in 1858 to try their luck in the Fraser and Cariboo rushes so dangerous in the eyes of British colonial administrators like James Douglas and Supreme Court Judge Matthew Baillie Begbie. These men considered the miners a lawless bunch and took steps to prevent local government from gaining a foothold on the banks of the Fraser River.

In September 1858, just a month after the mainland colony was formed, James Douglas issued the first *Gold Fields Act*. It and subsequent acts created and elaborated formal government institutions and regulations specifically designed to regulate gold mining. An Assistant Gold Commissioner presided over locally-based Gold Commissioner's or Mining Courts. He had jurisdiction to
hear all mining or mining-related disputes and to dispose of them summarily. By doing so the Gold Commissioner's Court allowed suitors to avoid the costly delays associated with Supreme Court actions and jury trials. A locally-elected Mining Board replaced the Californian Miners' Meetings, drafting bylaws which governed behaviour. Unlike the American institution they replaced, however, the decisions of the Mining Board could be overturned by the Assistant Gold Commissioner, who also possessed the power to dissolve the board at his pleasure.

Despite the early intrusion of this formal regulatory institution into the gold fields, British Columbia's miners retained a sense of themselves and their enterprise as distinct and crucial to the development of the colony. Despite their impermanent character, gold rush communities were localistic, regardless -- paradoxically -- of their location. Miners were particularly interested in the administration of the law, watching Mining Court decisions with an eye to their own fortunes. Though the law and the courts brought British Columbia's diverse and far-flung miners together in a common process of dispute settlement, they also were the cause of much division, for they resolved differences by creating other ones. The law defined plaintiffs and defendants, assessed guilt and innocence, and ultimately, in the eyes of those involved, determined right and wrong. The potential for conflict was thus inherent in the process of dispute settlement. As will be seen, different concepts of law stood in bold relief against this structured background of formal dispute resolution.

British Columbians understood and measured their laws with a standard that was rooted in a particular geographic, social and cultural milieu and that was
not always shared by those charged with its administration. Conflicting understandings of what constituted law underlay the disputes which culminated in the Grouse Creek War (1867), and which form the focus of the following narrative.

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The three cases that lay at the centre of the controversy over the colony's judicial administration were all disputes over the ownership of mining claims. Each is rather unremarkable in terms of the issues of fact involved, which consisted of the recording and re-recording of claims and the placement of stakes. Once the cases were appealed to the Supreme Court, however, the issues of fact in these cases became secondary to Supreme Court Judge Matthew Baillie Begbie's actions. The Judge's behaviour in the three cases and public reaction to them neatly illustrate the problems associated with administering the law in British Columbia, and adumbrate the limits of formal, institutional dispute settlement.

The first of these, launched in 1865, pitted the Borealis Company against the Watson Company. After the Assistant Gold Commissioner's decision awarding a disputed claim to the Watson Company was sustained by Begbie, the Borealis Company took the case to the Court of Chancery. There, sitting this time as Chancery Court Judge, Begbie reversed his earlier decision, and awarded the disputed ground to the Borealis Company! By all accounts, the mining community of the Cariboo was incredulous, and the colony's three main opposition newspapers wasted no time in adding their voices to the growing cries of
indignation over Begbie’s rulings from the gold fields. Most distressing to British Columbians was the use of the Chancery Court as a court of appeal, a process that was not only expensive and protracted, but was also capricious, because decisions appeared to be unfettered by any reference to statute law. "The late decision in the Borealis & Watson case strikes me as being the most flagrant and arbitrary stretches of power that has ever been committed by an individual occupying the position of Judge," wrote "Miner" to the Cariboo Sentinel in 1866:

...we have mining laws containing explicit provisions as to the manner in which claims should be taken up and held, but at the same time that any parties having money enough to stand the costs of a Chancery suit may omit to comply with these provisions and set the law at defiance; it tends to create a feeling of insecurity as the value of every title, no man is secure if he strikes a good claim, as after strictly complying with the law which he supposed to be protection and spending his last dollar in prospecting, he may find when he thinks he has reached the long hoped for goal of his ambition, that some more favoured individual had intended in taking up the same ground long previously, but had neglected...staking it off or recording it, a grave error certainly, but one which can be expiated by filing a bill in Equity, making a score or two of affidavits, and paying his own costs in a Chancery suit, and this is what is called "Equity."\(^{16}\)

Less measured was the commentary of the Victoria-based British Colonist, which contended that the "endless round of litigation" in British Columbia’s mining districts was "ruining claimholders, shutting up the country's wealth and causing disasters in communities hundreds of miles away from the scene of the dispute."

"The risks of mining are a mere bagatelle," the newspaper concluded, "it is the risks of Begbie's Chancery Court that terrify the miner."\(^{17}\)

Public indignation over Begbie's actions in the Borealis case scarcely subsided when his handling of another mining dispute again drew the attention
and the wrath of British Columbians. After issuing an injunction ordering the
Davis Company to cease work on disputed ground, Begbie discovered that the
Supreme Court seals necessary to validate the injunction were unavailable --
detained, with the rest of his luggage, on a wagon that had broken down en route
to Bridge Creek. Undeterred, the Judge sent a messenger to Richfield with the
injunction and orders for William Cox, the Stipendiary Magistrate and Assistant
Gold Commissioner there to attach seals to the injunction in his capacity as
Deputy Registrar of the Supreme Court. Cox, whose decision Begbie had
overturned in issuing the injunction, declined to act as ordered, claiming that
while he "entertain[ed] high respect for Mr. Begbie as Mr. Begbie and also as
Supreme Court Judge," he held no commission as Deputy Registrar. Moreover,
continued the Magistrate,

Finding now that it is attempted to drag me into this disagreeable
quarrel, and act contrary to my own conscience, I would if I actually
did hold a commission as Deputy Registrar of the Supreme Court
resign the post at once. 18

Although delayed by Cox’s "decisive stand," Aurora v. Davis came to trial before
Matthew Baillie Begbie and a special jury on 18 June. 19 After deliberating until
midnight, the jury awarded half of the disputed ground to each side, because "the
Aurora and Davis Companies have expended both time and money on said ground
in dispute." 20 According to the Sentinel, the jury’s decision met with the general
approval of the entire mining community.

There is probably no instance on record where trial by jury has been
so fully appreciated....We are convinced that there is not a single
miner on the creek that would not gladly submit his grievances to
the decision of seven disinterested fellow citizens, and thus avoid the
expensive and vexatious proceedings in Chancery. 21
Despite the satisfaction with the jury's verdict evinced by the *Sentinel*, Begbie insisted that a decision by his court "would not end the litigation, and the expense of actions in one or two other branches of this Court would be heavy on both parties." Instead of accepting the jury's verdict, the judge suggested "that the whole matter be referred to me, not in my capacity as Judge, but as an arbitrator and friend, and that whatever decision I may arrive at will be final and absolute." The two sides agreed, and the following day -- June 19 -- Begbie rendered his decision to an "anxious" court room. Perhaps hoping to forestall any criticism, the Judge made it a point to downplay the irregularity of his actions and to praise the jury as an institution. "I have always had every reason to be satisfied with the findings of juries during the whole period of my own official experience in this colony," Begbie remarked; but if "a jury finds a verdict contrary to the evidence, resulting from ignorance, fear, or any other cause it is [the judge's] privilege to set aside their verdict." Noting that "when men go to jump ground they do not see their enemies' stakes," Begbie ruled against the Davis Company and awarded all of the disputed ground to the appellant.

Reaction was immediate. Five or six hundred miners and residents of Cariboo gathered in front of the Richfield Court house on a rainy Saturday night six days after Begbie's decision to discuss the administration of the colony's mining laws. Amid a great many speeches lasting well into the night, the participants passed three resolutions:

**RESOLVED, That in the opinion of this meeting the administration of the Mining Laws by Mr. Justice Begbie in the Supreme Court is partial, dictatorial, and arbitrary, in setting aside the verdict of**
juries, and calculated to create a feeling of distrust in those who have to seek redress through a Court of Justice.'

RESOLVED, That the meeting pledges itself to support the Government in carrying out the Laws in their integrity, and beg for an impartial administration of justice. To this end we desire the establishment of a Court of Appeal, or the immediate removal of Judge Begbie, whose acts in setting aside the Law has destroyed confidence and is driving labor, capital and enterprise out of the Colony.'

RESOLVED, That a Committee of two persons be appointed to wait upon His Excellency the Administrator of the Government [Arthur Birch] with the foregoing resolutions, and earnestly impress upon him the immediate necessity of carrying out the wishes of the people.

With three cheers for "Judge" Cox, the British Colonist, the Cariboo Sentinel and the Queen (in that order), and three groans for Judge Begbie, the meeting adjourned.25

As a result of the mounting public pressure for reform, the colonial government amended the Gold Fields Act in April 1867, limiting appeals from the Mining Court to questions of law only.26 For all intents and purposes, this amendment made the decision of the Assistant Gold Commissioner final, something which bothered the colonial government greatly. "This change was made against the general feeling of the Legislative Council, at the insistence of the Members nominated for the Mining Districts and especially the urgent representation of the Mining Board of Cariboo;" Attorney General Crease wrote. However, "experience shews the power of appeal to be a safety valve for the preservation of the peace in the Mining Districts of the Colony."27 These were prophetic words. But for the next two months at least, all was quiet in Cariboo.
The *Borealis v. Watson* and *Aurora v. Davis* cases set the stage for the final, and according to one magistrate most "humiliating" part of this mining trilogy: the Grouse Creek War.\(^{28}\) Having found Chancery and arbitration wanting, and his government colleagues sensitive to public pressure, in 1867 Matthew Baillie Begbie found only one option remaining: to adhere to the newly-amended *Gold Fields Act* and refuse to hear appeals from the Mining Courts. This course was not successful in restoring British Columbians' faith in the administration of the law. The fault was not Begbie's, however. A less outspoken Supreme Court Judge might have succeeded in blunting the sharpest barbs, but no one could have bridged the gulf between the different meanings of law created by the colony's geography.

In late April 1864, the Grouse Creek Bedrock Flume Company, a Victoria-based joint stock company, applied to Peter O'Reilly, Richfield's Assistant Gold Commissioner, for the rights to a certain portion of land on Grouse Creek. O'Reilly granted the company title for ten years provided they fulfilled the usual conditions of occupation, licensing and recording of the claim as outlined in the *Gold Fields Act*. During 1864 and all of 1865 the "Flumites," as they came to be known, developed their claim, investing $20,000 to $30,000; but in late 1866 the company ran out of money, and their claim was left unoccupied from September to November. During this time -- on October 8 -- the Canadian Company, a locally-based association of free miners, entered the Flume Company's claim, and finding it apparently abandoned, applied for rights to it. Warner Spalding, who had replaced Peter O'Reilly as interim Assistant Gold Commissioner, duly
recorded the ground in the Canadian Company's name. At the beginning of the next mining season, in March, the Flumites renegotiated their lease to the Grouse Creek claim with the Crown, managing to extricate themselves from all previous conditions regulating their occupation of the ground. Inexplicably, Warner Spalding, who had just six months earlier granted the same piece of land to the Canadian Company, presided over this renegotiation on behalf of the Crown! It was only a matter of weeks before the two companies clashed, and the dispute was taken to the district's Mining Court, again to be heard before Spalding. They Spalding ruled in favour of the plaintiffs, and ordered the Canadians off the disputed ground. The Canadians gave notice of appeal, but obeyed the Commissioner's order.

Though the Canadians left quietly, they were back on Grouse Creek in a month. At the end of May, Anthony Melloday and three other Canadian Company members commenced work on the Grouse Creek Flume Company's claim. This time, however, the Flumites took their complaint to the Magistrate's Court, laying criminal charges of trespass against the Canadians. The foreman, Melloday, received the heaviest sentence: one month's imprisonment. The others were sentenced to seven and fourteen days. Noting that the earlier injunction served on the Canadian Company by Spalding had been "given to their foreman ...in an oral and extrajudicial manner, and not in the form of an order of Court," the Cariboo Sentinel contended that the Canadians had been operating under a "misconception" and that the punishment meted out was "rather severe."
At the beginning of July Begbie informed the two Companies that he would not, in keeping with the newly-amended *Gold Fields Act*, hear the appeal. Though he underscored his opposition to the new act, the Judge told the appellants that he was not willing "to drive a coach-and-four through this clause, [just] because I conjecture that it may prove mischievous or work hardship." Undeterred, the Canadians regrouped, and now thirty or forty strong, they again returned to Grouse Creek. Three constables and one surveyor were dispatched to eject the Canadians, but were prevented from doing so when the Company's men "surrounded [them]...without showing any hostile disposition, or making any threats of violence, but simply claiming that as they all acted as one man, if any one was liable to arrest they all were...." The constables left.

Local sentiment seemed to be very much on the side of the Canadians, particularly in light of Begbie's refusal to hear their appeal -- a situation that was doubly ironic, given that local sentiment, and notably the pressure of the Canadian Company's principals, John MacLaren and Cornelius Booth, had led to the 1867 amendment! Writing on behalf of the members of the Canadian Company, Booth insisted they were not "acting in opposition to the law of the land." Since they could not appeal, they were more than willing to force a new case.

Since the Supreme Court sat, they have made the most strenuous efforts to bring their case into court, not with a view of setting aside, but carrying out the decision of Commissioner Spalding. Their case would not be heard at any time, and any action they have taken since is simply with the object of coming into court in such a manner, that the rights they contend for may be contested on the real merits of the case, supported by evidence, which is, I opine, the spirit of British law.
Booth told the same thing to a public meeting of 500 people gathered to hear "a full and truthful statement of the grievances and position of the Canadian Company." The sympathetic crowd passed a resolution recording their sympathy with the Canadians and their commitment to aid the Company "by all lawful means to obtain their rights."  

The good will manifested toward the Canadians made itself apparent the next day, when the district's magistrate proceeded to Grouse Creek, backed this time by twenty-five or thirty of "the most prominent businessmen, and respectable citizens of this town" who had answered court summonses to act as special constables. Once there, the "posse comitatus" exchanged "the most friendly greetings" with the Canadians and the nearly 400 eager onlookers who had "splashed through mud and mire, knee-deep, in haste to reach the rendezvous." All settled in for a long, and what must have been anti-climactic, afternoon of negotiation by letter between the two companies. In the end, with no hope of settlement, the magistrate read a writ of injunction to the Canadian Company and asked them to leave the claim. "[A] unanimous NO was returned, whereupon Mr. Ball, along with his constables, left Williams Creek, and the crowd dispersed."  

The magistrate immediately telegraphed the Governor, requesting that a detachment of marines be sent to assist him. The Royal Navy refused to intervene, and Seymour, "at very considerable inconvenience to myself proceeded...to Cariboo."  

It was this stalemate that greeted the Governor when he arrived in Richfield a few weeks later, on August 7. Seymour, along with the rest of the colony had
been treated to a series of alarmist reports of "mob law" on Williams Creek from the *British Colonist* and the *British Columbian*, and no doubt expected the worst. "In our most important gold field the arm of justice hangs powerlessly by her side, while a company of men, under the most hollow and hypocritical professions of a desire to respect the law are wantonly and openly trampling it underfoot," screamed the *Columbian*:

...It is simply a question of British Law vs. Lynch Law....[with reference to Governor Seymour's visit] To go to the scene of strife unarmed with a force to compel submission will simply to be to toy with outlawry while the coveted treasure is being grabbed up.\(^{39}\)

Calling for the imposition of "martial law," the *Colonist* noted that "by offering armed resistance to the mandate of a court" the Canadians were "criminals" who "went into court determined to obey the law if it was *with* them; [and] to break it if it was *against* them."\(^{40}\) The *Cariboo Sentinel* took issue with its competitors' treatment of the Grouse Creek "War." "Victorians," the *Sentinel* speculated, "no doubt wrought up to the highest pitch of excitement by the graphic descriptions of the warlike attitude of the Canadians, would be surprised if they were here."

Canadians and Flumites may be seen daily in the streets of Barkerville, habited in the usual miners' garb, saluting each other without the slightest appearance of hostility.\(^{41}\)

The *Sentinel*'s attempts to emphasize the peacefulness of the Cariboo were not aided by the events which followed, however.

A few days after Governor Seymour's arrival, the Canadian Company strode into Richfield, not, noted one anonymous writer "in obedience to any order or summons," but at the suggestion of their leader, Cornelius Booth. Though Booth -
- the "Talleyrand of the band" --- assured his compatriots they would not be arrested, seven of their number were. Conveyed immediately to the courthouse, the seven received three month sentences for resisting arrest (stemming from Magistrate Ball's earlier attempt to eject the Canadians from Grouse Creek); however, with the exception of one man, all refused to go to jail. Instead, they "warned the constables not to touch any of them, and abused and blackguarded the Commissioner on the Bench!" The seven told the court "that if they had treated the Commissioner to more champagne &c. they would have won their case." Ball left the courtroom, and the Governor requested a parley with Booth. After extracting a promise from Seymour to commute the sentences to forty-eight hours imprisonment, Booth "persuaded his comrades to walk towards the gaol, promising them that they would not be confined three days!" This concession to the form of law was continued once the redoubtable Canadians arrived at the Richfield jail. There, wrote "Crimea," "they would not allow the doors of the jail to be locked upon them and had free access to all the Court house grounds during the term of their imprisonment."

By all accounts, their experience of prison life must have been very agreeable, for their sympathisers supplied them bountifully with grog; what with games and songs, interspersed occasionally with a derisive hoot at the officials, they were the jolliest convicts ever seen.

When Seymour left Richfield he left behind conflicting impressions of what he accomplished. The Canadian Company believed they had secured a promise for a new trial, while the Colonist and the Columbian were convinced that Seymour had merely offered the services of Joseph Trutch, the Chief Commissioner of
Lands and Works, as arbitrator. Added to this confusion was yet another round of vitriolic newspaper reports from Victoria, condemning the Governor's actions. Claiming that Governor Seymour's negotiation legitimized the actions of the Canadian "mob," the Colonist predicted an end to the "security of life and property in the country." The Canadians rejected arbitration, insisting that they would "accept nothing less than the law allows them": a new trial. Less lofty were Cornelius Booth's sentiments about Trutch's arbitration. "It appears to me passing strange," he wrote,

"that a case which has already, through the blundering of incompetent, or possibly interested officials, assumed an unpleasant and dangerous magnitude, should be proposed to be submitted to the decision of an individual in whom the Canadian Co. and the miners of Cariboo in general have no more confidence as to his ability to understand and administer British Law or British Justice than they would have in the ability of a dancing dervish to understand and expound the ten commandments."

Seymour then appointed Joseph Needham, Vancouver Island's Supreme Court Judge, as arbitrator. Needham arrived in Richfield in mid-September, prepared to try the Grouse Creek case (as well as other mining appeals) de novo. Noting that every court had the power to suspend its rules if "any technicality arises that might tend to defeat the ends of justice," the Judge began hearing evidence in the Canadian Company v. the Grouse Creek Flume Company on 17 September. After two weeks of testimony, Needham awarded all of the disputed ground to the Flumites. "I cannot be blind to the fact that much public excitement has existed with regard to this case," he told the court,

"But I do hope and believe that all will acquiesce in the decision of this court; I can only say that it has been arrived at after anxious consideration, and a simple desire to administer justice according to
the law. I hope, and firmly believe, that armed alone with the authority of the law, a child may execute this judgment, and that no one will here be found whose wish is not to uphold and obey the judicial tribunals of this country -- tribunals which have always been regarded by Englishmen as the fountain of justice, and the bulwark of freedom.

With this plea for peace, Needham ended one of the most protracted disputes in the colony's short history, and one which was noted as much for the bitterness engendered between Island and mainland, as between the rival mining factions. It also ended Begbie's stormy tenure as mining appeal court judge. After 1867 the "tyrant Judge" heard few mining cases, leaving them to his less controversial colleagues.

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These three cases have been discussed before by David Williams, who called them "causes célébres." They were certainly that, and more. *Aurora, Borealis* and *Grouse Creek* illustrate the difficulty of, in Joseph Needham's words, "administering justice according to the law." The Supreme Court Judge's distinction is an important one. While the Canadians and the Flumites were of one voice as to the ends of the law and the process of dispute resolution, they disagreed on how best to secure justice through the law. This was because of the variety of meanings of the law in a colony as loosely organized as British Columbia. Their various definitions of the law revealed the importance of geography in determining its contours, as well as showing the limits of authority.

Despite their differences, Flumites and Canadians used the same language of laissez-faire capitalism, linking liberty to the security of property, to frame criticisms and to justify their actions. The New Westminster *Columbian* and the
Victoria Colonist contrasted "British Law" with the Canadians' "Mob rule," and predicted an end to "that security of life and property in the country which has ever been our proud boast."

Capital, finding its tenure insecure, will fly to countries where people are made to respect the laws, and where possession of property rests upon a more stable and secure foundation.  

At the same time, the Canadian Company, that "mob" of "footpads" and "filibusters," used the very same language of law and property to predict the same ends if its demands were not met. "There are three things the most despotic governments claim," Cornelius Booth told a crowd of 500 gathered at Fulton's saloon, "namely the right to take property, liberty and life."

The first of these have already been taken from the Canadian Co., and there is but one step to the last. I repeat that these men do not wish to be looked upon as outlaws; they consider they have been unjustly shut out from having a hearing; and would be perfectly satisfied in obtaining one, even if a decision was given against them.  

The crowd agreed, as they had done in the wake of the Borealis v. Watson and the Aurora v. Davis cases, when they informed the colonial government that its laws and Begbie's administration of them were driving "labor, capital and enterprise out of the Colony." To British Columbians on both sides of the Grouse Creek War, as well as the mining disputes that preceded it, just laws and legitimate authority were defined by their positive effect on economic development. Begbie's Chancery Court was viewed with contempt not only because the laws of chancery appeared capricious, but also, and perhaps more importantly, because of the costly delays associated with its proceedings. Jury trials could not guarantee satisfaction either, as Aurora v. Davis showed. Recourse to a jury trial was a poor
alternative to Chancery because verdicts could be set aside by an "arbitrary" judge. The "tyranny" of Begbie's court lay in its unpredictability and inefficiency - - the two enemies of capitalist enterprise.

Just as they used the same language and agreed on the ends that the law served, British Columbians on both sides of the Grouse Creek war recognized the same process of dispute resolution. The ends sought by those who opposed the government's administration were always to be achieved within the existing structures of formal dispute settlement. In *Borealis v. Watson* Caribooites criticized the use of the Court of Chancery to resolve mining appeals because its ponderous proceedings were singularly unsuited to mining activity. But what did the miners propose as a solution? The establishment of a Court of Appeal! Similarly, in *Aurora v. Davis*, arbitration was rejected in favour of trial by jury. And in the Grouse Creek war, the Canadian Company did not ask for public sanction of extralegal action (in fact, it did not consider that it was acting in an illegal manner), but for "nothing less than the law allows us": a full hearing of its case.56 Indeed, as David Williams noted, both Cornelius Booth and John MacLaren visited Begbie in early July 1867 to ask for his intervention -- surely an indication they had not lost faith in the legal options available.57 Even after seven company members were arrested in August, the Canadians still demanded that the "tyrant Judge" or his Island counterpart replace Joseph Trutch as arbitrator.58 Clearly, those who took issue with British Columbia's legal administration did not reject the structures of dispute resolution; rather it was to the official framework of English institutions that they looked for relief. In fact, the
law, as I suggested in the previous chapter, was the social cement holding colonists together.

If Caribooites agreed about the ends of the law and the institutional means of executing the law, they took issue with what the law was and how to achieve justice through that law. British Columbians in other parts of the colony considered that a body of rules applied evenly and predictably insured justice. Reflecting on the Borealis and Aurora cases, the Colonist pointed to Begbie's lack of legal experience as the cause of the trouble. "Unlike Judge Needham," the newspaper reported, Begbie "had no legal experience to recommend him, and it is by no means a matter of surprise that his decisions instead of partaking of that judicial clearness and point which are the universal characteristics of the decisions of English judges, should be generally rambling, disconnected and irrelevant." Nevertheless, both the Sentinel and the Canadians dismissed the Chief Commissioner of Lands and Works, Joseph Trutch, as a suitable adjudicator for the same reasons and called for the intervention of the Supreme Court: "He [Trutch] lacks the legal acumen which is necessary to unravel those knotted points of law that are inseparably involved in the settlement of the dispute in question."

Had either of the judges of the Supreme Court, or even a barrister of good standing, been selected as the arbitrators...no reasonable objection could have been urged against the arrangement; but to entrust the settlement of an important case like the present, which requires the exercise of no small amount of legal skill in the hands of a gentleman who has no pretensions to that knowledge, is simply preposterous....
"Legal acumen" was not necessarily specialized knowledge, however. The valued acumen was a knowledge of community standards and local circumstance: what Caribooites wanted was law that was self-evident.

In the wake of *Aurora* and *Borealis*, Caribooites let it be known that "common sense" was the chief hallmark of just laws and just administration. The *Cariboo Sentinel* published a telling editorial emphasizing just this point by contrasting Peter O'Reilly's (the previous magistrate) conduct with that of his predecessors and his successor, William Cox. Prior to O'Reilly's arrival, the mining court "was virtually, if not nominally, a Court of Conscience."

Then the mining laws consisted of only a few proclamations issued from time to time by the Governor, and the Commissioner supplemented these with his own judgment. Since then extensive mining laws have been passed and partially consolidated. It was not until the administration of Mr. O'Reilly that this Court, by his false pretensions to legal ability, declared itself to be a Court of Equity or Law, or both combined....The policy of Mr. Cox, on the other hand, was quite different: he made no pretensions to legal ability, yet his policy was at once most agreeable to the miners; he converted this Court back once again almost wholly into a Court of Conscience, and presided in it with no little success.

Cox's success, the *Sentinel* concluded, was due to the fact he was guided by "common sense rather than a smattering of law."61

As the *Sentinel's* editorial revealed, common sense was an important yardstick of the law's legitimacy. Sociologists argue that common sense occupies an important place in human interaction.62 The strength and influence of common sense lies in its "taken-for-granted" nature. Common sense is common knowledge; it is a body of truths that does not need explanation (and probably cannot be explained) for it is instantly recognized as self-evident.63 According to
sociologist Siegwart Lindenberg, common sense is a "general baseline for human interaction." It is a frame of reference against which humans gauge events and understand the world as well as a "court of appeal." "Common sense," argue van Holthoon and Olson, "provided the basis of appeal...to criticize and overthrow a more specialized and restrictive world view." By appealing to a body of self-evident truths, critics attempt to show that the status quo is unnatural and illogical. But the concept could just as easily be used to buttress the existing order of things. Just as often, notes philosopher Herman Parret, "'Use your common sense', 'Behave commonsensically' -- these mean 'Be conventional', 'Be conservative.'...It is used to stop argument, fantasy and originality, and it is often a deus ex machina, a rhetorical device to express power." Given the ambiguous nature of common sense, literary critics argue that it is a powerful rhetorical device, "part of 'the formal language of ideological dispute.'"

Although common sense implied a commonality of experience that cut across political, social and economic divisions -- indeed, this is part of its strength -- it was rooted in a cultural and social matrix particular to a time and place. Concepts of common sense were tied to particular locales; they were, as anthropologist Clifford Geertz contended, part of "local knowledge." As such, "the law...is not a bounded set of norms, rules, principles and values...but part of a distinctive manner of imagining the real." Thus, when Caribooites appealed to common sense in criticizing the colonial legal administration, their meaning was clear only within their frame of reference. They wanted the law to be self-evident; however, what was common knowledge varied from place to place.
Common sense dictated what was just, but because it was bounded by space and by local experience with the law, the concept had different meanings for different people. British Columbia's great distances, thin population and poor systems of communication accentuated the localism of the colony's mining population. The mainland lacked an internal coherence that would have narrowed the variations in common sense. Its communities were uncoupled from each other, as well as the administrative centres of New Westminster and Victoria. In such a geographical context a variety of concepts of law proliferated; the historian's task is to recreate that milieu so that others can appreciate it as "commonsensical."

The *Cariboo Sentinel*’s opposition of common sense and conscience on one hand, and law and equity on the other is important. A Court of Equity was another name for a Court of Chancery; not the miners’ favourite legal institution as *Borealis* showed. Initially, cases tried by equity courts had been resolved by applying the "standards of what seems naturally just or right, as contrasted with the application...of a rule of law, which might not provide for such circumstances or provide for what seems unreasonable." By the early nineteenth century, however, the principles of equity had become a body of settled law rather than a personal and arbitrary assessment of fairness. Ironically, though equitable jurisdiction evolved as a corrective to the inflexibility of the law, the Court of Chancery acquired a reputation as a morass of legal complexity and delay into which unwitting suitors could fall and never gain a settlement. When British Columbians' equated Peter O'Reilly's tenure as Magistrate and Assistant Gold Commissioner with a "Court of Equity or Law," and contrasted it with Cox's
"common sense," they revealed that they considered the two kinds of knowledge to be antithetical. The complexities of equity and statute law were far from self-evident truths; in fact, they were "pretensions" that caused unnecessary delays and thwarted justice. Cox's common sense cut through all this. He circumvented legal technicalities by letting "conscience" guide his decisions. In the eyes of British Columbians, Cox's "court of conscience" was the sure route to justice. Yet courts of conscience were, in legal parlance, merely another name for courts of equity or chancery! Why was Cox's "conscience" -- his ability to apply "standards of what seems naturally just or right" -- superior to Begbie's? Why, in short, was the magistrate's common sense superior to that of the Supreme Court Judge?

Caribooites recognized the magistrate's decisions and actions as expressions of common sense because he was part of their community. Common sense was bounded by locale and rooted in specific constellations of social relations. Keith Wrightson shows that magistrates, constables and jurymen were caught between "different kinds of order" in which the execution of the law had to be balanced against the more tangible pressures of familiarity in the face-to-face communities of seventeenth century England. Nineteenth-century British Columbia demonstrates the same pattern. Because the colony's magistrates were a part of the communities they administered, they quickly became enmeshed in the politics of familiarity, a situation that both aided and limited their ability to execute the law. William Cox's knowledge of miners and mining won him the admiration and support of 490 of his neighbours, who petitioned against his
removal in 1866. "From the very long acquaintance we have had with Mr. Cox, and the intimate knowledge he has acquired of mining in Cariboo, we consider him much better qualified for the office than any other gentleman in this Colony;" they wrote. "Mr. Cox's conduct...has been such as to inspire the public with the utmost confidence in his integrity,...while his judicial decisions have had the effect of checking litigation." These judicial decisions were often unconventional: on one occasion the magistrate settled a mining court claim by making the opposing parties race from the steps of the Richfield Court House to the disputed ground - winner take all. On another occasion Cox swore in Chinese witnesses by decapitating a chicken instead of administering the usual and less spectacular oath.

Cox's "intimate knowledge" consisted of a proper understanding of community morals, and it was this empathy that underlay justice in the Cariboo. Community sentiment about what was right and wrong made it impossible to keep the Canadian Company under lock and key. Henry Maynard Ball, whose misfortune it was to preside over the Grouse Creek dispute, failed because "he had but little experience in the mining districts." Familiarity also limited the ineffectiveness of enforcement. For the most part, policing was done by special constables, sworn in from the local population as the need arose. In the Grouse Creek case the special constables, who as men of capital and business presumably stood to lose from the unrest, were of no use in ejecting their neighbours; nor could the district's jailer incarcerate the Canadians. "The public feeling was rather in favour of the Canadians," complained Frederick Seymour, "At
all events no one would come forward to assist the Government in an emergency."

Despite the constraints of familiarity on the execution of the law, British Columbians would have it no other way. The interventions of outsiders in their affairs were considered despotic, even when that intervention was done by a figure as magisterial as a Supreme Court judge. In this context, juries became an important bridge between law and justice. "[T]his community," reported the Richfield Grand Jury,

owing to its isolated position, the peculiarity of its interests, and especially its national origin, has a decided preference for local trial by jury, and is extremely jealous of all verdicts by its peers....

The *Cariboo Sentinel* was even more direct, asserting that "a man is wrong when almost every person in the community thinks and says he is wrong." When Begbie overturned the jury verdict in *Aurora v. Davis*, he not only breached what Caribooites perceived to be established practice, he also burned the only bridge between the law as a set of overarching rules and as a set of social and locally constructed norms. The Judge's cavalier treatment of the jury in this and other cases led many colonists to conclude that Begbie did not consider them qualified to pass judgement on their peers. What these British Columbians objected to was not so much Begbie's lack of technical legal knowledge, but the fact that he was not guided by the same self-evident truths as they were. He could not have been. The Supreme Court Judge was outside their community: he resided in Victoria, visiting the colony's far-flung communities only once a year. His circuits were metaphors for his status as an outsider. Begbie's actions and decisions appeared
arbitrary, particularly in a colony that lacked the social organization that would support the arbitrariness of paternal authority. Because his decisions were not necessarily commonsensical and because of the important role the law played in establishing some cohesion in the colony, Begbie's actions and decisions not only threatened the colonists' economic security, but eroded one of the few bonds tying them together.

Caribooites also considered the Grouse Creek Flume Company an outsider. Not only were the Flumites based in Victoria, headed by one of that city's largest merchants, but they also represented "big capital" in a region where small, independent entrepreneurs were the norm. The Canadians styled themselves a "company," but their Victoria opponents were the real thing. The Grouse Creek Flume Company was a joint stock venture, capitalized to the tune of $50,000. The Flumites were harbingers of a different kind of resource entrepreneur in British Columbia. By the late 1860s, most of the easily accessible surface gold in the Cariboo was gone. Continued success on the upper country creeks depended on a hydraulic process which required a substantial capital investment to construct the necessary flumes. Such an investment was beyond the means of most independent miners. Part of the support for the Canadians and the wrath directed at Begbie likely stemmed from an antipathy toward this form of large corporate enterprise that would eventually dominate resource exploitation and push out the smaller upper country operations.
Conflicting concepts of law were central to the controversies surrounding the administration of British Columbia's mining laws in the colonial period. While recent writing in Canadian legal history has cast a critical eye on the law, revealing its normative nature, few studies deal with the variety of meanings the law could take on. As I have discussed, despite its detached nature, the law gained much of its meaning through the very local experiences people had with it. Foremost in placing meaning at the centre of analysis is the work of anthropologist Clifford Geertz. Eschewing materialistic and generalized explanations for behaviour, Geertz concerned himself with recovering meaning "from the native's point-of-view." A Geertzian perspective on theft, for instance, would involve contextualizing the act in a local frame of reference to understand what the act meant for the people involved, rather than linking it to more generalized phenomena like war and dearth. Whereas materialist explanations like the latter implicitly accept theft as an objective fact to be counted and cross-tabulated with socioeconomic data, Geertzian analysis, or "thick description," treats "theft," "thief" and "victim" as "essentially contestable" categorizations and seeks to ground them in local circumstance.

Both cultural historian of France Natalie Davis and English historian E.P. Thompson take this anthropological perspective in their work on the charivari and rioting. Emphasizing the ritualistic aspect of violence, they root concepts of legality in community norms, and see the violation of these norms as motivation for violent action. For both these scholars, meaning is at the crux of understanding behaviour. Many of those who dealt with formal law took the same
approach. Focusing on local frames of reference, some English historians of the law explored the social context of crime. For them, legal categories were rife with significance. Forest gleaning and pilfering in the putting-out industries, for instance, activities long sanctioned by custom, became criminalized as poaching and embezzlement. The criminalization and prosecution of behaviour like this was interpreted as evidence of the growing centrality of private property in the politics and social relations of eighteenth century England.

The Grouse Creek War and the events leading to it demonstrate the importance of geography in creating "local frames of awareness" that shape social meaning. The law Caribooites wanted had to be self-evident; it had to be commonsensical. Because common sense was local knowledge, however, its meaning was spatially limited. This localism was accentuated by the colony's geography which effectively precluded the integration of the archipelago of small settlements that was British Columbia. Geographers and sociologists have recognized that space is deeply implicated in social life. Because human relations and the extension of authority are spatially, as well as socially, constructed, understanding what the law means involves more than contextualizing behaviour in time. Distant places like the Cariboo were uncoupled from New Westminster and Victoria, the colony's centres of authority. In this spatial context, law and authority were rooted in specific and local constellations of social relations. For Caribooites, the law was more a collection of community norms than a set of hard-and-fast rules. Face-to-face relations, the politics of the personal and personality loomed large in determining authority. Being recognized
as an authority conveyed more power in these localized settings than being in authority by virtue of some extra-community sanction.  

Although I have put local knowledge at the crux of understanding behaviour, local frames of reference were not the only ones that influenced the meaning of law. On Grouse Creek, common sense may have gone a long way to shape what the law meant to British Columbians, but clearly the larger framework provided by the structure, institutions and traditions of the common law itself also played an important role. Magistrate William Cox’s decisions may have been commonsensical, but he and those who came before him still operated within a set of rules and procedures that at least nominally constrained action and provided a standard for measuring legality. As I discussed, British Columbians on both sides of the Grouse Creek War and the disputes that led to it never challenged the authority of the law and its institutions; instead, they took issue with their administration and looked to the existing forms of law for redress. Perhaps more important in shaping the social meaning of the law than its forms were its traditions and the expectations they created. The "rule of law" promised freedom from the dictates of arbitrary sovereigns for all, no matter their condition. The idea of the rule of law became intimately tied to the security of life and property, and became the keystone of English liberty. For British colonists, the law was an important source of unity, particularly in the years immediately following settlement. Though differences brought them before a magistrate, the British Columbians who resorted to the law were tied together in a common adversarial process that imposed a degree of structure, organization and
predictability on social relationships in a colony where such characteristics were rare commodities. More broadly, for both those directly involved in litigation and those who perhaps afterwards discussed and criticized its administration, the law was a link to and a symbol of a common, storied and secure past that stood in marked contrast to the new and alien environment they found themselves in. The common law conferred citizenship to colonists whose sense of place had been eroded by the experience of migration. Much of the social meaning of the law, then, was provided by the forms and traditions of the law itself -- forms and traditions which had their genesis outside the locale that has been the focus of my analysis.

Although they were physically distant from the main centres of population, as well as from the rest of British North America, Cariboolites were tied to another frame of reference through extensive webs of credit: the wider world of commercial capitalism. So dominant was economic activity in the collective experience of the colony that the language of laissez-faire infused British Columbians' discussions of the law and provided the standard with which they measured political authority. Begbie's actions and decisions provoked the reactions they did because they were the antithesis of what commercial capitalist enterprise demanded and defined as the criteria for legitimate action: efficiency, predictability and standardization.

Though British Columbians on both sides of the mining disputes demanded these characteristics of the law and conceived of it as an instrument of economic development, there was room for a diversity of opinion because of the spatial
context in which the law was administered. Divergent concepts of law became apparent only when the localism of the colony was penetrated by the annual circuits of British Columbia's Supreme Court. Begbie and the Supreme Court represented a different level of law and a different level of social interaction. To Caribooites, the Supreme Court Judge was an outsider; his reasoning and decisions were not self-evident because he operated in a world outside the community of local interaction. To be effective, Begbie and his fellow magistrates had to balance the demands of colonial administration with local sentiment. With these conflicting demands, "administering justice according to the law" was a difficult, and sometimes impossible, task. This was Gaggin's "delicate game," and it was one that would be played over and over again amid the western mountains.

2. On "levels of law" see Leopold Pospisil, *Anthropology of Law: A Comparative Theory* (New York, 1971), 99ff; as well, see Keith Wrightson, ""Two Concepts of Order: justices, constables, and jurymen in seventeenth-century England." In John Brewer and John Styles, eds., *An Ungovernable People: the English and their Law in the Seventeenth and Eighteenth Centuries* (London, 1980). Pospisil contended that anthropologists tended to "dissociate law from the structure of society," [99] and that, in fact, there were as many different kinds of law as there were "subgroups" in society. Because an individual belonged to several subgroups simultaneously (i.e. family, kin group, community, religious sect, etc.) he was subject to many different kinds, or "levels" of law, each of which affected him differentially depending on his degree of integration ("inclusiveness") in each subgroup. The job of the anthropologist, Pospisil argued, was to sort out the different levels of law an individual was enmeshed in and understand how each of these levels related to each other and the individual in a matrix of regulation.

3. Gaggin to the Colonial Secretary, Douglas, B.C., 2 July 1862. British Columbia Archives and Records Services (hereafter BCARS), Colonial Correspondence, GR 1372, reel B-1330, file 621/14. For more on this episode and Gaggin see Dorothy Blakey Smith, "'Poor Gaggin': Irish Misfit in the Colonial Service" *BC Studies* 32(1976-7):41-63.


5. Cited in Smith, "'Poor Gaggin',' 45.

6. Ibid., 47.


12. Rules and Regulations for the Working of Gold Mines under the "Gold Fields Act, 1859" [7 September 1859]; Rules and Regulations for the working of Gold Mines, issued in conformity with the "Gold Fields Act, 1859" (Bench Diggings) [6 January 1860]; Rules and Regulations under the "Gold Fields Act, 1859" (Ditches) [29 September 1862]; Further Rules and Regulations under the "Gold Fields Act, 1859" [24 February 1863]; Proclamation amending the "Gold Fields Act, 1859" [25 March 1863]; The Mining District Act, 1863 [27 May 1863]; The Mining Drains Act, 1864 [1 February 1864]; An Ordinance to extend and improve the Laws relating to Gold Mining [26 February 1864] and An Ordinance to amend and consolidate the Gold Mining Laws [28 March 1865]; An Ordinance to amend the Laws relating to Gold Mining, 2 April 1867.


14. Ibid.

15. A Court of Chancery is a court that has jurisdiction in equity; that is, it resolves disputes according the rules and procedures of equity rather than the rules and procedures of common law. Though the principles of equity initially reflected the chancellor’s own arbitrary and sometimes idiosyncratic ideas of justice, (the Tudor Court of Star Chamber was the repository and dispensary of equity, for instance) over the seventeenth, eighteenth and early-nineteenth centuries the principles of equity evolved into a more settled body of rules. Chancery never lost its negative reputation for arbitrary, protracted and unnecessarily complex proceedings, however (see Charles Dickens' Bleak House (1859), for instance).


19. Ibid.


21. Ibid.

23. Ibid.


26. An Ordinance to amend the Laws relating to Gold Mining [2 April 1867].


30. "Magistrate's Court," *Cariboo Sentinel* 3 June 1867. Spalding heard case on 22 April 1867, and the order ejecting the Canadian Company was issued on 24 April.

31. Ibid.

32. "Trespassing on Grouse Creek Bed Rock Flume Co.'s Ground." *Cariboo Sentinel* 3 June 1867.


34. Letter to the Editor from C. Booth, dated 13 July 1867. *Cariboo Sentinel* 15 July 1867.


37. Seymour to Buckingham and Chandos, New Westminster, 16 August 1867. CO 60/28. NAC. MG 11, reel B-97, 333.

38. Ibid.


42. Anonymous letter to the Editor, dated Williams Creek, 21 August 1867, *British Colonist* 2 September 1867.


44. Anonymous letter to the Editor, dated Williams Creek, 21 August 1867, *British Colonist* 2 September 1867.


47. Resolution passed by the Canadian Company, at Booth's Saloon, Grouse Creek, 30 August 1867. Reprinted in "Grouse Creek Dispute Again," *Cariboo Sentinel* 2 September 1867.

48. Letter to the Editor from Cornelius Booth, dated Grouse Creek, 31 August 1867. *Cariboo Sentinel* 2 September 1867.

49. *Cariboo Sentinel* 16 September 1867.


52. Williams, "...The Man for a New Country", 68.


56. Emphasis added. Resolution passed at a meeting of the members of the Canadian Mining Company, convened at Booth's Saloon, Grouse Creek, on the
evening of the 30th August 1867. "Grouse Creek Dispute Again." Cariboo Sentinel 2 September 1867.

57. Williams, "...The Man for a New Country", 76.

58. Letter to the Editor from Cornelius Booth, dated 31 August 1867, Cariboo Sentinel 2 September 1867.


60. "The Grouse Creek Dispute Again." Cariboo Sentinel 2 September 1867.


63. van Holthoon and Olson, "Introduction," 3-4.

64. Lindenberg, "Common Sense and Social Structure," 202-203.

65. Ibid.; "court of appeal" from van Holthoon and Olson, "Introduction," 3.

66. van Holthoon and Olson, "Introduction," 3.


68. van Holthoon and Olson, eds., "Introduction," 8.


70. Ibid., 173.

71. Anthony Giddens discusses the influence of space on the integration of societies. The key to integration is the extension or the "stretching" of experience over time and space (something he calls "time-space distanciation"). When people do not share common understandings of time and space the communities they live in become "uncoupled" from each other and from the central administrative state, thus posing problems for the exercise of power (i.e. the regulation of


73. Ibid., "Chancery," 204.

74. On courts of chancery and conscience, David Walker notes "The Court of Chancery was sometimes referred to as a court of conscience because its jurisdiction was originally founded on relief granted by the Chancellor, as Keeper of the King's Conscience, in circumstances where equity and justice demanded it." See his Oxford Companion to the Law, 272.


76. Petition dated Williams Creek, B.C., 3 November 1866. Colonial Correspondence. BCARS. GR 1372, reel B-1355, f 1352.

77. Both examples from Margaret Ormsby, British Columbia: a History (Toronto, 1958), 181.

78. Seymour to Buckingham and Chandos, New Westminster, 12 May 1868. CO 60/32. NAC. MG 11, reel B-100, 368.

79. Seymour to Buckingham and Chandos, Victoria, 4 September 1867. CO 60/29. NAC. MG 11, reel B-97, 5.

80. "From Cariboo." British Colonist 4 July 1866.


82. Selim Franklin was the president of the Grouse Creek Flume Company and noneother than J.P. Cranford was its treasurer.

84. "Thick Description: Toward and Interpretive Theory of Culture," in Clifford Geertz, *The Interpretation of Cultures* (New York, 1974), Chapter One. For a good overview and criticism which I have drawn from, see Aletta Biersack, "Local Knowledge, Local History: Geertz and Beyond," in Lynn Hunt, ed., *The New Cultural History* (Berkeley, 1989), Chapter Three.


91. According to geographers Jennifer Wolch and Michael Dear, space impinges on social practices in three generalized ways: first, social relations are *constituted* through space; they are *constrained* by space; and they are *mediated* by space. For instance, to understand law and authority we must look at how geography influences the construction of legal institutions (the constitutive role of space);
how distance hinders or facilitates the imposition and articulation of law and legal institutions (the constraining role of space); and finally how space facilitates the construction of the social meanings of the law (the mediating role of space). See Michael Dear and Jennifer Wolch, "How Territory Shapes Social Life," in Wolch and Dear, eds., *The Power of Geography: How Territory Shapes Social Life* (Boston, 1989), 9.


CHAPTER FIVE
CRANFORD VERSUS WRIGHT:
LAW AND AUTHORITY IN BRITISH COLUMBIA

In British Columbia, law and the colonial economy were intimately associated, and standards from the marketplace -- predictability, efficiency and standardization -- provided the measure of legitimacy. On Grouse Creek these standards were encompassed by the concept of common sense. As a body of self-evident truths the law's predictability was axiomatic. Laws based on common sense were also efficient because applying them to the resolution of disputes short-circuited the complexities of statute law and the convolutions of equity, as well as guaranteeing satisfaction. Who could argue with decisions based on self-evident truths? And, of course, common sense was standardized because it was common knowledge. But despite the transcendence implied by its name, common sense was rooted in a particular social, cultural and geographic milieu that made it impossible to achieve the sort of consensus that would allow common sense to be a workable standard against which to measure the rule of law.

_Cranford v. Wright_ (1862) demonstrated how British Columbians' demands for the rule of predictable, efficient and standardized law were met by applying quite a different set of criteria to measure the law and those who administered it. In _Cranford_, British Columbians rejected the paternal discretion of Supreme Court Judge Matthew Baillie Begbie. But instead of common sense, they rooted legitimate authority in legal texts and the experts who could interpret them. Both Begbie's paternalism and common sense were unworkable as means of civil
dispute resolution. Civil cases like *Cranford* were lengthy ordeals which generated masses of undifferentiated, and sometimes complex, information. To make sense of it all, and to come to a decision, jurors had to rely heavily on precedent and rules of law to guide them. The authority of experts like lawyers who could, through their specialized knowledge, impose some kind of order on the information generated in a trial was crucial in resolving civil disputes. The interpolation of experts into the legal process was emblematic of the overwhelming influence of commercial capitalism on law and authority in nineteenth-century British Columbia.

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The case of *Cranford v. Wright*, which John Robson called "most lengthy and, to the mercantile community of this and the adjoining Colony, most important trial," began on Thursday, December 4, 1862 before a densely crowded court room, with David Babington Ring and John Foster McCreight representing the plaintiffs -- John and Robert Cranford, Jr. -- and George Hunter Cary, Attorney General of British Columbia, and H.P. Walker representing the defendant, Gustavus Blinn Wright.¹ This action was a counter-suit for $25,000 damages for delays and goods valued at $10,000 that Robert Cranford had contracted Wright, a packer, to transport from Douglas to Lillooet. The original suit, launched by Wright against the Cranfords, was heard in Lillooet before Begbie at *nisi prius* proceedings in October 1862.²

Hoping to profit from the demand for goods in the Cariboo mining district, Robert Cranford arrived in Victoria in April 1862 with a consignment of goods
from San Francisco which he arranged to be transported from New Westminster to Lillooet by G.B. Wright & Company. In a contract signed on April 25, Wright agreed to pack the goods for nine cents per pound, payable sixty days after the arrival of the merchandise at Lillooet, and assured his customer that the goods would reach their destination in seven to ten days. Robert Cranford then proceeded to Lillooet, where he contracted another packer to take his goods to Williams Creek, farther up the Fraser River. Then he waited. And waited. Two weeks later, the second packing company released Cranford from the agreement they had struck, informing him that it could wait no longer. Not until May 28—thirty-three days after the signing of the contract with Wright—did the first of Cranford’s goods arrive at Lillooet. The merchandise continued to trickle in over the summer, a third of it delayed some sixty to seventy-five days and none of it arriving in less than thirty-three days. Once it arrived at Lillooet, nearly half of Cranford’s consignment could not be forwarded to Williams Creek because of the lateness of the season. The portion that did make it to the upper country could not be sold at the high prices that Cranford had hoped for in April. During the delay in shipping the goods to Lillooet, other enterprising merchants had established themselves in the Williams Creek area, and had glutted the market.

None of this was of concern to Wright, however, who launched a suit against Robert Cranford and his elder brother John, in August, for non-payment of “goods sold and delivered.” Claiming a debt of £1719, Wright convinced the County Court Judge at Lillooet, A.C. Elliott, to issue a writ of capias on September 8 for the arrest of both Cranfords. Robert Cranford was arrested at Lillooet on
the same day, and imprisoned for eighty-four days. His brother, John, also a Cariboo merchant, was arrested at Williams Creek three weeks later, on September 27, brought to Lillooet, and imprisoned for sixty-six days. Their case was heard before Matthew Baillie Begbie on October 15 and 16, and despite their efforts to show that John Cranford was not a partner, and therefore not indebted, and that Robert Cranford, by virtue of his contract with Wright which stipulated that payment was not due until sixty days after delivery, also was not indebted, the case proceeded.

When Wright produced the April 25 contract in the Lillooet court room both Cranfords "pronounced it altered."

that the words "& Brother" had been interpolated, and that the "&" had been crowded in at the end of the first line, the word "brother" written across the margin opposite the second line, that the "t" had been inserted before "him" to make it read "them" and that the alterations had been made in darker ink.

Even Begbie agreed that the document had been tampered with, noting that "the dot which had been over the "i" in "him" was still there to show what the word once was." Nevertheless, the judge "went on to make apologies for Mr. Wright, saying that it was a private memorandum of Mr. Wright's and that he had a right to do what he liked with it." Wright, without prompting from the bench or the defence counsel, admitted "that he had made the alteration of the same day on which it was written." To this Begbie again interjected that "it was rather in Wright's favor than against him that he should so boldly show this altered agreement." "In this way," editorialized John Robson of the New Westminster-
based *British Columbian*, "Judge Begbie relieved Wright's Counsel of his duties, and drew a veil over the ugliness of Wright's guilt.

In this way Judge Begbie would not see, and did his best to prevent the Jury from seeing, that Wright had virtually committed the CRIME OF FORGERY against J.P. Cranford. How could the memorandum of agreement be a private one with which he had a right to do as he chose, and then bring it forward in a Court to prove an Account!

Despite the sensation caused by this evidence, however, the jury ruled that John Cranford was liable as a partner and that the sixty day stipulation in the contract signed by Robert Cranford and G.B. Wright had been rescinded. They therefore awarded Wright $9500, a sum which included court costs of almost $1000. Robson attributed this decision to Begbie's failure to charge the jury properly. "If he had done so, fairly, no honest Jury could have decided as they did." "In sober truth," he concluded, "Judge Begbie ignored a large part of the evidence...."

From their jail cells, the Cranfords were unsuccessful in their attempts to get a new trial, and were only released when they launched the countersuit against Wright which was heard at the December sitting of the Supreme Court before Begbie. Claiming damages of $25,000, the Cranfords used the same line of defence as they had in the earlier suit. As well as arguing that John Cranford was not a partner and that Wright had breached his contract with Robert Cranford, the counsel for the plaintiffs also claimed that Wright had appropriated Cranford's goods, "having caused the brand and mark of the plaintiff to be obliterated, and his own substituted, at a time, too, when the market was high."

At this point, Begbie interrupted the Cranfords' lawyer, McCreight, saying that he "could not allow imputations of such a nature to be cast upon the defendant, and
insisted that they were disgraceful and must recoil upon the head of the person advancing them." McCreight refused to withdraw his remarks, and Begbie requested that David Babington Ring, the plaintiffs' other lawyer, take over. Ring refused, and the Judge subsided until the contract between Robert Cranford and Wright as well as invoices between the two were produced as evidence. Though the contract was admitted, the invoices, addressed to "R. Cranford, Jr.," which were brought forward to show that the contract had been altered to read "R. Cranford & Brother," were not. Begbie's refusal to admit the invoices "produced a hot discussion between the judge and plaintiffs' counsel, and a reference by the latter to Taylor on Evidence. "The title of this book," according to the Colonist, "will never be forgotten by those present at the trial. Taylor was invoked nearly every hour of the day." Relations between the bench and the Cranfords' counsel were not improved on the last day of the trial (December 17), when Robert Cranford attempted to shake Wright's credibility by telling the jury that the affidavit with which Wright obtained the capias (in Wright v. Cranford) was false. Wright swore that the Cranfords owed him £1719 15s. for "goods sold and delivered." This, according to the Cranfords, was not strictly true: the Cranfords, if they owed Wright any money at all, owed it for freight charges. Here Begbie again interjected:

Oh, Mr. Cranford! I have seen sheaves of affidavits made in this country by persons who never read them. No doubt Mr. Wright did not read that before he swore to it, so that it would be unfair to impute a false oath to him.

Amidst the "confusion" which followed, proceedings were adjourned, and at Begbie's suggestion, all retired to the races. At 6:30 PM the court met, counsel
gave their closing statements and Begbie charged the jury, telling them first that "they must consider that the defendants [sic, plaintiffs] (the Cranfords) were strangers, while on the other hand, Mr. Wright was well known to them;" and second, that they had three points to decide: first, whether the contract between the Cranford and Wright was rescinded, as the defendant claimed, or was still binding. Secondly, if the contract was not rescinded, then the jury was to ascertain what a reasonable time for delivery of the goods to Lillooet was. Thirdly, they were to ascertain the value of the goods when they should have arrived and their value when they did arrive, the difference being equivalent to the damages incurred by the Cranfords. Before the jury retired, Ring asked that they be given a "bill of particulars," outlining the plaintiff's claim to aid them in their decision. To this Begbie reluctantly agreed.

Late the next day, some twenty-six hours after they had been locked up, the jury were recalled, having failed to come to a decision. Begbie refused to accept a majority verdict as he had in an earlier case in the same nisi prius session. Ring then asked when the jury had been given the bill of particulars. Begbie was "considerably disconcerted at this enquiry," and the Court Registrar, Greville Matthew, sported "an unusual flow of blood to his features." The foreman, "after considerable shuffling," told the court that the document in question had not been given to the jury until "Three o'clock this afternoon!" Thus it appeared that a document essential to enable the Jury intelligently to come to a decision had only reached them after they had been locked up for twenty-five hours, and three hours before they had been called before the Court!
Though William Grieve, the foreman, said that considerable progress had been made after they received the bill of particulars, and that a decision could be reached if the jury were allowed to retire again, another juryman disagreed, and asked to be discharged. Both counsel for the plaintiffs asked Begbie to offer advice or assistance to the jury so "that justice be not defeated," but Begbie refused, and discharged the jury. "Upon this Mr. Ring, addressing the Registrar, said:"

'Mr. Matthew, have you the book in Court which contains the names of the Barristers who practice in this Court?'

Mr. Matthew: 'Yes'

Mr. Ring: 'Then please dash your pen across my name.'

McCreight made a similar request, and "both gentlemen indignantly withdrew. Cheers were given and the Court adjourned amidst great confusion and excitement."16

The Cranfords were rearrested and sent to prison, but released when they again made application for another trial -this time in the adjoining colony, on the grounds that their contract had been made in Victoria with a Victoria-based firm. David Cameron never heard the case, however, as it was finally settled out of court in April 1863.17 Ring and McCreight's dramatic withdrawal created a great sensation in New Westminster, and a "meeting to mark public disapprobation of the extraordinary course pursued by the Judge throughout the trial" was held immediately.18 "Loud applause" greeted the arrival of the two principals in the Columbia Theatre, where both were complimented for the "firm and manly ability with which...[they] repelled the insults heaped upon them by the Court during the Cranford suit." William Grieve, the foreman of the jury, was called upon to address the meeting and "in a very able and lucid manner went over a large
amount of facts and figures bearing upon that extraordinary trial, and showing most conclusively that the Jury had sufficient data before them to entitle the Plaintiffs to a verdict." The meeting soon adjourned, but discussion continued in the pages of Robson's newspaper.

What is striking about the Cranford case is the intensity of feeling and the interest that accompanied what was, on the surface, a routine suit for debt. If the attention given to the trial by the British Columbian is any indication, all of New Westminster's 1190 inhabitants were riveted by the proceedings. The Cranfords themselves contributed to a good portion of the discussion. "We desire, through your columns, to present a plain statement of facts for the consideration of the authorities and the people of British Columbia," they wrote to John Robson, the newspaper's editor. With his help they produced a lengthy three part series entitled "A History of the Wrongs of the Cranfords including an Account of the Two Celebrated Suits -- Wright vs Cranford and Cranford vs Wright." The articles related the circumstances leading to the trials themselves and reprinted some of the documents submitted as evidence in the two cases. In addition, the newspaper published nine editorials and four letters to the editor, representing the views of all twelve jurors, in the weeks preceding and following the December trial. Interest was equally keen across the water in Victoria. The British Colonist followed the trial closely, reprinting daily testimony as well as offering editorial comment on the case. The interest generated by the Cranford case stands in marked contrast to the relative lack of discussion given to assize criminal trials, even those for murder.
The Cranford case is important on two levels for understanding the relationship between law and authority. First, its significance derived from the legal points at issue. Cranford was a case that involved the law of contract and imprisonment for debt. The arguments surrounding these substantive legal issues sheds light on the role the law played in mediating social relations, which bears directly on the question of authority. Rather than reinforce a paternalistic and organic social order by accentuating the discretionary power of the judge and reinforcing the mutuality of social relations, in British Columbia the law upheld the wills and desires of individuals in accordance with laissez-faire thinking.

Second, Cranford is important for what it reveals about the nature of civil litigation in the nineteenth century. The length of the trial, the nature of the testimony and jury deliberation, as well as the court room dynamics between judge and lawyers made Cranford a notable but not, I would argue, an exceptional civil case. Civil trials placed heavy demands on the decision-making abilities of judge and jury, and this had implications not only for the shape of the trial, but also for the standard against which the legitimacy of the law was measured.

In both the original suit brought by Gus Wright against the Cranfords and in the subsequent countersuit, the contract between the two disputing parties was the central point at issue. Cranford occurred at the height of what legal historian Patrick Atiyah calls the "age of freedom of contract." From 1770 to 1870 the law of obligations, which contract law is a part of, reflected and reinforced the central tenets of laissez-faire. Contract law treated individuals as equal and independent agents whose obligations were limited by and coextensive with the
intentional, voluntary and private arrangements they made with each other. Individuals could only be held responsible for meeting obligations they intended to enter into and that were specified in a contract. The role of law in the age of freedom of contract was to enforce these private agreements between individuals. Using the law in this way was not considered paternal intervention by the state, but rather simply as an extension of individual will. The law had almost nothing to say about the content of the contracts; that is, whether they were reasonable or just. Such questions were best left to the judgement of the individuals involved or, at best, lay in the realm of politics. Instead, those who framed and enforced the law operated under the assumption that the greatest happiness and prosperity, as well as the greatest justice, resulted from allowing individuals to "realize their own wills."

Matthew Baillie Begbie had a different interpretation of the law of contract and the nature of obligation which got him into trouble during the Cranford case. Although the Cranfords insisted repeatedly that Robert "was the only person connected in the business," Begbie, during the Lillooet trial, "ingeniously helped the plaintiff's [Wright's] case by laying great stress in his charge on the fact that after J.P. Cranford had been employed by R. Cranford, Jr., he had manifested great zeal and energy in conducting the business, and had given the impression...that he might be a partner.

Judge Begbie ruled that J.P. Cranford might, in this way, unconsciously have made himself a co-contractee with R. Cranford, Jr., and so instructed the jury."
According to the newspaper, J.P.'s "zeal and energy" did not make him liable as a partner, and it was ridiculous to punish him for his industry.

Begbie's understanding of contract stemmed from an older and by the 1860s, when Cranford came before his court, anachronistic understanding of obligation that was rooted in paternalism and a particular understanding of society. To the Supreme Court Judge, obligation was not limited by a legal instrument like a written contract. Instead, responsibility was coextensive with the moral obligation incurred by behaviour and social status. J.P. Cranford acted like a zealous merchant and partner and so took on, regardless of his intent, the responsibilities of a businessman. This included paying his bills. Begbie's idea that obligations extended beyond the particular desires and intents of the people involved was rooted in an organic view of society. In such a society, the bonds of obligation were horizontal and vertical and extended between and among all individuals regardless of their power and status. The mutuality among the various parts meant that individual actions had consequences for all, and that for the well-being of the social whole, the power and actions of some had to be curtailed. The role of the law was to protect and reinforce this mutuality and, in doing so, to promote the general welfare. In this way, the rule of law and the moral economy fit hand-in-glove to uphold a system of paternal authority.

In the age of freedom of contract and laissez-faire, the mutuality that characterized social relations in the previous century was gone. In the absence of an organic understanding of society, obligation only existed between equal, independent and freely-contracting people. Individual action had consequences
only for those directly involved. Because of this, individual responsibility was limited, and the role of the law was correspondingly circumscribed to encompass only the enforcement of the faithful performance of specific obligations. The rule of law was the perfect complement to the market economy. As in societies characterized by a moral economy of mutual obligation, nineteenth-century law promoted the general welfare, but it did so by favouring individual initiative. The rule of law promised to guarantee a level of predictability and standardization in behaviour, and in so doing, limited the uncertainty and risk inherent in economic pursuits. By making the options open to individuals clear, the law provided a level playing field for each to pursue his economic ambitions with the greatest chance of success.

If the general welfare was tied to the faithful performance of economic transactions, it was also guaranteed by liberal laws pertaining to imprisonment for debt. The extension of credit that was characteristic of commercial capitalist economies led to changes in attitudes toward debt. As it became more common, indebtedness shed some of its association with moral failure, and was viewed instead as a consequence of respectable economic activity. In this context, imprisoning debtors was not only immoral, but immoral because it did not serve the security of property or promote continued capitalist enterprise. British Columbia's volatile economy only accentuated these sentiments, and in the wake of Cranford, John Robson published two editorials on the subject. As honest businessmen engaged in opening up and developing the colony through the extension of credit, the Cranfords, like other merchants, could not be blamed for
an occasional "misfortune." By imprisoning a debtor, the colonial government deprived him of his freedom to engage in the pursuit of economic gain and hence did great injury to the public welfare. Such sentiments were voiced in antebellum America, which, like British Columbia, was equally concerned with economic growth. Lawyer Daniel Webster felt that changes in the law of debtor and creditor were necessary to "liberate 'human capital' for reentry into the economy." Legal historian James Willard Hurst agreed. The abolition of imprisonment for debt in the nineteenth century was, he felt, motivated by a desire to "afford the debtor a breathing spell in which he might regather his strength," and "to preserve the general course of his dealings." Laws that deterred economic activity did not, in short, serve justice.

*Cranford's* more general characteristics as a civil trial are also revealing. Though trials in British Columbia often occurred in unorthodox settings, their actual conduct would be familiar to those who lived in more settled societies. Civil cases heard at the assizes were characterized by their length. The testimony in a single case could often occupy an entire day, during which large amounts of information were produced and difficult questions of law and fact raised. The intervention of experts who could guide the decision-making process by ordering the evidence produced and by offering rules and precedents became necessary to meet the demand for predictability and efficiency in the legal process. The authority represented by these experts was not paternal or derived from common sense, but textual. The rule of a technical, positive law was emblematic of the rule
of the marketplace and the individual in the Anglo-North American world that British Columbia was part of.

What is known about trials in British Columbia is the stuff of frontier legend. Rough and ready, and draped metaphorically if not actually in coonskin rather than scarlet and ermine, British Columbia’s judges were prepared to hear cases anywhere. "Anywhere" included a variety of venues, from the "curious brick and frame designs" of Victoria’s "Birdcages" to the back of an accommodating horse.\(^{28}\) Usually the court sat in a location somewhere between these two extremes. The temporary nature of the venues testified to the lack of capital and permanency that characterized the colony. The substantial stone court houses that anchored other colonial communities in British America were notably absent in both the Island and mainland colonies.\(^{29}\) In Victoria, the administrative centre of the "settler" colony of Vancouver Island, the Supreme Court did not have a permanent location until 1860, and even then it shared the "Birdcages" with the Legislative Assembly, shoe-horning its hearings in between sittings of the House.\(^{30}\) The mainland’s rapid transformation into a colony left its mark even more noticeably on British Columbia’s public architecture. The HBC "barracks" at Fort Langley provided the site for the first sittings of the Supreme Court, though a separate court house was built in New Westminster in 1860.\(^{31}\) It was "an austere frame structure measuring 40 ft by 20 ft," and did not age well. "As far as the present court house is concerned," wrote the *British Columbian* in 1865, "the inside is not a very desirable place in the winter."

With its open floor, rattling windows, and old sooty cotton lining and ceiling, in many places torn to shreds and fluttering in the breeze
like a bird of evil omen over the seat of justice -- the whole thing is a disgrace to the town.\textsuperscript{32}

But despite its condition, New Westminster's court house remained in use throughout the colonial period, its poor state of repair a constant point of comment for those forced to occupy it. "Very great inconvenience is incurred by all parties being jumbled together in a small low room, with a canvas ceiling, in an old wooden building, without ventilation or means of warming it," the Grand Jury complained to Puisne Judge Henry Crease in 1870. "We cite as an instance the fact of a juryman, during a late trial, fainting, and also it being well known that officers of the Court have been frequently obliged to leave, owing to the extreme closeness of the room."\textsuperscript{33}

Outside New Westminster, the shifting mining frontier worked against the establishment of any stable and long-lasting communities. Government buildings reflected this transiency, particularly in the Cariboo. Most were dark, windowless log structures held together by mud and constant repair. "The style of architecture here is peculiar in its order," wrote one Caribooite of the upper country's government buildings. "It is neither Doric, Ionic, nor Corinthian, but decidedly Columbian....The relative properties of capital, column and base never trouble the mind of the builder."\textsuperscript{34} Matthew Begbie provided an evocative, though less technical, description of what awaited him on his circuits. "At Williams Creek a log house was built by Mr. Elwyn, which being divided across the middle gave accommodation for writing in one half."

and on the other half, of equal size but possessing the inestimable luxury of a fireplace, Mr. Elwyn, his secretary and three constables had bunks piled upon each other, in which each man could spread
his blankets separately. At Van Winkle, Mr. O'Reilly had not found the means of providing himself with any such luxury -- the whole of the business of the district had to be conducted in a tent, which was the sole protection against the weather for him, the books and records of the district!35

Whether Begbie or his fellow magistrates conducted the legal business of the colony on horseback, in a tavern or in a crudely constructed log building, they strove to maintain a certain degree of orthodoxy in their trial proceedings. Begbie travelled his 500? mile circuit with his robes and full-bottomed wig in tow, and the assizes he opened followed a pattern not too dissimilar from that of his English counterparts. The Judge's arrival must have been greeted with a certain amount of anticipation and interest in these remote communities, a feeling that could only have been heightened by the fact that his circuits were annual rather than semi-annual affairs as they were in England.

In general, proceedings began at 10 or 11 o'clock in the morning with a procession into the court house, whatever form the building took. The Judge, Registrar of the Court, Sheriff and Magistrate of the district took their seats, and the Queen's commissions were read. "I may record these few days as some of the most remarkable in my life," noted Arthur Thomas Bushby, British Columbia's first Court Registrar, of his and Begbie's first assize in March 1859. "Since my arrival in B.C., Begbie had appointed me clerk of the court, assize clerk, registrar, clerk of the arraigns &c. As I had never been in a Ct of justice before the thing seemed strange indeed to me."

I had to open the proceedings by reading the proclamation of silence O Yes O Yes O Yes which I did at the top of my lungs. Then I had to read aloud the different commissions -- the Queen's to Begbie and of oyer & terminer & gaol delivery &c. -- swear the grand jury, petty
jury, witnesses &c., read the indictments twice through, ask the prisoner whether he was guilty or not.

"It was most strange work," he concluded, "however, I got through all right & once I heard my voice tell at the other end of the room I bawled away like fun."36

The commission of assize and nisi prius gave the judge power to hear all civil cases, while the commission of oyer and terminer and general gaol delivery gave him jurisdiction to "deliver the gaols"; that is, to dispose of all criminal cases. Because Begbie was the colony's only Supreme Court judge (a puisne judge was not appointed until 1870), the civil and criminal business of the assize could not be divided and dealt with concurrently as it was in England and other English colonies. Almost invariably, Begbie chose to proceed with the criminal cases first, likely because of the constant danger that prisoners (or Indian witnesses) would escape from the insecure local lock-ups. After disposing of the cases on the criminal calendar, it was customary for the court to adjourn until the next day, when the more time-consuming and lengthy civil cases would be heard.

"It has often happened to me on the Mainland," noted Judge Begbie in 1866, "that while the criminal business was either nothing at all, or at least extremely light, the nisi prius business extended over several days or even weeks."37 Begbie's characterization of his court's workload is borne out by his bench books. From 1859 to 1871, the colony's Supreme Court devoted only one-fifth of its time to criminal trials. It expended the rest of its energies in civil matters, including civil litigation, business in chambers, probate and bankruptcy (see Chapter Three). The reasons for the lengthy civil trials lay in the number of witnesses brought forward, the nature of their testimony and the protracted
deliberations of the jury. Unlike criminal trials, civil litigation did not proceed "at a cracking pace." In Cranford, the point at issue was frequently lost sight of in the mass of evidence produced over the nine days of testimony. During that time at least twenty-four witnesses took the stand and produced evidence which, even after twenty-six hours of deliberation, the jury was unable to make sense of and reach a verdict.

Though the existing court record is too incomplete to allow more than an impressionistic view of the pace of civil trials, the outlines it does reveal suggest that Cranford was not unusual. The testimony in Linaker v. Ballou, heard at the same assizes as the Cranford case, occupied a whole day, and the jury required twenty-two hours to come to a verdict. Cases heard in the upper country mining districts were no less complex. For instance, in H.M. Curry v. Forest Rose Company, heard at the Richfield assizes in 1865, at least eight witnesses gave testimony and were thoroughly cross-examined before the jury retired to deliberate. Though they were locked up overnight, they failed to come to a verdict and were discharged. It was not uncommon for civil cases tried at the Supreme Court to feature between 4 and 8 witnesses who testified over one or two days, and for civil trial juries to take more than an hour to deliberate.

Mining cases, whether they were heard before an Assistant Gold Commissioner or before Matthew Begbie on appeal, could be even lengthier despite the fact that neither usually involved juries. This was due in part to the greater number of witnesses and the complexity of their testimony, which usually revolved around survey lines and the staking of the claim's boundaries. Assistant
Gold Commissioner William Cox listened to eight witnesses over three full days of testimony in an 1865 mining case before rendering his "summary" decision. In 1867, no less than fifteen witnesses paraded before Henry Maynard Ball in a mining case that lasted two days. Mining cases appealed to the Supreme Court featured fewer witnesses, but were equally protracted. In these, the lawyers took centre stage, arguing both points of fact and law to Matthew Begbie. Borealis v. Watson (1865), discussed in Chapter Four, occupied a full day of the assize court's proceedings, but featured only three witnesses. In Aurora v. Davis, also discussed in Chapter Four, twelve witnesses gave testimony over a twelve hour day, with the court finally adjourning at 10 PM.

If the numbers of witnesses at civil trials made for lengthy proceedings, the quality of their testimony also contributed to their slow pace. The Cranford witnesses took the stand to establish the nature of the contract between the Cranfords and Gus Wright, as well as more general questions about the business of packing goods to the Upper Country; the condition of the trails and the possibilities of delay; and the likelihood of goods spoiling. In general, the civil cases heard at the assizes were all characterized by a more detailed and complex (and more than occasionally, stultifyingly dull) recapitulation of the circumstances and events surrounding the legal question at issue. This was particularly true of the mining cases that came to the assize on appeal: the testimony in these was filled with the exciting details of ditch widths and flume obstructions. One reason for the quality of testimony and evidence in nisi prius cases was the result of the intrusion of lawyers into the court room. In Cranford, both the appellants and the
respondant were represented by teams of lawyers, who made full use of their opportunities to cross-examine witnesses.

The main reason for the length of these proceedings lay in the nature of the points at issue in civil trials generally. Not only were there likely to be more and better witnesses to a civil dispute than a criminal act, but the range of behaviour and the obligations imposed by civil law made these trials more complex. Rather than assessing simple guilt or innocence, the Cranford jury had to make decisions on a variety of issues: first, whether a valid contract existed between the Cranfords and Wright; second, if a contract did exist, what constituted a reasonable time for the Cranfords' goods to be delivered; and third, what, if any, damages should be awarded. These were difficult questions for twelve laymen to decide. The detail produced over the nine days made Begbie's summation more than a mere preliminary to jury deliberation. Despite his summary, the twelve still needed some of the documentation produced as evidence to help them. Even then a verdict was not forthcoming after some twenty-six hours of deliberation.45

It is difficult to say much about what went on during deliberation, but occasionally one gets glimpses of the process that indicate that it could be both lengthy and heated. In 1861 Begbie wrote to James Douglas to tell him that "a jury room is much required" in New Westminster.

[It] should be an empty room except [for] benches and one desk. A jury locked up for three hours would utterly destroy any furniture....46

In Cranford, however, the dissention in the jury room spilled out into the press. So strongly did some of the jurors feel after their discharge from the case that they
wrote letters to the editor of the *British Columbian* accusing their peers of misconduct.⁴⁷

These letters revealed more than the acrimony that could be part of decision-making, for they also shed light on the sorts of issues jurors grappled with in coming to a decision. Though Begbie considered character important in *Cranford*, instructing the jury to consider the fact that while they knew Gus Wright, the Cranfords were "strangers to the Colony," the jurors spent most of their time wrestling with more factual and technical issues. The chief points at issue were the contract between Cranford and Wright and the assessment of damages. Was the contract valid, or had it been rescinded by the actions of either party? What damages should be rewarded?⁴⁸ To decide, the jurors needed proper instruction from the judge. "As jurors we are appointed by our country, we are sworn to give a true verdict according to the evidence, as we shall answer to God, not the Judge," wrote "One of the Jurors" to the *British Columbian*.

The duties of Juries, as I understand them, are very different and distinct from the duties of a Judge. The Judge is undoubtedly the first officer of the Court, and among his other duties I suppose he must see that order and decorum are preserved, that witnesses are not brow-beaten by Counsel, while Lawyers have every opportunity afforded them of extracting the truth; he also takes notes of the evidence, and after the opposing Counsel are through, I suppose his duty is to take the evidence, of which he has copious notes, and comment on it for the benefit of the Jury....Now Mr. Editor, in this celebrated case of Cranford against Wright we were occupied nine days listening to evidence, when the Judge very coolly told us he was not going to read the voluminous notes he had; and he was as good as his word.⁴⁹

When Begbie denied them both proper instruction and documentation, they considered it an injustice. The *Cranford* jurors were very jealous of the role they
played in the legal process, and wanted to do it well. They could only be effective if they were instructed properly, as "One of the Jurors" noted, and supplied with the necessary documentary evidence. "Now Sir," he concluded, "it seems to me a complete mockery of men to keep them eleven days listening to evidence, Judge and Counsel, then lock them up without giving them the article they most need to enable them to solve what difficulties might arise." A just verdict thus was one that was informed by a close reading of the evidence and legal instruction, rather than an assessment of character or the advice of a few prominent or experienced jurors.

Because of the volume and complexity of information produced in civil trials, decision-making required the intervention of experts. To be effective, the volume of information produced in cases like Cranford needed to be marshalled, organized and interpreted by experts before being presented to the judge and jury. The intervention of such experts in Cranford led to repeated clashes with Matthew Begbie. The battles between judge and lawyers were battles for influence in decision-making, and were emblematic of the tensions between two kinds of authority. English authority as represented by Begbie was discretionary and paternal and drew its strength from a particular form of social organization that was absent from colonial British Columbia. In the events leading to the Grouse Creek War, Caribooites rejected Begbie's actions and decisions as illegitimate and arbitrary because they did not accord with their frame of reference, which was local. In Cranford, British Columbians also rejected English authority because it did not make sense. This time, however, the standard they used to measure the
law was not provided by common sense, but by its opposite: specialized knowledge. The Supreme Court judge's actions were deemed illegitimate because they were not *legal*; that is, because they did not correspond to a set of predictable, standardized and certain rules. The standard for legitimate action resided in a text rather than in community norms or the mutual obligation implied by a moral economy between ruler and subject. Expertise was more important than both paternalism and common sense as the "new engine of authority" in British Columbia.\(^{51}\)

Begbie's conflicts with the legal profession had not begun with the *Cranford* case. Almost from the day he arrived, the issue of lawyers and legal representation plagued the Judge. In the absence of lawyers in the early days of the colony, the Supreme Court Judge was used to conducting cases on his own, taking responsibility for representing the interests of both parties. It was not an easy job. "The labor and responsibility is in all cases thrown upon the Judge or the Registrar," he wrote. Their job was to "see that the plaintiff takes out the proper writ or commencement of proceedings that is correct in point of form;"

The Judge is then called by the defendant to point out the most efficacious mode of defence; and then he has to sit in Judgment upon the case so brought forward, embarrassed perhaps by the insertion of unnecessary matter or the omission of details with a mind preoccupied & feelings probably engaged on one side or the other (at all events the suitors think so). I hope that I am not given to despondence: but I should in such a position despair of giving satisfaction to the suitors.\(^{52}\)

Though Begbie recognized the irregularity of his position as judge and counsel and the threat it posed to the legitimacy of his judgements, he was wary of letting lawyers into his court. For the Supreme Court Judge, colonial lawyers posed a
threat to the "ethical unity," to borrow William Nelson's phrase, that underlay dispute resolution. The American and Canadian laywers who presented themselves before British Columbia's courts did not share the same social and intellectual genealogy as Begbie, and thus could not be counted on to reinforce the same values and behaviour through the law as the Supreme Court Judge thought proper to do. Instead, they represented a potential challenge to the judge's authority and, more broadly, to the ability of the court to direct the course of social conduct according to its own agenda. To limit these challenges, British Columbia's colonial government simply barred American and Canadian barristers from practicing. Like all other developments which touched the administration of the law in the colony, this one provoked its share of controversy.

The absence of lawyers in British Columbia was certainly not satisfactory in the eyes of the American government, who sent Special Envoy John Nugent to investigate the treatment of American miners at the hands of British justice. Nugent was to report to Congress on the working of the mines, the restrictions imposed by the British colonial government, and the laws regulating mining activity. According to Reid, "the American Government was specially anxious to know if any distinction was made between British subjects and foreigners with respect to entrance into the country and to rights and privileges after arrival there." Particularly concerned about the absence of qualified counsel in the young colony, Nugent wrote to Douglas asking him to allow American lawyers to plead before the colonial courts. Douglas refused, telling the American that he had no power to alter the rules governing the colony's courts, and that the
existing provisions relating to the admission of lawyers placed American and British prisoners at an equal disadvantage. While Begbie may not have agreed with Nugent's and the American government's charges, he was concerned about the fact that "assistance [was given] to suitors sub rosa by all sorts of persons, qualified or not." These informal counsellors were beyond any sort of regulation. To solve this problem, Begbie created a temporary roll of barristers, which allowed those qualified to plead in other colonial courts to practice in British Columbia for six months.

The issue of admitting lawyers to the British Columbia bar came up again during Wright v. Cranford. There Begbie refused to allow the Cranfords lawyer, George Walkem to act for them, because as an Upper Canadian, Walkem was not qualified to plead. Not to be outdone, Walkem advised his clients from the public gallery, and made an enemy of the Supreme Court Judge. Begbie's actions precipitated the publication of four more editorials by Robson, and a petition calling for Walkem's admission signed by 150 "bona fide citizens", at a time when his every action was under intense scrutiny. "Why such an invidious distinction should be made between Barristers from England and from the British Colonies we are at a loss to understand," exclaimed the British Columbian.

Why should a Barrister from England be at once admitted to practice here, while one from Canada is not allowed to practice until he has spent a year reading in an English barrister's office? Is it because one stands so much higher in his profession than the other? If we are to take our Supreme Judge and some of the Barristers in these colonies as a fair specimen of the English Bar, this cannot possibly be the reason. Yet Judge Begbie refuses to admit Canadian Barristers of known character and ability to practice in this Colony, and thus he protects the few at the expense of the public!
A few weeks later, Robson renewed his attack, denying the inferiority of colonial barristers:

Inferiority indeed! With the greatest respect for our Barristers, how could they, or even his Lordship compare with the Robinsons, the Camerons, the Boultons, the Wilsons, The Beechers, The Connors, of Upper Canada?⁶²

Three months later, in May, perhaps because of the pressure of prominent mainland residents and the Colonial Office, "The Legal Professions Act," which allowed Canadian barristers to plead in the colony was passed.⁶³

Begbie considered American and Canadian barristers unqualified to plead because they did not have the same training or come from the same social background as he did, and therefore threatened the ethical consensus that underlay the authority of his court, a kind of authority that was paternal and discretionary and reflected the rigid, class-based society he came from. What the Supreme Court Judge failed to appreciate, however, was that this kind of authority was not entirely suited to a mid-nineteenth century British colony experiencing rapid economic development within the framework of an international market economy. The challenge to his paternalism came from the demands of commercial and industrial capitalism, which put a premium on a very different kind of authority, one based on specialization and expertise.

The sharp exchanges between the plaintiffs' counsel and the bench in Cranford enlivened the case and illustrate the clash of these two kinds of authority. Begbie's behaviour shocked the jurors, and led their foreman to exclaim:

I never witnessed such scenes as I saw in that Court!....
The Judge was frequently applied to by the plaintiff's counsel to have certain memoranda inserted into his notes which led to long discussions, the reading of precedent after precedent, and sometimes recriminations would follow. The following came from the Bench to Mr. Ring, "Really Mr. Ring, I do not know how to stop you, unless I order you to be removed out of the Court." At another time he said to the learned gentleman in curls, "Sit down Mr. Ring, Mr. Walker has forgot more than you ever knew!"  

The battles between the bench and bar that characterized the Cranford cases were more than a clash of personalities. They were battles for court room hegemony. Particularly annoying to the Judge was Ring's penchant for citing precedent and dwelling on what he perceived to be irrelevant legal technicalities. When Ring attempted to convince Begbie to admit invoices made out to Robert Cranford as evidence, he cited *Taylor*, and contended that "the maxim, 'qui facit per alium facit per se' governs here." To the delight of the public, the Judge sarcastically replied, "Translate that into Chinook, Mr. Ring." On another occasion, when he tired of the arguments put forth by Ring and McCreight relating to the affidavit on which the writ of capias had been issued, he "became petulant and sarcastic, asking them 'if every i was dotted and all the t's crossed.'" Only once did Ring manage to silence the Judge. He did this at the end of the case, when Begbie attempted to force a non-suit. "This is a most extraordinary power attempted by your lordship," Ring said.  

The practice is well understood. The most elementary legal textbook - "Smith's Actions at Law" -- lays down the principle against such an assumption, followed with "Chitty's Archibold," another elementary work, [which]...contains cases deciding the point for a century back. "Upon this," noted the *British Colonist*, "the Judge, who seemed surprised, withdrew from his position."
The battles between the Cranfords' lawyers and Matthew Begbie were a metaphor for the larger tensions associated with the intrusion of the expert and his specialized knowledge into the decision-making process. Frontier conditions created an artificial environment which sustained Begbie's personal and discretionary authority and placed him centre-stage in the decision-making process. But as elsewhere in the English common law world of the nineteenth century, the division of labour in the trial process had changed. The demands of a commercial capitalist economy for predictability, efficiency and certainty created a need for specialization. The people involved in creating the proper legal environment in which the market economy would operate were not exempt from this trend. With commercial capitalism expertise was more important than paternalism as the foundation of authority.

Although Cranford v. Wright was a single trial, and therefore not typical of all civil litigation, both the issues of law it raised and the kind of authority it revealed were emblematic of the intimate association between the rule of law and the rule of the marketplace. Discussion of the law of contract and imprisonment for debt used a lexicon derived from laissez-faire capitalism. Contract law favoured individual initiative by giving precedence to the integrity of individual will in resolving disputes. For instance, contract law had nothing to say about the justness of contracts, their content, or the relative bargaining power of the two contracting parties. The private arrangements between people were manifestations of individual will, and beyond the realm of the law's empire. What was important
in the eyes of the law was that the obligations spelled out in the contract be fulfilled. Faithful performance of specific and limited obligations ensured the smooth running of the market economy. Optimum performance of the market economy also required competition, but competition involved a certain amount of risk. To offset this risk and to encourage people to enter the marketplace, liberal laws relating to imprisonment for debt were necessary. While debt was not a good thing for the economy, throwing a debtor in jail promised to inflict more damage because the marketplace would be deprived of his competition.

*Cranford* also revealed the heavy demands civil law disputes placed on decision-makers. The commercial economy involved people in complex relationships, the intricacy of which was sometimes unravelling in court. Civil trials were long in duration and the information amassed by the process was often detailed and technical. The issues in contention were also complex, demanding great effort on the part of the judge and jury to reach a verdict. In the face of this complexity, decision-makers turned to statute law and precedent to clarify the issues and define the options open to them, rather than looking for guidance in common sense (for cases were too complicated for that) or a paternal figure like Matthew Begbie, whose authority was rooted in a social reality that had little meaning for them.

Because decision-makers looked at the law as a text, interpretation became central to determining the legitimacy of its administration. Interpretation required skilled interpreters; people who possessed specialized knowledge, like the Cranfords' lawyers David Ring and John Foster McCleight. It was just this
requirement for specialized knowledge that made Eton and Oxford-educated Philip Henry Nind, the Stipendiary Magistrate and Assistant Gold Commissioner at Alexandria in the Cariboo, feel ill-equipped to deal with the miners under his jurisdiction. Nind declined an appointment as County Court Judge. "I regret that His Excellency has been pleased to nominate me to this post," he wrote to the Colonial Secretary,

as I am deficient in that special Knowledge requisite to the proper execution of its duties, nor have I any legal works to refer to for instruction and guidance. The population in this district is fond of litigation and many are acquainted with the technicalities of law, and would only be too ready to detect mistakes committed by an inexperienced County Court Judge. I respectfully submit that the appointment be conferred upon someone better qualified by education and experience to undertake its duties.⁶⁸

James Douglas and Matthew Baillie Begbie chose Nind, along with the colony's magistrates, because he possessed what they believed to be the necessary attributes for the job. As a middle-class Englishman of "country tastes," Nind had the necessary carriage of paternalism. But paternal authority was somewhat wanting. Legal authority in nineteenth-century British Columbia did not turn on an eighteenth-century moral economy between the powerful and the powerless, but on a modern, market-driven one. The expertise and specialization that conferred authority in the colony were just another manifestation of the demands of a capitalist economy.
NOTES


2. Value of suit taken from the Colonist 23 December 1862.


5. Ibid., [part 3] British Columbian 7 January 1863. There were two ways for a creditor to secure his debt. The first was to initiate a suit to recover his property. If the court ruled in his favour, the debtor was required to satisfy the claim by selling his personal (i.e. not land; moveable property) property first and then, if necessary, his real property. To this end, the court had the power to attach and sell his goods. If he could not comply then he was jailed until he fulfilled his obligation. The second way of securing a debt was called the "mesne process." In it, the creditor simply swore an affidavit attesting to an overdue debt or the fact that the debtor was about to abscond or sell his property and the court (at the discretion of the judge) issued a writ of capias ad respondendum. This was the course pursued by Gus Wright in the Cranford case. The writ of capias ad respondendum empowered the sheriff or bailiff to arrest the debtor and hold him in jail until he satisfied the creditor's claim. Unlike the trial process, however, the court had no power to attach the debtor's goods. The creditor could have the debtor's property (through the longer, more expensive trial process) or his body (through the mesne process), but not both. See Peter J. Coleman, Debtors and Creditors in America: Insolvency, Imprisonment for Debt and Bankruptcy, 1607-1900 (Madison, Wisconsin, 1974), 4-5.


7. Ibid. The British Columbian reproduced the contract as follows: "The following is the agreement as it was when first written.

April 25
Agreed with R. Cranford, Jr.,
to carry goods for him from Douglas
to Lillooet at nine cents per pound, to
wait sixty days after delivery at Lillooet for pay.
If freight falls, to come down in price.

"Recollecting this most positively they gladly accepted Mr. Wright's proposition
that his memorandum of agreement should be shown; what was their astonishment to find it garbled as follows:

April 25

Agreed with R. Cranford, Jr., &
Brother to carry goods for them from Douglas
to Lillooet at nine cents per pound, to
wait sixty days after delivery at Lillooet for pay.
If freight falls, to come down in price.

17. *British Columbian* 4 April 1863; *Colonist* 15 April 1863.
19. Great Britain. Colonial Office. British Columbia Blue Books. NAC. MG 11, CO 64/3, 4, reel B-199. In 1862-63 the colony's population was 7738, with 5525 in the Cariboo.

20. As will become apparent, John Robson, editor of the *British Columbian* and future premier of the province, took a special interest in the case. Robson emigrated from Canada West in 1859 as a gold seeker. Almost from his arrival he took an interest in colonial politics, aligning himself with other "reformers" who took issue with the lack of representative institutions in the colony and its absentee governor. After serving as the editor of the *New Westminster Times* for a year, Robson founded the *British Columbian* in 1861 as an organ dedicated to "a resident governor, responsible government and representative institutions." Some of his reform sentiments were aimed directly at the colony's legal administration. In giving them voice he quickly ran afoul of British Columbia's
Supreme Court Judge. The first broadside in what was to be a long and vitriolic exchange was fired in November 1862, when Robson penned an editorial charging the colony's law officers with speculation in gold claims. He followed these allegations by printing an anonymous letter which further charged that Matthew Begbie had accepted twenty acres in the Cottonwood district near Quesnel in exchange for issuing a certificate of improvement on a parcel of land owned by one Dud Moreland. Begbie charged Robson with contempt of court for printing the letter and precipitating what became known as the "Cottonwood Scandal." R. v. John Robson came before the New Westminster assizes in December 1862, the same session which featured the Cranford case. The coincidence of the two cases and his anti-government stance explain Robson's readiness to allow his newspaper to be used as a platform for the Cranfords' grievances. See Ivan Earl Matthew Antak, "John Robson: British Columbian," University of Victoria M.A. thesis (history), 1972, especially Chapter One; Sydney G. Pettit, "Matthew Baillie Begbie: Judge of British Columbia," University of British Columbia M.A. thesis (history), 1945, Chapter Four; and David Ricardo Williams, "...The Man for a New Country": Sir Matthew Baillie Begbie (Sidney, B.C., 1977), 190-191.


25. For a brief overview of changing attitudes toward debt and debtor/creditor legislation see Jamil Zainaldin, Law in Antebellum Society: Legal Change and Economic Expansion (New York, 1983), 39-41. For a more thorough treatment, see Robert J. Coleman, Debtors and Creditors in America: Insolvency, Imprisonment for Debt and Bankruptcy, 1607-1900.


34. *British Colonist* 10 July 1863.

35. Sydney Pettit, "His Honour's Honour: Judge Begbie and the Cottonwood Scandal," *British Columbia Historical Quarterly* 11(1947):208; cited in Mills, *Early Court Houses of British Columbia*, 228. For other descriptions of mainland court houses see Brew to Young, New Westminster, 29 February 1860, British Columbia. Colonial Correspondence. British Columbia Archives and Records Service (hereafter BCARS) GR 1372, reel B-1310, f 189/7; Elwyn to the Colonial Secretary, Williams Creek, 22 August 1862, reel B-1327, f 525/18; Franklyn to Young, Nanaimo, Vancouver Island, 14 May 1862, reel B-1329, f 593/26; Presentment of the New Westminster Grand Jury to Matthew Baillie Begbie, 8 November 1864, reel B-1308, f 142f/16; and Brew to Ball, New Westminster, 22 August 1868, enclosed in Ball to the Colonial Secretary, New Westminster, 26 August 1868, reel B-1305, f 100/19.


37. Begbie to Young, New Westminster, 6 April 1867. BCARS. GR 1372, reel B-1308, f 142g/14.


40. *Cariboo Sentinel* 26 July 1865.

42. Grouse Creek Bed Rock Flume Company v. Black Hawk Company, Cariboo Sentinel 30 May 1867.

43. Cariboo Sentinel 24 June 1865.

44. Cariboo Sentinel 18 June 1865.

45. In criminal cases, jury deliberation was usually a brief affair. Rather than retire to a separate room, jurors "huddled around their foreman," taking only two or three minutes to come to a decision. Given this brief interval, the jurors could not possibly review the evidence and come to a common decision. The character of the accused must have weighed heavily in determining a verdict. "Most often," noted Beattie, "the majority must simply have acquiesced in a verdict arrived at by one or two dominant figures on the jury." See Beattie, Crime and the Courts in England, 397. Such a process, however, may not have been not common to British Columbia's civil trial juries.

46. Ibid.

47. Letter from "One of the Jurors," 10 January 1863; Letter from Robert McCleese and 3 others, 17 January 1863; Letter from William Grieve and 7 others, 21 January 1863; and Letter from William Grieve, 21 January 1863.


49. Letter from "One of the Jurors," British Columbian 10 January 1863.

50. Ibid.


52. Begbie to Douglas, Victoria, 15 August 1858. BCARS. GR 1372, reel B-1307, f 142a/4.


54. For a discussion of Nugent and his relationship with James Douglas, see Robie L. Reid, "John Nugent: the Impertinent Envoy," British Columbia Historical Quarterly 8(1944):53-71. Also see Nugent to Douglas, Victoria, 6 October 1858, CO 305/9. NAC. MG 11, reel B-237, 224-225; Douglas to Nugent, Victoria, Vancouver's Island, 8 October 1858, CO 305/9, 225-226; Nugent to Douglas, Victoria, Vancouver's Island, 3 November 1858, CO 305/9, 229-230; Douglas to
Nugent, Victoria, Vancouver’s Island, 9 November 1858, CO 305/9, 231-234; Pemberton to Douglas, 8 November 1858, CO 305/9, 235-236.

55. Ibid., 61.


59. See Petitt; Douglas to Newcastle, Victoria, Vancouver Island, 21 April 1863, CO 60/15. NAC. MG 11, reel B-88, 224-225; and "The Gold Commissioners and the Lawyers," British Columbian 4 July 1863.

60. Re the petition, see "An Unholy Alliance," British Columbian 28 March 1863.


63. "The Legal Professions Act, 1863"

64. Letter to the Editor from William Grieve, British Columbian 21 January 1863.


The dual influences of commercial capitalism and geography on law and authority found tangible expression in the construction of British Columbia's courts. The demands of the market economy for a rule-bound arena that would provide a secure framework for individuals to pursue economic gain gave the colonial courts their raison d'être, while British Columbia's geography went a long way to defining the ambit of their power. The extension of authority was a spatial, as well as a social, problem. The mainland colony's great distances and scattered population posed significant obstacles to the execution of the law. The colonial government overcame these barriers by investing more power in the hands of the colony's inferior court officers. Though the resulting institutions were more effective and efficient as a result, in accordance with the standards of laissez-faire, they achieved this at the cost of public input into the process of dispute resolution, something which had implications for the ethical foundations on which political authority rested.

Construction of the colony's legal apparatus did not effectively begin until after the arrival of British Columbia's new puisne judge, Matthew Baillie Begbie, in November 1858. A third-class Cambridge graduate and a Lincoln's Inn-trained barrister, Begbie was recommended for the British Columbia post by Sir Hugh Cairns, his colleague at Lincoln's Inn and England's Solicitor-General. A month after his arrival Begbie issued an order creating the Court of British Columbia,
and six months later the court over which he presided was named "the Supreme Court of Civil Justice of British Columbia" and was given jurisdiction over "all cases civil as well as criminal, arising within the said Colony." Proclamations issued in 1860 and 1865 augmented the powers of the Supreme Court by making provision for the speedy trial of prisoners and giving it jurisdiction in bankruptcy.

Begbie also turned his attention to the appointment of the colony's Justices of the Peace. His remarks on the magistracy reveal the Supreme Court Judge's belief that authority sprang from character. Those suitable for the position possessed the carriage and demeanour associated with the English gentry. "Great care would require to be exercised in the selection of these gentlemen," he informed Governor James Douglas.

Probably men upwards of thirty years old, with such common sense and good temper as possible -- and a little capital, and with country tastes, would be preferable. Personal appearance and even manner and voice are of considerable effect -- an Indian can distinguish an Englishman by his voice....

Colonial magistrates should also have a legal education, be married and bring their families with them to their districts. "I should hope thus," he concluded, "to secure to the colony the advantages of both resident English country gentlemen and stipendiary magistrates." Despite Begbie's desire for educated gentlemen, the colony's justices were all, with one exception, untrained in the law. English "sentiment" remained the overriding prerequisite for the colonial magistracy. Englishmen who lived in California before travelling north to British Columbia were to be avoided. "There is usually to be remarked among such persons an
alteration in voice, in tone and manner," noted the Supreme Court Judge, as well as "an accretion of prejudices as to colour and race, which I think render them unfit." 7

Despite their lack of legal education, British Columbia's justices were called stipendiary magistrates, a term usually reserved for those with at least seven years of legal training, and were paid civil servants. Most were Anglo-Irish rather than English, and had some previous connection with the military. 8 They emigrated to the far reaches of the Empire, like so many others from similar backgrounds, to maintain and perhaps increase their social status. Becoming a colonial justice was attractive for just these reasons. The actions of Langley JP Charles Bedford attest to the social status attractions of the post. When he learned to his surprise that the office did not confer the status he hoped for, he resigned. "At the time I had the honor to receive from you the appointment of Justice of the Peace...I was under the impression that...altho' the salary was extremely low, my position in the colony would be of some standing," he wrote to Douglas. "I find that Justice of the Peace in this colony occupies an inferior position....I therefore beg...to resign." 9 Although Bedford did not achieve the social status and political standing he desired, most of British Columbia's other JPs eventually did, sitting in the colony's Legislative Council after its creation in 1864. 10

In addition to their political involvement, all of the colony's magistrates held a variety of non-judicial posts concurrent to their judicial offices. The concentration of a variety of administrative functions in the hands of British
Columbia's legal officers was probably a hallmark of English colonial society. "In the early conditions of the Colony before institutions are formed and Departments are organized," the Colonial Secretary informed newly-appointed JP Peter O'Reilly, it is incumbent upon every officer of the Government to afford his assistance in every way in which it may be needed; and under such circumstances, Officers are frequently called upon to render Services which in a more advanced state of the Colony it would never fall to them to fulfil.\textsuperscript{11}

These services included acting as the district's land recorder, coroner, postmaster, gold commissioner, Indian agent and revenue officer, as well as its Stipendiary Magistrate. They also negotiated the public works contracts for many of the colony's roads and bridges.

In addition to the duties associated with these offices, British Columbia's justices sometimes found themselves saddled with the responsibility for the social welfare of the district. For instance, after the 1868 fire that all but destroyed Barkerville, the magistrate there dispensed what money he could to help those who had lost everything.\textsuperscript{12} At Lytton, Henry Maynard Ball dealt with "a serious and infectious epidemic of 'Diphtheria and Diarrhoea' combined" that spread among the Indian population. "Common humanity, as well as a sense of duty dictated to me to undertake upon myself the responsibility for the expense," he informed the Colonial Secretary.\textsuperscript{13} Later the same magistrate wrote to New Westminster requesting that "an Indian Half Breed destitute and sick with a white swelling on his knee" be given some money and sent down to the hospital to have his leg amputated.\textsuperscript{14} Cases of insanity sometimes confronted the magistrates, who locked up the offending parties until they could be sent to the jail at New
British Columbia's magistrates were, as contemporaries noted, virtually the government of their districts.

The judicial duties of British Columbia's justices of the peace were defined in part by the gold rush economy. From the colony's beginnings, cases arising from commercial transactions comprised the bulk of the legal business in the colony. At Yale, on his first circuit in 1859, Begbie reported that there were "heaps of civil causes here, I don't know how many came rushing at me. Summons have been issued right & left: and I hear that there will be an equal amount of litigation at Lytton." Even after the initial rush of suits that accompanied the 1858 Fraser rush Begbie still considered that nisi prius business occupied most of the court's time. "It has often happened to me on the mainland," he wrote after the completion of his 1866 summer circuit, "that while the criminal business was either nothing at all, or at least extremely light, the nisi prius business has extended over several days or even weeks." Most of these causes were actions to recover debts usually, according to Begbie, involving sums "almost always under £50 and often under £5."

By 1859 it was clear that the costly and slow proceedings of the Supreme Court in handling these cases deterred suitors from launching actions. Certainly the forty-five people who petitioned James Douglas in August 1859 thought so. Calling themselves "Sufferers by their being no Courts of Law in the nature of District or County Courts in the colony of British Columbia to which we can apply...to recover Debts of small Amounts due by Miners and others, as well as between miner and miner," the petitioners called for the creation of a number of
small debts courts with jurisdiction to hear cases of up to £50.\textsuperscript{21} Pointing to the "[m]any abuses that had grown out of that state of things, together with a general want of confidence, and an almost entire stoppage of credit transactions," James Douglas issued a proclamation creating small debts courts in December 1859.\textsuperscript{22} Presided over by the colony's stipendiary magistrates, these courts were given the jurisdiction requested by the petitioners (£50) but were not confined to acting in particular districts because, according to Attorney General George Hunter Cary, of the "wandering nature" of the population.\textsuperscript{23}

As the rush proceeded up the Fraser, culminating in the 1862 discoveries in the Cariboo, commercial credit became even more widely extended. Attracted by the possibility of profiting from the influx of miners into the colony's interior, Victoria and New Westminster merchants scrambled to get their consignments of goods upcountry. This growing web of credit precipitated calls for greater regulation by the courts. "Merchants should be protected and assisted by the judiciary of the country," wrote one Cariboo trader in 1865.

[T]here should be no false delicacy manifested by the Judge to protect the trader, without whom the country never would have been prospected[,]....for the moment merchants are prevented from recovering their just debts they will shut down all alike.\textsuperscript{24}

"Pickaxe" agreed, writing that the "good nature" of the district's Stipendiary Magistrate had inspired some miners to avoid paying their bills, and the merchants to withdraw credit. As a result of the magistrate's "imprudent" leniency, he concluded, "the poor but honest man is likely to die of starvation, when he might otherwise be profitably employing his time prospecting."\textsuperscript{25} These voices and the others that joined them\textsuperscript{26} struck a sympathetic chord with British
Columbia's Supreme Court Judge. "Authority might usefully be given to one or more county court judges," Begbie suggested, "to deal...with all matters...touching the granting of injunctions, the appointment of Receivers and the giving leave to appear and defend actions on Bills of Exchange and promissory notes." When the county courts were established in April 1866 they were modelled on their English counterparts, but had jurisdiction in cases involving sums up to £100 ($500), a significant increase over the old limit of £50 ($250) set by the 1859 proclamation. Notwithstanding the objections of Attorney General Crease, the new County Courts Ordinance was, if the Yale Grand Jury's presentment was indicative, "looked upon as a most desirable improvement."

While the Small Debts and County Courts dealt with the general need to regulate credit, more specialized institutions emerged to serve the needs of the mining economy. Created in August 1859, Gold Commissioner's, or Mining Courts were modelled on the New Zealand institution of the same name and heard all mining disputes arising within a given district. The colonial administration moved quickly to establish formal institutions in the gold fields, hoping to profit from the collection of various licencing fees, but also to prevent the development of a strong tradition of local government of the form that in California centred around the Miners' Meetings. These were informal tribunals consisting of elected miners who regulated conduct in the gold districts, meting out punishment according to local sentiment. In British Columbia, the Miners' Meetings were replaced by a single Assistant Gold Commissioner who rendered decisions summarily and was armed with powers of enforcement equal to those
of the Supreme Court. Additional rules and amendments were made in the next five years and proclamations issued in 1864 and 1865 further extended and consolidated the provisions of the various Gold Fields Acts. The jurisdiction of the Mining Courts remained the same until 1867, when the Gold Fields Act was again amended, this time eliminating appeals to the Supreme Court based on questions of fact. As well as sitting in judgement over mining disputes, Assistant Gold Commissioners issued mining licences, collected the various licensing fees, monitored the productivity of the diggings and presided over locally-elected Mining Boards which drafted bylaws regulating the operation of the local mines. As with the Small Debts and later the County Courts, British Columbia's Mining Boards and Courts were expected to "foster and encourage mining enterprise in developing our mineral resources."

The union of Vancouver Island and British Columbia in November 1866 created a controversy over the Supreme Court which again underscored the importance of commerce in the life of the colonies. As with the inferior courts, the colonial merchants exerted pressure on the government to ensure the security of property through reform of the Supreme Court. Because the Act of Union made no mention of the status and jurisdiction of the colonial courts, it was unclear to all concerned how the legal apparatus of the now united colonies would work. British Columbia's governor, Frederick Seymour, along with Matthew Baillie Begbie and the colony's Attorney General, Henry Crease, contended that upon union the Supreme Court of Civil Justice of Vancouver Island ceased to exist, and that the only valid court and Chief Justice was that of the former mainland
"When the whole executive [of Vancouver Island] is abrogated," wrote Begbie to the Colonial Office, "the judiciary must surely expire with it":

and when the executive is extended into a new dominion, it carries its own courts of justice along with it....

According to my view therefore I have still the honor to be, as I have been since the 2d September 1858 or at least since the 19 November 1858 the sole & therefore necessarily the chief judge of the Supreme Court in British Columbia.36

While those on the mainland considered the Act of Union less as the merging of the colonies and more the "extension" of British Columbia "into a new dominion," those on the Island had very different ideas.

There was little love lost between Joseph Needham, Vancouver Island's Chief Justice, and Matthew Baillie Begbie, particularly in the wake of the Grouse Creek war, when Needham was called in to arbitrate an appeal of one of Begbie's decisions. Over and above the personal animosity between them, Needham claimed, quite rightly, that because the Act of Union did not specifically abolish either of the colonial Supreme Courts, both continued to exist after 1866. Moreover, by virtue of the 1857 imperial order-in-council establishing the Supreme Court of Vancouver Island, the local colonial legislatures could not frame or alter the rules and regulations governing the court.

While the Colonial Office sided with Needham on his first point, it rejected the second. "The object of that Act [of Union], as I understand it, was simply to unite the 2 colonies of Vancouver's Island and British Columbia in as general terms as possible, leaving the Colonial Legislature to work out the details of any changes that might be deemed expedient," Secretary of State for the Colonies, Lord Carnarvon informed Seymour.
The act was not intended to grant titles, jurisdiction, powers & position of the Judges, and it appears to me that it did not touch them. And if this is so, Mr. Needham is still Chief Justice of Vancouver's Island & with all the same powers & authority that he had before the Act passed.37

To clear up the doubts surrounding the jurisdiction of the two courts, the Colonial Office suggested that the local legislature pass an act declaring the legitimacy of the two Chief Justices in the united colony, but giving each precedence in his formerly separate jurisdiction. Upon the death or resignation of either Begbie (Chief Justice of the Mainland of B.C.) or Needham (Chief Justice of Vancouver Island), the remaining judge would become the Chief Justice of British Columbia.38 After much heated discussion, the Colonial Office's suggestions were embodied in the Courts Declaratory Ordinance, passed in May 1868, almost a year and a half after union.39

The ordinance did little to alleviate the practical problems of having two Supreme Courts in a colony of less than 6000 people.40 Both the merchants and lawyers of British Columbia complained of difficulty in securing debts given the concurrent jurisdiction of the two superior courts. When Joseph Nicholson, an agent of some Victoria merchants, attempted to collect money owed to his employers from Charles Wallace, the capias issued on his behalf by the mainland Supreme Court was ignored by its Island counterpart. Needham discharged Wallace as a first-class bankrupt, and the money that was paid into court was given not to Nicholson, but to Wallace's other creditors.41

Nicholson petitioned the government in December 1868, and in response, the Legislative Assembly struck a committee to examine the jurisdictional
problems raised by the petition. Of central concern to the committee was "the very great injustice [done] to litigants", particularly given that "a very large portion of the law suits are connected with the local trade and commerce of the colony." The only solution, the committee reported, lay in giving the two courts equal jurisdiction. Without reform, suitors would be compelled to launch actions in both the Island and the mainland courts, an enterprise that was both costly and time-consuming.42

Concerns about the adverse effects the Courts Declaratory Ordinance had on the commercial life of the colony were raised again by British Columbia's merchants and its lawyers a year after Nicholson's petition. "Nearly all the men of business in the Colony"43 called the Governor's attention to "the want of concurrent jurisdiction in Civil cases."

[It] is felt to be a great hardship pressing with great weight on a Commercial community whose interests are identical over the whole Colony. It imposes on litigants a double tax, by compelling them to resort to two Courts before they can obtain the fruits of their Judgement and by giving to Debtors every opportunity of defrauding their Creditors by passing from one Jurisdiction into another and so embarrassing the Administration of Justice.44

In addition, both the merchants and "nearly all the lawyers in the colony" also complained about the absence of a colonial Court of Appeal, calling the situation "disastrous and oppressive."45 Before the colonial government was able to respond, the jurisdictional problem disappeared with the appointment of Joseph Needham as Chief Justice of Trinidad.

The Nicholson petition and the debate surrounding the Supreme Courts following union underscored the connection between legal institutions and
Figure 6-1: British Columbia's Courts, 1866
Showing routes of appeal and jurisdiction.
economic development. The demands of private commercial transactions shaped the mandate of the colony's superior court. As Governor Seymour's successor, Anthony Musgrave, noted in his report to the Colonial Office, the debate over British Columbia's Supreme Courts "illustrates the practical difficulty which exists in separating the legal business of the Mainland from the commercial requirements of Victoria, which is the Mercantile focus of the whole colony."46

While the construction of British Columbia's courts reflected the importance of commerce in the colonial economy and the need for institutions to regulate commercial activity, it also bore the imprint of the colony's geography. Despite the place of North American geography in shaping a continental consciousness, however, its effects on the organization of power have been largely overlooked. Canadian historians are not alone, however, in overlooking the influence of distance on the organization of power. According to sociologist Anthony Giddens, "there is a lack of concepts that would make space, and control of space, integral to social theory."47

The extension of political authority is fundamentally a spatial, as well as a social, problem that confronts all states.48 Distance acts as a barrier to the extension of authority in two ways. First, geography is a physical obstacle to surveillance and enforcement, the two fundamental requirements underlying effective authority. While rulers or states can have absolute dominion over their subjects, if they lack the ability to monitor their subjects' behaviour and punish those who violate its rules, then their political authority is meaningless. Second, distance prevents the development of a set of experiences common to all citizens
of the state, and so hinders social integration. Effective political authority depends in part on the state's ability to "stretch" experience over time and space. Without sufficient integration, that is, without sufficient stretching of common experience over time and space, it is difficult for states to govern by rule of law because groundwork for the necessary consensus is absent.

These barriers to the effective exercise of political authority can be surmounted by increasing the scope and the intensity of state power; that is, by vesting a wider range of powers in the hands of the state's agents and institutions, allowing them to regulate different kinds of behaviour (the scope of power); and by increasing the numbers and visibility of the state's agents and institutions, thus making it more likely that individuals will fall under government surveillance and enforcement (the intensity of power). As the intersection between the agents and institutions of the state increase, moreover, a commonality of experience develops as more and more social relations are mediated through the forms of the state, and authority becomes more effective. This commonality of experience makes it easier for governments to rule by law.

In the Anglo-North American world, the courts and, more broadly, the law, I would argue, are particularly important in extending political authority over time and space. The law and the courts were symbols of the extension of state power. The circuits of the assize court adumbrated the boundaries of the law's empire and, at a more local level, the same was achieved by the permanent inferior courts, which were the outposts of the realm of the law. In addition, however, the law and the courts contributed to the social integration necessary for effective
authority because disputes were mediated through these state institutions. Though conflict was what brought people before the courts, participation in the legal process was an experience that stretched over time and space. Not only were disputing parties engaged in a common social experience when they went to court, but they also were linked to a common past. The courts were a touchstone which tied people to the familiar, secure and sometimes glorious traditions of the common law.

In British Columbia, the extension of political authority was markedly hindered by the colony’s geography. One look at a topographical map is all that is needed to get a sense of the scale of the physical obstacles confronting the colonial government in exercising its power. A few years after Confederation, former colonial Attorney-General Henry Crease complained at length about the problems posed by geography in the administration of the law. "In every direction we are met by the fact that the centres of population in British Columbia are at the circumference."

Cassiar is full 1000 miles north of Victoria, making a clear 2000 mile journey thither and back, Kootenay is some 600 miles, 400 of it on horseback, from Victoria, making a journey there and back 1200 miles, Cariboo, 400 or 500 miles north from Yale, 700 from Victoria....Off the [Yale Cariboo] Waggon Road the only mode of transit over all other parts of the province is by packhorse and trails. The Judge has to carry with him for himself and his attendant and packer, tents, baggage, food, cooking utensils, and camp equipage of every kind, and blankets; ford rivers, scale mountain-sides, camp and sleep out seven and six weeks at a time, sometimes subject to an Egyptian plague of mosquitoes.

The Supreme Court Judge as a matter of absolute necessity has to carry with him, in addition to the above, all Law Books he will require in every branch -- Chancery, Probate, Common Law...some 500 lbs., with freight at 25 cents per lb. 51
British Columbia’s legal institutions were of central importance in extending political authority in the colonial period, and their construction was characterized by efforts to increase both the intensity and the scope of their powers. In doing so, the colonial government traded accountability and public participation in the legal process for effectiveness and efficiency in its courts.

The colonial government attempted to increase the intensity of its power through the legal system by creating a set of inferior courts anchored by a resident stipendiary magistracy. By placing legal officers in the gold fields and arming them with extensive powers the government hoped to increase the effectiveness of its courts and make the resolution of disputes more efficient.

Though an early plan for British Columbia’s legal system called for two or more Justices of the Peace to be assigned to each of the colony’s districts to take informations and issue warrants in all criminal cases, to hold ball or commit prisoners to jail to await the next Quarter Sessions or Assizes, or to hear cases involving petty offences and render judgement summarily, this was never done. Instead, the colony’s JPs had the "power to act in all the said Colony, without distinction of districts and divisions." The government also dispensed with the need for JPs to sit in pairs to decide cases by endowing "a single Justice...[with] all such powers and jurisdiction as...vested in...any Stipendiary Magistrate for the metropolitan district of London." The increased power of the magistrates eliminated the need for the colony’s Justices of the Peace to sit together quarterly. A Court of Quarter Sessions did not exist on the mainland. Instead, a single justice decided all but the most serious civil and criminal cases. These were heard
at the annual assize by Matthew Baillie Begbie. This widening of power was achieved without a parallel change in the expertise of British Columbia's legal personnel. For although they were called stipendiary magistrates, the colony's justices were untrained in the law, unlike their English counterparts who were barristers of seven years training.54

The most visible example of the trend toward investing more power in the hands of B.C.'s inferior courts, however, is given in the legislation governing the Small Debts and County Courts. There were two ways for a creditor to secure his debt.55 The first was to initiate a suit to recover his property. If the court ruled in his favour, the debtor was required to satisfy the claim by selling his personal property first and then, if necessary, his real property. To this end, the court had the power to attach and sell his goods. If he could not comply then he was jailed until he fulfilled his obligation. The second way of securing a debt was called the "mesne process." In it, the creditor simply swore an affidavit attesting to an overdue debt or the fact that the debtor was about to abscond or sell his property and the court (at the discretion of the judge) issued a writ of capias ad respondendum. This was the course pursued by Gus Wright in the Cranford case, and the method chosen by most British Columbians because it was faster than the more elaborate trial process. The writ of capias ad respondendum empowered the sheriff or bailiff to arrest the debtor and hold him in jail until he satisfied the creditor's claim. Unlike the situation in the trial process, however, the court had no power to attach the debtor's goods. The creditor could have the debtor's
property (through the longer, more expensive trial process) or his body (through the mesne process), but not both.

The Small Debts Act (1859) gave the colony's magistrates the power to issue writs of *capias ad respondendum* in all cases of debt above L20, when it could be shown that the debtor was about to abscond. Even this was not sufficient for Yale's Stipendiary Magistrate, Andrew Charles Elliott, who informed the Colonial Secretary in 1860 "that the exigencies of justice are by no means fully complied with by the "Capias ad respondendum" not issuing for any less sum [i.e. debt] than L20."

The greater number of cases in my Court are, and will continue to be, under that amount and in which I have no power to detain debtors when about to leave the Country. I should respectfully suggest that L5 should be the minimum.56

Under the imperial statute regulating the English county courts this power was severely limited by a series of stringent conditions that had to be fulfilled before such a writ could issue. No such limitations were defined in the British Columbia act, leading Matthew Baillie Begbie to conclude that "it wo[ul]d really seem impossible to set aside a *capias* obtained on such an order," even though, he went on, "circumstances may be such that I myself wo[ul]d not or co[ul]d not have made the order."57 Thus, out of a need to facilitate economic transactions in the frequent absence of the colony's senior law officer, the *Small Debts Act* endowed British Columbia's magistrates with virtually unlimited powers of arrest in suits involving relatively small amounts of money.

In addition to the power to issue writs of *capias*, an 1865 ordinance gave magistrates powers in bankruptcy and insolvency equivalent to those held by the
Supreme Court, allowing them "to grant immediate protection to debtors instead of their being kept in prison until Mr Begbie's circuit came round again." But it was the *County Courts Ordinance* (1866) that put the final touches on the wide powers of the colony's inferior courts. As well as setting a new limit to the jurisdiction of the county courts (£100), the act made no provision for appeal, shortened the time for the return of a summons from ten days to three, dispensed with the need, on the part of the plaintiff, to prove the defendant's intention to abscond, and gave the judge, rather than the plaintiff, the right to decide whether a case would be heard before a jury. In addition, the act also modified the conditions under which a *capias* was served. Prior to the enactment of this ordinance, writs had to be presented to the defendant directly by the Sheriff or High Bailiff of the court. Under the new act, writs of *capias* could be served by any person designated by the court to do so. Taken together, the provisions of the *County Courts Ordinance* not only made it easier for suitors to recover debts and sue for damages, but also vested wide-ranging and discretionary legal powers in the hands of a few untrained men, whose "country tastes" were of questionable use in insuring the judicious exercise of the law.

The effects of geography were also felt on the criminal side of the law. The *Speedy Trials Act* (1860) made provision for criminal hearings to be held by the Supreme Court anywhere and at any time in the colony without a commission. In framing the act, Supreme Court Judge Matthew Baillie Begbie was well aware that its provisions "entirely contradicted the spirit and practice of the Courts of Justice as administered in England;" nevertheless he claimed that
"the practise of Criminal Trials as followed in England would render convictions [in British Columbia] in almost every case impossible."

[It would be in the upper country simply impossible to secure the attendance of the witnesses or of the prisoner on a serious charge after an interval which would in England be deemed barely sufficient to introduce between the apprehension and trial of an offender. Your Excellency is well aware of the wandering habits of the population[...], the absence of all gaols or places of security[, and] the extremely small number of regular constables....There would be no means of securing the attendance of witnesses after the interval of a month without committing them to close custody; which in the existing state of things is a physical impossibility.

"I do not recollect one case of a white man who has been convicted of any offence," concluded the Judge, "unless the trial were had within a month or so from the time of his apprehension." The Colonial Office did not share Begbie's pragmatism or appreciation of the problems of distance and disallowed the act.

At the same time as the power of the courts was being extended, the power of British Columbia's juries was curtailed and challenged. The Juror's Act, passed in 1860, eliminated the right of plaintiffs and defendants to challenge the selection of jurymen. In English law, the right of challenge was a check on the possibility of corruption or bias, and was unlimited. When similar legislation was put forward in the Island colony, the opposition press predicted that trial by jury would become "a mockery, a delusion, [and] a snare." In the eyes of British Columbians, the bench further challenged the effectiveness of the jury. Whether he addressed them as "a pack of Dalles horse thieves," altered their verdict, or discharged them and decided the case himself, Matthew Baillie Begbie gained a reputation for his repeated attempts to undermine the decision-making
power of juries. So infamous was Begbie's treatment of the jury that in 1863 the New Westminster-based *British Columbian* reported "that it is the intention of our prominent citizens to unite in a declaration that they will not sit on a Jury in our Supreme Court while the Bench is occupied by Mr. Begbie." Though the Supreme Court Judge was within the scope of his powers when he challenged jury verdicts, his actions, when combined with the widening of judicial power achieved through colonial laws must have contributed to a growing sense of the colonial government's power.

*The Sheriff's Act* was also passed in 1860. It gave the High Sheriff the authority vested in Stipendiary Magistrates, thus combining the powers of enforcement with those of judgment. Though sheriffs in England had once had judicial powers in civil and criminal matters, by the time English law was received in British Columbia a strict distinction had been made between the two functions, and the sheriff was "disqualified from acting as a justice of the peace." This consolidation of offices reflected the exigencies of frontier life. Specialization and the division and diffusion of power was sacrificed, and the risks of consolidation taken in the name of efficiency and economy.

After the union of the colonies in 1866, the colonial legislature passed a series of acts which effectively imposed British Columbia's legal apparatus on Vancouver Island. With the exception of its Supreme Court, Island tribunals were given the wide-ranging powers the mainland's courts had as a result of the geographic context they operated in.
The demands of commercial capitalism gave British Columbia's legal institutions their *raison d'être*. The colony's courts were created as arenas where competing economic interests could sort out their disputes in a legal environment structured to maximize the security of private property. Recourse to the courts and the minimal security that it provided was almost as necessary to British Columbians, particularly the merchants and miners, as were roads and bridges. Both were part of the necessary infrastructure of a colony experiencing rapid economic growth and which was tied to external markets, and both were the subject of petitions to the colonial government. If the exigencies of commerce were the catalyst for the construction of British Columbia's courts, the colony's geography went a long way to defining their powers. To make the administration of the law more effective in a colony whose small population was separated by great distances and rugged terrain, the colonial government endowed its inferior court officers with powers usually reserved for people who possessed a formal legal education. They also attempted to modify legal procedure, streamlining it to meet the needs of local circumstance. The colony's geography thus reinforced the centrality of commercial capital in the colony by making it even easier to secure debt through a powerful set of inferior tribunals: the County and Gold Commissioners' Courts.

The union of British Columbia and Vancouver Island effectively marked the triumph of commercial capitalism and an instrumentalist view of the law. The island's courts, which did not bear the imprint of property and geography as did their mainland counterparts, ceased to exist at union, and were replaced by
institutions which followed the conventions of British Columbia's courts, forged as they were in the gold fields.

The language of laissez-faire economics had captured the political discourse surrounding the creation of the colonial courts. Because British Columbia's legal institutions served economic purposes, security and efficiency became the standards that simultaneously guided their construction and measured their utility and, ultimately, their legitimacy. The summary proceedings of the Gold Commissioners' Courts were designed to settle disputes within a formal legal setting, but without the lengthy and potentially costly delays associated with jury trials or Supreme Court proceedings. The same rationale underlay the formation of the Small Debts/County Courts. In these, the colony's Stipendiary Magistrates had powers of arrest (that is, powers to issue writs of *capias ad respondendum*), which in England were more tightly controlled and placed in the hands of formally-educated and seasoned barristers. The widened powers possessed by British Columbia's County Court judges enhanced the security of property and avoided the delays associated with trials by making the mesne process of recovering debts more accessible. On the criminal side, the *Speedy Trials Act* (1860) did away with the need for separate commissions to be issued for each assize, allowing criminal cases to be heard at anytime and in any place in the colony. Less serious offences were also treated with the twin demands of security and efficiency in mind. Stipendiary Magistrates dealt with criminal offences summarily, sitting alone rather than in pairs at Quarter Sessions of the Peace.
Each of these modifications to English practice was made in response to the dual exigencies of the frontier -- of the colony's geography -- and a commercial economy, and each was perhaps of little consequence in itself. Taken together, however, these changes added up to a set of institutions in which public participation in the legal process was traded for efficiency. British Columbians played a diminished role in dispute resolution, and legal adjudication became less a formal articulation of public sentiment and more a matter for the government's law men and experts. The declining public participation in the legal process complemented the increased influence of experts in the court room and can be interpreted as another manifestation of the division of labour and specialization that accompanied the emerging commercial and industrial capitalist economy.
NOTES

1. For more on Begbie see David R. Williams, "...The Man for a New Country": Sir Matthew Baillie Begbie (Sidney, B.C., 1977).

2. Ibid., 14, 16-19, 28-33.

3. Court of British Columbia. Order of Court, 24 December 1858; Proclamation dated 8 June 1859.

4. Proclamation to make provision for the Speedy Trial of Persons charged with Criminal Offences, 23 April 1860; An Ordinance to amend the Law relating to Bankruptcy and Insolvency in British Columbia, 10 April 1865.


6. This was Andrew Charles Elliott. See Margaret Ormsby, "Some Irish Figures in Colonial Days" British Columbia Historical Quarterly 14(1950):61-82.

7. Begbie to Douglas, 18 May 1859. BCARS. GR 1372, reel B-1307, f 142b/7.


10. When British Columbia's Legislative Council was created in 1864, five of its fifteen seats were reserved for the colony's magistrates. See James E. Hendrickson, 265.


14. Ball to the Colonial Secretary, Quesnelmouth, 31 May 1865. BCARS. GR 216, v. 10, 107.
15. See Trevor to Ball, Quesnel, 27 May, 1 December 1870. BCARS. GR 216, v. 1, box 1, files 3, 7.

16. Seymour to Cardwell, New Westminster, 31 January 1865. CO 60/21, reel B-92, 20; and Nind to the Colonial Secretary, Lytton, 25 November 1865. BCARS. GR 1372, reel B-1351, f 1259/50.

17. Begbie to Douglas, Fort Yale, 13 March 1859. Colonial Correspondence. BCARS. GR 1372, reel B-1307, file 142a/22.

18. "Nisi prius" means literally "unless before." Civil actions under the jurisdiction of the Supreme Court had to be tried at New Westminster, where the superior court was based, unless the judges of assize had come into the district on circuit before to hear such cases. In short, nisi prius cases are civil actions heard at the assizes.


20. Begbie to Douglas, Victoria, Vancouver Island, 7 November 1859. Colonial Correspondence. BCARS. GR 1372, reel B-1308, file 142b1/17b.


23. Cary to Douglas, Attorney General's Office, Victoria, 9 December 1859. CO 60/5, reel B-81, 274.


26. See the following petitions for county courts in the Colonial Correspondence. BCARS, GR 1372: petition addressed to James Douglas, Yale, 30 December 1861, reel B-1354, file 1348; petition to the Colonial Secretary, dated Quesnelle, 28 March 1864, reel B-1354, file 1348; petition, n.d., from Fort Hope, reel B-1355, file 1358; Nind to the Colonial Secretary, Alexandria District, Williams Lake, 17 October 1860, box 149, file 1254/5; Nind to the Acting Colonial Secretary, Williams Lake, Alexandria District, 9 November 1860, box 149, file 1255/1; and Nind to the Colonial Secretary, Douglas, 17 March 1864, reel B-1351, file 1257/9.

28. An Ordinance amending the procedure of the County Courts of the Colony of
British Columbia, 5 April 1866; and An Ordinance to define the jurisdiction of the
County Courts under the "Small Debts Act, 1859", 5 April 1866.

29. Crease was uncomfortable with placing greater power in the hands of the
colonial County Court Judges because they were men untrained in the law. See
Crease to Birch, Attorney General's Office, New Westminster, 18 June 1866, CO
60/24, reel B-94, 326; Extract from the Presentment made by the Grand Jury at
Yale, 4 May 1866, enclosed in Birch to Cardwell, 21 June 1866, CO 60/24, reel
B-94, 328.

30. The Gold Fields Act, 1859 [31 August 1859]; William J. Trimble, The

31. On miners' meetings in general, see Charles Shinn, Mining Camps: A Study
in American Frontier Government (Gloucester, MA, 1970); for the short-lived
practice in British Columbia and the operation of the Gold Commissioners' Courts
see David Williams, "The Administration of Civil and Criminal Justice in the
Mining Camps and Frontier Communities of British Columbia," in Louis A. Knafla,
ed., Law and Justice in a New Land: Essays in Western Canadian Legal History
(Calgary, 1986).

32. Rules and Regulations for the Working of Gold Mines under the "Gold Fields
Act, 1859" [7 September 1859]; Rules and Regulations for the working of Gold
Mines, issued in conformity with the "Gold Fields Act, 1859" (Bench Diggings) [6
January 1860]; Rules and Regulations under the "Gold Fields Act, 1859" (Ditches)
[29 September 1862]; Further Rules and Regulations under the "Gold Fields Act,
1859" [24 February 1863]; Proclamation amending the "Gold Fields Act, 1859" [25
March 1863]; The Mining District Act, 1863 [27 May 1863]; The Mining Drains
Act, 1864 [1 February 1864]; An Ordinance to extend and improve the Laws
relating to Gold Mining [26 February 1864] and An Ordinance to amend and
consolidate the Gold Mining Laws [28 March 1865].

33. An Ordinance to amend the Laws relating to Gold Mining, 2 April 1867.

34. "Election of a Mining Board," Cariboo Sentinel 6 August 1866.

35. Seymour to Needham, Government House, New Westminster, 13 November
1866. NAC. MG 11. CO 60/27, reel B-96, 150-151; Memorandum for the Right
Honourable the Earl of Carnarvon, one of Her Majesty's Principle Secretaries of
State, respecting the Chief Justiceship in the Supreme Court of British Columbia.
Submitted by Matthew Baillie Begbie, judge in this Court, New Westminster, 18
December 1866, in W. Kaye Lamb, "Memoirs and Documents relating to Judge
Begbie," British Columbia Historical Quarterly 5(1941):136-140; and Crease to
Seymour, New Westminster, 24 June 1867. NAC. MG 11. CO 60/28, reel B-97,
234-243.

37. Carnarvon to Seymour, Downing Street, 14 March 1867. NAC. MG 11. CO 60/27, reel B-96, 127-128.

38. Ibid.


40. In fact the situation was a point of embarrassment to British Columbians. Seymour's replacement, Anthony Musgrave, told the Colonial Secretary that William Seward, the American Secretary of State, made B.C.'s Supreme Courts "the subject of pointed jest, not intended to operate to the praise of British institutions." NAC. MG 11, CO 60/36, reel B-104, 562-563.


42. Report of the Committee struck to study the jurisdictional problems brought up by Nicholson's Petition. Dated 23 February 1869. BCARS. GR 673, box 2.

43. There were 155 in all. Musgrave to Granville, Government House, 22 December 1869. NAC. MG 11, CO 60/36, reel B-104, 540-541.

44. Petition from 155 merchants, n.d., enclosed in ibid., 555-557.

45. Petition from the colony's lawyers, n.d., enclosed in ibid., 558-559.

46. Musgrave to Granville, Government House, 22 December 1869. NAC. MG 11, CO 60/36, reel B-104, 542.


49. This is what Anthony Giddens calls "time-space distanciation."


52. Pearkes to Douglas, Victoria, 27 October 1858. CO 60/1, reel B-77, 281-284.

53. The Justices' Act, 1859. Colonial Correspondence. BCARS. GR 1372, reel B-1307, file 142a/12a. Retrospective acknowledgement of its provisions was given in An Ordinance respecting Stipendiary Magistrates, 10 March 1869.


55. See Peter J. Coleman, Debtors and Creditors in America: Insolvency, Imprisonment for Debt and Bankruptcy, 1607-1900 (Madison, Wisconsin, 1974), 4-5.


57. Begbie to Douglas, New Westminster, 22 December 1862. Colonial Correspondence. BCARS. GR 1372, reel B-1308, file 142e/12.

58. need ref. for quote. An Ordinance to amend the Law relating to Bankruptcy and Insolvency in British Columbia, 10 April 1865.

59. Proclamation allowing for the Speedy Trial of Prisoners charged with Criminal Offences, 23 April 1860.

60. Begbie to Douglas, 28 May 1862. Colonial Correspondence. BCARS. GR 1372, reel B-1308, file 142e/6.


62. Proclamation to obviate the difficulty in procuring a sufficient number of British Subjects to sit on Grand and Petit Juries, 8 March 1860.

64. *British Colonist* 25 November 1861.


66. Proclamation to enable the High Sheriff to act as a Justice of the Peace and in other respects alter the law relating to Sheriffs, 8 March 1860.


68. William Nelson found the same trend in American jurisprudence and tied it to an overall effort to guarantee certainty and predictability in the marketplace. "The certainty and predictability of substantive rules that a commercial economy required would be of little avail," he noted, "if juries remained free to reject those rules or apply them inconsistently." *The Americanization of the Common Law* (Cambridge, Massachusetts, 1975), 165.
CHAPTER SEVEN

THE "UBIQUITOUS" NED?:
CRIME AND SOCIETY IN BRITISH COLUMBIA

On New Year's Eve, 1858, a month after British Columbia had become a colony, a man strode into the Hill's Bar magistrate's office with nine of his comrades, forced his way into the lock-up and released the prisoners, friends who had been incarcerated for roughing up some "darkies" in a local saloon.¹ The posse leader was a Californian known as "Ubiquitous" Ned McGowan, who wanted to put an end to the pompous blusterings of the local magistrate, "Captain" Peter Brunton Whannel. Whannel was an Australian; a man "of fine physique, and had been a Captain in a gold guard in Australia."

His good looks was all he had to recommend him, however, for he was an imperious blatherskite and fool. If you addressed him with your hat on, he would threaten to commit you for contempt.² As it turned out, the "Captain" was but a simple foot soldier in the infantry who deserted and ran off with another man's wife.³ This dashing cad loved to exercise his newly minted authority; or in Ned's words, to "go charging and slashing about." It was during one of these fits of judicial energy that the Captain decided to clean up Hill's Bar by closing down all the saloons and gambling halls. In doing so, he incurred the wrath of Ned and his colleagues, with the consequences just outlined.

The Captain was quick-marched to Yale, a few miles away, and forced to stand trial before Ned and the colonially-appointed magistrate there, who, somehow, was convinced of the propriety of the actions of Ned and his gang.
Whannell was charged with contempt of court, tried and jailed after getting "a pretty sharp lecture about his tyrannous and illegal acts."4

Ned was no ordinary California goldseeker. McGowan began his public career as a municipal politician in Pennsylvania, migrating to California in 1849 to participate in the gold rush. Politics attracted him again, and he soon was elected a Judge in San Francisco. The position embroiled him directly in the affairs of the Committee of Vigilance, an informal but powerful tribunal of respected men who were the real political brokers in the city and who meted out rough justice to anyone who got in their way.5 In 1856 McGowan was accused of murdering one of the Vigilantes. Before he could be lynched, he escaped, and sparked the longest manhunt in the territory's young history. "Ubiquitous" was eventually caught, and actually managed to secure a real trial in 1857. Though he was acquitted, Ned found California a little too uncomfortable for his tastes and slipped out of Sacramento in July 1858 for the safety of the Fraser River.

A shooting in broad daylight, gambling in "unhallowed resorts," two inept lawmen and a cagey band of desperadoes bent on imposing their own brand of order was hardly the scenario we associate with the British North American frontier. Dodge City was a likelier setting for this nineteenth-century spaghetti western that became known as "Ned McGowan's War." Just how ubiquitous was Ned? McGowan may have been an exceptional individual, but was the violence he represented as unusual?
British Columbia was a violent place by nineteenth-century statistical standards, and the nature of violent crime confirms the picture already presented of colonial society as bondless. The same social organization that made court intervention a necessary part of civil dispute resolution was also fertile ground for violence. Yet British Columbians were loathe to admit theirs was anything but a society characterized by law and order. Such an understanding was possible because of the social meaning of violence in the colony. Statistics of violent crime convey little of what violence meant. The standards British Columbians used to measure violence derived from the visibility of crime and their expectations about behaviour in a frontier society. Colonists expected a certain level of violence and degradation in a mining society, particularly one with a large American component. But many of the expectations British Columbians had about violent crime were rooted in racial prejudice. Violence was tied to the supposed savagery of the colony's indigenous population. When Indians were accused of crimes, it merely reinforced existing white stereotypes, rather than evoke fears of social breakdown. British Columbians could boast about their own civility because the society they described was one that did not include the native population. Their sentiments thus constituted a cant of an exclusive, racially-defined community. The criminal courts reinforced these racial boundaries by underscoring the existing image of Indian savagery and inferiority. Not only did Natives constitute the colony's "criminal class," but they also were subject to differential treatment before the law. As with civil litigation, criminal trials revealed that the rule of law was not without normative value and bias.
Many Europeans looked upon North America as a place suited for the construction of ideal societies. It was a continent endowed with bountiful resources and wide open spaces, a place unburdened by old world corruption and decay. As a "playground for European ideals," the continent was the perfect place for realization of John Winthrop's "City Upon a Hill," or William Penn's Society of Friends. For the less idealistic and the more materialistic, North America was a field for economic investment and quick gain. The hogsheads of tobacco that the Virginia tidewater yielded gave rise to a wealthy but unstable society devoted to acquisitiveness and fierce individualism; the verso of New England's idealism. For puritan and adventurer alike, North America represented boundless opportunity, limited only by individual failing.

For the most part, these glowing and optimistic assessments were reserved for the southern half of the continent. Canada never captured the European imagination in quite the same way, and, as a result, attracted fewer immigrants. It also developed a slightly different self-image: one that was less utopian and more defensive. Canada might not have been the best poor man's country, but it did hold out the opportunity for social mobility and landholding, as well as offering an escape from the class conflict of the old world.

Because of its beginnings as a gold colony, British Columbia did manage to capture the imagination of a great many people in England, America and Australia. Within a matter of weeks after the arrival of the first shipload of fortune hunters in Victoria in April 1858, some 30,000 miners flooded into the Fraser's River district to try their luck. Although initially the colonial government was wary
of the influx of American miners, they had high hopes for the colony’s future development. Governor James Douglas predicted that within a few years British Columbia would boast a population of 100,000, becoming a Greater Britain on the Pacific. Whereas no other British North American colony had fulfilled its promise, British Columbia would. For not only did it offer adventure and the possibility of quick riches, it was also a place endowed with fertile land and timber: a perfect place for agricultural settlement. Best of all, British Columbia offered all of this within the orderly framework provided by British institutions. Prospective immigrants could have all the benefits of life in the American west without its violent side-effects.

Despite Douglas’ favourable assessment of the colony’s future, the 30,000 never turned into 100,000. Ten years later the non-native population of British Columbia was less than a tenth of that starry-eyed figure, and by Confederation in 1871 it was just over 10,500. Not many of the miners turned into sturdy yeomen farmers, preferring instead to go home. In 1867 British Columbia was in the middle of an economic depression, its colonial coffers almost empty. Yet in the face of a gloomy future, British Columbians still held fast to their optimistic self-image. If the colony was not prospering, they seemed to think, it was because of the proximity of American territory and the promise of free land. Land prices plummeted in British Columbia in the years after 1858, but the colonial government resisted instituting an American-style Homestead Act. With the reformed land laws it was only a matter of time before people awakened to the benefits of life in the colony.
Though their confidence in the colony's economic prosperity wavered somewhat, British Columbians never lost faith in the superiority of British institutions. The law and order they conferred came to hold a central place in the colonists' image of themselves. Throughout the colonial period, neither the government nor British Columbia's active press had occasion to comment on criminal matters. Criminal jurisdiction was almost an afterthought to the architects of Vancouver Island's and British Columbia's court systems. Instead, civil law concerns occupied most of the attention of the colonial government and were the focus of almost all of the commentary and criticism levelled at British Columbia's legal administration by the newspapers. When the press did write about crime and violence, it was to note their absence and to congratulate themselves on their own civility and the efficacy of British institutions. "No sooner is the British Flag unfurled in a new Colony than a complete judicial system is contemporaneously organized and British Law ever-inspiring a wholesome terror in the mind of the evil-doer is administered," wrote the New Westminster-based *British Columbian*.

And with all her mal-administration and autocratic bungling even British Columbia does not constitute an exception. Almost with the first rush of gold-hunters came the machinery for the administration of justice. And who, that is acquainted with the history of the Colony during the past four years would venture to contradict us when we assert that the unparalleled absence of crime, the promptitude with which criminals have been brought to justice, must be attributed to the fact that we have British Law administered by a British Judge, and that the administration was coeval with the settlement of the country.\(^{13}\)

Begbie considered the absence of crime in the colony "providential," and after his 1861 circuit he passed on these sentiments to James Douglas.\(^{14}\)
It is a continued subject of thankfulness that the amount of crime still remains very small in comparison with what might have been anticipated from the amount of population, the extent and difficulty of the country over which the population is scattered, the habits naturally induced by the unsettled and exciting life of a miner, and from the impunity which criminals might hope for, looking to the state of communications and the state of the Country generally, the proximity of a long, open Frontier accessible by unfrequented passes, and the necessarily distant and scanty Police force.

It is clear however that the inhabitants almost universally respect and obey the laws, and voluntarily prefer good order and peaceful industry, to the violence and bloodshed to which other Gold mining regions have been subjected.\textsuperscript{15}

The judge’s sentiments did not alter throughout the colonial period, and though his comments might be tainted with self-interest, his views were shared by the often critical colonial press and by the American miners. The San Francisco press, however, disagreed, and sarcastically referred to British Columbia as "NED’S COLONY" -- a place where weak and ineffectual British authorities were no match for the wily American criminal.\textsuperscript{16}

Historians of British Columbia have accepted this consensus on the state of the colony uncritically. According to David Williams, the colonial government administered the law without controversy and with the blessing of British Columbians. "The fact is," Williams wrote, "that the imposition of British criminal justice in colonial British Columbia was accomplished with little difficulty or opposition from the community."\textsuperscript{17} Mining historian William J. Trimble contended that "in British Columbia there was Law and an Executive and a Chief Justice and a magistracy that expected obedience, and the mining population rendered obedience willingly."\textsuperscript{18} Margaret Ormsby also stressed the importance of the character and integrity of British Columbia’s law men in securing peace and
order, and asserted, rather than proved, that incidents like Ned McGowan's War were "the exception rather than the rule." Louis Knafla went even further than either Williams or Trimble, arguing that in British Columbia the law was administered "effortlessly" and "evenly, without controversy," as well as the blessing of a grateful population.

Despite these repeated assertions about the tranquility of the colony and the absence of crime, British Columbia's magistrates registered their private concerns about the potential and the reality of violence in their letters to the Colonial Secretary. American miners, Indians and alcohol formed a triangle of interlocking threats to property and person on the mainland. The stream of American miners entering British territory aroused fears in the minds of colonial officials about controlling "the very dregs" of Californian society. "There will always be a hankering in their minds after annexation to the United States," James Douglas warned. "And with the aid of their countrymen in Oregon and California at hand they will never cordially submit to British rule, nor possess the loyal feelings of British subjects." Though the miners gained a reputation for being litigious, mining society was also notable for its casual violence. Assault, whether organized in the form of saloon entertainment or the result of the spontaneous combustion that came from mixing "Dominion cocktails" and gambling, was a common occurrence. Alcohol as well as blood flowed especially freely on occasions like the 4th of July and, later, Dominion day.

Gold was central to much of the violence. Shortly after the arrival of the first miners at Fort Yale in 1858 clashes between natives and non-natives
occurred. According to Douglas, the Indians at Yale attempted to evict the advancing miners, who organized themselves into "military units" in response. Though some fighting did occur, both parties managed to reach some agreement before the Governor arrived to investigate. Relations between the native population and the Chinese miners were no less strained. "All along the [Fraser] river, at the mining bars and in boats, were Chinese," noted Anglican bishop George Hills in his diary. "Our Indians seemed to hold them in great contempt. They called out continually, "John, John," and having arrested John Chinaman's attention, imitated some Chinese expression, sounding "Hah, ah, war."...It was amusing to see their patronizing manner." When a Chinese miner was found dead, his compatriots blamed the Indians, going to their villages "in large parties, charging them with the murder and saying that they should soon be very numerous and then they should kill all the Indians."

While the rush brought these groups into conflict, the precious metal itself was directly responsible for robbery and murder. Miners travelling to New Westminster to convert their gold to money were particular targets. In 1861 a the colonial government established a Gold Escort to relieve the individual miner of this duty. An armed and horsed escort of government agents accompanied a stage coach carrying the gold down to New Westminster's banks. Though it made three trips in its inaugural year, the Gold Escort ceased operations because it could not guarantee delivery. Miners preferred to take their own chances. The three men who followed Charles Rouchier, Harris Lewin and David Sokoloski from Antler Creek to Quesnel in the summer of 1862 certainly knew this. "The Three Jews,"
as they were known, had between $10,000 and $12,000 in gold dust which they wanted to cash in at the lower country banks. They were ambushed and murdered by three highwaymen who were never caught, despite the $1000 reward offered.\textsuperscript{30}

Women were also implicated in violence and crime as victims and perpetrators, as well as catalysts for disputes between men. Indian men at Beaver Lake in the upper country complained that the miners wintering there "were in the habit of giving Whiskey to their squaws and violating them."\textsuperscript{31} In fact, colonial officials believed that relationships between Indian women and European men were at the root of most of the violence between the two groups. But non-native women could also be the victims as well as the perpetrators of crime. The violence of male society in the mining districts was not limited by the boundaries of gender, even when white women were involved. Magistrate Philip Henry Nind thought that assaults on women were often the result of "a drunken frolic indulged in by men who have suffered many privations and worked hard during the past year."\textsuperscript{32} This explanation did not prevent Cariboo magistrates from punishing men who assaulted women when they perceived "things [had been] carried a little too far."\textsuperscript{33} Cornish miner William Williams received a six month sentence when he pulled Hattie Lucas, a "public woman," off her horse and knocked her down three times on Barkerville's main street.\textsuperscript{34} Hattie Lucas was no shrinking violet when it came to dealing with men, however. Exactly a month earlier, she levelled a pistol at John Carson and threatened to shoot him because he "had offered her an insult in the public street."\textsuperscript{35} The district's nine
prostitutes were formidable figures. "They dress in male attire and swagger through the saloons and mining camps with cigars or huge qwids [sic] of tobacco in their mouths," reported the Victoria-based Colonist,

cursing and swearing and looking anything but the angels in petticoats heaven intended they should be. Each has a revolver or bowie knife attached to her waist, and it is quite a common occurrence to see one or more women dressed in male attire playing poker in the saloons, or drinking whiskey at the bars.36

The absence of a gold rush and the different population on Vancouver Island did not mean that violence and crime were any less a part of colonial life there. The Island was largely the preserve of single men, though women were present in greater numbers than on the mainland. These rootless men were not, in the opinion of Vancouver Island's law officers, the chief threat to order. However, instead, the resident native population around Victoria, Nanaimo and, somewhat later, the settlements at Cowichan and Comox were the focus of concern. In Victoria, there was a marked seasonal variation in the level of concern exhibited on the part of the police magistrate and constables about the Indian threat. Each summer "a great concourse" of "Northern" (Haida and Tsimshian) and "Southern" coast Indians congregated at Victoria. Their drinking, gambling and occasional rioting inspired a mixture of fear and disdain from the district's white inhabitants.37 In May 1859, "a serious disturbance" occurred between visiting Haida and Fort Simpson Indians near the Songhees village in Victoria. Police Magistrate Augustus Pemberton, accompanied by ten men armed with batons, discovered that nine Haida had been killed or wounded. About "2000
excited Indians" met Pemberton's party. They were armed with "every kind of offensive weapon:"

blunderbusses, long and short muskets, single and double-barrelled rifles, fowling pieces; revolvers and pistols from every nations: swords, bayonets, dirks, daggers, and Knives of every size and shape. They were also said to have in their possession a brass cannon.38

The affrays associated with "Indian season" were a regular source of entertainment for the non-native population, among whom numbered the city's constabulary, who watched from the relative safety of "high points" above the inner harbour.39 The Victoria Gazette called the pitched gun battles between the local Songhees and the visiting Haida and Stikine "Sunday Aboriginal Amusement," reporting the numbers of killed, wounded and captured as if they were cricket scores, and wondered if police inaction was part of an unstated colonial policy to let the native population kill themselves off.40 In 1860 Victoria's Grand Jury suggested that Indians be prohibited from carrying arms and be subject to a curfew.41 Though these suggestions were not heeded, the colonial government did try to address the problem in a different way. Because they felt that liquor consumption underlay Indian violence and vice, the police installed natives as constables to infiltrate the Songhees reserve. When the redoubtable "Sir Robert Peel" felled a notorious whiskey seller with one swing of his baton, the local press called him a hero and congratulated the police on their creative experiment.42 But when the same Indian constables began arresting white men public opinion shifted and the initiative came to an end in 1861. The Victoria Daily Press contended that the native constables had "become as great rowdies as the
common folk of the tribes," and called the Indian police force "a played out institution."  

Indian prostitution was also considered a scourge of the colonial city. In 1865 Police Superintendent Philip Hankin estimated that the area between Fisgard, Cormorant and Store Streets housed more than 200 Indian prostitutes, housed in crude shanties they rented from the Chinese. "A dozen of Police could not keep order in these streets," he wrote.

It is not proper for any respectable person to walk in Cormorant Street by day; and by night it is absolutely unsafe. Not long since an Indian woman was arrested by the Police, and brought to the Gaol in a Complete state of Nudity; Scenes occur nightly of drunkenness and rioting, and here congregate together Whiskey sellers, thieves and Prostitutes, and I feel convinced if these Natives were removed from the City and sent over to the Reserve which is set apart for them, less crime would be committed....

The marketing of "smutty commodities" was not itself considered a problem; what colonial officials objected to was the location of the trade. Hankin was more than willing to let Indian women carry on their business if they limited themselves to the reserve, which appears to have been considered by the constabulary as something of a "free enterprise zone:" prostitution, riots, shootings and liquor consumption on the reserve were not subject to the same degree of regulation by colonial authorities as they would receive if they occurred outside its boundaries. As long as this violence and vice was localized in an already undesirable area the police considered it under as much control as could reasonably be expected.

Outside Victoria, Indian "depredations" were equally frequent, but of a different kind. Settlers at Cowichan and Comox, as well as at the small
communities in the lower country on the mainland, complained about the malicious wounding of their cattle and horses by Indians. The natives countered with their own complaints about trampled potato patches and incursions by settlers on land they felt "reserved" for their own use. Efforts to make both parties fence their land and to delineate boundaries failed. Perhaps more than the more bloody manifestations of Indian-white conflict, these frustrating little skirmishes came to characterize social relations between the two groups throughout the colonial period.

"As may be supposed," wrote Duncan Macdonald of British Columbia in 1862, "the state of society is low in the extreme, and life and property are far from secure."

Night and day bands of murderous-looking ruffians prowl about and commit the most atrocious robberies. Indeed, no accounts of the discomfort and crimes encountered at the gold fields, however exaggerated, can come near the reality....At the darkest hour of the night the agonising shriek and the muffled cry is heard of some poor wretch who is gagged or murdered. But you dare not interfere unless you desire yourself shot and to have your tent sacked. Even in the broad light of day, from hiding places in the clefts of rocks, from the eternal snows of the Rocky Mountains, with no witness but the allseeing eye of God, have ascended many a cry from lips which never opened more.

Macdonald's account and the snatches of colonial life gleaned from magistrates' correspondence and newspapers raise questions about British Columbians' view of their society as a peaceable kingdom. These questions assert themselves all the more strongly given the revelations of the criminal court records.

Although the contemporary press and the judiciary idealized colonial British Columbia as a crime-free society, the statistics belie historians' faith in
this colonial optimism. Criminal statistics are problematic measures of crime because of "the inherent slippage between the occurrence of an offense and the chain of events by which it does or does not enter official records." Nevertheless, because of its severity, homicide is considered the least under-reported serious crime and hence the most reliable indicator of violence. Certainly Matthew Baillie Begbie took pains to note the absence of murders in particular when he reported on the state of the colony after his annual circuits. Over the colonial period the homicide rate fluctuated greatly (Figure 7-1, Table 7-1), but averaged 9.6/100,000 (the median was 8.8/100,000). At the same time, Victorian England had a rate of between 1-1.5/100,000. Given the concern expressed by English social critics about the growth of violent crime -- something historian Jennifer Davis labelled a "moral panic" -- and the consequent attention it received from successive local and national governments, one wonders what they would have made of the situation in British Columbia. Even in the seventeenth and eighteenth centuries, during the reign of the "Bloody Code," John Beattie estimated that the homicide rate fluctuated between 0.5 and 2.6/100,000.
TABLE 7-1: HOMICIDE RATE IN BRITISH COLUMBIA, 1859-1870

<table>
<thead>
<tr>
<th>YEAR</th>
<th>NUMBER OF TRIALS</th>
<th>RATE/100,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>1859</td>
<td>2</td>
<td>4.7</td>
</tr>
<tr>
<td>1860</td>
<td>1</td>
<td>2.3</td>
</tr>
<tr>
<td>1861</td>
<td>10</td>
<td>22.2</td>
</tr>
<tr>
<td>1862</td>
<td>5</td>
<td>11.1</td>
</tr>
<tr>
<td>1863</td>
<td>9</td>
<td>16.8</td>
</tr>
<tr>
<td>1864</td>
<td>9</td>
<td>19.0</td>
</tr>
<tr>
<td>1865</td>
<td>5</td>
<td>9.9</td>
</tr>
<tr>
<td>1866</td>
<td>1</td>
<td>2.2</td>
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<tr>
<td>1867</td>
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<td>8.8</td>
</tr>
<tr>
<td>1868</td>
<td>1</td>
<td>2.2</td>
</tr>
<tr>
<td>1869</td>
<td>6</td>
<td>13.6</td>
</tr>
<tr>
<td>1870</td>
<td>1</td>
<td>2.4</td>
</tr>
</tbody>
</table>


The natural comparison to make with British Columbia is with other nineteenth-century frontier societies, especially those in the western United States. New Zealand, a settler domain that shared many characteristics with British Columbia (including a gold rush) also shared an similarly high homicide rate of 8/100,000.\textsuperscript{56} New South Wales, the convict colony, had a very high rate of committals for murder and assault which dropped significantly over the nineteenth century, from 45/100,000 in the 1830s, to 10/100,000 in the 1850s and just 5/100,000 in the 1890s.\textsuperscript{57} Nineteenth-century American cowtowns exhibited very high rates of violence, but shared similar numbers of killings with British Columbia. Roger McGrath calculated that Aurora and Bodie, two Sierra Nevada gold rush towns, had homicide rates of 64 and 116/100,000 in their boom years (approximately 1860-1864).\textsuperscript{58} However, these rates reflected only sixteen
and thirty-one killings in Aurora and Bodie over a five year period, or three to six homicides per year on average. These numbers do not stand in stark contrast to those for British Columbia. Other American frontier settlements exhibited numbers similar to those reported by McGrath and those for British Columbia: in the year and a half following its foundation in 1859, Virginia City had eight homicides; Deadwood, South Dakota had four homicides in its first year, 1876; Ellsworth, Kansas had eight in 1867; and Dodge City, the quintessential wild west town, had nine in 1872-73.59

The pattern was similar for less serious violent crime. For these figures I used the Police Court records from Victoria, the colonial capital.60 J.M.S. Careless called the settlement on the southern tip of Vancouver Island "a sleepy little hamlet," and it is a characterization that has remained.61 However, the figures for assault indicate that perhaps fur trader James Murray Yale was closer to the mark when he described the city as "A Rising Sodom on Vancouver's Island."62

If the assault rate for Victoria is compared to other colonial British North American cities it is apparent that it was as violent, if not a more violent place than either Toronto or Halifax, another colonial capital and port city. Moreover, all these British North American cities had higher rates of assault than characterized mid-nineteenth-century England, where common assaults known to police occurred at the rate of 408-425/100,000.63
TABLE 7-2: ASSAULT RATES/100,000 FOR THREE BRITISH NORTH AMERICAN CITIES

<table>
<thead>
<tr>
<th>YEAR</th>
<th>VICTORIA</th>
<th>TORONTO</th>
<th>HALIFAX</th>
</tr>
</thead>
<tbody>
<tr>
<td>1859</td>
<td>3333.3</td>
<td>1010.7</td>
<td></td>
</tr>
<tr>
<td>1862</td>
<td>1250</td>
<td></td>
<td>1207.1</td>
</tr>
<tr>
<td>1864</td>
<td>833.3</td>
<td>609.1</td>
<td>1196.3</td>
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<tr>
<td>1865</td>
<td>1180</td>
<td></td>
<td>818</td>
</tr>
<tr>
<td>1869</td>
<td>881.4</td>
<td>524.1</td>
<td></td>
</tr>
<tr>
<td>1870</td>
<td>841.1</td>
<td>812.9*</td>
<td>738*</td>
</tr>
</tbody>
</table>


Killings in British Columbia were committed by persons unknown to the victim, usually in the course of a robbery. This differs markedly from homicides in Victorian England, where the killer and the victim commonly knew each other (often they were related) and the motive was passion, rather than material gain. Less serious violence like assault, cutting and wounding or fighting was also of a different character in British Columbia. Like homicide, violence was usually the act of individual men of little or no relation to the victim. Victoria was not troubled by collective violence. Riots, lynchings and episodes like Ned McGowan’s War, where groups of men organized specifically for "criminal" purposes, were exceptional.

The solitary, anonymous violence in colonial British Columbia reflected its social organization. The colony’s absence of family or kin ties, its sparse, scattered and culturally diverse population and its volatile economy gave British Columbia an impermanent and bondless character. These demographic, geographic and
economic features were fertile ground for violence. British Columbians simply did not interact sufficiently to create the sorts of informal social networks that regulated behaviour in more settled societies. Community censure did not exist to the same degree to deter anti-social behaviour or to punish those who transgressed community norms simply because there was not enough social cohesion in colonial settlements to bring informal pressure to bear on individual wrongdoers. Even vigilantism, the hallmark of law in the American west, was not possible in British Columbia because the social unity and common cause underlying this form of collective violence could not be achieved.

Though by statistical standards British Columbia was as violent as or more violent than other societies which historians have characterized as such, contemporaries were loathe to use those terms to describe it. The reasons for their self-definition as an orderly, law-abiding colony lay in the social meaning of violence. Though the colony possessed a fairly high homicide rate and its stipendiary magistrates and newspapers reported incidents of violent crime regularly, violence did not mean the same thing to British Columbians as it did in other jurisdictions. British Columbians used a different standard to gauge violence, and to understand why they considered theirs a peaceful society we need to understand the scale and calibration of their measure.

British Columbians calibrated their standard of violence using three different scales. The first was the visibility of violent crime. Though the colony had a fairly high homicide rate, the absolute number of killings in any year was small, fluctuating from one or two to nine or ten. British Columbia was not unusual in
this respect. Other jurisdictions with high rates had smaller absolute numbers of homicides. Rates are calculated to provide a basis of comparison, but are somewhat misleading because they convey little or nothing of the social meaning of violence. Given British Columbia's geography, settlement pattern and the solitary, anonymous nature of its homicides, the significance of the absolute numbers of killings pales even more. The likelihood of people witnessing serious violent crime at all, or frequently enough to become concerned about the rate of violence in colonial society was not great. Instead, it was more likely that violent acts were seen as episodic and isolated.

The second and third standards which influenced how British Columbians measured violence are related and stem from their expectations about frontier behaviour. Violence and degradation were expected in mining societies, particularly those which had a significant American presence. Matthew Begbie's charge to the Fort Yale Grand Jury before the 

_Niel_ case is indicative of such expectations. "The use of firearms and all that can tend to attack upon life, limb or property should be entirely discouraged," he told the grand jurors.

But in the early stage of society [in] a gold colony... men habituated to danger and risk of life do not set the same value on life. Wild sense of honor [is] peculiarly strong among the class of population who first open an unexplored gold [colony].

Beyond the expectations of lawlessness, miners from south of the border seemed to pose a more subtle danger to social order. Colonial officials, especially Supreme Court Judge Matthew Baillie Begbie, feared that an American presence would further erode the already fragile social hierarchy that underlay British authority on the frontier. The "californization" of British Columbia implied both an accretion
of American prejudices toward other racial groups and a razing of all the social distinctions that gave their class based authority so much texture.\textsuperscript{66} These sentiments were visible in Begbie's recommendations regarding British Columbia's magistracy. Even Englishmen who had lived in the United States were not immune from the American influence. "It would appear to be extremely desirable to have at every principle centre of traffic and population a resident Justice English by birth and sentiment," he told Douglas.

I am afraid that English sentiments are less prevalent than could be wished in Englishmen who have long resided in California. I do not mean to insinuated that such residence diminishes -- on the contrary, I believe it often even augments -- their natural loyalty and good affection to Her Majesty. But there is to be remarked among such persons an alteration in voice, in tone and manner, and an accretion of prejudices as to colour and race which I think would render them less fit, and contrast unfavourably with the tone, manner and prejudices of Englishmen habitually resident in the United Kingdom.\textsuperscript{67}

The concerns Begbie expressed about the change "in voice, in tone and manner and an accretion of prejudices" that resulted from an association with Americans and that threatened English authority were only part of a larger fear of social breakdown. Like the Victorian reformers, British Columbians feared the bondlessness of colonial society. Without the restraints of community to impose a familiar order, even Englishmen could slip into savagery. Anglican Bishop George Hills noted the beginnings of such a process at Yale in 1861. The miners there "had become reckless."

They were away from home-ties and restraints of society, so they gave themselves up to do whatever they were tempted to do; so gambling, drinking [and] sensual pleasures soon wasted their substance away.\textsuperscript{68}
Given the smaller numbers of people engaged in the British Columbian rushes and the larger geographic area over which these rushes were spread, it is not surprising that the level of violence in the colony fell short of what was thought to have characterized the Californian experience. The absence of the "lawless misrule" that was emblematic of the American west was the source of much self-congratulation in British Columbia. But because it has been accepted uncritically by historians, this self-congratulation has become self-delusion.

Violence in British Columbia may not have been as visible or perhaps as frequent as was the case south of the border, but this did not mean it was non-existent or insignificant.

Violence was also expected in a society with a sizable indigenous population. Along with the California miners, British Columbia's Indians acted as a foil against which the colony's white inhabitants gauged their own experience. Because of the racial divisions in the society they lived in, white British Columbians could point to their own civility with pride because the community they described did not include the native population. Violent acts involving natives only reinforced existing white stereotypes of Indian savagery; they did not evoke fears of social breakdown. Thus, Indians provided British Columbians with a criminal class but one which they did not have to take responsibility for. The colonial courts validated this view of Indian savagery, for not only did Indians make up the largest portion of those convicted and hanged, but they were also subject to differential treatment before the law on the basis of their perceived inferiority.
Much of the language and many of the concepts of criminality which white
British Columbians used were derived from mid-nineteenth century English social
commentary; thus, before turning to a discussion of the racial standard British
Columbians used to gauge violent crime in their own colony, it would be
instructive to understand the larger frame of reference from which that standard
derived.

In the world colonial British Columbians came from, especially those from
England, crime had occupied a central place in public discourse since the
beginning of the nineteenth century. Social critics from Bow Street magistrate and
novelist Henry Fielding, who wrote from the mid- to late-eighteenth century, to
Henry Mayhew, whose London Labour and the London Poor began appearing a
century later, were concerned with what they perceived to be an increase in crime
and with locating its cause. Fielding considered that the self-interest and
individualism that suffused the economic thinking of the industrial age was
responsible for community disintegration and a loosening of the bonds of social
restraint.\textsuperscript{69} The rapid urbanization England experienced over the course of the
nineteenth century only eroded social bonds further, and with the increasing
population density in the cities, made social decay all the more visible.

Despite the fact that people like Fielding and Mayhew recognized the larger
structural and environmental context in which crime occurred, they located its
cause in and aimed their solutions at individual transgressors or groups of
transgressors. Over the century, middle class reformers articulated an increas-
ingly detailed profile of the "criminal class," associating its members with a
particularly intractable sector of the poor working class. By the end of the century, English criminals were considered a people apart from the mainstream of society; they had made a rational choice to live the savage, dissipated and indolent lives they did and could not be educated to the habits of industry and respectability. It was generally assumed that they even looked different, as the typologies of criminal anthropologists Cesar Lombroso and Havelock Ellis attempted to show. By distancing themselves from these outlandish criminal tribes, Victorian reformers could simultaneously appear to address the problem of social decay but escape accepting full responsibility for it. To locate the causes of crime and its associated poverty in the very structures of society, economy and politics would have been a radical assault on the very foundations of Victorian society: the idea of progress and the association of that progress with individual endeavour. Framing such a radical challenge to the very organization of English society would have necessarily involved a loss of control over the ability of individuals to determine their own fates; and this was more threatening to middle class reformers than the problems of social decay that immediately confronted them. Not surprisingly, attempts to deal with crime and poverty continued to occupy the middle ground in an arena bounded by existing beliefs in progress, individualism and laissez-faire economics.

The same process of locating, labelling and thereby at least nominally controlling a "criminal class" occurred in British Columbia. No matter how dissolute the mining population may have been and no matter how alienated non-native British Columbians were from their fellow colonists and their environment,
they still had more in common with each other than they did with the indigenous population. Non-native British Columbians associated savagery and criminality with the Indians. The numerous and ever-present native population served as a reminder of the full meaning of savagery. The language British Columbians used to describe Indians was the same as that used to describe the English criminal class. Mayhew viewed the latter as "tribal," but British Columbians had the real thing: a group that appeared indolent, dissipated and prone to drunkenness; a group that treated its members (particularly its women) cruelly; one that could not, even on their reserves, be taught the habits of industry; and perhaps most significantly, a group that was distinguished by a separate language, rituals and physiognomy. Though the following passages use the same language and note the same features of social life, they describe two different populations. The convergence of language and sentiment is indicative of how European ideas were co-opted in the process of cultural transfer and applied to new world circumstances. The inhabitants of Manchester's manufacturing districts merited this description in the *Morning Chronicle*:

> Hot as the place was most of the women had shawls about their heads. They were coarse-looking and repulsive -- more than one with contused discoloured faces. The men were of that class of men you often remark in low localities -- squalid hulking fellows...The women were the worst class of prostitutes.\(^1\)

At the same time, Methodist missionary J.S. Green described British Columbia's natives in a similar fashion:

> In their persons and habitations they are intolerably slovenly. They seem, for the most part, to have a mortal aversion of water...they present to the eye an affecting exhibition of degradation. Their habitations are generally wretched hovels,
without doors, windows, floor or chimney; and their domestic arrangements correspond to their dress and external appearance.\textsuperscript{72}

Henry Mayhew's description of London's "nomadic street people" and James Douglas' description of the Songhees Indians who lived around Victoria were almost interchangeable:

There is a greater development of the animal than of the intellectual or moral nature of man...they are more or less distinguished for their high cheek bones and protruding jaws...for their lax ideas of property -- for their general improvidence -- their repugnance to continuous labour -- their disregard of female honour -- their love of cruelty -- their pugnacity -- and their utter want of religion.\textsuperscript{73}

From their formidable numbers and social habits they have become a positive nuisance and a cause of alarm....Passionately found of ardent spirits, they indulge in their use to excess whenever the means of intoxication are within their reach, and on those occasions their quarters exhibit scenes of riot, disorder and outrage, disgraceful to a civilized country.\textsuperscript{74}

It seemed that the "rookeries" of nineteenth-century English cities and British Columbia's Indian "rancheries" an ocean and a continent away were the breeding grounds for a very similar criminal class.

It was easier for non-native British Columbians to disengage themselves from the problems associated with the aboriginal population because of the deep racial cleavage that separated Indian and European. Crime was not a problem for non-native British Columbians because it was not their problem. Crime was something Indians did; and the fact that they did was not due to any failure on the part of non-native society but was instead attributable to the Indians' savage state. Non-native British Columbians could completely absolve themselves of any responsibility or concern for violence in a way that their English counterparts
never could. The physical dangers posed by a sometimes hostile indigenous population were certainly acknowledged by non-native British Columbians, but they probably never felt their solidarity and essential civility threatened by crime in the way English social critics did. No matter how different the English criminal class was from their upper, middle and working class brethren, the chasm that separated them was never as yawning as that imposed by race. The members of England's poor working class were never as completely disenfranchised from social, economic and political life as British Columbia's Indians were. The "otherness" that non-native British Columbians ascribed to the indigenous population allowed them to view theirs as a particularly crime-free and orderly society. Crime was alien because Indians were alien to British Columbians' definition of society. British Columbians' sentiments about the orderliness of their society formed a cant of community; a peculiar language that they used to set themselves apart from and above the other groups they shared the colony with.\(^75\)

Once non-native British Columbians labelled Indians as criminals their laws validated their "otherness." Not only were Indians prevented from owning and disposing of land, and therefore disenfranchised, but they were also subject to stringent liquor laws. Colonial, and later provincial, governments flirted with the idea of placing the native population under a completely separate jurisdiction. In 1861, Vancouver Island's House of Assembly considered a bill to establish a Board of Commissioners to deal with all Indians arrested for offences other than murder.\(^76\) The bill empowered the Board to administer floggings to Indians summarily, and was motivated out of a sense that the usual trial process was too
expensive and "without any compensating certainty in the result." The result
Vancouver Island's legislators wanted appeared to be summary convictions of
Indians. Too often, editorialized *British Colonist* editor Amor De Cosmos, there was
"a great deal of humbug in their trials here: and often times when one of them was
fed and clothed at the expense of the colony, awaiting trial, a good round dozen
would be the best punishment he could receive." Though corporal punishment
was rarely applied to non-native prisoners in Victoria's jails, it was routinely
meted out to Indians. Floggings aside, native prisoners were also punished by
cutting off their hair, a practice JP Gilbert Malcolm Sproat considered brought
them into disgrace with their peers.

Though masked by the seeming neutrality of legal procedure, criminal trials
also reinforced the ideal that Indians were inferior. Conventional wisdom views the
adversarial process as neutral. Anthropologist Andrew Arno considered it in an
even more favourable light, contending that by raising the powerless to a status
equal to the more powerful, the adversarial process provided a "level playing field,"
as it were, for the resolution of disputes.77 Judge Matthew Baillie Begbie agreed.
"It has ever since the creation of British Columbia into a colony been one of the
matter distinctly placed before the Indians...as a principle means of civilising
them...that all men are on a level before the Courts of criminal justice at all
events."

That they are amenable to the same Tribunals, for the same offences,
triabile by the same methods and ceremonies and liable to the same
punishments as white men, exactly.

They have been told most emphatically that their own old
methods of investigation and punishments and licenced retributions
and compensations &c. are annulled; and that we are "showing them
But criminal trials were not neutral tribunals in which the facts were unfolded before a passive judge and jury. They were public rituals which validated the existing racial hierarchy and thus reinforced the authority of the law. By casting doubt on the validity of native evidence, by subjecting native accused to different standards of proof, and by convicting and hanging them, British Columbia's criminal courts confirmed the inferiority and criminality of the indigenous population and the superiority and efficacy of British legal institutions.

Until he adjourned the court and allowed the jury to do its job, the judge wielded much influence on the outcome of the trial. His power to admit and refuse evidence meant that the judge shaped the "facts" that the jurors used in coming to a decision. Though rules of evidence guided his actions, much of the process was highly discretionary; what was admitted and refused was shaped far more by the immediate circumstances of the trial.

This discretion was particularly visible in cases involving natives. Native testimony was problematic to nineteenth-century law men because of the cultural gap separating European and Indian systems of law. Indian witnesses could not be bound to tell the truth in the usual manner -- by swearing a Christian oath -- because they had "no knowledge of a future state of rewards and punishments" that would deter them from giving false evidence. By the existing laws, Indian testimony could not be admitted into court. This was a problem in a colony where Indians made up the majority of the population and were frequently the only
witnesses to crimes involving other natives, or were themselves complainants or defendants. The colonial government's desire to stop liquor sales to Indians on Vancouver Island led that colony's justices to admit Indian testimony before any statute amending criminal procedure regarding evidence was drafted. Disallowing native evidence would have prevented the regulation of liquor sales and perhaps would have exacerbated clashes among Indians and between Indians and Europeans; as well, it also ran counter to James Douglas' stated policy of treating Indians as British subjects. The latter policy was not motivated out of any liberal idealism, but rather as a way of "teaching them [natives] that justice may be obtained by a less dangerous and more certain method than their own hasty and precipitate acts of revenge."  

Rather than undermine their pursuit of order by a strict adherence to the rules of evidence, British Columbia's judges usually admitted Indian testimony in cases involving Indians and Europeans after securing some sort of affirmation to tell the truth. Initially, James Douglas did not believe it wise "to receive Indian testimony in adjudging the disputes of white men;" but his reservations fell by the wayside due to pressure from the Colonial Office, the exigencies of each criminal trial and the need to secure convictions. These rather elastic provisions were formalized in 1865 (in British Columbia, but not Vancouver Island) in the Native Evidence Ordinance.

The admission of evidence was only the first filter the criminal adversarial process erected to fashion the "facts" the jury considered. Perhaps most important in shaping decision-making in the court room was the jury's assessment of the
credibility of the accused and the witnesses. Certainly the judge framed his summation to the jury in terms of who they should believe. Credibility was inextricably tied to assessments of character, and since Indians were considered inferior, they entered into the adversarial process at a disadvantage. In 1864 Vancouver Island’s Colonial Secretary asked Attorney-General Thomas Wood to comment on the disposal of two recent cases for murder involving Indian defendants and "the cause of the failure in obtaining a verdict" in one of them. The acquittals were the result of "the absence of any held reason to think them [the Indian witnesses] persons of faith or credit." The Indian accused of the murder of Vancouver Island merchant William Banfield near Barclay Sound was declared innocent for this reason. More than other crown witnesses, Indian witnesses were, according to Wood, unnaturally hostile to the accused and prone to use the legal process to protect their own interests and resolve private disputes. "Many cases of judicial murder from Indians swearing away the lives of their enemies...or slaves whom they would sacrifice instead of giving up the real murderer" could result if native testimony were not handled with care. 82 When Indians gave evidence against whites, their credibility was even more suspect to the colonists. When one McGilvery was tried and convicted for stealing $80 from an Indian woman at the Spring Assizes in New Westminster in 1866 the British Columbian responded with indignation, contrasting McGilvery with his native accuser.

We have a white man, a British subject, we presume, sent to the chain gang upon the very loose, insufficient and awkwardly rendered evidence of a native woman, it is believed, of a very low character -- a common prostitute in fact. 83
Conversely, in the case of two Indians charged with a Salt Spring Island murder, "the witnesses, for Indians [were] intelligent and enlightened, their conduct in court showed them to be persons of superior cultivation...and their testimony evidently carried conviction to the minds of the jury." 84

The importance of character assessments in determining verdicts is suggested by the relative brevity of jury deliberation in cases involving Indian defendants. 85 The information amassed in most criminal cases at the assizes was not overwhelming, yet juries often needed hours to come to a decision in cases involving non-native defendants, and only minutes in cases involving Indians. The evidence for this assertion is necessarily impressionistic (Begbie and the newspapers did not always make a note of the length of jury deliberation), but the pattern is suggestive. For instance, in R. v. Matthias Niel for the murder of William Hartwell, the jury remained locked up overnight, asking for instruction twice. Conversely, Indian defendants were convicted "after a brief absence" by the jury or "without [them] leaving their seats."

The differential in the length of deliberation points to the application of a different standard of proof in cases involving Indians. It is difficult to assess what this standard was but in Judge Begbie's opinion it did exist. In R. v. Scothla and Kalabeen for the robbery and murder of François Caban near Hat Creek in 1867 Begbie told the Colonial Secretary that "the legal evidence against Scothla was very scanty."

Had the prisoners been white men and defended by counsel, and tried separately, it is more than probable that Scothla would have got off.
The Judge was not, however, unduly bothered by the proceedings, noting that he had "never seen an instance where there seemed such an utter absence of all moral guilt or offence, in taking human life."

Only by a slight apparent delay in Scothla's statement of the fatal shot -- by a slightly downcast expression of countenance -- ...did they show the slightest perception of any difference between shooting a man and shooting a grouse....

I felt of course no moral doubt in the case.86

When Begbie heard the case against other Indians, Chilpakin and Tesch, for the murder of a Chinese miner at Foster's Bar he and the jury had even less information to evaluate. Though the trial took place in May 1868, the alleged murder was said to have occurred some seven years earlier. Other than the prisoners' statements, that of an Indian women who recalled hearing Chilpakin say "he was going to kill a Chinaman," and the favourable testimony of a white man who had known the accused for eight years, there was nothing -- not even a body. Nevertheless, the jury returned a guilty verdict. Again, the Supreme Court Judge noted that "if the accused had been a European...I should have felt bound to direct an acquittal."

But as this would have been a failure of justice -- for I feel confident that the prisoners committed the act to which they confessed...[and] while I feel confident that the extreme sentence will not be carried out...I suffered the case to go to the jury.87

The judge's comments suggest that obtaining a conviction was of utmost importance in criminal cases. Justice had to be seen to be done, and this meant that the legal machinery had to pass the ultimate judgement on Indian prisoners. Begbie himself went to extreme lengths to get a conviction. For instance, in the case against Indian Peter for the murder of Patrick O'Brien Murphy in 1861 the
judge allowed two of the jurymen to present evidence for the Crown and then return to the jury box to consider a verdict! During the deliberation, one of the jurors had an epileptic fit and was sent home to recover. When the remaining eleven reported that they had come to a unanimous verdict of "guilty," the judge, prisoner, eleven jurors and the sheriff trooped to the sick man's house to see if he concurred. He did and Peter was hanged.\(^{88}\)

The association of Indians with criminality received its ultimate validation on the hangman's scaffold. Of the 52 people tried for murder in the colonial period, 38 were convicted (5 acquitted, 9 found guilty of manslaughter). Of these 11 had their sentences commuted and the remaining 27 were hanged. Of these 27, 22, or over 80%, were Indians. While this is not larger than the proportion of Indians in the population, the sheer numbers and the very public nature of the hangings must have confirmed their savagery and inferiority and fixed the association of criminality and native peoples in the minds of white British Columbians.

How ubiquitous was Ned?

The statistics on homicide and assault and the nature of frontier violence discussed in this chapter challenge the traditional understanding of colonial British Columbian society, as well as the conceptualization of disputes and settlements. The rates of violence in British Columbia were similar or greater than those that characterized other nineteenth-century societies -- societies which
historians have labelled as violent -- and suggest that the colony was not the peaceful, law-abiding place contemporaries and scholars have idealized it to be.

The solitary, individual, anonymous violence that characterized British Columbia mirrored its social organization. The colony was a bondless place where, without the social cohesion and restraints imposed by family, kin, neighbour and community, the peaceful, informal resolution of disputes was difficult, and violence was likely.

The social organization that gave rise to violence in British Columbia also made court intervention in civil law cases necessary. As discussed in Chapter Three, over 90% of the suits launched in the colony's county courts were actions for debt, suggesting that, if nothing else, British Columbians were tied together by a web of credit. The colony's lack of social cohesion was borne out by a closer analysis of the disposal of civil law cases. Only slightly more than one-tenth of the cases initiated were settled out of court, and at least one-third were decided by trial. People turned to the civil courts in nineteenth-century British Columbia because there were no social networks that made it possible to work out solutions to problems internally. The same bondlessness that resulted in court intervention to settle civil disputes also led to violence.

Historians of dispute resolution do not view recourse to the courts and violence as routes of conflict settlement that characterize one society. Instead, disputes and settlements are usually conceptualized in terms of a dichotomy, as anthropologist Paul Bohannon does, in terms of "law" on the one hand, and "warfare" on the other. Using the courts to solve problems is usually
considered a feature of a society which has reached a certain size or is involved in a sphere of social, economic and political transactions that is larger than can be regulated by face-to-face relations and their concomitant informal social controls. A well-articulated set of legal institutions and procedures fill the breach left by the absence of familiarity. Violence, on the other hand, seems to be associated with lawlessness; that is, the absence of both informal social controls and more formal mechanisms of dispute resolution. There is a subtle developmental process implied in the writing on dispute resolution that connects violence with more "primitive" forms of social and economic organization and resort to the courts with a more "advanced" state. Violence is primitive and pathological; litigation is not. Yet in British Columbia both violence and civil litigation were symptomatic of the same condition: the colony's social organization. This situation suggests that the existing conceptualization of dispute resolution is based on a false dichotomy, and that instead of seeing recourse to the courts and violence as exclusive phenomena, they should be viewed as coexisting options to conflict settlement.

Statistics do not tell the whole story, however. Most importantly, they say little about the social meaning of violence. Although British Columbia was a violent place from a statistical standpoint, contemporaries insisted that theirs was an orderly, law-abiding society. British Columbians were able to persist in their characterization of the colony because of the standards they used to measure violence. In addition to the simple measure of visibility (the dispersed population made violent acts appear isolated and episodic), the yardstick British Columbians
used to measure violence was calibrated in accordance with their expectations about behaviour on the frontier. The Californian experience provided one scale of comparison. For demographic and geographic reasons, rather than any inherent superiority associated with British institutions, violence in British Columbia never approached the level it reached south of the border. If this were not sufficient cause for self-congratulation, British Columbians were assured of their civility by a more immediate comparison: that provided by the indigenous population. The violence and degradation of mining society never came close to matching the perceived savagery associated with British Columbia’s native population. White British Columbians could point to their community as crime-free because the society they described was an exclusive one. The criminal courts confirmed white notions about Indian inferiority and savagery by treating natives differently and convicting and hanging them, all in the guise of the neutral justice associated with the legal process. The fundamental social division the execution of the criminal law revealed illustrated the limits of social, political and economic freedom in British Columbia, and serves as another reminder that the administration of the law is not without value or cost.
NOTES


2. Edward McGowan, "Reminiscences: Unpublished Incidents in the Life of the 'Ubiquitous'," Argonaut (San Francisco) 1 June 1878, 10.


6. See R. Cole Harris and John Warkentin, Canada Before Confederation (Toronto, 1974), 316.


8. Harris and Warkentin, Canada Before Confederation, 314-315.


10. On views of British Columbia and Vancouver Island by British observers, see Stella Higgins, "Colonial Vancouver Island and British Columbia as seen through British Eyes, 1849-1871." University of Victoria M.A. thesis (history), 1972.
11. In 1868 the population was 8688. All population figures are taken from Great Britain. Colonial Office. British Columbia Blue Books of Statistics. National Archives of Canada (hereafter NAC), MG 11, CO 64/1-11, reel B-199, B-200, unless otherwise noted.


13. "Should Foreigners Sit on Juries?" British Columbian 19 November 1862. The Cariboo Sentinel had this to say in 1866:

We have had occasion to animadvert on the administration of justice by Chief Justice Begbie but we have never found fault with his practice in criminal law; in fact, it is well understood that it is owing to his unswerving application of the law that we are blessed with our comparative freedom from crime in this country. We sincerely trust that should any alteration take place under the new administration that Judge Begbie will be at least retained as head of criminal jurisdiction in these colonies [see "Murder," Cariboo Sentinel 18 October 1866].


22. Douglas to Labouchere, Victoria, Vancouver Island, 8 May 1858. CO 60/1, reel B-77, 12-14.

23. On the "litigious miners" see David R. Williams, "...The Man for a New Country": Sir Matthew Baillie Begbie (Sidney, B.C., 1977), Chapter Five.

24. Boxing matches were a regular event in saloons and the miner stood to gain quite a lot of money if he could unseat the local champ. See Cariboo Sentinel 10 May and 31 December 1866 and 26 September 1867.


29. Ormsby, 185, 188; Trimble, 341-342.

30. Elwyn to the Colonial Secretary, Forks of Quesnelle, 3 August 1862. BCARS GR 1372, reel B-1327, f 525/11; and Elliott to Young, Lillooet, 11 August 1862. Ibid., f 513/18. Also see W. Wymond Walkem, Stories of Early British Columbia (Vancouver, 1914), 281-282.


32. Nind to Mr. Y. Sellers, Beaver Lake, Alexandria District, Williams Lake, 4 January 1861. In Ibid., 60-64.

33. Ibid.

34. Chartres Brew to the Colonial Secretary, Richfield, 11 August 1868. BCARS. GR 1372, reel B-1311, f 197/21.


37. See J.K. Nesbitt, ed., "The Diary of Martha Cheney Ella, 1853-1856," part 2, *British Columbia Historical Quarterly* 13(1949):262n; Douglas to Labouchere, Victoria, Vancouver Island, 10 April 1856, CO 305/7, reel B-236, 28; *ibid.*, 57-58; *ibid.*, 20 August 1856, CO 305/7, reel B-236, 83; Douglas to Lytton, Victoria, Vancouver Island, 15 May 1859, CO 305/10, reel B-?, 183-186; Douglas to Newcastle, Victoria, Vancouver Island, 7 June 1860, CO 305/14, reel B-?, 328-343; *ibid.*, 8 August 1860, CO 305/14, reel B-?, 366-374.


42. *Colonist* 23, 26, 30 July 1861 and 1 August 1861; cited in Thackray, 144.

43. *Daily Press* 11 August 1860; cited in Thackray, 144.

44. Hankin to Young, 25 August 1865. BCARS, GR 1372, f 1397; cited in Thackray, 192.


48. On Cowichan, see Papers related to a visit to Cowichan by Augustus Frederick Pemberton. British Columbia. Department of Lands and Works, Herald Street Collection. BCARS. GR 1069, 1 901; more generally, see British Columbia. *Papers Connected with the Indian Land Question, 1850-1875* (Victoria, 1875; reprinted 1987).


52. Ibid., 299.

53. See Gurr, 310-311. The rate of homicides known to police was 1.4/100,000 in the 1850s; homicide committals for Middlesex County (including London) ranged from 2/100,000 in 1820-30 to 1/100,000 in the 1850s.


58. McGrath, Gunfighters, Highwaymen and Vigilantes, 254.

59. Ibid., 255.

60. A colonial rate for less serious violent crime could not be calculated because the necessary records do not exist in the extensive series required.


Victoria was like a lying-down cow, chewing. She had made one enormous effort at upheaval. She had hoisted herself from a Hudson's Bay Company Fort into a little town and there she passed, chewing the cud of imported fodder, afraid to crop the pastures of a new world, for fear she might lose the good flavour of the old to which she was so deeply loyal. Her jaws went rolling on and on, long after there was nothing left to chew.

[Emily Carr, The Book of Small (Toronto, 1942), 139].

The Indian traders here are glad to get a few furs to secure an ostentatious reception at the great emporium [Fort Victoria] for, while they are negotiating a higher price than could consistently be offered here, their wives and daughters are disposing of their more smutty commodities to still greater advantage, and after seeing the World and tasting of its sweets into the bargain, they come home loaded with goods.


64. For Canada, see Neil Boyd, The Last Dance: Murder in Canada (Scarborough, Ontario, 1988).


66. Begbie to Douglas, Victoria, Vancouver Island, 18 May 1859. BCARS. GR 1372, reel-B-1307, f 142b1/7.

67. Ibid.


70. On the trends in scientific racism (of which classifying criminals was just one manifestation) see Stephen J. Gould, The Mismeasure of Man (New York, 1981) and Douglas A. Lorimer, Colour, Class and the Victorians: English Attitudes to the Negro in the mid-nineteenth century (Leicester, 1978), Chapter Seven.

71. Angus Reach, Morning Chronicle, a description of Manchester's manufacturing district. Cited in Emsley, 60.


75. Louis Hartz suggests that this cant of community arises from the "heightened consensus" he sees as characteristic of fragment cultures. "The paradox of the fragment cultures in respect to violence and legality is that they heighten consensus by shrinking the European social universe but at the same time discover new sources of conflict which Europe does not have. Some of these sources are inherent in the process of fragmentation itself....But mainly they are to be found in the encounter of the fragment with new groups, western and non-western, as its history proceeds. In the end, to deal with these, the fragment is faced with the problem of transcending the new morality which it has established." L. Hartz, "A Comparative Study of Fragment Cultures," in Hugh Davis Graham and Ted Robert Gurr, eds., *Violence in America: Historical and Comparative Perspectives*, revised edition (Beverley Hills, 1979), 119.


78. Matthew Baillie Begbie, Memorandum on Indian relief legislation and Indian Chiefs' jurisdiction, Cache Creek, 11 September 1876. DIA Black Series, RG 10, volume 3638, file 7251, reel C-10112.


80. *Ibid.* To Douglas' comments regarding the exclusion of Indian testimony in disputes involving white men only, the Colonial Office wrote "the proper course will be to receive Indian testimony in all cases, swearing or pledging the witnesses
to tell the truth in whatever form is held most solemn among themselves, and that no distinction should be established between their testimony in cases in which the Colonists [are concerned], and cases in which they are themselves concerned." [Grey to Douglas, 18 March 1852, CO 305/3, reel B-233, 80-81].

81. An Ordinance to Amend the Law of Evidence, 8 February 1865.

82. Wood to the Acting Colonial Secretary, Attorney General's Office, 24 November 1864. GR 1372, box 147, f 54/19.


84. Wood to the Acting Colonial Secretary, Attorney General's Office, 24 November 1864. GR 1372, box 147, f 54/19.

85. On the importance of character in jury decision-making, see Beattie, *Crime and the Courts in England, 1660-1800*, 440-449.

86. Notes on Proceedings in *R. vs. Scothla and Carabine or Kalabeen*, BCARS. GR 1372, reel-B1308, f 142g/20.


88. Notes of Proceedings in *R. vs. Peter*. BCARS. GR 1372, reel B-1308, f 142h/5.


91. At the most "advanced" state of capitalist social and economic organization the courts are used not as dispute resolvers but as dispute "processors." For many large American corporations in the late twentieth century, court intervention is but a stage in a wider process of extra-legal dispute settlement aimed at positioning themselves more favourably for the purpose of economic gain. William Felstiner writes: "A significant amount of dispute processing is not intended to settle disputes....In many such formal cases one or all of the parties seek something other than a resolution, even an advantageous resolution....Litigation is used as a skirmish or an important manoeuvre in economic and political warfare: the expense, inconvenience and disgrace of court involvement imposed
on one's opponent outweigh one's concern about the end result of the ostensible dispute, if ever an end result is intended. It does not then seem to make sense to talk about a "settlement" process when frequently it is not demonstrable that settlement is the objective of the process.... [William L.F. Felstiner, "Influences of Social Organization on Dispute Processing," *Law and Society Review* 9(1974):63, n. 1.
CONCLUSIONS AND CONSEQUENCES

When Britain's Pacific North American colonies were created in the middle of the nineteenth century, they received the undercarriage of political authority in the form of English law but not much of the substance that gave it meaning. The social and economic organization and structures that reinforced and were upheld by the law in Britain supported a system of authority that has been described as paternal. Though the law's trans-Atlantic journey stripped away much of the context of paternalism -- its class-based rigid social hierarchy and land-based economy and citizenship -- it still played a central role in both defining and upholding a system of authority indigenous to its new North American milieu. Each of the chapters in this dissertation represented an attempt to adumbrate the contours of this new system of authority and to describe some of its substance by examining the law in colonial British Columbia. The law bore the imprint of the colony's commercial economy, society and geography, and the new relationships that were formed between them contributed to the formation of a new system of authority.

Everywhere in the Anglo-North American world of the late-eighteenth and nineteenth centuries, the institutional and ethical basis of political authority was recast to meet the exigencies of an emergent commercial and industrial economy. This process involved a rejection of paternalism and the embrace of the principles of laissez-faire and individualism. State intervention in public life was limited to that which maximized individual endeavour and free economic exchange. The law
was a particularly important component of the market economy, and one which, Patrick Atiyah argues, bore the deepest imprint of laissez-faire and individualism. The non-interference and free exchange so valued by classical liberal economists was a freedom circumscribed by law, by state regulations which allowed individuals to pursue their own ambitions without impeding others from doing the same.

This was the context in which Vancouver Island and British Columbia were created. And in both places, but particularly the mainland colony, the rule of law reflected the rule of the marketplace, and its demands for the security of capital through the efficient and predictable administration of the colonial legal machinery. Attorney-General Henry Crease’s comments on British Columbia’s mining laws are indicative of the influence of capitalism on colonial jurisprudence. The *Gold Fields Acts* were inspired out of a general desire "to give all newcomers a fair chance without bringing them into hostile collision with others....without encouraging all sorts of greed [and] overbearing conduct," he wrote.

Those evils, as appears practically throughout the British Columbia laws, can only be diminished by wise regulations, leaving as much freedom of action as can be allowed with safety, and making these safeguards as much as possible automatic, giving all miners a good chance, making the miners themselves, with their own free will, a reasonable watch and check on each other.¹

Both the institutional and ethical foundations of political authority in this nineteenth-century colony were suffused with the sentiments apparent in Crease’s remarks.

From the days of the Hudson’s Bay Company onward, the people who governed British Columbia and the non-native population that fell under their
rule had an instrumentalist view of the law, seeing it as a tool of economic development. The Governors of the Hudson's Bay Company and its field officers were concerned with regulating their labour force to protect their economic monopoly. Though company law was narrowly focused, it enveloped the lives of the servants in a variety of ways. From the contracts which bound them to the company and prohibited private trading of even the most minor kind, to its rigid corporate hierarchy and its ritualistic dramatization, HBC servants were surrounded by a web of formal and informal constraints whose purpose was to secure company profits. Though the company's experience on Vancouver Island demonstrated the inadequacies of private regulation in a colonial North American setting, the evolution of that colony's courts was still markedly influenced by the demands of its economy. The colonial courts were born out of a need to provide more certain routes of commercial dispute resolution, and much of the debate surrounding their creation fell within the boundaries of larger nineteenth-century attack on economic monopoly.

It was on the mainland, however, that laissez-faire principles made their deepest impression on colonial law and the courts. The demands of commercial capitalism drove the formation of British Columbia's courts. Though the colony's merchants were willing to underwrite frontier development by extending credit to the miners, tradesmen and settlers, they, along with those they carried in their ledger books, petitioned the colonial government for laws and institutions that would guarantee a minimum amount of protection for their investment. As a result, the colony's legal system was one that was characterized by a well-
articulated set of institutions which regulated private economic transactions and almost no separate criminal tribunals. Civil business occupied British Columbia's courts three times as much as criminal affairs. The nature of litigation reflected the extent and the importance of credit in the colonial economy and, by extension, the central contribution the courts made to the smooth running of that economy by providing a rule-bound arena in which to settle disputes.

If the demands of a commercial economy drove the construction of British Columbia's courts, the colony's geography influenced the scope of their power. The great distances, rugged topography, poor communications and scattered population were significant obstacles to the extension of law. To overcome the colony's geography, the colonial government created inferior courts that sat permanently in the colony's principal settlements, and endowed those who presided over them with extensive powers. In doing this, the colonial government was motivated by a concern for efficiency in the administration of the law rather than by the finer points of legal procedure. It was more important that legal tribunals be available and able to deal with a wide range of civil disputes quickly and efficiently than for them to follow the usual British conventions regarding due process. Maximizing efficiency and flexibility meant minimizing fairness, public participation, institutional accountability and democracy, however. Such was the overwhelming influence of commercial capitalism on the colonial legal administration.

So dominant was the commercial capitalist ethic that it provided the standards by which the legitimacy of the law was measured. Criticisms of the
colony's legal administration thus occurred within the bounds of a capitalistic discourse. When British Columbians took issue with the law as they did in Cranford or in the cases that led to the Grouse Creek War, they never challenged the idea of the rule of law or the justness of the capitalist society it was an integral part of. Instead, their targets were the human executors of the law, whose actions and decisions threatened the security of their property and the economic development of the colony. The Cottonwood scandal and the controversy surrounding Stipendiary Magistrates speculating in gold mining claims centred on the conflict of interest created when those charged with maintaining a level economic playing field became players themselves. Borealis v. Watson, the first of the Cariboo mining cases that led to the Grouse Creek War, provoked popular dissent because it was resolved in the seemingly arbitrary, costly and slow proceedings of Begbie's Chancery Court. Chancery Court proceedings did not respect the economic needs of the mining economy, where efficiency and standardized rules were necessary if profits were to be made. Aurora and Grouse Creek both brought up the issue of arbitrary justice again, when, in the first case, Begbie overturned a popular jury verdict, and in the second, when Caribooites deemed the judgement of the court to be contrary to common sense. In levelling these criticisms at the legal administration, British Columbians revealed that the standards they used to gauge the rule of law were economic. Efficiency, predictability and, ultimately, technical precision were the rationales underlying legal authority.
These economic standards were most apparent in *Cranford v. Wright*. Colonial commerce entangled British Columbians in complex issues of law, and made Begbie's paternalism appear wanting. As the battles between judge and lawyers in the case showed, legal authority in British Columbia was less paternal and reposed in the person of the judge than it was textual and resident in printed statutes and precedents, and in those who had the expertise to interpret them. This is not to say, of course, that paternalism ceased to be an important part of legal authority. It was. But the emphasis in *Cranford* on legal texts suggests that authority in nineteenth century British Columbia was different, and not something sufficiently described by paternalism. The law-as-text offered the advantages of stability through permanence, precision and predictability, characteristics which set it apart from the potentially arbitrary paternal discretion of judges; and characteristics that made it particularly well-suited for an age of laissez-faire individualism. Standardization and predictability in the law allow the individual to compete more effectively because his options are clearly delineated by explicit rules of conduct. Rather than upholding a paternalistic order, the law in British Columbia was the cornerstone of a modern world of laissez-faire capitalism, in which authority was conferred by specialized knowledge.

Perhaps it would be wise to end here. But doing so would give short shrift to the very important implications this new kind of authority (if I can use "new" without implying that what came before was unchanging and monolithic; and that "old" (that is, paternal) and "new" (that is, expert) forms of authority were exclusive) has for understanding the rule of law in the years after the colonial
period. Reposing authority in legal texts and in expertise has two important consequences that merit discussion. First, by tying authority to textual fidelity, lawyers and judges assume that authoritative interpretations can be recovered from legal texts.\(^2\) By understanding what the legislators intended when they framed a particular statute, judges and lawyers are able to make just, or at least legal, decisions. The recovery of legislative intent and its application to particular circumstances is the central purpose of the entire academic enterprise of statutory interpretation. Such an enterprise, if literary theorists are correct, is misguided at best and positively dangerous at worst. Legal texts, like any other kind, have no single, authoritative meaning. Meaning is not fixed like a fly embedded in amber. Interpretation involves the invention of meaning. When judges and lawyers construe the intent of certain laws they are constructing meaning from the materials around them. The edifice they build is at least as much a representation of themselves and the social, economic and political milieu they live in as it is a representation of original intent. Meaning and the legal authority of texts is thus assigned by a small group of experts rather than the legislator or the people he represents. The rule of law, then, is the rule of experts. It is a minority rule which has, nevertheless, as much potential for producing tyranny and arbitrary action as the divine rule of sovereigns it replaced.

The textuality of the law and the authority resident in it has a second and related consequence. Though the authority of texts and textual interpreters was put forward as a corrective to the arbitrariness of paternal authority, the cure has become the disease. The expert information introduced into trials first by lawyers,
but later by a whole variety of forensic professionals, was meant to aid the decision-making process by interpolating objective, scientific knowledge between the decision-makers and their biases. Expert opinion was supposed to clarify and suppress the effects of human prejudice. But the point of information saturation is reached and often exceeded in many trials. Confronted with a mass of information, judges and jurors tend to short-circuit the decision-making process by retreating to an evaluation of the complainant's and the defendant's character. Constrained and over-burdened by the facts, the rule of law thus takes on the very characteristic it sought to correct: arbitrariness.

The rule of law is the ultimate legal fiction. In nineteenth-century British Columbia, the rule of law reflected the needs of the marketplace, and thus the political authority it upheld was not without value. Criminal trials further revealed the normative nature of the law by delineating the limits of freedom in the colony, limits which were imposed by race. Little appears to have changed. With law library shelves full of how-to guides advising prospective young litigators in the subtleties of kinesics (body language), proxemics (space usage) and "power dressing," the legal profession itself acknowledges the fact that justice is not blind to differences in status, condition or belief. Certainly Donald Marshall, Britain's Guildford Four and the Commissioners on the Manitoba Native Justice Inquiry make the willing suspension of disbelief that underlies the fiction of rule of law difficult. If we do not see after these revelations that the Emperor is stark naked, the realization is slowly dawning that he is wearing fewer clothes than many of us feel comfortable with.
Still, the idea of the rule of law endures, shaken momentarily perhaps, but not unseated. Part of the reason for its endurance lies in the nature of the relationship between law and society. We are, as legal philosopher Ronald Dworkin argues, all citizens in law's empire. But while we are surrounded by the law and have much of our public existence defined by it, most of us do not intersect with the law in any meaningful way often enough to develop any coherent picture of the system of authority it upholds, much less to develop any self-conscious and cogent critique of it. Too much of human life is simply lived uncoupled from the power relations of dominance and submission to make mounting a challenge to the rule of law an easy thing. Thus, the consent that underlies the rule of law is a largely tacit, if not passive, one. Perhaps it is this tacit approval that is most important in maintaining the political status quo. That said, the lack of connectedness between the individual and the law is not the only thing that sustains the fiction.

The endurance of the rule of law attests to its ideological power, which limits our ability even to articulate alternatives. We need look no further for evidence of this than the very words we use to describe authority. "Law," "legal" and "legitimacy" are all derived from a common root, making it difficult for us to conceive of the rule of law as illegitimate or illegal. Authority is automatically legal and legitimate because we lack even the language to describe a system of authority outside the rule of law. Compounding the problem is the way we conceptualize social order in terms of dichotomies and absolutes. Take, for instance, the phrase "law and order." We think of the two components as one: the
presence of law is a precondition of social order. Societies need a set of rules to govern behaviour, and if social intercourse beyond the limited boundaries of tribal communities is to occur, then these rules must be formalized. The absence of law leads to violence. If violence occurs under a system of law, we legitimate it by calling it "ritualized," or root its cause in the absence or breakdown of the proper institutions of dispute resolution. We cannot, or are very reluctant to think of violent conflict as a part of human society that co-exists with the rule of law, or in fact may be caused by it.

Some might think this too apocalyptic a note on which to end. After all, all governments depend on a degree of self-deception, or "make-believe", on the part of those governed. We believe that our politicians represent us, that the people, the electorate, are sovereign, and that the law is blind to differences in status, condition and belief, and that the rule of law is the best guarantee of justice for all. Fictions like these sustain the government of the few over the many, but they make those who point them out very uncomfortable. Though E.P. Thompson devotes almost two hundred and fifty pages of Whigs and Hunters to showing that English criminal law embedded and contributed to the inequities in eighteenth-century society, he concludes that the rule of law was not a sham. The fact that "conflicts were mediated through the forms of law" meant that the ruling class did not govern with an iron fist. The law was still "an unqualified human good," and its rule was "a cultural achievement of universal significance." It would appear that the rule of law is indeed a potent ideology.
Thompson's favourable, if surprising, assessment of the rule of law may not be as over-optimistic as it appears in the context of the eighteenth century. There was a reciprocity between patricians and plebians that made the former realize the necessity of trading some of their power for legitimacy. The mutuality, or "moral economy," that governed social relations existed alongside the rule of law in early modern England was absent in much of the nineteenth century. The concepts of natural law and obligation that underpinned the moral economy gave way to the market economy's emphasis on positive law and contract. Whereas the language of natural law was ascendant in the political discourse eighteenth century, it was replaced in the next hundred years by the language of laissez-faire economics.

We are ruled by law, but the mutuality and reciprocity that is supposed to prevent abuse is gone. The forms of law that mediate conflict are themselves sources of inequity. The textuality of the law and the reliance on expert knowledge make legal proceedings less accessible, less democratic and more arbitrary. Law and the political authority I described are not responsive to the people they govern and the self-deception we call rule of law has become more a self-delusion. Recently, people in this country have taken some preliminary steps to narrow the gap between the ideal of rule of law and the social reality that confronts us. Reformers hold up "legal pluralism" as the solution. For the law to be more responsive to the needs of the people it serves it has to be administered in a variety of local tribunals that reflect community values. Much of the effort in the area of community justice is part of a larger agenda, that of aboriginal self-
government. The "indigenization" of the legal system -- that is, the hiring of more Native constables, JPs, court workers, and the creation of Native criminal courts and Native sentencing and parole tribunals, for instance -- was the solution offered by Nova Scotia's Royal Commission on the Donald Marshall, Jr., Prosecution. Though these recommendations may go some distance to make the rule of law the "unqualified human good" it is supposed to be, they are not a permanent solution. The inequities that make the rule of law a fiction lie outside the realm of the law and the legal system to correct. Ultimately, it is in the fundamental restructuring of social and economic relations that the real solution lies. Clothing the Emperor promises to be an expensive proposition.
NOTES


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APPENDIX

NOTE ON SOURCES

The primary material on which this dissertation is based comes from four major sources: the correspondence to and from the Colonial Secretaries of Vancouver Island and British Columbia (referred to as "Colonial Correspondence") comprises the most substantive record of the internal communication between the colonial governments of the island and mainland colonies and their officers in the field, as well as letters and petitions from other "ordinary" colonists; the British Colonial Office's correspondence with the governors of Vancouver Island and British Columbia (CO 305 and CO 60 respectively); contemporary newspapers, particularly the British Colonist (Victoria), the British Columbian (New Westminster) and the Cariboo Sentinel; and the court records and correspondence in the voluminous Attorney-General's collection at the British Columbia Archives and Records Service.

The quantitative investigation of civil litigation presented in Chapter Three is based on a complete analysis of all the existing county court records contained in the "plaint" or "plaint and procedure" books for the mainland colony. These recorded the names of the plaintiff and defendant, the nature and monetary value of the suit, court costs, the presence or absence of lawyers, and the disposal of the case. Mining Court records for the colonial period are extant for the Richfield District only and contain the same information as in the plaint and procedure books, though in paragraph, rather than ledger, form. The gold production figures
in Figure 3-2 were taken from Isabel Bescoby, "Some Aspects of Society in the Cariboo" (see Bibliography).

The homicide rates were calculated from a reading of Judge Begbie's Bench Books, the large, leather-bound volumes he carried with him on circuit and in which he recorded the details of the cases that came before him. The assault rates were calculated from a sample of the Victoria Police Court records. The population figures upon which the rates were calculated included both the native and non-native population.