Remote Justice: The Stipendiary Magistrate's Court of the Northwest Territories (1905-1955)

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by

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A Thesis

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Abstract

This thesis analyzes the most important legal institution in the Northwest Territories in the period 1905 to 1955.

"It is too easy for the legal historian to become 'immersed in detail' and to be diverted into the collector's mania and wind up an antiquarian.

Harassed by the calendar [the legal historian] begrudges time taken from collecting data in order to shape and test the theoretical framework of his inquiries. So he is tempted into naive cynicism - using his research simply to document the unexamined assumptions and prejudices of common sense and tradition, or behaving as if he believed that meaning could be squeezed out of data by the sheer weight of their accumulation."[1]

---

1. Parker, "The Masochism of the Legal Historian" (1974) U of T.L.J. 279, 315, fn. 187 quoting from Hurst, "Themes in United States Legal History," in Mendelson (ed), Felix Frankfurter: A Tribute (1964) at 701.

An Arena

Large as Europe

Silent

Waiting the Contest

Frank R. Scott, Q.C.

Acknowledgment

I gratefully acknowledge financial assistance, to complete aspects of research pertaining to this thesis, from:

John Ewart Memorial Fund;

Arctic Institute of North America;

Boreal Institute for Northern Studies.

Abbreviations

Can Gaz	- Canada Gazette
CNWT	- Council of the Northwest Territories
D of J	- Department of Justice of Canada
D/M of J	- Deputy Minister of Justice of Canada
H of C	- House of Commons
HBCA	- Hudson Bay Company Archives
JP^2	- Justice of the Peace with the powers of two
M of J	- Minister of Justice of Canada
NWT	- Northwest Territories
NWMP	- North West Mounted Police
PAC	- Public Archives of Canada
RCMP	- Royal Canadian Mounted Police
RNWMP	- Royal North West Mounted Police
Sess Pap	- Sessional Papers
RG	- Record Group
GAA	- Glenbow Alberta Archives

Introductory Note

I have used throughout certain appellations:

1. Inuit instead of Eskimo, Esquimaux, or Huskie;
2. Indian to encompass also Metis, and Half-breed;
3. Northwest Territories for North-West Territories, and North Western Territories.

A Map is essential to follow the peregrinations of the circuit court. Map M-4 shows the Mackenzie circuit; Map M-5 shows the Eastern Arctic circuit. To gain a flavor of the Stipendiary Magistrates Court circuits, Appendix A found at page 376 and following, should be reviewed before reading Chapter 8.

Tables 1, 2, and 3 (found at pages 409, 411 and 415) list the twenty-four Stipendiary Magistrates, describe their terms of appointment and give brief factual information concerning them. These tables should be reviewed before reading this thesis.

Maps of the NWT

M-1 - Rupert's Land and the North Western Territory (former Indian Territory)

M-2 - NWT as of 1905

M-3 - NWT as of 1912

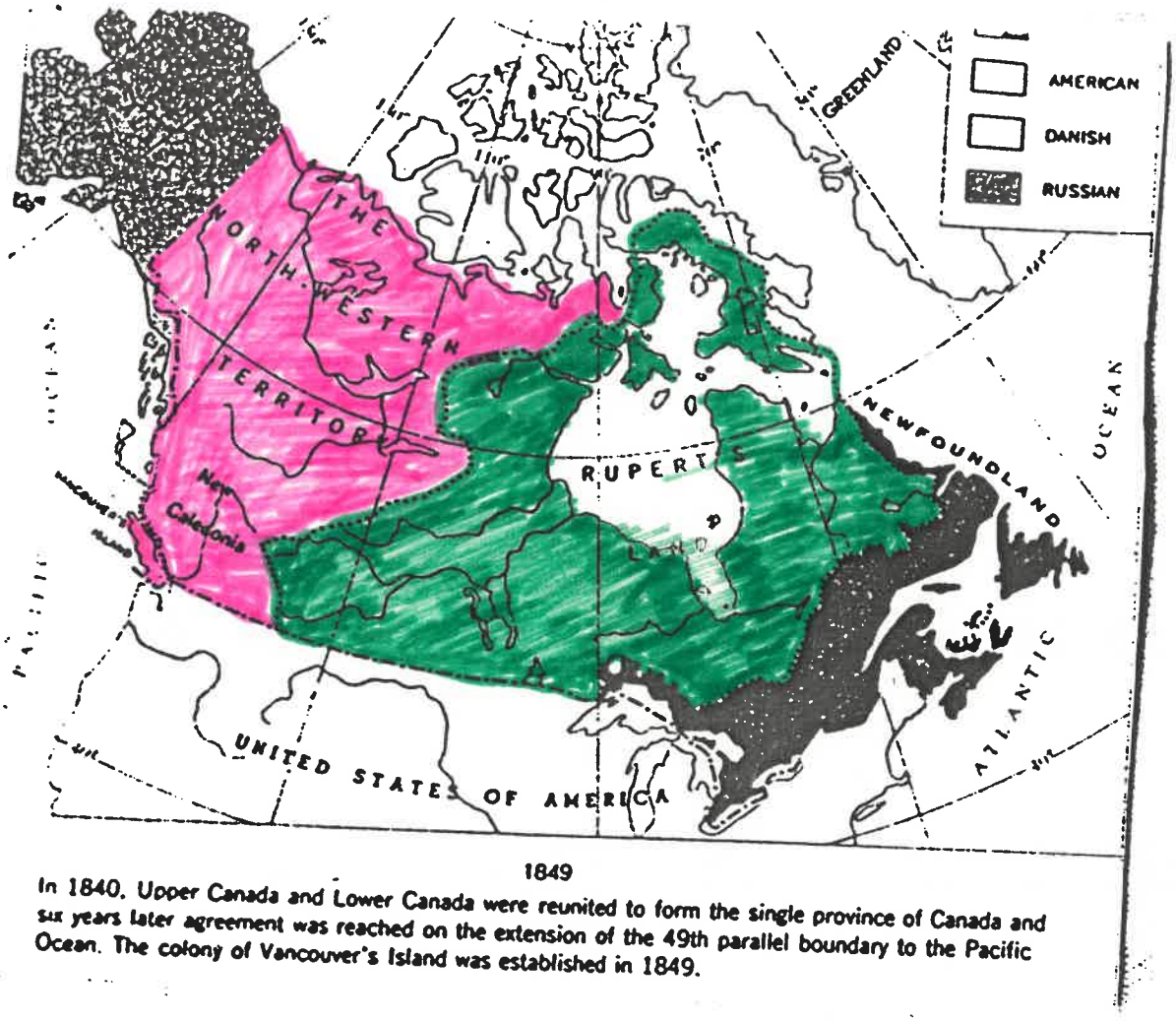
M-4 - Mackenzie Court Circuit

M-5 - Eastern Arctic Court Circuit

M-6 - NWT as of 1927

Sources:

- Maps M-1, M-2, M-3, and M-6 are found in Nicholson, Atlas of Canada (Ottawa: Queen's Printer, 1958) plate #109.
- Map M-4 is found in Robertson (ed.), A Gentleman Adventurer, The Arctic Diaries of R.H.G. Bonnycastle (Toronto: Lester and Orpen Dennys Limited, 1984) p.96.
- Map M-5 comes from one of the Eastern Arctic Patrol files at the Public Archives in Ottawa.



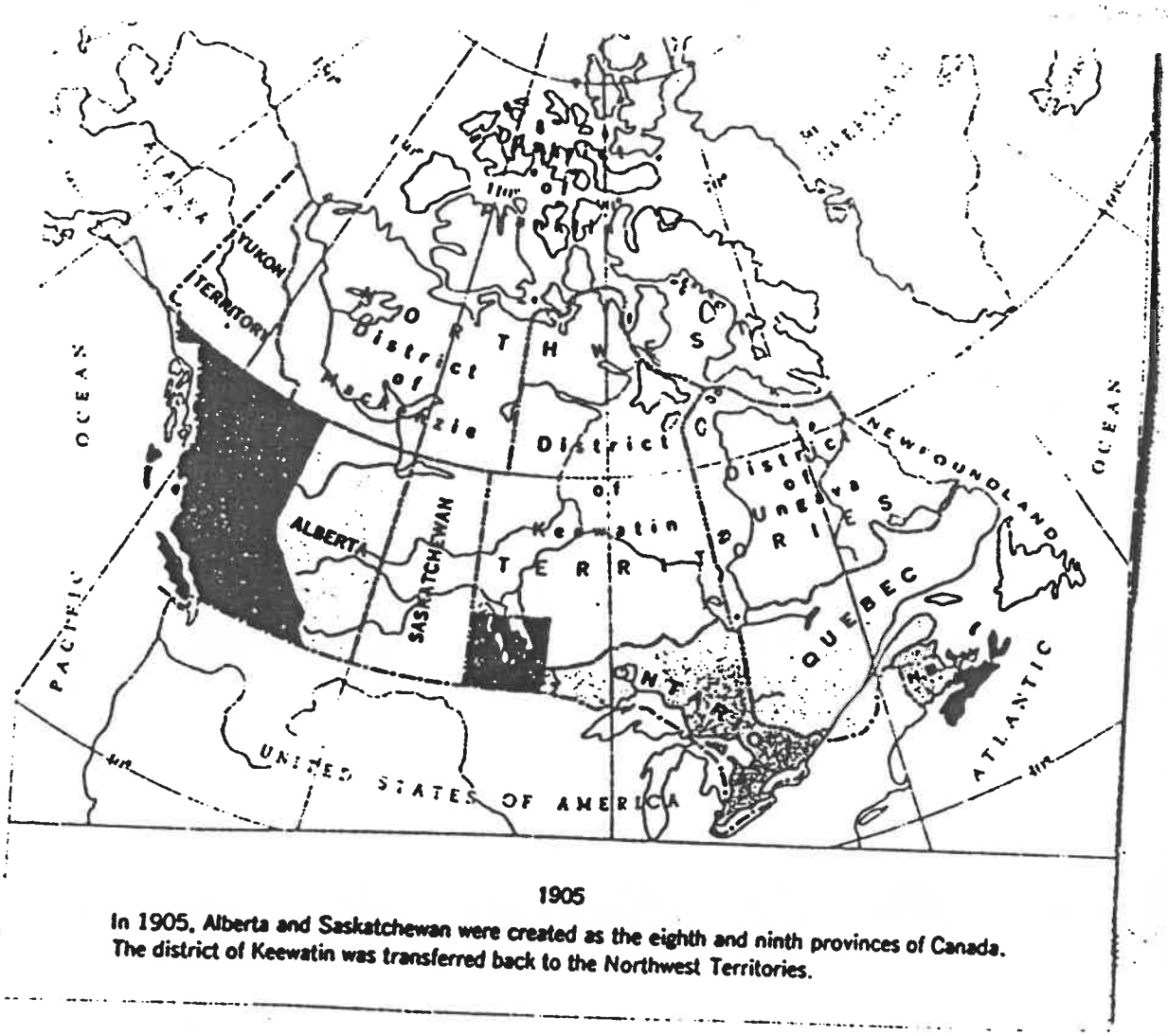
1849

In 1840, Upper Canada and Lower Canada were reunited to form the single province of Canada and six years later agreement was reached on the extension of the 49th parallel boundary to the Pacific Ocean. The colony of Vancouver's Island was established in 1849.

LEGEND:

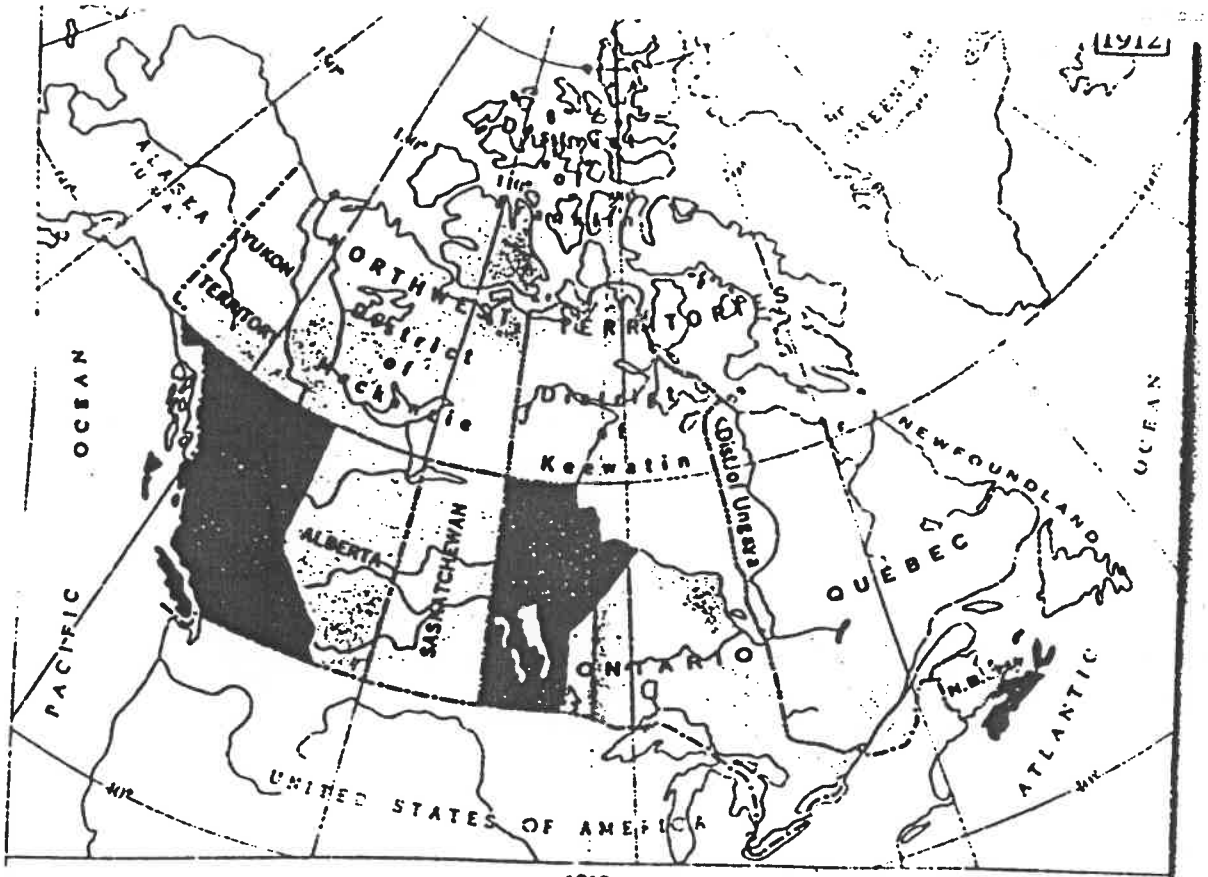
- Rupert's Land - Green
- The North-Western Territory (Indian Territory) - Pink

M-



1905

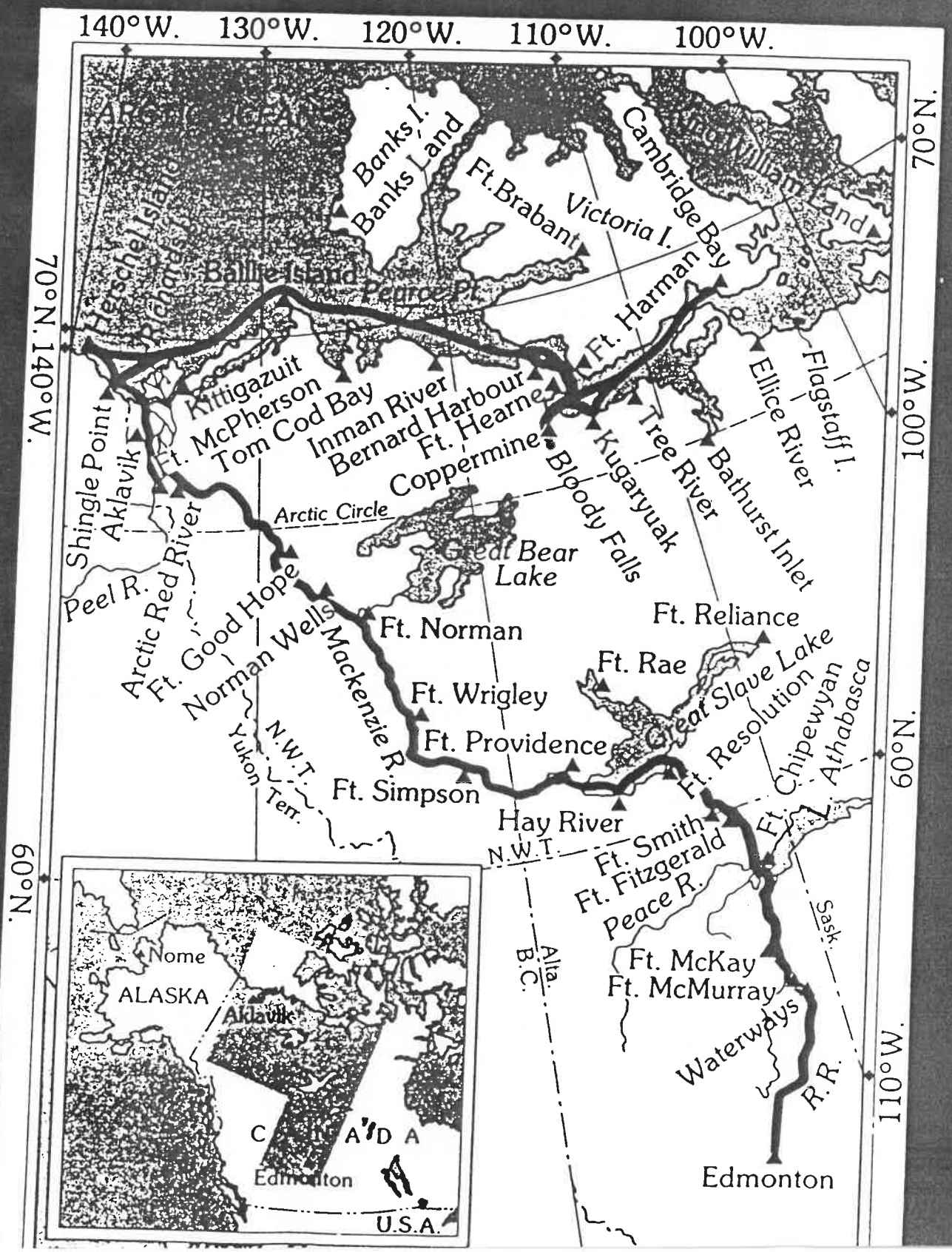
In 1905, Alberta and Saskatchewan were created as the eighth and ninth provinces of Canada. The district of Keewatin was transferred back to the Northwest Territories.

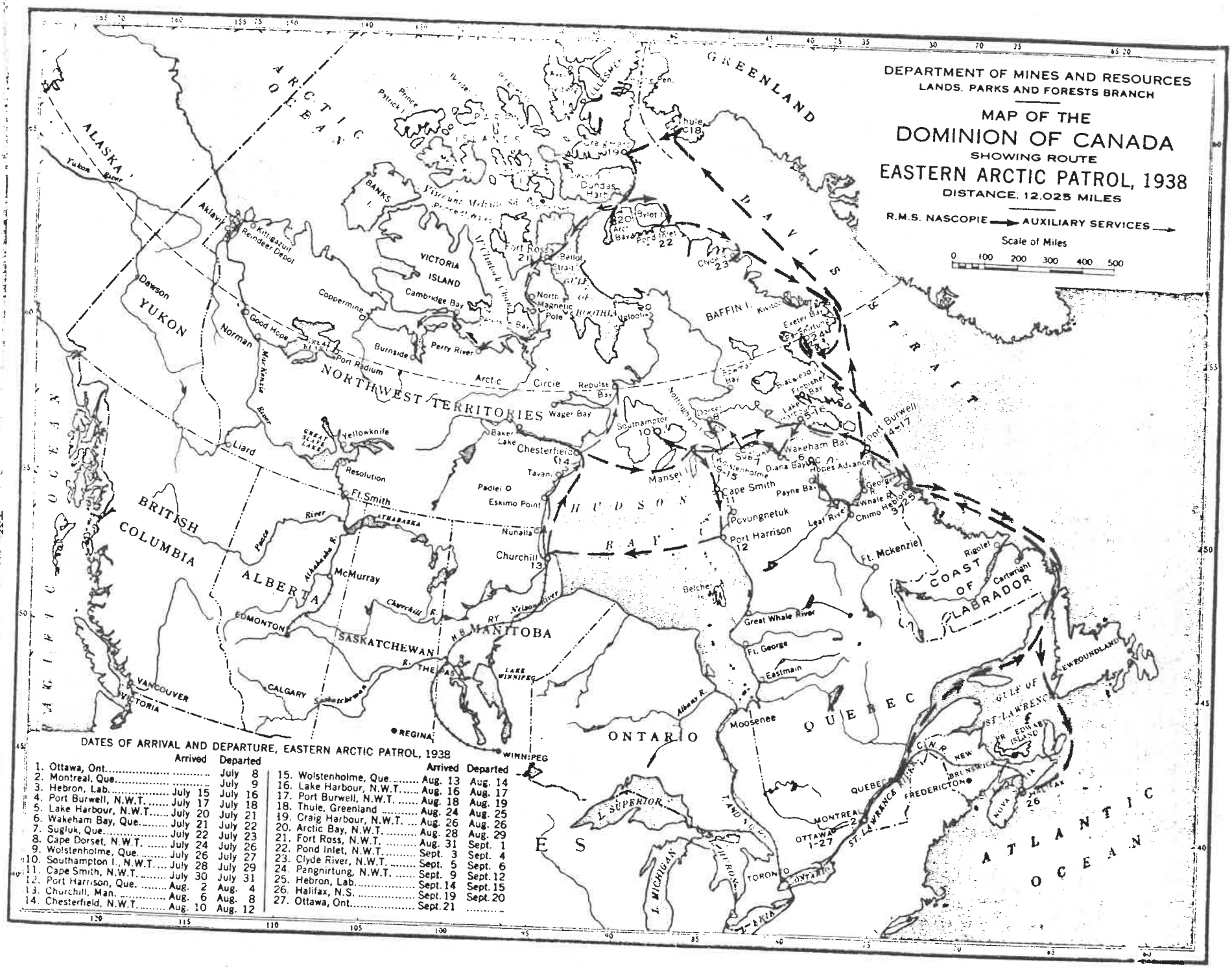


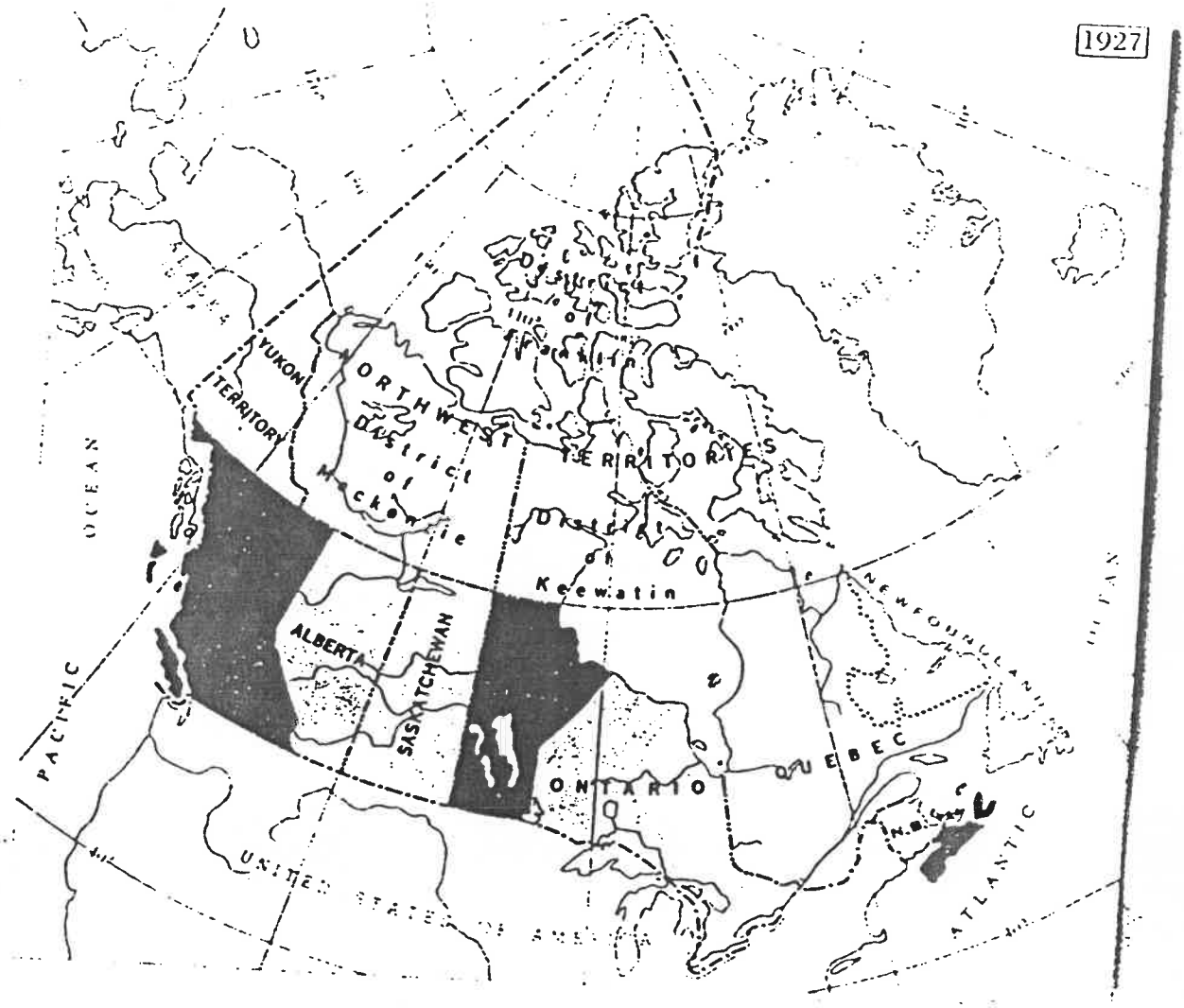
1912
In 1912, Ontario, Quebec and Manitoba were extended north to Hudson Bay and Strait

1927
By 1925 Canada extended to the North Pole. In 1927, the Imperial Privy Council rendered a decision on the boundary between Newfoundland and Canada.

1949
In 1949, Newfoundland was admitted to the confederation of Canada as the tenth province.


140°W.
130°W.
120°W.
110°W.
100°W.
70°N.
70°N.
140°W.
100°W.
60°N.
110°W.
ARCTIC OCEAN
Banks I.
Banks Land
Ft. Brabant
Victoria I.
Cambridge Bay
Prince William Land
Tescheil Island
Baillie Island
Pedlor Pt.
Ft. Harman
Kittigazuit
Ft. McPherson
Tom Cod Bay
Inman River
Bernard Harbour
Ft. Hearne
Coppermine
Kugaryuak
Tree River
Bathurst Inlet
Ellice River
Flagstaff I.
Shingle Point
Aklavik
Arctic Circle
Arctic Red River
Peel R.
Great Bear Lake
Bloody Falls
Ft. Good Hope
Norman Wells
Ft. Norman
Mackenzie R.
Ft. Reliance
Ft. Rae
Ft. Wrigley
Great Slave Lake
Ft. Providence
Ft. Resolution
Chipewyan
Athabasca
Yukon Terr.
N.W.T.
Ft. Simpson
Hay River
N.W.T.
Ft. Smith
Ft. Fitzgerald
Peace R.
Alta.
B.C.
Sask.
Ft. McKay
Ft. McMurray
Waterways
R.R.
Edmonton
Nome
ALASKA
Aklavik
Edmonton
U.S.A.


DEPARTMENT OF MINES AND RESOURCES
LANDS, PARKS AND FORESTS BRANCH
MAP OF THE
DOMINION OF CANADA
SHOWING ROUTE
EASTERN ARCTIC PATROL, 1938
DISTANCE, 12,025 MILES
R.M.S. NASCOPIE → AUXILIARY SERVICES →
Scale of Miles
0 100 200 300 400 500
ARCTIC OCEAN
GREENLAND
DAVIS STRAIT
BAFFIN I.
ALASKA
YUKON
NORTHWEST TERRITORIES
BRITISH COLUMBIA
ALBERTA
SASKATCHEWAN
MANITOBA
ONTARIO
QUEBEC
HUDSON BAY
PACIFIC OCEAN
ATLANTIC OCEAN
COAST OF LABRADOR
NEWFOUNDLAND
GULF OF ST. LAWRENCE
L. SUPERIOR
L. MICHIGAN
Thule 18
Dundas Harbour 19
Craig Harbour 20
Arctic Bay 21
Pond Inlet 22
Clyde 23
Exeter Bay 24
Lake Harbour 15-16
Port Burwell 4-17
Wakeham Bay 6
Diana Bay
Hopes Advance
Cape Dorset 8
Southampton I. 10
Mansel I.
Wolstenholme 5-15
Cape Smith 11
Povungnetuk
Port Harrison 12
Chesterfield 14
Churchill 13
Nunaitsiaq
Eskimo Point
Baker Lake
Wager Bay
Repulse Bay
Fort Ross 21
Bellot Strait
Victoria Island
Cambridge Bay
Coppermine
Good Hope
Norman
Aklavik
Dawson
Yellowknife
Resolution
Fort Smith
Liard
Fort Radium
Burnside
Perry River
Arctic Circle
Great Whale River
Fort George
Eastmain
Moosonee
Rigolet
Ft. Mckenzie
Lear River
Payne Bay
Whale R.
Chimo Hebron
Carteright
Belcher Is.
McMurray
Edmonton
Calgary
Regina
Winnipeg
Vancouver
Victoria
Toronto
Ottawa
Montreal
Quebec
Fredericton
New Brunswick
Halifax
Nova Scotia
Pr. Edward Island
Lake Winnipeg
Saskatchewan R.
Athabaska R.
Peace River
Churchill R.
Nelson River
Albany R.
Mackenzie River
Yukon River
Prince Patrick I.
Banks I.
Victoria Strait
Queen Maud Gulf
Boothia Pen.
Ellesmere I.
Lancaster Sound
Prince Regent Inlet
Foxe Basin
Hudson Strait
Ungava Bay
Labrador Sea
C.N.R.
DATES OF ARRIVAL AND DEPARTURE, EASTERN ARCTIC PATROL, 1938
1. Ottawa, Ont. ..... Departed July 8
2. Montreal, Que. ..... Departed July 9
3. Hebron, Lab. ..... Departed July 15
4. Port Burwell, N.W.T. ..... July 17 July 18
5. Lake Harbour, N.W.T. ..... July 20 July 21
6. Wakeham Bay, Que. ..... July 21 July 22
7. Sugluk, Que. ..... July 22 July 23
8. Cape Dorset, N.W.T. ..... July 24 July 26
9. Wolstenholme, Que. ..... July 26 July 27
10. Southampton I., N.W.T. ..... July 28 July 29
11. Cape Smith, N.W.T. ..... July 30 July 31
12. Port Harrison, Que. ..... Aug. 2 Aug. 4
13. Churchill, Man. ..... Aug. 6 Aug. 8
14. Chesterfield, N.W.T. ..... Aug. 10 Aug. 12
15. Wolstenholme, Que. ..... Aug. 13 Aug. 14
16. Lake Harbour, N.W.T. ..... Aug. 16 Aug. 17
17. Port Burwell, N.W.T. ..... Aug. 18 Aug. 19
18. Thule, Greenland ..... Aug. 24 Aug. 25
19. Craig Harbour, N.W.T. ..... Aug. 26 Aug. 26
20. Arctic Bay, N.W.T. ..... Aug. 28 Aug. 29
21. Fort Ross, N.W.T. ..... Aug. 31 Sept. 1
22. Pond Inlet, N.W.T. ..... Sept. 3 Sept. 4
23. Clyde River, N.W.T. ..... Sept. 5 Sept. 6
24. Pangnirtung, N.W.T. ..... Sept. 9 Sept. 12
25. Hebron, Lab. ..... Sept. 14 Sept. 15
26. Halifax, N.S. ..... Sept. 19 Sept. 20
27. Ottawa, Ont. ..... Sept. 21 .....


1927
YUKON TERRITORY
NORTHWEST TERRITORIES
District of Mackenzie
Keewatin
ALBERTA
SASKATCHEWAN
ONTARIO
QUEBEC
PACIFIC OCEAN
ATLANTIC

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  - (ii) A.H. Gibson
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  - (iv) Mr. Justice Gibben
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  - (i) Rivet and St. Germain
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(6) Summation

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List of Cases

ex parte Fernandez 10 C.B. (N.S.) 1; 142 E.R. 349

Queen v. Riel, 1 Terr. L.R. 20, on appeal 9 C.R.A.C. 214

Ross v. Lieberman [1947] 1 W.W.R. 1070

Royal Bank of Canada v. Scott [1971] 4 W.W.R. 491

Re Paulette [1973] 6 W.W.R. 97

Walton v. Hebb [1985] 1 W.W.R. 122

Re Steinhauer and the Queen (1985) 15 C.R.R. 175

R. v. Secretary for Foreign Affairs [1982] 2 All E.R. 118

R. v. Cardinal (1953) 10 W.W.R. (N.S.) 403

Pacific Western Airlines v. Queen (1979) 105 D.L.R. (3d) 44

R. v. Magrum [1944] 3 W.W.R. 486

Herman v. Deputy A.G. of Canada [1979] 1 S.C.R. 729

R. v. Sikyea (1964) 46 W.W.R. 65

Board v. Board [1919] A.C. 956; [1919] 2 W.W.R. 940

Fletcher v. Fletcher [1920] 1 W.W.R. 5

Walker v. Walker [1919] A.C. 947; [1919] 2 W.W.R. 935

Watts v. Watts [1908] A.C. 573

Thornback v. Thornback [1923] 4 D.L.R. 810

Fletcher v. Fletcher [1918] 3 W.W.R. 283

Voghell v. Voghell & Pratt (1960) 33 W.W.R. 673

A.G. for Ontario v. A.G. for Canada (1947) A.C. 127

R. v. Rivet [1944] 2 W.W.R. 132

Nadan v. King [1926] A.C. 482

British Coal Corp. v. King [1935] A.C. 500

Balogh v. St. Alban's Crown Court [1975] 1 Q.B. 73

Committee for Justice and Liberty v. The National Energy Board [1978] 1 S.C.R. 369

R. v. Lepine, 13 C.R. 380

R. v. Sussex Justices [1924] 1 K.B. 256

Hunter v. Southam Inc. [1984] 2 S.C.R. 145

R. v. Valente, 64 N.R. 1

Liversidge v. Anderson [1942] A.C. 206

R. v. A.B., 16 W.W.R. 425

Preface

(1) Historical Framework

The Northwest Territories in 1870 included what are now the Provinces of Alberta, Saskatchewan, most of Manitoba, Northern Ontario, Northern Quebec and the Yukon, in addition to the present-day Northwest Territories. In 1880 the Arctic Islands were added. In 1897 the Yukon was severed out; in 1905 Alberta and Saskatchewan were created (Map M-2); and in 1912 Ontario, Quebec and Manitoba were expanded (Map M-3). The boundaries of the Northwest Territories did not change between 1912 and 1955 (Map M-6).

Between 1873 and 1955 there were two Stipendiary Magistrate's Courts. The "old" Court existed from 1873 to 1886. The "new" Court, the subject of this Thesis, existed from 1905 to 1955.

There were also two Supreme Courts of the Northwest Territories - the first functioned from 1886 to 1905, the second was constituted in 1955, though until 1971 it was called the Territorial Court. The second Court had two Justices: Justice Sissons, who sat from 1955 to 1966, and Justice Morrow, who presided from 1966 to 1971. In 1971 the name of the Court was changed to the Supreme Court of the Northwest Territories.

(2) Purpose

One interested in the legal history of the present-day Northwest Territories searches in vain for literature dealing in depth with legal developments in the period 1905 to 1955. For example, in his book Judge of the Far North, Mr. Justice Sissons deals only in a cursory manner with legal developments in the Northwest Territories in the pre-1955 period. This Thesis concentrates on one particular legal institution (perhaps the most important) in the pre-1955 period - the Stipendiary Magistrate's Court. It seeks to establish a point of reference for subsequent scholars who come to deal with other aspects of the machinery of justice in the post-1905 period in the Northwest Territories. Studies on the Territorial Court (1955-1971), the legal profession, the office of the Crown Attorney, the police, and the Justices of the Peace remain to be written.

The Thesis is not an exhaustive interpretive history of the administration of justice in the Northwest Territories from 1905 to 1955. It does not, for example, seek to analyze how whites and natives sought "to mediate conflict and to facilitate economic growth and social stability."[1] It is, nevertheless, a story with many themes. Those themes will become evident as the account progresses, and the most important of them will be reviewed in the concluding Chapter.[2]

(3) Contents

The Thesis is structured on two levels. Chapters One through Seven are more descriptive than interpretive. They describe the historical roots of the office of Stipendiary Magistrate, the reestablishment of the Stipendiary Magistrate's Court, the three court periods, and certain aspects of the jurisdicton and process of the Court. The changing composition and character of the Court may be viewed in the descriptions of the twenty-four members of the Court, set out in chapters Three, Four and Five.

Chapters Eight through Eleven are more analytical than the earlier chapters. They build on the personages of the Court already introduced. The Stipendiaries' roles, judicial and extra-judicial, are defined; and some of their judicial traits are examined. Their significant contribution to the development of the court circuit system is detailed. The notion, perpetrated by Mr. Justice Sissons, that until 1956 courts in the Northwest Territories did not go on circuit is challenged and refuted.[3]

(4) Sources

The "hallmark of contemporary legal historiography is its interest in viewing the development of the law, [and legal institutions, like the courts] in a social context."[4] Legal

historians are challenged to adopt an interdisciplinary approach "to escape the stultifying boundaries of precedent and statute"[5] by also examining social, political and economic forces to assess their impact on evolving legal institutions.

This has been attempted. Extensive use has been made of contemporary documentary sources lodged at archival institutions in Central and Western Canada.[6] The records kept by the Territorial Administration, now located at the Public Archives at Ottawa, have been especially helpful. Also helpful have been newspaper accounts, council minutes, unpublished court records, diaries, government special and annual reports, and university theses. Oral history has also proven useful. Since there is a risk when relying on memory rather than documentary sources, where conflicts between the two have occurred, I have opted to rely on the documentary record. The Ottawa bias that pervades the documentation generated by officers of the Territorial Administration and the Department of Justice is to be noted and kept in mind when reading this Thesis.

(5) Northern Historiography

In the 1980's, "northern historiography remains a patchwork."[7] Except for the fur trade literature, until recently, there has been little analytical work done on northern subjects. This situation results from the southern focus of

Canadian historians, who with significant exceptions,[8] have ignored the North. It is hoped this Thesis will add a significant patch to the northern historiography quilt.

1. McLaren, John, Preface in Knafla (ed.) Law and Justice in a New Land (Calgary: Carswell, 1986) p.xiv.

2. Chapter 12(4).

3. See Appendix A in its entirety.

4. Bell, The Birth of Canadian Legal History (1984) UNB Law Journal 312 at 313.

5. Flaherty, Writing Canadian Legal History: An Introduction, in Flaherty (ed.) Essays in the History of Canadian Law, Vol. 1, (Toronto: The Osgoode Society, 1981) 3 and 4.

6. See List of Sources, (A) Unpublished.

7. Coates and Morrison, Northern Visions: Recent Developments in the Writing of Northern Canadian History, undated, unpublished, p.21. This is a draft of an article found in Manitoba History (Autumn, 1985).

8. Some of the exceptions are detailed in Morrison's introduction in Morrison, Showing the Flag (Vancouver: University of British Columbia Press, 1985) p.xiii.

Introduction

Few lamented the passing of the Stipendiary Magistrate's Court on April 1, 1955. Its only full time Judge quietly assumed his new office as Police Magistrate for the Northwest Territories, residing at Yellowknife.

This was the second time in the history of the Northwest Territories that the court had been "disestablished." The first time, in 1886,[1] three of its four Magistrates were elevated to positions as Justices of the Supreme Court of the Northwest Territories. The second time[2] however, L.H. Phinney, then the only active Stipendiary Magistrate, did not attain the newly created office of Justice of the Territorial Court of the Northwest Territories. For a time no one did.[3] There seemed to be no urgency to appoint a Judge just as there had been none to appoint a Stipendiary Magistrate in 1905, but for different reasons.

The Northwest Territories after 1905,[3a] and even more so after the Manitoba-Ontario-Quebec boundary extensions in 1912, was an unorganized, remote, sparsely settled Territory. There existed little crime and no civil business; hence few judicial cases.

In 1955, a Judge for the new Court was urgently needed. John Parker, a private legal practitioner residing at

Yellowknife, as early as April 1955 urged an immediate appointment.[4] Judicial business awaited the Court's attention.[5]

The delay is explained by executive indecision and procrastination. Opposition had developed to the appointment of Fred Fraser, a former Stipendiary Magistrate at Yellowknife and Ft. Smith, who, in 1955, was a senior officer in the Department of Resources and Development at Ottawa.[6] Also amendments to the Judges Act and the Northwest Territories Act to provide for the appointment of a separate Judge for the Northwest Territories were not passed until July 14, 1955.[7]

Finally on September 14, 1955, the Federal government announced the appointment of Jack Sissons. Sissons is perceived[8] to have created more controversy and excitement, and to have more significantly influenced judicial developments, in his 12 years in judicial office, than did the twenty-four Stipendiary Magistrates who preceded him. His battles with Ottawa bureaucrats and his many court circuits were highly publicized. Yet in their modest way, unpublicized, the Stipendiary Magistrates had gone about performing their important judicial duties. Their contribution to the development of the circuit system in the North was highly significant. That contribution had its sacrifices. On circuit, their lot was one of enduring physical hardship, lengthy periods of arduous travel and extended isolation, and danger. They undertook their duties in an energetic manner despite remuneration that was a pittance. In

the 1870's the "old" Stipendiary Magistrates were paid $3000 annually. Stipendiary Magistrate Senkler's salary in 1910 remained at that level. Stipendiary Magistrate J.E. Gibben's salary in 1938 still had not increased, though he now had a housing allowance.[9]

In sum, their judicial office was not a plum or a secure comfortable sinecure. And they suffered: Gibben's alcoholic tendencies first emerged in the period 1938 to 1941, while Meikle's religious convictions were severely tested in 1942.[10]

Their contribution, though, went unrecognized at the time. This Thesis attempts to redress the public perception, to accord to the Stipendiary Magistrates a status commensurate with the energy, sense of duty, sacrifice, and dedication they brought to the performance of their judicial tasks and with the importance of the superior court jurisdiction they exercised.

1. Northwest Territories Act (afterwards NWT) SC 1886, c.25, s.32.

2. NWT Act RSC 1952, c.331, ss.20-40, proclaimed in force April 1, 1955.

3. Gibben J., of the Yukon Territorial Court, as an ex officio Judge filled a part-time interim role from April 1 to July 11, 1955. NWT Act RSC 1952, c.331, s.20. He journeyed from his judicial seat at Whitehorse to take trials in the Mackenzie District.

3a. The relatively more civilized parts were severed out.

4. Department of Justice (afterwards D of J) file #170890, letter, John Parker, dated 19 April 1955.

5. By section 24(2) NWT Act RSC 1952, c.331 matters pending as of 1 April 1955 before a Stipendiary Magistrate were transferred to the new Territorial Court.

6. D of J, file #170909, memorandum, 30 March 1955, - "Fraser is efficient and conscientious [but] his legal judgment is not too sound." Because Phinney is "fairly competent, I doubt whether Fraser is competent to review the Magistrate's Judgments." If Bouchard is appointed [as prosecutor] the effect would be "to lower substantially the standards for the administration of justice in the Northwest Territories." Fraser was not appointed.

7. Judges Amendment Act SC 1955, c.48, ss. 3, 9, 10 repealing and substituting a new section 18(2) providing for a salary of $16,900; and repealing and substituting a new section 20 in the NWT Act RSC 1952, c.331 providing for one Judge. The former section 20 provided that the Yukon Territorial Court Judge, Mr. Justice Gibben, was an ex officio Judge of the Northwest Territories Court. The new section 20 came into force on 11 July 1955, and did not continue the ex officio appointment. See also Debates, H of C, 6 June 1955, p.4438.

8. The perception is enhanced by his book. Sissons, Judge of the Far North (Toronto: McClelland and Stewart Limited, 1968) and reinforced by the tendency amongst the legal community of the Northwest Territories to trace the legal history of the court structure in today's Northwest Territories from 1955. For example, Justice Morrow's jury survey begins in 1955: Morrow, A Survey of Jury Verdicts (1970) 8 Alta L.R. 50.

9. See Chapter 3, fn.38.

10. Appendix A, 1942, Rivet trial.

Chapter 1

Historical Roots of the Office of Stipendiary Magistrate and the Court Circuit System

Introduction

This chapter examines the English roots of the office of Stipendiary Magistrate. A brief reference is then made to its early Canadian namesake. The chapter concludes with a comment on the English and Canadian circuit court systems.

(1) Stipendiary Magistrates - English Origins

(a) Trading Justices

In the late eighteenth century the 'Metropolis' of London - that vast collection of townships, manors, parishes and extra parochial places - that had "agglomerated itself outside the City"[1] was a judicial mess. "Unity of action was impossible, the individual Magistrate was not controlled by the spirit of corporate magistracy, and metropolitan justice and police fell into bad ways."[2] The notorious "trading justices" - unscrupulous justices who lacked a substantial estate and relied upon the fees of office for a livelihood - flourished.

Holdsworth illustrates one of their practices: "the plan used to be to issue out warrants and take up all the poor devils in the street, and then there was the bailing of them 2/4,[2a] which [those who made a trade of administering justice retained] . . . . They sent none to gaol, the bailing of them was so much better."[3]

Burke described these "traders in justice" in dark terms: "[They] were generally the scum of the earth: [men] . . . unworthy of any employ whatever; and . . . so ignorant they could scarcely write their names."[4] Their odious practice of taking court fees for every act performed attracted the unscrupulous and made for lengthy delays.

To add to litigants' miseries, the volume of judicial work in the Metropolis of London increased beyond the capacity of part-time unpaid Justices with no legal training.

(b) Defective Police System

The police system, lamentably, was no better. The Lord George Gordon riots in London in 1780 consisted of "a week of looting, arson, and unchecked defiance of authority [that] severely shook the foundation of order."[5] The situation poignantly pointed out the need for a regularized, paid, reliable police force. Lord Mansfield, whose extensive library was destroyed by the unchecked mob, could only have agreed.

(c) Reforms of the Fielding Brothers

Into this cauldron of rampant crime and judicial incompetence the Fielding brothers plunged. Both sat as Bow Street Magistrates in Westminister: Henry, the novelist, from 1749 to 1754 and his half-brother Sir John from 1741 to his death in 1780.[6] Their writings and proposals spurred reform.

(i) Stipendiary Magistrates

The Middlesex (Metropolitan) Justices Act[7] of 1792 was one of the results. This legislation established seven "public offices" in Middlesex to each of which three Justices were attached. The Bow Street office, in which the Fieldings had sat, remained temporarily apart.[8] Judicial fees were paid to a Receiver. The Justices no longer took any court fees; instead they were paid an annual stipend of £400. Justices "fit and able" were appointed "during pleasure" by the Crown, on the advice of the Privy Council.[9]

This legislative reform was accomplished over strenuous opposition.[10] By tradition, the office of Justice of the Peace was unpaid. "This had always been considered an essential guarantee of its independence of the Government and was the basis of the regard in which Justices were held as guardians of liberty and the peace."[11] Their replacement in the Metropolis by stipend paid Magistrates was seen by some as the precursor of the last

plunge into tyranny, "a betrayal of the local self government which was the end and essence of national freedom and of the maxims and injunctions of our fathers . . . that the Executive cannot be trusted."[12]

Reform was acknowledged to be necessary but Magistrates whose appointments and salaries centred in the hands of the Secretary of State were regarded "as so many mercenaries, in the hands, and at the complete disposal of, Government."[13] The reference to mercenary is provocative. Archaic[14] definitions of stipendiary make reference to a soldier serving for pay, a mercenary.

That the term "mercenary" Magistrates did not become common parlance was due to the success of the 1792 legislation. Improvements did take place. "In October 1793, a committee [of businessmen expressed their] thanks for the establishment of the new magisterial system . . . . Great benefits have arisen, with regard to the security of property, from the correct and regular manner in which the judicial business has been conducted by the Magistrates of police."[15]

Similar legislation establishing the office of Stipendiary[16] Magistrate at specific places outside the Metropolis followed in turn,[17] as did legislation establishing the office of Police Magistrates, generally, outside London. The 1835 Municipal Corporations Act[18] specified that the reformed boroughs might

have Police Magistrates appointed by the Crown if the rural borough Councils chose to ask and pay for them. Similar legislation to that of 1835 for urban areas, was enacted in 1863.[19] Oddly, at first, borough Magistrates were to be barristers-at-law of not less than seven years standing while their urban counterparts needed only five years standing at the bar. To round out the legislative picture, after 1858 a troika of legislative Acts refining the office of Stipendiary Magistrate was passed.[20]

(ii) Police

To appreciate the other major aspect of the 1792 legislation, relating to the police, requires a review of the Bow Street Magistrates office. That office had carried with it a secret salary. As Holdsworth described it: "the government must have at least one secretly paid Justice to whom it could send confidential communications and on whom it could rely."[21] Thomas de Veil, one such Magistrate, fixed his office at Bow Street. His successors, including the Fieldings, remained there, and the Bow Street office flourished as "a central bureau of information as to crime."[22]

To that bureau, Sir John Fielding had brought reforms on a voluntary basis[23] in 1763, some of which were later incorporated into the 1792 legislation. A rotation of Magistrates was established. Court fees were applied to a fund used to defray expenses and pay the wages of peace officers.

The 1792 legislation, in turn, provided that the seven public offices were staffed by not more than six constables[24] paid a stipend to act under the Orders of the Magistrates.[25]

This close relationship between the Magistrates and the Police was not to last. Ten years after the establishment[26] of the London Police Force by Sir Robert Peel in 1829, the control of the Force was transferred from the Magistrates to Police Commissioners.[27] This development no doubt would have deeply troubled Sir John Fielding who had argued for the expediency of entrusting the Magistrates with the direction of all constables in the interest of a much needed unity of command and coordination.[28] For Fielding, the Magistrates were to fulfil both a judicial role and that of a police administrator.

Fielding's views were not, however, universally accepted. Colquhoun[29] argued for a centralized Force under executive control. For him it was essential that the functions of the Magistracy and those of the Police be kept separate. Without such separation no real reform of the Police could take place.[30] Colquhoun's views won out. The inconsistency of trying to combine judicial functions and crime prevention in a single Justice was appreciated by Parliament. A Board of Police Commissioners supplanted the Magistrates, who ceased to have any control over the police.[31] One may sympathize with Sir John Fielding's viewpoint but one cannot support it. It was incongruous for a Magistrate who advised a constable on the evidence needed to secure a conviction to then hear the case himself.[32]

(d) Stipendiary Magistrates in the Nineteenth and Twentieth Centuries

Stipendiary Magistrates were not widely appointed outside London. Faced with the ingrained tradition of unpaid lay Justices of the Peace, few appointments were made. Writing in 1885, Maitland observed that a very small number of Towns called a lawyer to their aid.[33] Manchester and Stephen confirm that observation. Relatively few Stipendiaries were appointed throughout the country. "The hostility . . . [toward paid professional Magistrates] on the ground that it increased Crown patronage, lost little of its sting in subsequent years."[34]

In general, only the Metropolitan districts of London and several large Towns were served by paid legally-trained Magistrates. The municipal boroughs, the City of London, the privately chartered towns and boroughs - "all [continued to be] served by elected or appointed persons exercising their office gratuitously."[35]

This trend continued as Manchester notes: "even in the twentieth century there were relatively few Stipendiaries."[36] Radcliffe and Cross [37] confirm Manchester's view. Writing in 1964 they comment "[s]urprisingly few places have availed themselves of [the] right to a salaried professional Magistrate.

(2) Early Canadian Stipendiary Magistrates

Not surprisingly the Indictable and Summary Conviction Acts passed by the British Parliament in 1848 found their way, in substance, into the legislative fabric of the United Canadas.[38] This colonial legislation introduced to the former Upper and Lower Canada the office of Stipendiary Magistrate.[39] The English raison d'etre for the office of Stipendiary Magistrate, though, was lacking. In the United Canadas in the 1850's there was no Metropolis, nor was there the pervasive judicial and police incompetence or corruption.

After the creation of the Confederation of Canada in 1867 and the acquisition of Rupert's Land and the North-Western Territory in 1870, legislation to create a court structure in the newly transferred Territory followed at a leisurely pace.[40] Federal legislation in 1873[41] provided for the appointment of the Stipendiary Magistrates in the North West Territories. That legislation with variations and amendments permitted the Stipendiary Magistrates to function until 1886, when the Supreme Court of the Northwest Territories replaced it.[42] Of note is the fact that these Stipendiary Magistrates did not exercise any effective jurisdiction[42a] north of 60° north latitude, in the area that after 1912[42b] remained the Northwest Territories.

(3) The Circuit System - English Origins

Stephen comments: "from the very earliest period . . . the King exercised his prerogative of justice locally by the agency of Commissioners authorized to try particular causes . . . in particular places."[43] By the early thirteenth century five Commissions had evolved - assize and nisi prius to do civil business; and Commissions of the peace, oyer and terminer, and general gaol delivery to handle criminal matters.[44] The Royal Commissioners, in time Justices of the Courts of King's Bench, Common Pleas or Exchequer, resident at Westminister, appointed to take Assizes, hear and determine criminal pleas, and deliver gaols of those held pending trial,travelled throughout England on court circuits.[45]

Lord Beeching[46] writing in the late 1960's observes that this system had changed little since medieval times. J.S. Cockburn[47] writing in the 1970's, would disagree. His thesis, persuasively put, is that until the early eighteenth century, circuit Judges, in addition to their judicial duties, attended to a multiplicity of non-judicial business. They energetically supervised local government officials while also fulfilling the demanding executive role set out for them by the Privy Council at Westminister. The extent of their executive-political function was occasionally defined by the King himself. James 1, on 20 June 1616 in Star Chamber, to the assembled Judges, enjoined:

> "Remember that when you go your circuits, you go not only to punish and prevent offences but you are to take care for the good government in general of the parts where you travel . . . You have charges to give to justices of peace, that they do their duties when you are absent, as well as present: take an account of them, and report their service to me at your return . . . I know not whether misunderstanding or slackness bred this, that I had no account but in general of that I gave you in particular in charge the last year: therefore now I charge you again that at your next return you repair to my Chancellor, and bring your accounts to him in writing of those things which in particular I have given you in charge: and then when I have seen your accounts, as occasion shall serve it may be I will call for some of you, to be informed of the state of that part of the country where your circuit lay."[48]

Circuit judges were as modern day political campaigners emanating from the Executive offices of the party in power. At election time, they trumpeted official government propaganda on the hustings, absorbed gossip and rumour, monitored and evaluated grievances and concerns, then reported back to the National Party Headquarters and sometimes to the Prime Minister himself.

By Lord Mansfield's day this multi-functionalism had lapsed; the judicial function was preserved so Doug Hay[49] postulates, to maintain order in the nineteenth century, by a spirit of consent and submission fostered by the public ceremonial and ritual aspects of the Circuit Court. That function, in a reduced ceremonial form, retained its vitality into the twentieth century.

Beeching, Cockburn and Hay would all agree with Justice Bayles[50] that the circuit system was one of the legacies of Magna Carta.[51] Every accused, as far as reasonably possible, had the right to be tried by a jury from the locality in which he was alleged to have committed an offence.

(4) Some Early Canadian Offshoots

Again, not surprisingly, aspects of the English circuit system found their way into the Canadian judicial mosaic and were adapted to the conditions in pre- and post-Confederation Canada. Several circuits evolved in Upper Canada.[52] Chief Justice Robinson on the Home Circuit in 1831 passed the sentence of death upon Moses Winter, convicted of bestiality.[52a] The Chief Justice's biographer writes that at every Assize, Robinson, in addressing the grand jury, would expound his view of the rights and duties of British subjects, urging the assembled to look to their duty "to inculcate obedience to the laws."[53]

Mr. Justice Begbie, trained in the equity courts in England, introduced to the then colony of British Columbia an unwavering circuit pattern. As his biographer relates, in the decade of the 1860's, during the winter and spring Begbie held court on the lower mainland at his judicial base at New Westminister. "In summer and autumn he rode on horseback to the upper country, the interior of British Columbia, to the mining camps where the bulk of the population lived, to administer justice."[54]

Prior to 1870, in the present day Northwest Territories, no court structure of any kind existed. Of the serious criminal matters, some were brought to Lower Canada for trial.[54a]

(5) Northwest Territories (1870-1905)

In this period, the area that after 1905 remained the Northwest Territories was viewed as undeserving of any but minimal judicial attention.[55] The judicial districts of the Northwest Territories Supreme Court encompassed what is now Alberta, Saskatchewan, Manitoba and, after 1897, the Yukon Territory.[56] The rest, the present day Northwest Territories, was not included in any Judicial District.

When Commissioner Wrigley of the Hudson's Bay Company in 1885 regretfully advised Lieutenant Governor Dewdney of the Northwest Territories at Regina of a murder committed by Indians near Ft. Chipewyan in Athabasca, Dewdney's reply was circumspect. The matter was referred to Stipendiary Magistrate Richardson, also at Regina. Wrigley had suggested, with some perspicacity, that the trial take place in Athabasca "as the expense to bring out those charged with the murder, and accessories to it, together with numerous witnesses would be great. [Additionally] the effect of the trial and if necessary the punishment would be more effective on the spot."[57]

Richardson, reluctant without specific details to "rashly" agree to the Commissioner's suggestion, given the "great expense

attendant upon holding a court" in Athabasca, observed that "the outlay necessary for holding a court in the North might be less to the government than bringing parties to Prince Albert or Edmonton." He prefaced these remarks with the general comment that since coming to the Northwest Territories he had "conceived the idea that a favorable opportunity offering, it would be in the public interest that a Criminal Court should be held in the Northern Country." The opportunity offered was apparently not taken.[58] Perhaps because the necessary formal charges never materialized, or because Richardson, by the summer, found himself fully occupied with the Riel trial[59] and the less pressing Athabasca matter was allowed to lapse.

The generous offer of the Hudson's Bay Company "to assist the [court] officers to make the journey to and fro as quickly and comfortably as possible" was not acted upon until 36 years later, when Stipendiary Magistrate Dubuc held court at Fort Providence in 1921.[60]

In this period, there is no evidence of any cases from the Northern Country being tried "on the spot." When the Sabourin murder case[61] arose, in 1899, the accused and witnesses were brought from Ft. Providence to Edmonton for trial before Justice Rouleau of the Supreme Court of the Northwest Territories.[62]

1. Maitland, Justice and Police (London: MacMillan and Co., 1885) p.98.

2. Ibid., p.99.

2a. 2 shillings, 4 pence.

3. Holdsmith, A History of the Common Law, 16 Volumes, 7th ed. (London: Methuen & Co. Ltd., 1956) Vol.1, p.146.

4. Radzinowicz, A History of English Criminal Law and Its Administration from 1750, 5 Volumes (London: Stevens, 1948) Vol.3, p.32.

5. Hay, Property, Authority and the Criminal Law in Hay et al, Albion's Fatal Tree (New York: Pantheon Books, 1975), p.50.

6. Magistrates were nicknamed beaks. A rum beak was a good Justice, and quare beak a bad Justice; Sir John Fielding, blinded early in life by an accident was known in the criminal underworld as the blind beak. Radzinowicz, Vol.3, p.57, fn.12.

7. (1792) 32 Geo3 c.53, also called the New Police Act.

8. The following year the Bow Street office was put on the same footing as the seven public offices.

9. At first only 3 out of 21 appointments were lawyers. By 1839 all appointments were confined to barristers of seven years standing.

10. Radzinowicz, op. cit., Vol.3, p.128.

11. Ibid.

12. Radzinowicz, op. cit., Vol.4, p.220.

13. Radzinowicz, op. cit., Vol.3, p.129, fn.11.

14. Webster's 3rd New International Dictionary.

15. Radzinowicz, op. cit., Vol.3, p.133.

16. Police Magistrate and Stipendiary Magistrate came to be used interchangeably. A Stipendiary Magistrate sat in a Police Court viz Police Courts Act (1839) 2-3 Vict., c.71, ss. 1 and 3; Indictable Offenses Act (1848) 11 & 12 Vict., c.42, s.29; Summary Jurisdiction Act (1848) 11 & 12 Vict., c.43, s.33; post fn.25.

17. For example: Manchester Stipendiary Magistrate Act (1813) 53 Geo3 c. 72; Staffordshire Potteries Stipendiary Justice Act (1839) 2 & 3 Vict., c.15; Stipendiary Magistrate for

Manchester (1844) 7 & 8 Vict., c.30, amended by Manchester and Salford Stipendiary Magistrate Act (1854) 17 & 18 Vict., c.20; Wolverhampton Stipendiary Magistrate Act (1846) 9 & 10 Vict., c.65; Chatham & Sheerness Stipendiary Magistrate Act (1867) 30 & 31 Vict., c.63; see generally Halsbury (1st ed.) Vol.19, p.546.

18. (1835) 5-6 Vict. 4, c.76, s.99; (1882) 45 & 46 Vict., c.50, s.161(1).

19. The Stipendiary Magistrates Act (1863) 26 & 27 Vict., c.97, s.3.

20. The Stipendiary Magistrates Act, 1858 (1858) 21 & 22 Vict., c.73; The Stipendiary Magistrates Act, 1863 (1863) 26 & 27 Vict., c.97; The Stipendiary Magistrates Act, 1869 (1869) 32 & 33 Vict., c.34.

21. Holdsworth, op. cit., Vol.1, p.146. A regular police force did not emerge until the 1829-1839 period. Prior to that the gentry would not tolerate even the idea of one. They remembered the pretensions of the Stuarts and the days of the Commonwealth, and they saw close at hand how the French monarchy controlled its subjects with spies and informers (a political police serving the Crown). Hay et al, Albion's Fatal Tree 17, 18.

22. Holdsworth, op. cit., Vol.I, p.147, fn.1.

23. Today, one would say Sir John conducted a pilot project.

24. Section 15.

25. This initial close relationship between the Magistrates and Police helps to explain the devolution of the office from Public Office to Police Office to Police Court, and that of Stipendiary Magistrate to Police Magistrate; supra, fn.16.

26. The Metropolitan Police Act (1829) 10 Geo4, c.44.

27. The Metropolitan Police Act (1839) 2 & 3 Vict., c.47, s.4 that established Commissioners of Police.

28. Radzinowicz, op. cit., Vol.3, p.38-39, fn.8.

29. A transplanted Scotsman, a former prominent citizen of Glasgow, who was a Stipendiary Magistrate in the Metropolis from 1792 until his retirement in 1818. He also was for a time a Receiver of court fees under section 5 of the 1792 legislation. He was ideally suited to comment on the relationship between Magistrates and the Police. He also was the author of the Treatise on the Police of the Metropolis published in 1795. Radzinowicz, Vol.3, p.219 ff.

30. Radzinowicz, op. cit., Vol.3, p.285.

31. Radzinowicz, op. cit., Vol.4, p.195; Holdsworth, Vol.1, p.147; Maitland, Justice and Police, 100.

32. This was a conflict of interest. Yet even today in certain Western European countries, notably France, such separation of the judicial function from the detection and prevention of crime is not seen to be so important viz the examining French Magistrate who "interogates" the accused while conducting an investigation, with the assistance of the police, to see if there is a case to go to trial.

33. Maitland, op. cit., p.102.

34. Manchester, A Modern Legal History of England and Wales (London: Butterworths, 1980) p.77.

35. Stephen, A History of the Criminal Law of England, 3 Volumes (London: MacMillan & Co., 1883) Vol.1, p.232-33.

36. Manchester, op. cit., p.78.

37. Radcliffe and Cross, The English Legal System, (London: Butterworths, 1964) 4th ed., p.337.

38. Indictable Offenses Act SC, 1859, c.102; Summary Convictions Act SC, 1859, c.103.

39. Section 61 of the Indictable Offenses Act provided that any "Police Magistrate or Stipendiary Magistrate . . . may do alone whatever is authorized . . . to be done by any two Justices of the Peace."; section 82 was the analogous clause in the Summary Convictions Act.

40. From 1870 to 1873 the Lieutenant Governor of the Northwest Territories was authorized to make provision for the administration of justice in the North-western Territory. SC, 1869, c.3, s.2; SC, 1870, c.3, s.36; SC, 1871, c.16, s.1; SC, 1873, c.34, s.1.

41. NWT Act, SC, 1873, c.35, s.1.

42. NWT Amendment Act SC 1886, c.25, s.4; NWT Act RSC 1886, c.50, s.41.

42a. Infra part (5) in this Chapter.

42b. See Maps M-2 and M-3.

43. Stephen, op. cit., A History of the Criminal Law of England, Vol.1, p.99.

44. Since the Judicature Acts (1873-1875) 36-37 Vict. c.66, s.29, and 38-39 Vict. c.27, the Judge acting under his commission was a Judge of the High Court of Justice. He was not limited by the terms of his commission but could do anything that a Judge sitting in the Royal Courts of Justice at Westminister could do. See also Holdsworth, A History of English Law, Vol.1, p.274ff.

45. Initially there were six circuits: they were the Northern, Western, Oxford, Midland, Norfolk and Home. The organization of the circuits dates back to the twelfth century (Stephen, op. cit., p.100). In England in the 1960's there were seven circuits.

46. Beeching, Royal Commission on Assizes and Quarter Sessions (1966-69) Chairman Lord Beeching (London: Her Majesty's Stationery Office, 1969) Command 4153, p.21, par.13 (hereafter Beeching).

47. Cockburn, A History of English Assizes (1558-1714) (Cambridge: Cambridge University Press, 1972) p.5. By the end of the sixteenth century Judges "were growing accustomed to an influence and aspiring to an authority which . . . was less judicial than consciously administrative and political."

48. Cockburn, op. cit., p.10. The personal attendance before the Lord Keeper and sometimes the King was by the early eighteenth century replaced by printed orders and instructions advising the Judges as to their expected conduct on circuit. Cockburn, p.59. One of the last examples of personal attendance by the Judges before the King prior to going on circuit occurred in the summer of 1688. Havighurst, James II and the Twelve Men in Scarlet (1953) 60 L.Q.R. 523 at 541.

49. Hay, op. cit., referred to by Wright, Towards a New Canadian Legal System (1984) 22 Osgoode H.L.J. 349 at 364.

50. Ex Parte Fernandez 10 CB (NS) 1, 142 E.R. 349, at 371 per Bayles J: "From Magna Carta down to very recent times, the distribution of public justice . . . has been effected . . . by periodically dispatching the Judges to administer justice, in the name of the Sovereign, among the people in every country."

51. Magna Carta (1215) 17 John s.18, 19.
"Assize . . . The King, or in his absence the Chief Justice shall send two Justices into each county four times a year, who, with four knights to be chosen by the county court, shall hold such assizes . . .".

52. There appear to have been several circuits: the Home circuit consisting of York and the surrounding area; the Niagara circuit; the Midland circuit; the Kingston circuit; and the Johnstown circuit.

52a. Brode, Sir John Beverley Robinson (Toronto: The Osgoode Society, 1984) p. 172. The sentence was commuted.

53. Ibid., p.174, 175.

54. Williams, Duff and Begbie, (1985) 43 The Advocate, 747 at 750; see also Williams, The Man for a New Country (Sidney: Gray's Publishing, 1977); see also Hamar Foster's illustration of the functions of the commission of goal delivery in the context of the Kamloops outlaws. Foster, "The Kamloops Outlaws and the Commission of Assize in Nineteenth Century British Columbia" in Flaherty, (ed.) Essays in the History of Canadian Law (Toronto: Osgoode Society, 1983) 308.

54a. See Chapter 6(3)(b)(i) and Appendix C.

55. That minimal attention came only in the 1890's. It resulted from the whaling activities at Herschel Island near the Mackenzie River Delta and on the west coast of Hudson Bay; and the Klondike gold rush.

56. Williams, Law and Institutions in the Northwest Territories (1965) 30 Sask. B.R., 51.

57. Letter, Wrigley to Dewdney, 11 March 1885, A.S. (Saskatoon), A.G., "G", 248 L; letter, Dewdney to Wrigley, 13 March 1885, H.B.C.A., D/20/33/folio 49; letter, Richardson to Forget, 18 March 1885, A.S. (Saskatoon) A.G., "G", 248 L.

58. No evidence can be found that a trial took place either in Athabasca, Edmonton or Prince Albert.

59. Queen v. Riel 1 Terr. L.R. 20 (Man. Q.B. en banc) on appeal.

60. Appendix A - 1921 - Le Beaux trial at Fort Providence. The court party travelled from Ft. Smith to Ft. Providence on the SS Distributor. The H.B. Co. screw-propelled, wood burning steamer Wrigley travelled down the Mackenzie River from Ft. Smith to Ft. McPherson, in 1887. From that date, from June to August, court parties had water access to communities on the waterways of the Mackenzie Basin.

61. Schuh, "Justice on the Northern Frontier: Early Murder Trials of Native Accused" 1980 Crim. L.Q. 74 at 81 ff.; for transcsript see PAC, RG13, Vol.1439, file 1769. Sabourin was convicted of murder and sentenced to death. The sentence was commuted to life imprisonment. Sabourin died of tuberculosis at Stoney Mountain Penitentiary two years later.

62. There is a tantalizing enigmatic reference in 1878 to one Lepine. letter, Hardisty to Gardner, 24 March 1878, H.B.C.A. B/200/b/42 p.60.

> "P.S. The charges you bring against Lepine will be thoroughly investigated . . . and if the least truth is found in them he will have to go out, and you will please tell him so."

No further reference to Lepine could be found in the B/200 reference at the H.B.C.A.

Chapter 2

Reestablishment of the Stipendiary Magistrate's Court

Introduction

In 1905 major federal legislative developments occurred, the most important of which for our purposes[1] was the reestablishment of the Stipendiary Magistrate's Court[1a] and the "disestablishment" of the Supreme Court of the Northwest Territories.[2] This "second coming" produced a Court significantly different from its earlier namesake, and the Supreme Court it replaced.

The purpose of this chapter is to set out the legislative structure of the new Stipendiary Magistrate's Court and compare it to the courts before and after in the Northwest Territories. Comparisons will centre on the status, jurisdiction, tenure, and legal qualifications of its Judges.

(1) Comparisons

(a) Status of the Stipendiary Magistrate's Court

What, in 1905, was the status of the Stipendiary Magistrate's Court? The Court had no separate existence.

The jurisdiction of the former Judges of the Supreme Court of the Northwest Territories was vested personally in each Stipendiary Magistrate.[3] In 1905, no Stipendiary Magistrate Court of the Northwest Territories was separately constituted.[4] When the Stipendiary Magistrate, clothed with this personal jurisdiction, acted, the Court functioned. But otherwise it did not.

The Northwest Territories Supreme Court[5] (1886-1905), and the Territorial Court of the Northwest Territories[6] (1955-1971) did have separate existences. Both were constituted under provisions of the Northwest Territories Act, the former in 1886 and the latter in 1955.

(b) Jurisdiction of the Stipendiary Magistrates

Unlike the "old" Stipendiary Magistrates, the "new" Stipendiaries:

> [held] and [could exercise] the powers, authorities and functions which were vested in a Judge of the Supreme Court [of the Northwest Territories] by the Northwest Territories Act . . . on [31 August 1905].[7]

Sir Charles Fitzpatrick, then Minister of Justice, when introducing the amending legislation in 1905[8] wrongly agreed with R.L. Borden, leader of the Opposition, that this amendment was "a reversion of (sic) the old [court] system."[9] In the earlier period, from 1873 to 1886, the Stipendiary Magistrates possessed

a limited inferior civil court jurisdiction. That jurisdiction was "magisterial"[10] in nature. Although their criminal jurisdiction was substantial,[11] the "old" Stipendiaries did not have the jurisdiction of a Superior Court. The "new" Stipendiaries did. They had all the authority "of a Judge of any of the Superior Courts of England"[12] sitting as a Court of original jurisdiction.

(c) Tenure of the Stipendiary Magistrates

In their jurisdiction and powers the "new" Stipendiary Magistrates were at least the equal of provincial Superior Court Judges. Yet provincial Superior Court Justices were appointed "during good behavior,"[13] while Stipendiary Magistrates were appointed "duringpleasure." Security of tenure for the latter was therefore lacking.[14] No term of appointment was specified for them, just as none had been specified for the "old" Stipendiary Magistrates.[15]

In contrast, the Supreme Court of the Northwest Territories Justices were appointed "during good behavior"[16] In the same vein, the Territorial Court Justices, appointed after 1955,held their offices "during good behavior."[17]

The Stipendiary Magistrate appointment "during pleasure,"after 1905, was contained in letters patent issued to each Stipendiary Magistrate. The patent, in part, specified:

> Greeting: -
> KNOW YOU, that reposing trust and confidence in your loyalty, integrity and ability, we, under and by virtue of the powers vested in us by section thirty-four of chapter 142 of the Revised Statutes of Canada 1927 . . . and by and with the advice of our Privy Council for Canada, have constituted and appointed, and we do hereby constitute and appoint you, the said to be a Stipendiary Magistrate for the Northwest Territories.
>
> To HAVE, HOLD, EXERCISE and ENJOY the said office of Stipendiary Magistrate for the Northwest Territories unto you . . . with all and every the powers, rights, authority, --, profits, endowments and advantages unto the said office of right and by law appertaining during our pleasure.
>
> IN TESTIMONY WHEREOF etc.

It is doubtful if the "during pleasure" designation needed to be inserted in each patent since section 24[17a] of the federal Interpretation Act specified that Governor-General appointments were at pleasure, unless expressed to be otherwise.

(d) Legal Qualifications of the Stipendiary Magistrates

The Stipendiary Magistrate needed no legal qualifications.[18] Deputy Commissioner R.A. Gibson usefully took advantage of this laxity, appointing several Stipendiary Magistrates, lacking in legal training, in the 1930's.[19] Only

the growing complexity of legal problems at Ft. Smith and Yellowknife after 1938 necessitated the appointment of legally trained Stipendiaries. The lack of legal qualification, however, remained until the legislative demise of the Court in 1955. Surprisingly, in contrast, by 1880, "old" Stipendiary Magistrates were required under the Northwest Territories Act to be "barristers-at-law or advocates of five year's standing in any of the provinces."[20]

(2) Section 101 Court

It is submitted that the Stipendiary Magistrate's Court was a court created under section 101 of the Constitution Act 1867:

> The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance, and organization of a General Court of Appeal for Canada and for the establishment of any additional Courts for the better administration of the laws of Canada.[21]

It shared this distinction with the Supreme Court of Canada, the then Exchequer Court of Canada and the Yukon Territorial Court. Like it, these latter two Courts were created under the second branch of section 101.

There is an argument that the Stipendiary Magistrate's Court was a court created by royal prerogative under section 32 of the Northwest Territories Act. As noted earlier[21a] the Governor in Council appointed each Stipendiary Magistrate. The court then functioned when the Stipendiary exercised his personal jurisdiction. On balance, it is submitted, the section 101 argument is the more persuasive.

It might perhaps be thought odd that Parliament reintroduced the Stipendiary Magistrate designation when creating a Court for the Northwest Territories in 1905. In the Yukon, by 1901, the court structure included the Territorial Court, with superior court jurisdiction, and the Police Magistrate Court, with a limited civil and criminal jurisdiction.[22] Pressure of judicial work, the result of the Klondike gold activity, had necessitated the creation of this judicial hierarchy. That same hierarchy had existed in the whole of the Northwest Territories prior to 1905. Then Police Magistrates appointed in the Northwest Territories under the Magistrates Ordinance had handled inferior civil and criminal cases.[23]

The Northwest Territories of 1905, however, including the southern portion of the District of Keewatin,[23a] was a vast,sparsely settled Territory. The paucity of judicial work there did not demand a "full panoply of judicial institutions."[24] A simple, economical, yet effective, court structure was needed. The Stipendiary Magistrates, supplemented by the work of local Justices of the Peace, had successfully fulfilled that task little more than 20 years previously. They were now called upon to do so again.

Lamentably, despite changes in the court structure, the territorial Judicature Ordinance[25] was not revised. It remained unchanged until 1949, seriously outdated,[26] a source of annoyance and confusion. Section 3 was, in particular, hopelessly inappropriate.

> "The jurisdiction of the Supreme Court of the North-West Territories shall be exercised so far as regards procedure and practice in the manner provided by this Ordinance and the Rules of Court, and where no special provision is contained in this Ordinance or the said Rules it shall be exercised as nearly as may be as in the Supreme Court of Judicature in England as it existed on the first day of January, 1898."

Two points immediately emerge. The Supreme Court of the Northwest Territories no longer existed. Secondly, the reception date[26a] for the substantive laws of England was 15 July 1870,[27] and hence the confusion created by a reference to English procedure and practice on 1 January 1898.

1. For other purposes, Saskatchewan and Alberta were created leaving the residual Northwest Territories.

1a. The "old" Stipendiary Magistrates (1873-1886) like the "new" Stipendiary Magistrates (1905-1955) exercised a personal jurisdiction, post fn.3.

2. NWT Amendment Act SC 1905, c.27, s.8.
"The Supreme Court of the North-West Territories is hereby disestablished in the territories . . . ".

3. This is not unusual. Some modern day provincial Court Judges exercise a personal jurisdiction, some do not.
Compare Provincial Court Act, SNB, c.P-21
S.8(1)
Each Judge and deputy Judge is hereby constitued a Court of record . . .
with Provincial Court Act, RSA, 1980, c.P-20
S.2(1)
There shall be a provincial Court for Alberta to be styled "The Provincial Court of Alberta"
S.2(3)
The Provincial Court is a court of record;
and Provincial Court Judges Act, RSA, 1980, c.P-20.1
S.4
Every Judge has jurisdiction throughout Alberta in every division of the Court . . . .

In the Judicature Ordinance ONWT, 1949, c.17, the definition section specified
S.2(d)
"Court" means a Stipendiary Magistrate . . .

4. NWT Amendment Act SC 1905, c.27
S.8
The Supreme Court of the North West Territories is hereby disestablished in the territories, but the Governor in Council may appoint such number of persons as Stipendiary Magistrates, from time to time, as may be deemed expedient, who shall have and exercise the powers, authorities and functions by the said Act vested in a Judge of the [Supreme Court of the North-west Territories].
NWT Act, RSC, 1906, c.62
S.32
(1) The Governor in Council may appoint such number of persons as Stipendiary Magistrates, from time to time, as may be deemed expedient.

(2) Every Stipendiary Magistrate so appointed shall have and may exercise the powers, authorities and functions which were vested in a Judge of the said Supreme Court by the North West Territories Act [on the 31 August 1905].
RSC, 1927, c.142, s.34; RSC, 1952, c.195, s.38.

5. NWT Act, SC, 1886, c.49
S.4
> There is hereby constituted and established in and for the Territories a Supreme Court of record of original and appellate jurisdiction, which shall be called "The Supreme Court of the North-west Territories."

Affirmed in NWT Act, RSC, 1886, c.50, s.41.

6. NWT Act, RSC, 1952, c.331
S.20
> There shall be a Superior Court of record in and for the Territories to be called the Territorial Court . . . .

Reaffirmed in Judges Act, SC, 1955, c.48, s.9 repealing and substituting a new section 20.

7. NWT ACt, RSC, 1906, c.62, s.32(2); RSC, 1927, c.14, s.34(2); see also NWT Act, RSC, 1886, c.50, s.48.
S. 48. (1886)
> The court shall . . . possess all such powers and authorities as by the law of England are incident to a Superior Court of civil and criminal jurisdiction; and shall have use and exercise all the rights, incidents and privileges, as fully to all intents and purposes as the same were on the fifteenth day of July, one thousand eight hundred and seventy, used, exercised and enjoyed by any of Her Majesty's Superior Courts of commonlaw, or by the Court of Chancery, or by the Court of Probate in England - and shall hold pleas in all and all manner of actions, causes and suits as well criminal as civil, real, personal and mixed - and shall . . . give judgment thereon . . . in as full and ample a manner as might at the said date be done in Her Majesty's Court of Queen's Bench, Common Bench, or in matters which regard the Queen's revenue . . . by the Court of Exchequer, or by the Court of Chancery or the Court of Probate in England.

8. NWT Amendment Act SC 1905, c.27, s.8.
S.8.
> . . . the Governor in Council may appoint such number of persons as Stipendiary Magistrates, from time to time, as may be deemed expedient . . . .

9. H of C Debates, 7 July 1905, p.8767-68. Sir Charles had forgotten that 20 years before when appearing as one of Louis Riel's defence counsel he had appeared before Richardson, who did not possess all the civil jurisdiction of a Supreme Court Justice.

10. NWT Act SC 1880, c.25,
S.76
> Each Stipendiary Magistrate shall have the magisterial, and other functions appertaining to any Justice of the Peace, or any two Justices of the Peace, under any laws . . . in force in the Northwest Territories.

Also in section 85 of this 1880 legislation, monetary limits were imposed in civil cases.

Also see NWT Act SC 1884, c.23
S.4
> Every Stipendiary Magistrate shall have jurisdiction . . . as sole Magistrate.

11. NWT Act SC 1880, c.25
S.76
> . . . and shall also have the power to hear and determine any charge against any person for any criminal offense alleged to have been committed in the Northwest Territories . . .

12. Ross v. Lieberman [1947] 1 W.W.R. 1070, 1073 (S.C.A.A.D.) per Harvey C.J. for the Court.

13. Constitution Act, 1867,
S.99.
> The Judges of the Superior Courts shall hold office during Good Behavior, but shall be removable by the Governor General on address of the Senate and the House of Commons.

14. NWT Amendment Act SC 1905, c.27, s.8; RSC, 1906, c.62, s.32(1); RSC, 1927, c.142, s.34(1). There was no wording in the legislation, either "during good behavior" or "during pleasure."

15. NWT Act, SC 1873, c.35, s.2; NWT Act, 1975, c.49, s.61; NWT Act, 1880, c.25, s.79.
S.2. (1873)
> Every Stipendiary Magistrate shall hold office during pleasure . . . .

16. NWT Act RSC 1886, c.50, s.46.
> The Judges of the Court shall hold office during good behavior, but shall be removable by the Governor General on address of the Senate and House of Commons of Canada.

17. NWT Amendment Act SC 1955, c.48, s.9, repealing and substituting a new section 20(2).
> A Judge of the Court holds office during good behavior, but is removable by the Governor General on Address of the Senate and House of Commons . . . .

17a. RSC, 1906, c.1, s.24; RSC, 1927, c.1, s.24; RSC, 1886, c.1, s.7(41).

> All officers now appointed or hereafter appointed by the Governor General, whether by commission or otherwise, shall remain in office during pleasure only, unless it is otherwise expressed in their commissions or appointments.

18. Those who could be appointed were those persons who "may be deemed expedient," supra fn.4.

19. Table 1.

20. NWT Act SC 1880, c.25, s.74, although the first appointments did not need legal qualification; NWT Act SC 1873, c.35, s.1; NWT Act 1875, c.49, s.61.

21. Constitution Act, 1867, (Imper.) 30 & 31 Vict., c.3, s.101.

21a. Supra fn.4.

22. Yukon Territory Amendment Act SC 1901, c.41, s.1

> The Governor in Council may appoint Police Magistrates for Dawson and Whitehorse in the Yukon Territory who shall reside at those places . . . .

Yukon Territory Amendment Act SC 1902, c.35, s.1, assigning criminal jurisdiction to the Judges of the Territorial Court.

23. The Magistrates Ordinance, CONWT, 1898, c.32; The Magistrates Ordinance Amendment Ordinance, ONWT, 1903, c.10.

23a. See Map, M-2.

24. Morton, The Queen v. Louis Riel (Toronto: U of T. Press, 1979) p.xiii-xix. Morton makes this comment in the context of the court structure in the Northwest Territories in 1885. He is critical of it, principally because of the 6 man jury and the perceived inferiority of the office of Stipendiary Magistrate when compared to "a [Superior Court] Judge in all his majesty."

Surely there is no "magic" in an office, of importance is the person who occupies that office. Richardson, SM went on to become a respected Chief Justice of the Supreme Court of the Northwest Territories. In 1885 he had been a Stipendiary Magistrate for approximately 10 years.

25. An Ordinance respecting the Administration of Civil Justice ONWT 1898, c.21.

26. At various times beginning in the 1930's the Territorial Administration leisurely addressed the question of a general statute revision. Piecemeal legislative revision did occur. The Judicature Ordinance was finally repealed and replaced. ONWT, 1949, c.17.

26a. Simplistically, the date after which the laws of England were no longer "incorporated into" the laws of the North-west Territories.

27. NWT Act, RSC 1906, c.62, s.12.

Chapter 3

The White Court

Introduction

This is the first of three chapters dealing with different periods of the Court's development. Three Courts are identified: those of Commissioner Frederick White, Director Oswald Finnie and Director R.A. Gibson. It may seem odd to characterize the Court by reference to non-judicial personalities.[1] However, White, Finnie and Gibson so dominated the Territorial Administration in the era under review that the Court's evolution was strongly influenced by their actions.[2]

This chapter will describe White's administration, discuss the need for Stipendiary Magistrates in the Mackenzie District, and the Territorial Administration's limited response. Finally, it will offer some explanations for the failure to meet the continuing need for a Court in the Mackenzie District.

(1) Frederick White

White was a consummate bureaucrat. Joining the Department of Justice in 1869 as a third class clerk he rose rapidly in the

public service, serving under successive Liberal and Conservative Administrations until his death in September 1918.

He had been charged in 1873 with responsibilities for the administrative organization of the North West Mounted Police. When Sir John A. Macdonald in 1880 determined to reorganize and strengthen Ottawa's control over the Force, he looked to his private secretary,[3] White, for assistance.[4] White was appointed to the newly created office of Comptroller of the Force to manage from Ottawa its financial and political aspects. This left the Police Commissioner free to oversee field operations in Western Canada. White served as Comptroller until his formal[5] retirement at 65 years of age in 1912.

By 1905, after adding to his duties the office[6] of Commissioner of the Northwest Territories, White had served as Comptroller of the then Royal North West Mounted Police for 25 years. Understandably, he had developed a close working relationship with the Police Commissioner, A. Bowan Perry.

Various sketches of White have attempted to define his personality. R.C. Macleod has commented: "White was very close to being the total civil servant. He was highly efficient, tactful, discreet, courteous but firm with his subordinates, friendly but distant with his equals and never presumptuous with

his superiors."[7]

Turner, less eloquently, has remarked: "possessed of a warm and friendly, yet withal a highly efficient, personality, he soon got on a "first name" basis."[8] Professor Morrison, perhaps unjustly, has described him as a "humourless"[9] man.

(2) White's Administration

Unquestionably, White "ruled" the Northwest Territories from 1905 to 1918. No Legislative Council as contemplated by section 5 of the 1905 legislation[10] was ever appointed during his time in office. Only the Commissioner-in-Council could enact ordinances.[11] None being capable of enactment, White was unburdened by any new legislation,[12] and carried on under the general appointment provision[13] in the Northwest Territories Act. He appointed officers as required and resorted, when necessary, to the increasingly outmoded Ordinances enacted before 1905.

White suffered a momentary setback when, in 1906, he attempted to appoint Mr. Evans a Justice of the Peace. In response to his enquiry as to his powers of appointment, the Deputy Minister of Justice advised[14] that under the 1905 legislation[15] no authority to appoint Justices resided in the Commissioner. The point was a subtle but important one.

The 1905 federal legislation gave to the Commissioner only those executive powers vested in the Lieutenant-Governor of the

Northwest Territories as of 31 August, 1905. In 1903[16] under an amendment to the Magistrates Ordinance,[17] the Lieutenant Governor-in-Council had assumed the power of appointment of Justices of the Peace. Accordingly, as of 31 August 1905, the Lieutenant-Governor alone no longer possessed this power.

The solution suggested by the Deputy Minister of Justice was an amendment to the Northwest Territories Act. That was promptly secured the next year,[18] vesting in the Commissioner all powers residing in either the Lieutenant-Governor or the Lieutenant Governor-in-Council under the Northwest Territories Act, 1886 or otherwise.

This hurdle overcome, White appointed Justices of the Peace and continued to appoint, as required, Coroners,[19] Marriage Licence Issuers, Commissioners of Oath, and a Registrar of Vital Statistics.

But essentially he was "marking time"[20]: "I have purposely held myself in check in connection with the administration of the new Northwest Territories beyond ordinary routine."[21] This posture stemmed from "uncertainty about the physical integrity of the Territories"[22] best exemplified by Sir Wildred Laurier's positing of two alternatives with respect to the District of Keewatin:

> "one is to continue to administer this territory as we are doing at present; and the administration at the present time is practically nil, it simply provides for the administration of justice in case of crimes committed and some cases of a similar character, because there is practically no population in that territory. The other . . . is to hand over this territory to the provinces which now claim it . . . . [Of] these two courses before the government the more reasonable, the more practicable and the more expedient in the interest of all parties appeared to be that these respective territories should be annexed to the Provinces of Manitoba, Ontario, and Quebec . . .".[22a]

The uncertainty was resolved in 1912 when Laurier's second alternative was adopted[23] leaving only that part of the District of Keewatin north of 60° north latitude, the Ungava tip excepted, still within the Territories. With these developments, the relatively"civilized"portion of the Northwest Territories was severed from White's administrative control.

White retired as Comptroller of the Royal North West Mounted Police in 1912; but continued as Commissioner of the Northwest Territories until his death on September 28, 1918. "The office provided a pleasant sinecure for an experienced civil servant who well deserved a salary of $1000.00 a year in addition to his pension.[24] White delegated the minimal workload - issuing liquor permits, and administering estates and grants to mission schools[25] - to his part time three-man clerical staff.[26] As he explained in 1915: "after 45 years of hard work I have been taking it easy for more than a year, and have been in Ottawa only occasionally."[27]

(3) Need for a Stipendiary Magistrate in the Mackenzie District (1905-1910)

NWMP Superintendent Charles Constantine reported after his Mackenzie River inspection in 1903 that "the want of courts is much felt."[28] He lamented the expense and delay characterizing the disposition "outside" of criminal[29] and civil business; and recommended the appointment of a Stipendiary Magistrate resident in the Mackenzie District. His recommendation went unheeded. In choosing not to follow this recommendation, the Federal Government ignored several important developments.

The excess of crime arising from contact between the Inuit and American whalers in the Mackenzie delta had not wholly subsided. Ten years earlier Reverend Stringer in his 1892 visit to the Arctic coast found the Inuit to be "degraded, dishonest and treacherous, crimes of various kinds including murder and infanticide being common among them."[30] Observing in 1903, from the police detachment at Herschel Island, Constable Sutherland remarked that the whalers were "a low scurrilous lot of unscrupulous curs."[31] A court was needed to tame them.

Furthermore, there was a continuing concern that few criminal cases were coming to the attention of the police. "No doubt things went on in the bush which the police had no inkling of."[32] When made aware of criminal offences, the police, in the absence of local Justices, were forced to make a public example of the native culprit, in order to discourage similar crimes.[33]

In the Mackenzie District the trading companies no longer had either the desire or the resources to apply the law to the native inhabitants.[34] The lacuna was only partially filled by the police. The police needed a Court, formally to sanction and punish the perpetrators of crime. Without a local Court, as Inspector Howard[35] in 1906 narrates, all that Sgt. Fitzgerald could do with the crew member of a local whaling ship who threatened to shoot his captain was to take the sailor aboard and instruct the captain to look after him. No charges were laid because no resident Court existed before which to bring the offender.

A sense of this lack of ultimate sanction in serious cases may be gleaned from the example[36] of a Indian woman at Ft. MacPherson who, in 1907, complained of rape. Correspondence flowed from Inspector Howard to Commissioner Perry and Commissioner White, and thence to the Department of Justice. Faced with the choices of transporting the accused to Edmonton with all the witnesses, or bringing the entire Court north or else ignoring the case altogether, the decision was reached to do nothing. The financial considerations were too burdensome. The Department of Justice speciously reasoned that the evidence was not strong enough to warrant the expense of bringing everyone concerned south for a trial.

This need for a resident Magistrate, when recognized, provoked an inappropriate and feeble response; before 1921 two Stipendiaries were appointed, both to deal with matters arising only in the southern part of the District of Keewatin.[37] Those appointments will be examined next.

(4) Appointments of Perry and Senkler

(a) A. Bowen Perry's Appointment

Early in his tenure as Commissioner of the Northwest Territories, White in correspondence with the Deputy Minister of Justice expressed his views on the appointment of Stipendiary Magistrates.

> "The appointment of several Stipendiary Magistrates would involve large expense and in some places, it would be difficult to find residents having the necessary qualifications. Police patrols extend from Keewatin to the MacKenzie River. All reports respecting crime pass through the hands of the Commissioner [of Police] and with his facilities of travel, and police lines of communication, he is in a position to proceed from Regina to any point in Keewatin, or in the far North, more expeditiously than a Judge of one of the regular courts."[38]

Predictably, White in 1906 recommended that Commissioner Perry be appointed and that commissioned Officers of the Force be appointed Justices of the Peace with the powers of two, justifying the latter since these Officers "would expedite and simplify the administration of justice in the outlying districts and [would not abuse their appointment]."[39] The necessary

legislative amendments passed early the next year.[40] Perry thereafter took up his appointment.[41] Interestingly, Colonel French, Commissioner of the North West Mounted Police, in 1874, was also the first Stipendiary Magistrate appointed to the "old" Stipendiary Magistrate's Court.[42] His appointment, though, came under the general appointment section. No section then existed that was similar to the 1907 amendment that specified that the Commissioner while in the Territories possessed the jurisdiction of a Stipendiary Magistrate.

A. Bowen Perry, appointed Commissioner of the Royal North West Mounted Police in 1900, had come to that position with excellent credentials assisted by political maneuverings. After graduating first in his class from the Royal Military College at Kingston in 1882, he joined the police. By 1898 at 38 years of age, he commanded the detachment at Regina, and after studying in his spare time, was admitted to the NWT Law Society.[43] Wishing to resign from the Force to prosecute at Ft. Macleod where "the Liberals needed someone to look after the interests of the party,"[44] he was persuaded to remain. After short stints in London at the Queen's Diamond Jubilee and in the semi-independent Yukon contingent, he was promoted to Police Commissioner in 1900, a position he held for the next 22 years.

Advised in 1906 of White's recommendation of his judicial appointment, Perry reacted favorably, adding in private correspondence to White that "it would certainly be an honor, and although it will entail more work, it is work I am very fond

of."[45] No large number of cases were to burden him. To some extent his caseload was explainable by the unique nature of his appointment. Ordinarily resident in Regina,[46] he only held the jurisdiction of his office while physically in the Northwest Territories.[47] Seemingly his police duties kept him at Regina almost all of the time. Surely White was fully cognizant of this fact, when he recommended his appointment.

Theirs was a cozy[48] relationship, typified by White's solicitation of Perry's views on pending Justice of the Peace appointments: "I am holding this for discussion with you as Chief Justice of the Northwest Territories, when you visit Ottawa." In his usage of this appellation, White was in error since no Chief Justice was ever designated for the Stipendiary Magistrate's Court.

Although Perry continued to be noted in 1915 and 1920[49] as a Stipendiary Magistrate for the Northwest Territories, this can only have been a nominal listing. No evidence that he sat other than from 1907 to 1909[50] has yet surfaced. Nor is there any evidence that he ventured into the far North.

(b) E.C. Senkler's Appointment

E.C. Senkler's appointment owed little to the direct intervention of White. Rather, it resulted from the fact that the anticipated judicial activity surrounding the construction of the Hudson Bay railway from The Pas to Churchill called for "the

prompt and effective administration of justice."[51] Construction began in 1910, the same year Senkler was appointed.

Senkler had come from the Yukon to take up his appointment. At Dawson since 1898, having replaced Gordon Hunter[52] as Gold Commissioner, Senkler for the next 12 years served at various times as Public Administrator, Legal Adviser to the Yukon Council, and for a brief time as Judge of the mining court.[53] He had survived a Judicial Inquiry stemming from charges made in 1900 that he, as Gold Commissioner, and others had fraudulently recorded mining claims. Justice Dugas of the Quebec Superior Court[54] had exonerated him.

Writing to White from his judicial residence at The Pas shortly after his appointment, Senkler helpfully offered to write if anything arose that might be "of interest."[55] Again there was to be no great pressure of judicial work.[56] Senkler's civil business was not extensive enough to justify the appointment of a Clerk. His suggestion that a Royal North West Mounted Police officer be appointed Clerk went unheeded.[57] Senkler was expected to discharge both functions himself.

It may be surmised that Senkler sought out the appointment as he took a yearly salary reduction from $5000.00 to $3000.00.[58] His surprise when the southern part of the District of Keewatin was absorbed by Manitoba in 1912, and no position could be

offered to him, may be imagined. "What should be done about Mr. Senkler"[59] vexed the Deputy Ministers of two Federal Departments. White was of the view that there was no place in the Northwest Territories "as at present constituted where the services of Mr. Senkler, as Stipendiary Magistrate, could be utilized to advantage."[60] On October 24, 1912 by Order in Council (to take effect December 31, 1912) Senkler retired.[61]

He returned to his far western Canadian roots: he had practised law at Nelson, British Columbia for ten years before taking the Gold Commissioner appointment in the Yukon. Not soured on the law, Senkler became the Secretary of the Law Society of British Columbia, a position he occupied for a longer period than anyone before or since, 34 years,[62] until his retirement in 1947 at 78 years of age. During his secretaryship he also served as law reporter of the original British Columbia Law Reports until their demise in 1948.

(5) Court Officers

Judges exercise an essentially passive role in the court process. Litigants bring them civil business, the police bring them criminal work. No court may function without court officials who initiate and enforce the court's process. Sheriffs and clerks are essential to that functioning.

Immediately after the Stone v. Red Deer Lumber Co. decision in 1908, it became necessary to appoint a Sheriff so that execution of Judgment might be levied. Perry intervened with White to secure the appointment of Police Inspector Percival William Pennefather[63] to perform the duties of acting Sheriff of the Stipendiary Magistrate's Court.

The year following it became necessary to appoint a Clerk to process a criminal appeal to be heard by Perry. Not surprisingly, Perry again persuaded White to call upon a member of the police. Inspector Frank Church was appointed Clerk at The Pas in November 1909.[64]

These appointments were revoked in 1912 effective upon the Manitoba boundary extension. The Court was left without a Clerk and only a nominal Stipendiary Magistrate in Perry. Police Commissioner Perry took over the office of Sheriff himself, holding it until his retirement in 1922 and starting a trend that would continue until 1938.[65]

(6) Continuing Need for Resident Stipendiary Magistrates

In the Mackenzie and Keewatin Districts, after 1912, the want of a resident Court continued to be felt. An attempted murder charge against an Indian woman did not proceed beyond her 1914 Preliminary Inquiry at Fort MacPherson. The evidence at the

Inquiry had not warranted sending the accused "outside" for trial.[66] Four years earlier, Cpl. Joyce at Fullerton, on the west coast of Hudson Bay, had been restricted, to his discontent, to giving two Inuit suspects a "severe talking to and a warning that in future they would be punished."[67] The lack of a Court in the Northwest Territories rendered him powerless to proceed further.[68]

That the two judicial appointments did not meet the need for a resident Court in the Mackenzie District is partially explained on a number of counts. White's administration, prior to 1912, was in "a holding pattern"; subsequently in semi-retirement White spent little time on territorial affairs. At no time did he perceive that a resident Court structure was justified. In this he espoused the viewpoint enunciated in 1879 by his mentor Sir John A. Macdonald.

> "It is not wise at this time to impose upon a new country all the complex systems of common law and equity which [exist] in the other Provinces. At present the law of the Northwest Territories, both civil and criminal [is], perhaps, cheaply and roughly administered, but [is] quite sufficient for all present needs."[69]

The governments of Laurier and Borden also perceived the judicial needs of the Territories to be minimal. Were not, year after year, the published annual reports of the Royal North West Mounted Police succinctly telling the same story: "Crime? There has been little or none."[70] Why then was there a need for a

resident Stipendiary Magistrate with the attendant expense? Until 1920 neither White's administration[71] nor that of his successor[72] budgeted anything for the administration of justice.

It was left to police patrols to exert effective governmental and judicial control in the Mackenzie. They oversaw the native population, and regulated and stabilized the increasing contact between whites and natives.[73] Police Inspectors, as Justices of the Peace with the powers of two,[74] "roughly administered" justice, patrolling to various settlements to dispose of summary proceeding offences.[75] Moreover, many cases never came before the Police. Writing in 1906, Superintendent Constantine commented: "the majority of [criminal] cases are settled amicably . . . and it is not an uncommon thing for the policeman to act as arbitrator rather than in his official capacity."[76]

1. One identifies with the Laskin Court, the Warren Court, the Denning Court, or just Denning himself.

2. To attribute court developments to the actions of a few persons may be bold in the extreme. This attribution does not discount the other social, political and economic influences; it merely seeks to reduce their significance. Comfort for this approach is found in the recently published essay by A. Lentin, Lloyd George, Woodrow Wilson and the Guilt of Germany, An Essay in the Pre-History of Appeasement" (Baton Rouge: Louisiana State University Press, 1984).

   This study analyzes in depth the struggles among the three principal actors - Wilson, Lloyd George and Clemenceau - leading up to the execution of the Treaty of Versailles in 1919. Lentin attributes to these three powerful personages an enormous impact on the treaty process, neatly summed up by John Maynard Keynes: "Perhaps what happened at Paris was inevitable, the personalities being what they were." Keynes to Bonar Law, 8 December 1919 (Keynes Papers) Lentin at p.105.

3. He served as such from 1880 to 1882.

4. Sir John observed, "hard-working and most efficient, one of the best officers in the public service." Morgan, Canadian Men and Women of the Times, 1912, p. 1158.

5. He continued as Commissioner of the Northwest Territories until 1918.

6. He was appointed Commissioner by Order-in-Council under the Great Seal on 24 August 1905.

7. Macleod, The NWMP and Law Enforcement 1873-1905, (Toronto: U of T Press, 1976) p.49. He almost seems to be too good to be true.

8. Turner, The Northwest Mounted Police (1873-1893) 2 Vols. (Ottawa: King's Printer, 1950) Vol.1, p.92.

9. Morrison, The Mounted Police on Canada's Northern Frontier 1895-1940, (University of Western Ontario, unpublished Ph.D. thesis, 1973), p.251. Morrison, who reviewed White's letter books could only find one example when White attempted to be humorous. Another can be added. Enquiring of the Deputy Minister of Justice as to his power to appoint marriage licence issuers White comments: "There is a matter of some urgency as I am advised that inconvenience has been experienced, and there is danger of amorous couples dispensing with the outward ceremony, if they are unable to obtain legal marriages through the authorized ministers of the respective churches." PAC, RG18, A2, Vol.789, p.53, letter, White to Deputy Minister of Justice, 26 May 1906.

   It seems White had a dry subtle wit.

10. NWT Amendment Act SC, 1905, c.27; RSC 1906, c.62, s.6.

11. NWT Amendment Act SC, 1905, c.27, s.6; RSC 1906, c.62, s.7.

12. The Ordinances enacted by the Northwest Territories Legislative Assembly continued to be valid.

13. NWT Act RSC, 1906, c.62, s.16.
"Whenever in any Act of the Parliament of Canada, or in any Ordinance of the Territories, any officer is designated for performing any duty therein mentioned, and there is no such officer in the Territories, the Commissioner may order by what other person or officer such duty shall be performed . . . ".

14. Letter, Deputy Minister of Justice to White, 22 May 1906, PAC, RG85, Vol.176, 542-1-1; also memorandum, Department of Justice, file #1519/1906; also see PAC, RG18, A2, Vol.789, p.51-53.

15. SC 1905, c.27, s.4.; RSC 1906, c.62, s.44.

16. ONWT, 1903, c.10, s.2(3)
". . . Every Justice of the Peace . . . shall hold office during the pleasure of the Lieutenant Governor in Council . . . ".

17. CONWT, 1898, c.32, s.2.

18. NWT Amendment Act SC 1907, c.32, s.2 repealing and substituting s.4 of RSC 1906, c.62.
"The executive powers vested by the Northwest Territories Act, Revised Statutes of 1886, chapter 56 and amendments thereto, or otherwise in the Lieutenant Governor of the Northwest Territories or in the Lieutenant Governor of the Northwest Territories in Council, immediately before [1 September 1905] shall be exercised by the Commissioner . . .". The underlining indicates the differences from the 1906 legislation.

19. RNWMP Inspectors were appointed at Fort MacPherson, Churchill and the area north of Lake Winnipeg.

20. Bovey, The Attitudes and Policies of the Federal Government Towards Canada's Northern Territories: 1870-1930 (University of British Columbia: unpublished M.A. thesis, 1967) p.147.

21. PAC, RG18, A2, Vol.789, p.354, letter White to Deputy Minister of Justice, 6 April 1908.

22. Bovey, op. cit., p.147.

22a. Debates, H of C, 13 July 1908, Cols. 1276-77.

23. Manitoba Boundaries Extension Act, 1912, SC 1912, c.32; Quebec Boundaries Extension Act, 1912, SC 1912, c.45; Ontario Boundaries Extension Act, SC 1912, c.40; see also map M-3.

24. Bovey, op. cit., p.150.

25. The bulk of the correspondence in his letterbook relates to these matters. PAC RG18, A2, Vol.880.

26. The total budget for the government of the Northwest Territories never exceeded $9,800.00 during White's administration. The Commissioner was paid $1,000.00 a year; mission school grants were approximately $3,000.00 to $4,000.00 a year, see Bovey, M.A. thesis, p.185, fn19.

27. Letter, White to Cpt. Allen, 5 June 1915, quoted in Bovey at p.150.

28. RNWMP Annual Report, Canada, Sess. Papers, 1904, #28, p.51.

29. The latest example was the Fort Providence Sabourin case, tried in Edmonton in 1899.

30. Canada, Department of the Interior, The Yukon Territory (Ottawa, King's Printer, 1926) p.82.

31. Longstreth, The Silent Force, (New York: D. Appleton, 1934) p.266.

32. Morrison, op. cit., p.303.

33. Ibid.

34. Macleod, The Problem of Law and Order in the Canadian West 1870-1905 in Thomas (ed.) The Prairie West to 1905 (Toronto: Oxford University Press, 1925) 132. Macleod makes this same comment in the period from 1870 to 1905 relating to what are now the Provinces of Manitoba, Saskatchewan and Alberta. His comment is germane to the Mackenzie district in 1905. In the 1870-1905 period there is evidence that the Hudson's Bay Company in the Mackenzie district continued to maintain order of sorts in the Indian Territory. This was done for commercial reasons. Unchecked serious crime tended to disrupt "the trade".

35. Morrison, op. cit., p.203, fn 2.
RNWMP Report, Canada, Sess. Papers, 1907, #28, p.131.

36. Morrison, op. cit., p.216-217. Police inspectors as Justices of the Peace with the powers of two did not have jurisdiction to preside over the trial of a rape case. They could only take a preliminary hearing and commit for trial. Morrison uses this example to illustrate police pragmatism; it also serves to illustrate government penuriousness and indifference.

37. Now Northern Manitoba.

38. Letter, White to Deputy Minister of Justice, 25 May 1906, PAC RG85, Vol.177, 542-3-1. Also see D of J, file #1519/06.

39. Letter, White to Minister of the Interior Oliver 9 May 1906, PAC RG85, Vol.177, 542-3-1. They already had similar powers in the Yukon. SC 1898, c.6, s.16.

> "While in the Yukon Territory . . . every commissioned officer of the North-West Mounted Police, shall ex-officio have, possess and exercise all the powers of a Justice of the Peace . . . [and] two Justices of the Peace."

40. NWT Amendment Act SC (1907) c.32, s.3 and 4; RSC (1927), c.142, s.5; (1907) s.3.

> "The Commissioner of the Royal Northwest Mounted Police, while in the Territories, shall have all the jurisdiction powers and authority of a Stipendiary Magistrate appointed under section 32 of the Act." (Emphasis added.)

41. No evidence of an Order-in-Council pertaining to Perry's appointment has yet surfaced though it must have been before 1907. Perry heard the Joseph Fiddler murder case in 1907 at Island Lake, NWT.

42. Harvey, The Early Administration of Justice in the North West (1934-35) 1 A.L.Q. 1 at 7. Colonel Macleod, Commissioner of the NWMP after Colonel French, was also a Stipendiary Magistrate.

43. Perry was admitted either 16 August 1891 or 10 May 1896. He never practised law. He was also a member of the Law Society of Upper Canada. He retired from the Police in 1922 at 62 years of age, living on to 96 years dying on 17 February 1956.

44. Macleod, The NWMP and Law Enforcement 1873-1905, (Toronto: U of Toronto Press, 1976) p.64.

45. Letter, Perry to White, 23 May 1906, referring to White's letter of 10 May 1906. PAC RG85, Vol.177, 542-3-1.

46. The RCMP headquarters were moved to Ottawa in 1919.

47. Supra note 40.

48. It was also an odd one. As Commissioner of the Police, Perry was White's nominal boss, although the Comptroller reported to the Secretary of State on financial matters not interfering with Perry's field operations. White as Commissioner of the NWT was responsible for Perry's Stipendiary Magistrate appointment and was Perry's nominal superior.

49. The Canadian Law List.

50. The Joseph Fiddler murder case in 1907 at Island Lake, NWT; the Stone v. Red Deer Lumber Co. civil case in 1908 at Burrows, NWT and an appeal at The Pas in 1909.

51. D of J, file #752/1910.

52. Who took an appointment as Chief Justice of the Supreme Court of British Columbia.

53. Memorandum, 29 June 1938, of A.L. Cumming, PAC, RG85, Vol.600, 2395.

54. Letter, Report of Justice Dugas, 3 August 1900, PAC, RG85, Vol.600, 2395 and 2426. "The charges by D.G. McTavish were false, dishonest and baseless accusations."

55. Letter, Senkler to White, 25 July 1910, PAC, RG85, Vol.177, 542-3-1. Senkler was appointed on 17 May 1910.

56. There was a crime that apparently was not tried. Mackay and Hart, probably both Indians, were charged with carnal knowledge of a girl less than 14 years old. Sgt. Nichols at Norway House was to prosecute. Superintendent Moodie instructed him to have a trial before Mr. Calverley, the Indian agent (Indian Act RSC 1906, c.81, s.161, 162) and "to do your utmost to get a conviction." Calverley refused to hear the case indicating, on advice from his Department, he did not have the jurisdiction to deal with this type of criminal charge. PAC, RG85, Vol.176, 542-1-1, correspondence, 22 December 1910, and 17 February 1911.

    Senkler certainly did have the necessary jurisdiction to deal with this indictable offence. The Indian agent had the powers of two Justices of the Peace, that is the power to hear only summary proceeding offences and absolute indictable offences.

57. Letter, Deputy Minister of Justice to Senkler, 21 November 1910, D of J, file #1376/1910.

58. It is of note that the salary of Stipendiary Magistrates in 1875 could not exceed $3000.00 plus actual travelling expenses. SC 1873, c.35, s.1. Also, Gibben's salary in 1938 was $3000.00 plus accommodation; Perkin's salary in 1942 was also $3000.00 plus living expenses.

59. Letters passed between White and the Deputy Minister of Justice and the Deputy Minister of the Interior in August and September 1912 (D of J, file #752/1910). The Manitoba boundary was extended to its present day area by the Manitoba Boundary Extension Act SC 1912, c.32.

60. Letter, White to Deputy Minister of Justice, 30 September 1912, PAC, RG85, Vol.177, 542-3-1.

58. D of J, file #752/1910.

62. Watts, History of the Legal Profession in British Columbia 1869-1984 (Vancouver: Law Society of BC, 1984) p.13.

63. His appointment was made under section 16, NWT Act RSC 1906, c.62, effective 26 October 1908; letter, Perry to White, 20 October 1908, PAC, RG85, Vol.177, 542-3-1.

64. He was appointed under section 16, NWT Act RSC 1906, c.62, on 16 November 1909. The appeal was filed by McKay and Adam, solicitors of Prince Albert, Sask., at The Pas.

65. Perry was Sheriff until 1922; then Cortlandt Starnes from 1922 to 1931, then General MacBrien from 1931 to 1938.

66. RNWMP Annual Report, Canada, Sess. Papers, 1915, #28, p.186.

67. RNWMP Annual Report, Canada, Sess. Papers, 1911, #28, p.265.

68. There was no local Court before whom to take the accused to be formally punished.

69. Debates, H of C, 1879, p.680.

70. RNWMP Annual Report, Canada, Sess. Papers; 1916, #28, p.193; 1915, #28, p.182; 1913, #28, p.178, 183; 1912, #28, p.53; 1911, #28, p.150, 158; 1909, #28, p.257, 268; 1907, #28, p.136.

71. Supra, fn.26.

72. Morrison, op. cit., p.288. Only a "token" administration was envisaged.

73. Zaslow, The Opening of the Canadian North 1870-1914 (Toronto: McClelland and Stewart, 1971) 243. Zaslow asserts that the Police were "the only arm of government effective in the lands north of sixty. I have added the "and judicial control."

74. NWT Amendment Act SC 1907, c.32, s.4.
"While in the Northwest Territories . . . every commissioned officer of the . . . Police, shall ex officio have, possess, and exercise all the jurisdiction, powers and authority . . . of two Justices of the Peace."

Justices of the Peace were usually lay persons, that is lacking in legal training. Usually, by statute, two lay Justices constituted a Magistrate's Court. A Justice of the Peace with the powers of two had the equivalent power of two Justices of the Peace. Walker, The Oxford Companion to Law, (Oxford: The Clarendon Press, 1980) 693.

75. Inspector Pennefather, JP^2 at Burrows in September 1908 imposed fines for the illegal importation of liquor. Inspector Reault, JP^2 at Ft. Simpson on 24 July 1915 dispensed fines for liquor-related offenses and "indecent assault of Mrs. Johnny Sanderson" (fine of $50.00). Inspector Reault, JP^2 at Ft. Smith on 17 April 1915 levied a fine on the manager of the Hudson Bay Company for sale of 3 bottles of essence of peppermint to an Indian.

76. RNWMP Annual Report, Canada, Sess. Papers, 1907, #28, p.136.

Chapter 4

Finnie Court

Introduction

To trace the continuing development of the Stipendiary Magistrate's Court in the decade of the 1920's is the objective of this chapter. It will be recalled that after the split off of the southern part of the District of Keewatin in 1912, the Court did not function. That situation persisted until the appointment of Lucien Dubuc in 1921. In the following ten years only two Stipendiary Magistrates were appointed - Dubuc in the Mackenzie District, and Louis A. Rivet in the Franklin District. The latter's services were required only once, to take the Janes murder trial at Pond Inlet in 1923. Dubuc, by comparison, made several summer circuits down the Mackenzie River to dispense justice.

The administrative structure during Director Finnie's time will now be discussed and the two court appointments placed in context.

(1) Oswald Finnie

Oswald Finnie, like White, was a life-time federal civil servant. Appointed as Director of the newly created Northwest

Territories and Yukon Branch, of the Department of the Interior, in 1921, he came to the position with impeccable credentials. A graduate from McGill in engineering, he had spent 11 years at Dawson, Yukon, before returning to Ottawa in 1910 to serve for the next 11 years as Chief Mining Inspector for the Department. As Director he attracted to the Branch a small coterie of trained administrators, explorers and scientists whose task was to further the long range program of putting the Territories on a sounder economic footing while maintaining a sympathetic regard for the welfare of its inhabitants.[1]

(2) Finnie's Administration

Professor Zaslow describes the Mackenzie District of the 1920's:

> "Living among or dependent upon the native population of the Mackenzie basin . . . was a fluctuating number of whites - trappers and prospectors, traders, mission workers, agents of the government, a few artisans and transportation employees. These included the inhabitants of the forty or fifty tiny settlements, many of them a century old, which hugged the waterways . . . [down] to Aklavik. Despite their age they remained pioneer communities, outposts of white settlement in the midst of miles of wild, virtually empty territories and inhabited mostly by relays of transient white residents."[2]

The inhabitants' tranquillity was momentarily shattered. In August 1920 oil was discovered on the Mackenzie River near Fort

Norman. The Administration feared an oil stampede[3] into the District on the opening of navigation in 1921. To prepare for this "Second Klondike",[4] the Administration established a local administrative office at Fort Smith, with sub-offices at Norman and Resolution. Coincidentally, a treaty party spent the summer of 1921 travelling down the Mackenzie River persuading the Indians to "quit claim"[5] their aboriginal rights so the District might be made ready for the expected commercial activity.

The "oil rush"[6] did not occur. No huge influx of white people materialized. The office at Fort Norman was closed after one season. The District slipped back into its quiescent routine. The Royal Canadian Mounted Police continued to provide the only effective administration.[7] The situation fostered, encouraged and brought to fruition by Commissioner White proved seductively convenient to Director Finnie. With the police in place to maintain law and order, in addition to their many other duties, there was no perceived need for resident Stipendiary Magistrates.

The Territorial Council in this decade ruled with "benign neglect." In eight years there were only seven Council Sessions[8] and in "some years it did not meet even once."[9]

The first two Ordinances[10] enacted in 1920 were responsive to the specific and anticipated problem of controlling white

intrusion into Fort Norman. Thereafter, Council's concerns centred on protecting the still viable fur trade and the predominantly native population and "its principal activity consisted in controlling white trappers and traders, changing the game regulations, establishing game preserves and making grants to hospitals and schools."[11]

By the end of the decade, Council's focus began to shift. The advent of the mining industry and improvements in communication and air transportation produced a mobile and transient population.[12] Whites in greater numbers came into the Mackenzie District. The increasing population meant that the police could no longer, as before, keep track of the residents and their conduct.[13] The previous relatively low crime rate[14] began slowly to increase and the "police state, [although an "enlightened" one, began in the Mackenzie District] to crumble and break down."[15] In response, Council's legislative thrust switched from protecting the fur trade economy to regulating white commercial activities. More sophisticated legislation resulted. More sophisticated judicial controls evolved leading by the end of the 1930's to the appointment of a resident, legally trained Stipendiary Magistrate installed at Yellowknife.

(3) Continuing development of the Court

Several questions may be posed when examining the Stipendiary Magistrate appointments in the 1920's and 1930's.

Should the Stipendiaries have been legally trained? Should they have been resident in the Northwest Territories? Should they have combined judicial duties with non-judicial administrative tasks? Should they have been full-time appointments?

In the two appointments in 1921 and 1923, the Administration opted for part-time non-residents: one a Judge from Alberta, the other a practising lawyer from Montreal. Those two appointments will now be examined.

(a) Dubuc's Appointment

Lucien Dubuc was appointed a Stipendiary Magistrate on 21 May 1921[16] to take the Le Beaux murder trial at Fort Providence.[17] This was to be the first Stipendiary Magistrate's Court trial held in the modern day Northwest Territories. The exact reasons for his appointment remain moot but it may be surmised that his close proximity to the Territories - he was then a District Court Judge at Peace River - and his French background were attractive qualities. Le Beaux spoke little English but had a good command of French.

Dubuc came from a distinguished background. His father Joseph had been the Chief Justice of the Manitoba Court of Queen's Bench. A college friend of Louis Riel's, Joseph Dubuc had declined to sit on the Manitoba court that considered Riel's appeal from his conviction for treason.

The son, like his father, was educated in Quebec and trained in the civil law. After practising in Peace River[18] he served there for a time as a District Court Judge before being appointed to the same Court at Edmonton in January 1922. He served on that Court until the late 1940's, latterly as the Chief Judge of the District Court of Northern Alberta.

Possessed of the bearing of a French nobleman, he imposed a quiet dignity on his Court's proceedings.[19] He held a healthy disrespect for written law[20] pronouncing that the facts were for this court and the law for the Court of Appeal.[21] His handling of the Le Beaux trial evoked no criticism. The only concern was the "very great expense of his judicial retinue."[22]

His appointment was to last only seven months. With the revocation of Dubuc's appointment on 21 December 1921, Inspector Jennings enquired in early 1922 how civil justice was to be dispensed now that there was no Stipendiary Magistrate for the Territories. Finnie[23] suggested that petty civil cases for amounts up to $250.00 might be heard by Justices of the Peace with the powers of two. Nothing came of that suggestion despite Inspector Jenning's view that the presence of such Justices would be a "deterrent to some who might otherwise take advantage of the fact of the non-operation of any civil process in the country."[24]

Concerned about the lack of a Stipendiary Magistrate, in view of its necessity[25] under section 53 of the Northwest Territories Act, Finnie observed that "we should either appoint a Stipendiary or the Act should be properly amended."[26] He continued, in a further memorandum to Commissioner Cory: "perhaps it would be advisable to have a Stipendiary Magistrate, either resident in the Territories, or one who could conveniently make a trip at regular intervals. As the police, in most cases, conduct the prosecutions, perhaps it might not be in the best interests to have them also act as Judges."[27] There the suggestion languished.

C.A. Beck, in late March of 1922, took up the matter, suggesting his appointment as a Stipendiary Magistrate. Trained in the law, Beck was then working for the Northern Trading Company at Fort Resolution but wished "to be occupied along the lines in which [he had] been trained. [B]ut no opportunity [would] present itself."[28] Finnie replied curtly: "there is no intention of appointing a Stipendiary Magistrate in the near future, nor is there any necessity for appointing a lawyer. There would be no duties for such an Officer to perform."[29]

This was an incredible statement! Had Finnie forgotten so quickly his memorandum of two months previously to Commissioner Cory? Had he considered the Le Beaux murder of the previous year an aberation? Had he not studied the history of the Mackenzie District?

A brief digression elucidates the last point. Over the previous one hundred and twenty-five years the Mackenzie basin had seen its share of 'blood and gore'. Such events crystallized into three broad categories: instances pitting native against native,[30] those where natives murdered or attacked whites,[31] and killings by whites or their representatives of natives. From the first two categories, until 1899,[32] no judicial proceedings arose. A partial explanation is found in the attitude of the Hudson's Bay Company that only in incidents where the whites were the perpetrators would the Company's commercial activities be endangered. There was no such perceived danger to "the trade"[32a] in the other two categories. From the third category, the resort to the concurrent original criminal jurisdiction provisions in a variety of legislation produced several trials. Those of de Reinhard, Cadien, and Sinnisiak, for example, are discussed elsewhere.[33]

In rejecting Beck's overture, Finnie apparently had not yet received Superintendent Jennings' letter of 18 April 1922. Jennings advised that Peter Baker had been committed at Fort Smith for trial. The Superintendent, expecting to be going to Fort Smith on one of the early boats, offered, in the absence of other arrangements, to take the trial if appointed a Stipendiary Magistrate.[34] He attempted to solidify the offer three days later when detailing a pending post office offence at Fort Good Hope and a possible murder in the Mackenzie delta, querying "whether it was necessary to appoint a Stipendiary . . . for this

year, with the necessary added expenses, in connection therewith."[35] His offer was not accepted, perhaps, because Finnie was uneasy with Jennings having seemingly prejudged the Baker case - "the case is a comparatively minor one and will be quite possibly determined in the nature of a fine"[36] - but more probably because Police Deputy Commissioner Starnes recommended Dubuc be appointed.

The appointment of Dubuc, when made on 28 June 1922, was limited to that year, "the same as last years" with Finnie's added expressions of concern: "what fee will he charge?"[37] Dubuc, however, did not travel north that year. The Deputy Minister of Justice had been against a circuit that summer. The Peter Baker case was the only one pending and as he was at large the Deputy Minister had not been "disposed to appoint (sic) a Stipendiary Magistrate this season."[38]

Dubuc's appointment was not, contrary to expectations, revoked later that year. Continuing, it permitted him to travel north in 1923 to deal with several trials at Herschel Island, and thereafter to go north on criminal circuit in the summers of 1924, 1926, 1929, and 1931.[39] That it remained unrevoked occurred in spite of Director Finnie's spirited representations. Writing to Commissioner Cory in October 1922, when it became known that a Stipendiary Magistrate would have to go to the arctic coast the next summer to hear the Corporal Doak murder trial, and others, Finnie with an eye to cutting costs - the

"very great expense of a judicial retinue" - thought it would be well to utilize the services of a "barrister who is at present employed by this branch."[40] A recommendation to that effect had gone forward from the Minister of the Interior to the Minister of Justice.[41] It was, however, not acted upon. Seemingly, resistance to the appointment of an in-house lawyer prevailed.

(b) Rivet's Appointment

Like the first appointment of Dubuc that of Louis Adheniar Rivet as Stipendiary Magistrate on 19 June 1923, was to be a temporary one. Appointed to take the Janes murder trial[42] heard at Pond Inlet in August 1923, Rivet came to the task with almost 30 years legal experience behind him. Educated at Laval, he practised law in Montreal taking time out from practice in 1904 to 1911 to serve in Parliament.[43] Little seems known of the reason for his appointment, although his Liberal party affiliations would not have hindered his selection. The trial at Pond Inlet was to be the only one he presided over as a Stipendiary Magistrate.

Evidently Rivet's handling of the Janes trial gave satisfaction, for on 1 December 1928 he received an appointment to the Circuit Court for the Judicial District of Montreal. No published Order in Council revoking his Stipendiary Magistrate appointment has been found nor any record of any remuneration paid to him.

(4) On-going questions

In 1924, the Deputy Minister of Justice enquired of Commissioner Cory whether "in view of present conditions it [was] necessary or advisable that Stipendiary Magistrates be located in the Northwest Territories."[44] At that time Dubuc and Rivet "discharged their duties as circumstances required."[45] When open river navigation permitted, they entered the Territories, either to travel down the Mackenzie River or to accompany the Eastern Arctic Expedition, in both instances cleaning up the cases on the docket.

Director Finnie briefed Commissioner Cory so Cory could intelligently respond to the Deputy Minister's query. Finnie noted: no appointment of a resident Stipendiary Magistrate is necessary because for nine or ten months of the year "there is no means of getting about the country and a resident Judge would be obliged to remain in one settlement." Finnie then summarized: "I do not think there is anything to be gained by appointing permanent or resident Judges."[46]

Cory responded accordingly. The court structure thereby slipped into an easy rhythm dictated by the exigencies of water transportation and the personal viewpoint of Director Finnie.

The question not posed was should civil servants of the Department of the Interior, resident or non-resident in the

Northwest Territories, legally trained or otherwise, be appointed Stipendiary Magistrates. The District Agent, J.A. McDougall, had resided at Fort Smith since 1922. Though not legally trained, could he not combine his administrative duties with the sometimes required judicial duties of a Stipendiary Magistrate? The answer for a variety of reasons was, not at present. Dubuc and Rivet had respectably handled, when required, the few major criminal trials needing the confident hand that a non-legally trained Magistrate lacked. The Department of Justice had not been favorably inclined to Finnie's suggestion along this line in 1922.[47] And R.A. Gibson had not yet brought to full fruition the concept of hybrid Stipendiary Magistrates.[48]

1. Finnie, Canada Moves North, (Toronto: MacMillan & Co., 1943) p.64.

2. Zaslow, The Development of the Mackenzie Basin 1920-1940 (University of Toronto, unpublished Ph.D. thesis, 1957) 608.

3. Finnie, report, 31 March 1922, Minutes, CNWT, 1922, PAC M-811 to 815, p.28.

4. RCMP Annual Report, Canada, Sessional Papers, 1921, #28, p.27; Bovey, M.A. thesis, p.153: "To officials of the Department of the Interior it seemed that the Klondike stampede was almost to repeat itself, with petroleum instead of gold the quest of a legion of prospectors . . . . Many of the Department's officials [were Yukon veterans] and they had a lively awareness of the 'lessons of history'. They were determined that the Government of Canada would 'be prepared'. As Finnie related, writing in 1921, if the coming season demonstrates an undoubted deposit of oil, we can anticipate a big influx of people next year. Letter, Finnie to Walter, 9 May 1921. Major McKeand, later a Stipendiary Magistrate, toured the Mackenzie River on an inspection trip in 1921.

5. Treaty 11, covering the Mackenize District north of Great Slave Lake. The Treaty Commissioner was Conway. As background see Fumoleau, As Long As This Land Shall Last (Toronto: McClelland & Stewart, 1974).

   When Indian bands entered into treaties with the Crown, in the usual situation, the treaty provisions superceded (i.e., extinguished) the provisions of the Royal Proclamation of 1763, Re Steinhauer and the Queen (1985) 15 C.R.R. 175 at 178 per Veit J. (C.Q.B.A.); R. v. Secretary for Foreign Affairs [1982] 2 All E.R. 118 at 125 (C.A.) per Lord Denning.

6. Bovey, The Attitudes and Policies of the Federal Government Towards Canada's Northern Territories: 1870-1930 (University of British Columbia: unpublished M.A. thesis, 1967) p.155; Zaslow, op. cit., p.636.

7. The Annual Reports for the police in this decade detail many activities undertaken by them. They were game enforcers, timber agents, game licence issuers, collectors of custom duties, income tax collectors, assistants to the public administrator in the handling of estates, issuers of government pay checks, recipients of naturalization applications, takers of the census, distributors of liquor rations among the permit holders, collectors of fur export taxes, enforcers of federal shipping legislation. (Zaslow, op. cit., p.640-42.) They also delivered the mail, dispensed welfare to the natives, acted as returning officers at elections, performed duties as Land Agents and

Mining Recorders, treated the sick, issued radio licences, took meteorlogical readings, supervised civil service exams, etc.

8. Zaslow, op. cit., p.648.

9. Bovey, op. cit., p.154.

10. Entry Ordinance, assented to 27 October 1920; Entry Amendment Ordinance, assented to 10 December 1920. Can. Gaz., Part I, Vol.54, p.2565; both repealed. ONWT 1950, c.6.

This legislation followed, in part, from the recommendation of Inspector Jennings: "all parties such as miners, prospectors, and scientists [should] be compelled to have with them on entering the north country not less than two years rations." RNWMP Annual Report, Canada, Sess.Papers 1911, #28, p.161; and Ibid., 1921, #28, p.27.

These two Ordinances were open to challenge on three counts. Firstly, no Council was appointed until April 1921, and Commissioner W.W. Cory could only enact legislation in Council (Department of Justice, file #719/1921 - letter to Cory from Deputy Minister of Justice, April 5, 1921). Secondly, no subjects had yet been designated by Order-in-Council as required by section 8 of the Northwest Territories Act RSC 1906, c.62. Thirdly, the legislation probably was ultra vires as dealing with naturalization and aliens, a legislative head reserved exclusively to the Federal Parliament, Constitution Act, (Imp.), 1867, c.3, s.91(25).

The Entry Amendment Ordinance in part read: s.2 "No person shall enter . . the Provisional District of Mackenzie . . . unless he has satisfied . . . the police at Edmonton, Fitzgerald, Peace River, Dawson or the . . . police at Fort McPherson and Herschell Island in the District of Mackenzie (sic), or such other point on the Arctic Coast that such person is not in the opinion of the said police officer likely to become a public charge while he is in the territory."

11. Zaslow, op. cit., p.649.

12. Ibid., p.643.

13. Ibid., p.643.

14. Ibid., p.643; an examination of the Justice of the Peace quarterly returns in the period 1922-1925 substantiates this point. Fines or short terms of imprisonment followed from RCMP prosecuted convictions for such crimes as assault, cruelty to animals, swearing in public, illegal possession

of liquor, petty theft, game infractions. PAC, RG 85, Vol.170, 540-4-1. J.W. Harris, JP[2] refers to the "severe reprimand I received last year for inaction in matters connected with infractions of the NWT Game Act."

15. Jenness, Eskimo Administration: II Canada (Montreal: Arctic Institute of North America, Technical Paper #14, 1964) p.48. The "enlightened" police state continued in the Franklin District.

16. See Table 1.

17. See Appendix A - 1921.

18. The firm was Pelton and Dubuc.

19. Comments of Justice Dechene, formerly of the Alberta Court of Queen's Bench and Deputy Judge of the Territorial Court of the Northwest Territories.

20. Recollections of Charles Perkins, resident lawyer in Yellowknife 1937-1942, who articled and practised briefly in Edmonton in 1935-1937.

21. Commentse of Hon. Neil Primrose, formerly of the Alberta Court of Queen's Bench and Deputy Judge of the Territorial Court of the Northwest Territories.

22. Memorandum, Finnie to Cory, 12 October 1922, PAC, RG 85, Vol.607, 2580.

23. Memorandum, Finnie to Daly (in-house legal advisor for the Department of the Interior) 19 January 1922, PAC, RG 85, Vol.176, 542-1-1.

24. Letter, Jennings to Perry, 18 January 1922, PAC, RG 85, Vol.177, 542-3-1.

25. NWT Act RSC 1906, c.62, s.53(1). "Every Justice of the Peace . . . holding a preliminary inquiry . . . shall immediately after the conclusion of such investigation, transmit to the nearest Stipendiary, all information, etc. (2) Whenever any person charged with a criminal offense is committed to goal for trial, the person in charge of such goal, shall, within twenty-four hours, notify the nearest Stipendiary . . . ".

26. Memorandum, Finnie to Daly, 19 January 1922, PAC, RG 85, Vol.177, 542-3-1.

27. Memorandum, Finnie to Cory, 19 January 1922, PAC, RG 85, Vol.177, 542-3-1.

28. Letter, Beck to Finnie, 23 March 1922, PAC, RG 85, Vol.177, 542-3-1.

29. Letter, Finnie to Beck, 18 April 1922, PAC, RG 85, Vol.596, 952.

30. Examples include: **(1)** feuding of Chipewayans and Ft. Laird Indians, letter, Smith to Keith, 27 March 1825, HBCA B/200/b/1, p.2; **(2)** unfortunate hostilities between the Mackenzie River Indians and the Red Knives leading to deeds of bloodshed, letter, Dease to Smith and McLeod, 7 February 1825, HBCA B/200/b/2, p.1; **(3)** a "treacherous esquimaux cruelly" murdering one of the Loucheux near Peel's River (Ft. McPherson), letter, Bell to Smith, 10 August, 1829, HBCA B/200/b/5, p.3; **(4)** retaliation of Loucheux and killing of several esquimaux, letter, Smith to Governors and Factors of Northern Department, 23 November 1830, HBCA B/200/b/6, p.11; **(5)** followed by retaliation of esquimaux, who massacred four Loucheux women, letter, Smith to Factors and traders of Northern Department, 3 June 1831, HBCA B/200/b/7, p.3; **(6)** Copper Indians clandestinely and without provocation killing one of the Martin Lake Slaves - "the song of death is again revived between the inveterate tribes and when the quarrel will end is uncertain," letter, Smith to Factors and traders of Northern Department, 28 November 1831, HBCA B/200/b/7, p.20; **(7)** killings by the esquimaux of three Loucheux at Red River. The exasperated Loucheux propose to retaliate in force, letter, Bell to McPherson, 3 August 1837, HBCA B/200/b/10, p.4; **(8)** Loucheux killings of several esquimaux in the summer of 1839, letter, Lewes to Finlayson, 20 November 1840, HBCA D/5/5 folio 368; **(9)** continuing quarrell(sic) between Loucheux and esquimaux disrupted the trade, letter, Lewes to Governor of Northern District, 25 November 1841, HBCA B/200/b/14, p.34; **(10)** esquimaux pillaging a Loucheux camp, letter, Anderson to Governor of Northern Department, 30 March 1854, HBCA B/200/b/30, p.63; **(11)** a Loucheux killing of his esquimaux wife - revenge has been promised - "the feud between the races is as bitter as ever," letter, Ross to Governor of Northern Department, 29 November 1858, HBCA B/200/b/33, p.17; **(12)** Francis Lake Indians taking revenge for a murder of one of their own committed by the Nahannies (sic) some years ago, letter, Hardisty to Grahame, 4 August 1876, HBCA B/200/b/42, p.10; **(13)** row at the Mackenzie delta between the esquimaux and Indians in which one or two men lost their lives, letter, Hardisty to Grahame, 30 November 1877, HBCA B/200/b/42, p.49.

31. Examples include: **(1)** atrocities perpetrated by Ft. Laird Indians against H.B. Co. officers at St. John's, letter, Smith to Factor at Fort du Liard, 24 May 1828, HBCA B/200/b/4, p.5 and B/200/b/6, pp.3, 4; **(2)** Hudson Bay traders John Spence and Murdoch Morrison killed, cut to pieces and devoured by starving cannibal Indians, letter,

Lewes to Chief Factor, 15 November 1842, HBCA B/200/b/15 folio 3; when the facts are clearly ascertained an exemplary punishment ought to be inflicted on the cannibals, letter, Bell to Lewes, 11 September 1842, infra, folio 33; the cannibals La Petite Rat and Petit Vieux were "threatened with instant death if they did not reveal the whole [truth]", letter, Christie to Lewes, 19 January 1843, infra folio 47; the women thought to have done this deed cannot be punished "as beyond all manner of doubt they were impelled to the dreadful alternative by the most pressing demands of hunger," letter, Sir George Simpson to Lewes, 5 June 1843, HBCA B/200/b/17 folio 4; **(3)** Loucheux attack on trader Mr. Deschambeault at Ft. Good Hope, letter, MacPherson to Governor of Northern Department, 3 March 1845, HBCA B/200/b/20, p.28; **(4)** esquimaux attempted murder of Mr. Wilson in 1884 at Peel's River, letter, Camsell to Grahame, HBCA B/200/b/43, p.205; **(5)** Northwest Company Trader Duncan Livingstone's death at the hands of his Slave Indian guides in 1799 in the vicinity of Ft. Resolution, (Yerbury, Duncan Livingstone of the Northwest Company (1977) 30 Arctic p.187); **(6)** killing of the half-breed William Henry and his family in 1814 at the Fort Nelson post on the Liard River, (Sloan, The Native Response to the Extension of the European Traders in the Athabasca and Mackenzie Basin (1979) 60 Canadian Historical Review 281 at 297).

32. Sabourin case heard in Edmonton before Justice Rouleau in 1899.

32a. Chapter 3, fn.34.

33. Chapter 6.

34. Letter, Superintendent Jennings to Finnie, 18 April 1922, PAC, RG 85, Vol.177, 542-3-1.

35. Letter, Superintendent Jennings to Finnie, 21 April, 1922, PAC, RG 85, Vol.177, 542-3-1.

36. Letter, Jennings to Finnie, 18 April 1922, PAC, RG 85, Vol.177, 542-3-1.

37. Memorandum, Finnie to Cory, 22 May 1922, PAC, RG 85, Vol.582, 560.

38. Memorandum, McKeand to Finnie, 16 June 1922, PAC, RG 85, Vol.582, 560.

39. Chapter 8 and Appendix A.

40. Memorandum, Finnie to Cory, 12 October 1922, PAC, RG 85, Vol.607, 2580.

41. Letter, Stewart to Sir Lomer Gouin, 12 October 1922, PAC, RG 85, Vol.607, 2580.

42. Appendix A - 1923.

43. Roy, Les Juges de la Province de Quebec (Quebec: Archives du Governement de Quebec, 1933) p.467.

44. Letter, Deputy Minister of Justice to Commissioner Cory, 6 September 1924, PAC, RG 85, Vol.177, 542-3-1.

45. Ibid.

46. Memorandum, Finnie to Cory, 10 September 1924, PAC, RG 85, Vol.177, 542-3-1.

47. Supra, fn.40.

48. Chapter 5.

Chapter 5

The Gibson Court

Introduction

Of the twenty Stipendiary Magistrate appointments made between 1932 and 1953, the majority were clustered around World War II. As the economic and social complexion of the Mackenzie District changed, more sophisticated court business led to the appointment of resident, legally trained Stipendiary Magistrates. These Magistrates, though, only worked part-time on judicial business: their judicial duties remained subordinate to their other more onerous administrative ones.

Judicial developments in the Franklin and Keewatin Districts, by contrast, lagged. Stipendiary Magistrate D.L. McKeand, who headed the Eastern Arctic Patrol, visited the Districts each summer from 1939 to 1945. Otherwise, the Central and Eastern Arctic were largely ignored. After 1945 a Stipendiary Magistrate was not sent to the Eastern Arctic again until 1950.

As with the chapters on the White and Finnie Courts, the Gibson administration will be examined and the various judicial appointments will be placed in the changing social-economic milieu. Later chapters will analyze the roles, judicial and

otherwise, played by the Stipendiary Magistrates and the procedure of the Stipendiary Magistrate's Court.

(1) R.A. Gibson

Serving as Deputy Commissioner of the Northwest Territories from 1921[1] to 1951, Roy Gibson's impact on the Stipendiary Magistrate's Court was enormous. The spectrum of assessments of him range from highly laudatory to a "thoroughly distrusted Paper Shuffler."[2]

R.A. Gibson came from Brandon, Manitoba. After graduating from Brandon College he worked briefly as an office manager in Winnipeg before joining the Department of the Interior in 1908. For the next 43 years until his retirement from the Federal Government, he took no holidays and only one forced leave of absence. The medical certificate, issued in 1942, poignantly confirmed his dedication and energy: - "Diagnosis - hypertension, prolonged concentration on Department work; no holidays."[3] During his tenure at Ottawa, this square-jawed, square-shouldered senior federal civil servant performed his duties under several Commissioners of the Northwest Territories,[4] serving himself as acting Commissioner from 1934 to 1936.

Charles Perkins, resident lawyer in Yellowknife from 1937 to 1941 and briefly thereafter a Stipendiary Magistrate, offers the telling point that R.A. Gibson was not liked because of the power over people's affairs that he exercised. That power was pervasive and subtle. Decrying in 1938 the unsanitary conditions of the public lavatories at Yellowknife townsite, the local newspaper, the Prospector, called for improvements. Gibson, ever seeking to economize, suggested that those convicted of breaches of the liquor[5] law be employed, as part of their sentence, in looking after Yellowknife's sanitary requirements. In this suggestion, exceptionally, Gibson was thwarted.

But he was not so thwarted when complaints about trader H.E. Peiffer's[6] alleged questionable trade dealings with Inuit at Aklavik came to R.A. Gibson's attention in 1942. Summoning the assistance of the Commissioner of the Royal Canadian Mounted Police, a police investigation of Peffer was immediately begun. The desirability of auditing Peffer's tax returns was discussed with the Commissioner of Income tax. Consideration was given to lifting unilaterally Peffer's game licences. The Inuit concerned were prevented from leaving Aklavik to journey by air to Edmonton for a holiday by the simple expedient of a letter to the Canadian Pacific Airlines manager at Edmonton. And, surprisingly, but indicative of the sense of his own strong position, Gibson recorded all these manoeuvers in the Minutes of the Territorial Council meetings.

Such power, in the hands of this "dominant, immensely clever, able and brilliant administrater"[7] was never shared. This had its negative aspects. "Gibson's [autocratic nature] demanded that all items be submitted for his approval before action was taken . . . . He was opposed to initiative and decision, and this slowed up operations in the field."[8]

Gibson also had his detractors. The "Paper Shuffler lacked imagination and a sense of committment" to the Northwest Territories.[9] A more charitable view saw Gibson as a "capable detail man, a sound administrator."[10] The paper trail certainly supports this view. The files[11] of the Territorial Administration contain copious vivid memoranda initialled by "RAG".

(2) Gibson's Administration

The developments under way at the close of the 1920's,[12] in the Mackenzie District, gradually gained pace in the 1930's. Developments in the Franklin and Keewatin Districts moved at a much slower pace. The slower advance of white "civilization" in

the Central and Eastern Arctic nevertheless brought dislocation to the "primitive" manner of life of the Inuit. Writing in 1930 a Territorial Administrator remarked:

> "The advent of the traders has introduced a new factor into the life of the Inuit by providing a food supply that is not seasonal and in giving value . . . to that which formerly had little or no value - fox skins.[13] The direct result has been to simplify life for the people by providing them with improved means of living: rifles, pots, pans, primus stores, and other useful articles of many kinds. The indirect results are often of an insidious nature. The change from a hunter to a trapper is a fundamental one. It introduces the ideas of supply and demand, of accumulated wealth. This leads to a new conception for a primitive people, that of an organized society which tends to establish itself in communties and to give up its former nomadic life and wherein there are rich and poor. The advantages or disadvantages of this fundmental change of life is a controversial point but the transition period is always a difficult one for them and often results in both physical and moral breakdown."[14]

But no matter at what pace developments occurred, all were influenced by changes within the Territorial Administration. The Depression brought forth a 'cry for retrenchment in the civil service."[15] The watchward of "economy"[16] ruled. The Northwest Territories and Yukon Branch was dissolved. The highly experienced scientists, explorers, naturalists, and administrators of the Branch were superannuated. Oswald Finnie, embittered,[16a] took early retirement. At Ottawa, the reins of

office fell to R.A. Gibson. He took them firmly and held them for the next 20 years.[17]

Gibson, with alacrity, enforced a rigid "holding of the line." His stringent economy[18] drive cut deeply into the activities of the Eastern Arctic Patrol.[19] Operating since 1921[20] to secure scientific data in the region, to extend Canadian sovereignty to the Arctic Archipelago and to bring "the White Man's law and order" to the Inuit, the Patrol was reduced to a "routine operation of supplying and relieving the medical officer at Pangnirtung and the posts of the police."[21]

Ten years later the obsession for economy gave way to the distracting and diversionary influences of the war effort. The Territorial Council's attention was captured in the Mackenzie District by the Canol project[22] and in the Franklin District by the Crimson Air Staging[23] project that led to the construction of American air bases at Frobisher Bay on Baffin Island.

Emerging from World War II, the Mackenzie District experienced a brief mining boom. Company incorporations reveal its extent. Over 300 mining companies were incorporated in Ontario in 1945-46 with Yellowknife as part of the corporate name. An examination of issues of the Yellowknife weekly newspaper, the News of the North, confirms the boom: of the eight pages, on average, in each issue at least half were devoted to

the mining industry. Peter Parker, then a resident lawyer at Yellowknife, has observed that the mining activity, aided by a sensationalist press, was based on what might be described in Dicken's words as "Great Expectations."[24] This modern day gold fever, predicatably, soon collapsed.

The brief frenetic mining activity signalled the tentative emergence of the Territories from the grip of Ottawa's central control. Governing from Ottawa since 1905, the Territorial Administration was imbued with the idea that all decisions must be made there. Until 1947, the Territorial Council remained a wholly appointed body of senior Ottawa mandarins. In that year J.G. McNiven, manager of Negus Mines at Yellowknife, became the first local representative appointed to Council. In a similar vein, in 1947 the District of Mackenzie joined the Yukon Electoral District to create the constituency of Yukon-Mackenzie giving to residents of that part of the Northwest Territories their first representative in Parliament.

It is important to note that the form of Territorial Government - a small appointed coterie of Ottawa managers - played a significant role in shaping the structure of society and pattern of life in the Mackenzie District.[25] And who controlled this Council? R.A. Gibson.[26]

(3) Pre-War Appointments

(a) Hybrid Stipendiary Magistrates

R.A. Gibson "who loved power and who kept everyone under his thumb"[27] exploited the opportunity to appoint as Stipendiary Magistrates such "persons as . . . as may be deemed expedient."[28] Persons untrained in the law could be appointed.

The first such appointment was that of James Douglas, followed shortly thereafter by Albert Reames, Alex Norquay and McKay Meikle. But only in the latter two appointments were the full ramifications of the opportunity realized. Civil servants could be appointed Stipendiary Magistrates! In their "spare" time, at no extra salary cost, they could look after judicial matters.[29]

In this, Gibson took full advantage of the opportunity that from 1905 waited to be seized, and from his fertile imagination, as from the magician's bag of tricks, out popped a hybrid Stipendiary Magistrate - a Stipendiary that Gibson tried, usually successfully, to control, to direct and to maniuplate. There was however no sleight of hand in his use of them to perform their many administrative and judicial tasks. In time these hybrid Stipendiary Magistrates were legally trained,[29a] of necessity, but they still continued - Gibben and Perkins before the War,

Fraser, Cunningham and A.H. Gibson after the War - to perform their dual functions.

That R.A. Gibson was alive to this sleight of hand there is no doubt. He acknowledged it, but not openly. In 1941 Justice Macaulay retired from the Yukon Territorial Court. Gibson suggested that the judicial work in the Yukon could be taken care of "satisfactorily by a Stipendiary Magistrate who would be of great assistance to Controller Jeckell, who is overworked."[30] The success of the arrangement would depend on the type of Stipendiary Magistrate chosen.

In the Northwest Territories the dual function arrangement with J.E. Gibben had worked well. Such an arrangement in the Yukon would necessitate an amendment to the Yukon Act making provision for the appointment of a Stipendiary Magistrate in words similar to the equivalent section[31] in the Northwest Territories Act. It would not be necessary, Gibson acknowledged, to mention that the "Stipendiary Magistrate would be available for other duties since this follow[ed] in any event and its mention might cause questioning when the Bill went through the House."[32] In the end the abolition of the Territorial Court did not occur, rather a simple amendment to the Yukon Act left the Yukon Territorial Court unimpaired with the Stipendiary Magistrate appointed as the acting Judge thereof.[33]

Two significant reasons emerge to explain Gibson's encouragement of hybridization. The situation of the police is the more obvious. The police as the "main agents of the regularization of the northern frontier"[33a] performed many public functions unrelated to the investigation and enforcement of law and order.[34] As their accumulated administrative tasks became too onerous for the police to handle, some were assigned to the Stipendiary Magistrates. The less obvious reason flows from the personality of R.A. Gibson. Never until Phinney in the early 1950's did judicial matters occupy the Stipendiary's full time.[35] Gibson's penurious nature - "he was that rare and now extinct animal, a parsimonious government offfical"[36] - would not permit him to pay full salary for a part-time job.[36a] Thus, J.E. Gibben at Fort Smith in 1938 was expected "to assist the District Agent and Mining Recorder in legal and administrative work because there [was] not sufficient work for a full time Stipendiary Magistrate.[36b] In a similar vein Perkins, in 1941, when succeeding Gibben, took over "the important and varied functions[36c] that the appointment entailed. Gibben, meanwhile, had been transferred to the Yukon since he had "sufficient all round training now to be exceptionally useful."[36d]

With this background some early appointments will now be examined.

(b) Douglas - A Political Appointment

James W. Douglas' appointment[37] was purely political. An entrepreneur from Edmonton, he sat in Parliament from 1909 to 1921, first as a Liberal and then as a Conservative. Defeated in 1921, he returned to his mining and merchandising activities in Edmonton. He possessed an abiding interest in the Mackenzie river basin visiting Great Bear Lake and financing a family expedition to the mouth of the Coppermine river in 1911.[38]

With the change in government in 1930, Douglas was rewarded[39] for his commitment to the Conservative Party. From his base in Edmonton his court parties journeyed three times into the Territories on criminal court circuit, twice by steamer to Aklavik in 1932 and Arctic Red River in 1935, and once by air to Coppermine in 1934. Anticipating quite a number of civil cases owing to mining activities in the mineral areas, Douglas in September 1932 asked for and got a salary of $2500 per year[40] paid from the date of his appointment.

Other than his three summer criminal circuits, his judicial workload was minimal. It consisted of some estate matters brought to him by Egbert Owen, public administrator at Edmonton.

Not surprisingly, when the Government again changed in late 1935, Douglas' status came under review. On 30 March 1936 his appointment was revoked.[41] A short cryptic note is revealing: "the 'retirement' of Douglas meets with the approval of our local friends."[42]

(c) Reames - A Short Term Appointment

Reames and Eames were both Police Inspectors who served in the Northwest Territories. Inspector Albert E.G.O. Reames in 1920-21 undertook a special patrol in the Hudson Bay area investigating some Inuit murders.[42a]

Inspector Alexander Neville Eames at Aklavik co-ordinated the investigation and later pursuit of the mad trapper of Rat River, Albert Johnson.[43] This episode that captured the imagination of the North American press in the winter of 1931-32 came during Eames' second tour of duty in the Mackenzie District.[44]

In the spring of 1932, the Norberg incest case awaited adjudication at Aklavik. Two alternatives were discussed by the Territorial Council, that of sending a judicial party to Aklavik or the appointment of Inspector Eames as a Stipendiary Magistrate to take the trial.[45] Police Commissioner MacBrien advised that it had been decided to appoint Eames to hear the Norberg case.[46]

In the end he was not appointed. Douglas was appointed instead,[47] Dubuc's appointment having been revoked in February 1932.[48] Rather Eames attended as an observer at the Norberg trial on 17 June 1932 at Aklavik. It may be surmised that the political forces that sustained Douglas' appointment intervened to thwart that of Eames.

Reames was appointed in the spring of the following year,[49] and sworn in at Ottawa on 5 July 1933. At the time of his appointment he was on active service in Toronto. No explanation for his appointment has surfaced.[50] By October 1937, now a Superintendent in charge of "O" Division, he had been granted a leave of absence pending retirement.

There is no record of Reames sitting as a Stipendiary Magistrate. To speculate why he was appointed must lead to the conclusion that it was anticipated he would be available to take criminal circuit trials on short notice. This would occur if Douglas were unavailable in the Mackenzie, or his judicial services were needed in the Eastern Arctic. In 1941, his Stipendiary Magistrate patent was cancelled,[51] the same year he died, after years of intermittent ill-health, at the age of 51.

(d) Taking stock - 1933-34

To "take stock" in 1933 reveals that judicial matters in the

Northwest Territories were handled by various officials: two[52]Stipendiary Magistrates, "appointed when it was found necessary;"[53] and Police Inspectors,[54] Indian Agents[55] and a few Medical Officers[56] who all held appointments as Justices of the Peace with the powers of two.

At this time Police Commissioner MacBrien was pushing to extend the jurisdiction of Police Inspectors, advocating[57] in 1934 that the recent Yukon amendment[58] to the Criminal Code should be extended to the Northwest Territories. That amendment permitted the Yukon Magistrate to dispose of theft and possession charges under $25.00 in a summary way. MacBrien argued that such an amendment would reduce expenses were it extended to the Northwest Territories. In the Mackenzie District there were many such property cases which could be "conveniently and satisfactorily handled by officers of the Force."[59]

MacBrien further submitted that in the "isolated parts of the country"[60] all, except capital cases, should be heard by police officers exercising the jurisdiction of a Stipendiary Magistrate. Mr. Daly, in-house counsel for the Department of the Interior, blinded by the economies to be achieved if this latter suggestion were implemented - "the suggestion seems excellent, it will be a great saving of time and trouble"[61] - failed to advise, if he appreciated, the potentially grave inherent conflicts though others did. The suggestion was not taken up.

The Yukon amendment was expanded to the rest of Canada to provide a modest modification to the Criminal Code,[62] increasing the summary jurisdiction of a Magistrate from $10.00 to $25.00. This presumably did have the intended effect of reducing expenses in the Northwest Territories.

(e) Norquay - First Hybrid Stipendiary Magistrate

The year 1936 found Alex Norquay at Edmonton, as agent of the Department of the Interior, with a reduced work load. Seizing the opportunity to occupy Norquay's time, the Territorial Administration, coincident to the revocation of Douglas' appointment, secured Alex Norquay's as a Stipendiary Magistrate.[63]

The reason given to Douglas for his removal was contained in a letter from the Minister of Justice when advising of Norquay's appointment: "Mr. Norquay, can do both jobs because his work load has been decreased greatly as a result of the Natural Resource Transfer Agreement, 1930[64] and as well things are pretty quiet in the Mackenzie District right now."[65] The more compelling reason for an "economy minded" Administration was the opportunity to avoid[66] paying a salary of $2500 per year. Mr. Norquay took on his judicial duties without additional pay.

The records available to date indicate Norquay heard no criminal cases. His only judicial duties related to estate cases

brought to him by the public administrator H. Milton Martin of Edmonton.

Norquay's tenure was to be little more than one year. In early 1937, Milton Martin, in correspondence with R.A. Gibson, alluded to Norquay's impending retirement from the Government service and asked if Norquay could continue with his judicial duties after retirement.[67] Martin's request was based on convenience. The Supreme Court Justices at Edmonton "much preferred"[68] not to deal with estates in the Northwest Territories. Without a Stipendiary Magistrate in Edmonton, Martin would have to go for estate Orders to the reluctant Alberta Justices or to MacKay Meikle, recently appointed Stipendiary Magistrate, at Ft. Smith.

Martin hopefully enquired: "is Norquay's commission still good after he retires from the service?"[69] Gibson wrote the inevitable memorandum[70] concluding that Norquay might continue as a Stipendiary Magistrate as long as the Department was not called upon to contribute in any way to his remuneration or the furnishing of office accommodation."

An abrupt "volte face" occurred one month later. Charles Camsell, Commissioner of the Northwest Territories, advised[71] the Department of Justice that Norquay was ceasing his duties as a civil servant and those of a Stipendiary Magistrate as well.The revocation[72] of Norquay's appointment occurred in late April, effective 31 March 1937.

(f) Resident Stipendiary Magistrates

The appointment of a resident Stipendiary Magistrate in the Mackenzie District in the 1930's was long delayed.

As early as 1903,[73] the Police had unsuccessfully urged the appointment of a resident Stipendiary Magistrate. At various later times the suggestion re-surfaced. In 1921, C.C. McCaul upon returning from the Le Beaux trial, wired the Minister of Justice recommending a resident court structure.[74] In 1926, R.A. Gibson in a pre-depression economy, sought the advice of the Department of Justice "as to the advisability of creating a Judicial District and [the] appointment of a [resident] Judge."[75] With an eye to the expense involved, the Deputy Minister "doubted if the population of the Territories would justify"[76] these steps.

The Police in 1931 renewed their call for a resident Judge. Superintendent Acland suggested "the advisability of establishing a Small Debts Court and the appointment of one or two intinerant civil Magistrates."[77] His suggestion was not acted upon. Mr. Daly's recommendation that no Courts be established in the Territories[78] was accepted by the Territorial Council. Daly further added, "it is unlikely that Courts will be established in the Mackenzie District for some time to come."[79] A.L. Cumming appeared to put an end to the debate: "the expense involved would be out of all consideration to the services rendered."[80]

But the issue would not go away. In 1934, the Edmonton Bar Association's proposal[81] to the Territorial Administration for a Stipendiary Magistrate at Edmonton provoked a reassessment. This time the Territorial Administration also solicited views outside its Department. Dr. McGill, the Deputy Superintendent General of Indian Affairs was opposed to resident Magistrates. The police were not. Superintendent Irvine thought that "in all fairness to residents of the Northwest Territories the Magistrate should reside therein."[82]

Within the Administration, too, views differed. Meikle writing from the Mining Recorder's office at Cameron Bay referred to the "great expense" attendant on resident Magistrates, and observed that a "regular annual trip of the non-resident Stipendiary Magistrate with sittings at Smith, Simpson, Aklavik and Cameron Bay would provide better facilities for administering justice than by exercising jurisdiction at Edmonton."[83] A.L. Cumming, District Agent at Fort Smith, also opposed resident Magistrates, reiterating and stressing the expense and adding that a Small Debts Court in the Northwest Territories should[84] go some way to meeting the concerns of the Edmonton Bar Association.

Urquhart was more circumspect. He wrote from Aklavik in September 1935:

> "Loudly from time to time the desire has been expressed by traders to take action in the country and for the past two or three years it would appear as if some civil jurisdiction

> obtainable locally would be of advantage. However, the Stipendiary Magistrate was here for two days on the last Distributor[85] and during his stay, no one took advantage of the fact that he was here and available should anyone wish to take action. Hence the need is more apparent than real."[86]

For the time being, uncertainty maintained the status quo. Soon events coalesced to lead to the first resident appointment in 1936.

By late 1935, with the gold strike at Gordon Lake, near Yellowknife, and the continued mining activity at Eldorado on Great Bear Lake, it was expected that these areas would see intensive development in the near future.[87] Conditions in the Northwest Territories made it advisable to appoint another Stipendiary Magistrate.[88] Mackay Meikle of Fort Smith was appointed[89] in December 1936.

(g) Meikle - "Part-Time" Appointment

A mining engineering graduate of Queen's University, Mackay Meikle in 1930 was working at The Pas, Manitoba, when the Natural Resources Transfer Act, 1930 ended his federal government responsibilities. Transferred to Fort Smith he worked in the District office as mining inspector for the Northwest Territories

until 1934, when he moved to Great Bear Lake to establish a sub-Mining Recorder's office at Cameron Bay. When A.L. Cumming, District Agent at Fort Smith, moved to Ottawa in 1936, Meikle replaced him. For the next three years, full time at Fort Smith, and the following eight summers coming annually from Ottawa,[89a] Meikle engaged in general inspection work for the Territorial Administration in the Mackenzie District.

He was always a "part time" Stipendiary[89b] who sat as required from 1938 to 1942.[90] His many extra-judicial duties are described elsewhere.[91] After 1947 he undertook senior administrative duties in Ottawa until his retirement in 1954. In 1951,[92] nine years after his last sitting as a Stipendiary Magistrate his patent was revoked.

The Perkins, Charles and Helen, both lawyers resident at Yellowknife from 1937 to 1942, differ in their description of Meikle. His description is of "a very wise man, small in stature, quick in his movements, pleasant but with an astonishing feeling of authority about him."[93] Her's is exquisitely succinct: he was a "dapper little squirt, cold and distant."[94] Charles Perkins adds that he was a "kindly religious man of too gentle a fibre to be an administrator in a wild country."[95] That assessment is substantally confirmed by Fred Fraser, a fellow Stipendiary Magistrate, and senior government administrator: Meikle was a "most honest and upright person who complained bitterly that he was not qualified for the Stipendiary Magistrate duties he was asked to undertake."[96]

(h) James Morrow - a Reluctant Appointee

The Hurtubise summary conviction appeal led to Dr. James Morrow's appointment on 26 November 1937[97] as a Stipendiary Magistrate. Meikle sitting as a Justice of the Peace had convicted Hurtubise,[98] the Fort Smith butcher, of supplying liquor to a young Indian girl. The sentence of three months was appealed by Mr. Duncan, of Edmonton, to the Stipendiary Magistrate of the Northwest Territories who was Mr. Meikle. Viewing this as an unsatisfactory situation, Duncan sought to cut short the appeal process imploring the Deputy Minister of Justice to "reduce the sentence to a fine" since "of course it would not be fair for [Mr. Meikle] to hear the appeal."[99] The Deputy Minister declined, if he even could, to intervene.

As objection had been taken to Meikle's hearing of the appeal, R.A. Gibson asserted if an additional Stipendiary Magistrate were to be appointed at Fort Smith "the logical appointment would be that of Dr. James Morrow."[100] Advised by wire on 30 November 1932 of his appointment, Morrow immediately and forcefully "begged to be relieved of this responsibility."[101] Gibson placated him, assuring Morrow that it was only because Meikle could not sit that he had been appointed.

Hurtubise was the only case heard by Morrow as a Stipendiary Magistrate. Transferred to Prince Albert in 1938, his patent was surrendered up, presumably without reluctance, and cancelled on 5 April 1939.

In the immediate aftermath of Morrow's appointment, R.A. Gibson reflected that "it may be that with the enactment of the Judicature Ordinance[102] and the Rules of Practice "it will be necessary to have at Ft. Smith someone who has a certain amount of legal knowledge."[103] This concern presaged the appointments, both in August 1938 of Omer St. Germain at Morinville, Alberta and J.E. Gibben at Fort Smith.

(i) Stipendiary Magistrates with Legal Qualifications

Not since Dubuc and Rivet's appointments in the 1920's had there been appointments of Stipendiary Magistrates with legal training.[104] This concerned Mr. Edwards, the Deputy Minister of Justice, who in 1936 expressed "the desirability of appointing lawyers as Stipendiary Magistrates."[105] His concern, coupled with that of R.A. Gibson, led to the decision taken by the Territorial Council in March 1938 to appoint a Stipendiary Magistrate resident in the Northwest Territories with "full legal qualifications."[106]

Before the Territorial Council R.A. Gibson elaborated: Meikle and Morrow possess common sense but no legal training to deal with "the legal technicalities."[106a] With three[107] exceptions, thereafter legally trained appointments became the norm.[108]

(j) J.E. Gibben's Appointment

On the recommendation of the Minister of the Interior T.A. Crerar of Winnipeg, John Edward Gibben of the Winnipeg law firm of Coleman, Swail and Gibben, was appointed a Stipendiary Magistrate in August 1938.[109] The appointment had a political flavor;[110] Gibben was a Liberal.

Gibben had returned from World War I as a Captain in the Army to enter the Manitoba Law School. Admitted to the Manitoba Law Society on 23 December 1921 he practised law in an undistinguished fashion[111] until his appointment in 1938.

Gibben spent the next three years as a Stipendiary Magistrate, the first year at Fort Smith and the latter two at Yellowknife before surrendering up[112] his patent to accept an appointment as Stipendiary Magistrate for the Yukon.[113] His reappointment[114] as a Stipendiary Magistrate in the Northwest Territories in 1950, and the legislative revocation of that second appointment are described elsewhere.

Gibben in the period 1938 to 1941 had no extensive judicial business to engage him. Rather, his diverse judicial and extensive extra-judicial duties occupied the major part of his time.[115] After 1950, his activities in the Northwest Territories were restricted to the judicial sphere. His position as Justice of the Territorial Court of the Yukon did not permit him to undertake non-judicial matters.[115a]

Jack Worsell, Gibben's clerk in the Yukon offers this glimpse of him:

> "Gibben, John E., was a little man, physically not much over five feet, chubby, rosy, well-scrubbed. Immaculate in dress. The last is a key-word. The first impression of Gibben was that he had just emerged from a shower, parboiled and pink, barbered with extreme care, then clothed in fresh linen."[116]

(k) Omer St. Germain

Like the appointment of Gibben, St. Germain's appointment was due to his Liberal connections. The French ancestry he shared with H. Milton Martin, the public administrator with whom he was to work on estate matters, also proved to be an asset in his selection. His appointment in 1938[117] and its revocation seven years later are described elsewhere.

Of a retiring disposition, St. Germain practised in the French community of Morinville, north of Edmonton. His was not a

thriving legal practice, with a limited clientele;[118] and hence he must have welcomed the prestige and remuneration that the Stipendiary Magistrate appointment brought to him.

Besides attending to estate matters, St. Germain engaged in a public relations campaign on behalf of the Court. He mailed his card:

> Omer St. Germain
> Stipendiary Magistrate for the Northwest Territories
> Morinville, Alberta
> Upon request will gladly attend at Edmonton
> to perform his judicial duties.

to various lawyers and Companies, with the "hope of increasing"[119] his judicial business. The Deputy Minister of Justice was "at a loss to discover any need for [its] distribution."[120]

St. Germain also interposed to no avail on behalf of his wife: "I feel it would be better [than have me do the clerk duties] to appoint a Clerk of the Court - I could suggest my wife, Mme St. Germain . . . [she] would gladly accept the appointment and I can assure you that she will be able to do the work."[121]

In 1940, his salary was reduced by half to $900.00 per year for his part time services, because of the unprecedented

financial demands which Canada's war effort entailed.[122] After some disappointment at this turn of events, St. Germain changed his mind and was "glad to have the opportunity to bring [his] humble contributions towards winning the war."[123] He went on to ask if he might retain[124] the court filing fees of $178.70 but this proved impossible because of the exigencies of the Consolidated Revenue and Audit Act, 1931.[125]

(1) 1938-39

By the summer of 1938, Yellowknife had established itself as a significant mining community.[126] Business activity created debt and that brought into play the Small Debts Ordinance. But the only Magistrates before whom a small debt summons could be sworn were Gibben and Meikle. Both were at Fort Smith. The Prospector, the weekly Yellowknife paper, lamented: "all that is needed . . . is a Stipendiary Magistrate at Yellowknife."[127] The editor[128] added that such a Stipendiary Magistrate would probably "have a lot of time for fishing as far as criminal work is concerned . . . but that does not lessen the necessity of a resident Magistrate."[129]

In October 1938, Commissioner Camsell voiced the Administration's thinking: "It begins to look as though we may have to move Gibben to Yellowknife."[130] With that in mind, and because Morrow had been transferred to Prince Albert[131] and

Meikle was in Fort Smith only in summer and early fall, Dr. Urquhart, at Fort Smith, was appointed a Stipendiary Magistrate[132] in late October 1938.

By the following spring Gibben was agitating to move to Yellowknife. He confirmed the need for a Small Debt Official at Yellowknife. He advised that Charles Perkins had four large civil claims pending at Yellowknife. He alluded to police support for his move.[133] And he complained that "if I am to remain at Fort Smith I will need more adequate accommodation" than the two rooms my family now occupies.[134] That June, Gibben moved to Yellowknife.[135]

By the summer of 1939 there were five[136] Stipendiary Magistrates for the Northwest Territories: Gibben at Yellowknife, Urquhart at Fort Smith, St. Germain at Morinville, Meikle sometimes at Fort Smith but residing in Ottawa, and McKeand[137] in Ottawa in charge of the Eastern Arctic Patrol.

(m) Urquhart and McKeand - the Next to Last Non-Legally Trained Appointments

(i) Urquhart

Dr. James Alfred Urquhart, in 1930, was the medical officer in charge of the Anglican mission hospital at Aklavik. For the

next eight years he travelled throughout the Delta, occasionally sitting as a Justice of the Peace with the powers of two[138] and as a Coroner.[139]

Urquhart sat as a Stipendiary Magistrate from 1938 until his retirement to the Okanagan in September 1943.[140] The Perkins again lend assistance in describing him. Dark in complexion, big in stature and quite stout, he dominated a situation physically. Very dignified, he gave the impression he was holding a great deal back; there was an air of mystery about him. The overall effect was of a man of great ability, drive and energy.[140a] That drive sustained him in his retirement while he sat as a Magistrate at Kelowna.[141]

(ii) McKeand

Major David Livingston McKeand came to be appointed in 1939[142] in the aftermath of the cost-saving manoeuvres initiated by R.A. Gibson.[142a] Dick Finnie[143] gives this candid appraisal of him:

> "David Livingstone McKeand was a man you could not help liking until you got to know him well. He rose to the rank of Major in World War I and carried that title into civilian life. As a veteran in need of a job [he joined the Branch headed by Oswald Finnie] . . . . In 1932 he became leader of the government party on board . . . the Eastern Arctic Patrol, which became his chief activity until his retirement [in 1945]. He was a pompous ass, fancying himself as an authority on the North. A diplomatic interpreter once told him the [Inuit] called him 'Great White Father.' Actually, because one of his eyes was askew, they called him 'Old Cockeye.'"

and that assessment is corroborated.[144]

Six days after his appointment, McKeand confided to R.A. Gibson that he had not "mentioned this to a soul."[145] Oddly and remarkably, that same day a press notice appeared in the Ottawa Citizen[146] detailing McKeand's appointment. The account was also remarkable for its many inaccuracies. McKeand was described in his judicial capacity as having the "full authority of a Judge of the Supreme Court of Canada."[147] The press report noted that this was the "first time anyone without official standing in the legal profession has been appointed." Historical exactitude notes six previous non-legally trained appointments.[148] The report continued in a most laudatory and imprecise fashion: McKeand was appointed because of "his unique standing with the [Inuit], his wide experience in the Eastern Arctic and his comprehensive understanding of the natives and their problems. In the past [he has] been looked upon by the natives as the chief representative of the "Great White Chief" at Ottawa.

No reference, not unexpectedly, to the real reason for the appointment, R.A. Gibson's parsimony, is mentioned. Gibson though justified the appointment: McKeand has "extensive experience in the Eastern Arctic and familiarity with the mental processes of the [Inuit].[149] How he could have such familiarity and not speak Inuktituk was not explained.

McKeand heard several cases as a Stipendiary Magistrate in the summers between 1939 and 1945.[150] He spent his retirement

years at Victoria, enjoying the warm summers that since 1932 had eluded him.[151] His judicial appointment was revoked in 1951.[152]

(n) Charles Percy Plaxton - a Special Appointment

The Belcher Island religious murders[153] shocked the Territorial Council. Police Commissioner Wood related the circumstance of the nine murders committed by "clubbing, shooting or freezing" and reasoned in view of the publicity that "Council should take steps to have a full court convened. [T]he presiding Judge should have exceptional qualifications with a broad understanding of human nature and with some experience dealing with aborigines, although such a Court might be an expensive undertaking."[154]

The Department of Justice recommended Charles Percy Plaxton be appointed a Stipendiary Magistrate on the understanding he would resign his Commission after the trials.[155] Plaxton,[156] a former Deputy Minister in the Department of Justice who had in 1939 appeared on behalf of the Federal Government in the Quebec Eskimo reference case,[157] was in 1941 a Justice of the Ontario High Court. His Chief Justice almost blocked the appointment. Expressing the view to the Deputy Minister of Justice that "all Judges in Ontario are compelled to work to the very limit of their strength, [Chief Justice Rose suggested a Western Judge be

appointed since] what I hear leads me to the belief that . . . especially [in] some of the Western provinces, the Judges have a comparatively easy time. I may be wrong about this, but I do not think I am!"[158] Plaxton was appointed on 8 July 1941.[159] He conducted several trials at the Belcher Islands in late August, and then, as agreed, surrendered up his commission which was cancelled on 12 January 1942.[160]

(o) Charles Augustus Perkins

Chuck and Helen Perkins, both recent graduates[161] from the University of Alberta, came to Yellowknife in the spring of 1937. For the next four years, they directed their energies to running a law practice and publishing a newspaper. The latter endeavor was the more lucrative of the two.[161a]

In 1940 Charles Perkins endeavored to enlist in the Air Force but was, for medical reasons, initially turned down. As this refusal was communicated to him, J.E. Gibben received a confidential telegram from R.A. Gibson advising that Perkins had been "recommended for the position of Stipendiary Magistrate in Yellowknife in the event of your appointment to the Yukon."[162] Gibben was requested to "ascertain confidentially from Perkins, if he would accept." Perkins indicated he would[163] reacting in a fit of pique[164] to his military rejection.

As this telegram exchange occurred, the Minister of Mines and Resources wrote to the Minister of Justice recommending Gibben's transer to the Yukon since there was then in Yellowknife "an energetic and well posted young lawyer who is qualified to take Mr. Gibben's present [wide ranging] responsibilities.[165]

Perkin's formal appointment came in August.[166] For the next year he attended to the minimal criminal and civil business. In late 1942, Perkins was called up for military duty and left Yellowknife without surrendering up his judicial patent.

At War's end he met with Territorial Administration officials in Ottawa who requested that he remain a Stipendiary Magistrate with the status and salary of a Supreme Court Judge.[167] Instead, Perkins resigned[168] and went to Vancouver to join his wife and son who had moved there in late 1942.

With Perkins' departure in 1942, there remained only Dr. Urquhart at Fort Smith as a resident Stipendiary Magistrate. Meikle continued in the summers to visit the Mackenzie District; likewise McKeand continued to visit the Keewatin and Franklin Districts and St. Germain remained at Morinville servicing estate matters. All but St. Germain were untrained in the law. The "skeleton of a legal system"[169] that existed before Perkins' departure was reduced to a few bones.

(4) Post-War Appointments

(a) Darling, A.H. Gibson, Fraser and Cunningham

(i) Darling

E. Clare Darling was the first of three appointments made in 1944. He had been a socially prominent[170] lawyer in Edmonton who had not "cut much dash"[171] in his legal pursuits. The political arena - he was a Liberal - seemed more susceptible to his abilities. His only northern exposure had been when he had acccompanied Dubuc's court party north in 1929[172] acting as prosecutor.

In September 1943 with the retirement of Dr. Urquhart, no full time resident Stipendiary Magistrate remained in the Northwest Territories.[172a] Meikle soldiered on when in the Mackenzie District though he felt he was "more than fully occupied with his regular duties and had no special training to handle serious cases."[173] R.A. Gibson therefore recommended that a "Northern Alberta lawyer who has practised in the Courts be appointed at Fort Smith."[174] The obligatory letter from the Minister of the Interior to the Minister of Justice, Louis St. Laurent, went forward recommending E.C. Darling's appointment.[175] This was duly accomplished[176] and Darling took over his duties as Stipendiary Magistrate at Fort Smith on 5 June 1944. Thirteen days later he was dead, of natural causes.

This proved especially upsetting to Mr. Meikle who enquired "when may we expect a new Stipendiary Magistrate as I wish to arrange my summer inspection trip"[177] adding that an attempted murder committal[178] had occurred and "I don't want to take the trial."[179]

(ii) A.H. Gibson

The Territorial Administration, uncharacteristically, moved quickly. The Minister wrote to his counterpart at the Department of Justice recommending A.H. Gibson K.C. be appointed.[180] Gibson's appointment followed on 1 August 1944.[181]

He came to the position with a wealth of life and legal experiences[182] and was arguably, Cunningham excluded, the best qualified[183] of all the Stipendiary Magistrates. Graduating from Queen's, Gibson soon thereafter came to Alberta where one of his first jobs was as a horse wrangler.[184] A short stint as a school teacher followed,before he joined a law practice in 1917 at Fort Saskatchewan.

He had been a Police Magistrate in Edmonton but was dismissed in 1937 under unusual circumstances. Gibson asserted that his dismissal came about because he "declined" to submit to political pressure and acquit an accused. This assertion provoked "grave alarm"[185] among the Alberta Bar which was concerned about political interference in the Judicial Process.

He returned to law practice at Fort Saskatchewan serving as a sometime prosecutor until his move to Fort Smith to take up his Stipendiary Magistrate appointment.

Harold Gibson spent the next four years at Fort Smith, the following two years at Yellowknife and then after a brief one year stint as Commissioner of the Yukon, the remaining years of his life as a Police Magistrate in the Yukon.

A.H. Gibson was a big, heavy set man, with steely gray hair, gray eyes and of florid complexion. A man of few words, he presented a dour countenance[186] though when he spoke a pithy humorous[187] phrase might come forth. Clearly his administrative capabilities did not match his judicial ones, for he was demoted in 1951 from his administrative post as Commissioner of the Yukon to Police Magistrate at Whitehorse. His legal judgments though were scholarly, thoughtful and precise.[188]

(iii) Fraser

Fred Fraser appointed in October 1944[189] to sit at Yellowknife, filled a need "which had existed for a long time."[190] He was the opposite of A.H. Gibson in one sense - he was a capable administrator, of forceful, disposition. Like Gibson, he had a wealth of experience behind him when he came to Yellowknife.

Fraser had served in the Air Force in both Wars. In between, he had practised law in Vancouver and the Interior of British Columbia, had been solicitor for the Solider Settlement Board at Kamloops, had been employed with Cominco at Trail, and from 1930 until 1941 had been employed with Hudson Bay Mining and Smelting Co. at Flin Flon. It was in this last position that he was to gain a fund of knowledge indispensible to him in his tasks of planning and running the affairs of a northern mining community like Yellowknife.[191]

The intervention of the member of Parliament for Flin Flon resulted in an offer from R.A. Gibson in August 1944 to go to Yellowknife "as a Stipendiary Magistrate and general Pooh-Bah."[192] He proved to be a hard, tough administrator - "energetic, forceful, outgoing, quick of decision"[193] - a combative bantam rooster-type, around whom controversy swirled.[194] The local newspaper, the Blade,[195] in a manner fully bursting in irony, with mixed metaphor, characterized Fraser standing in the stern of a rowboat, with hand on heart, a Napoleonic hat on his head, as "Frederick the Great."[196]

(iv) Cunningham

By 1946, Fraser found his judicial and administrative duties becoming extremely onerous. R.A. Gibson agreed to recruit an

assistant to take over the duties of Stipendiary Magistrate[197] and Chairman of the Administrative Board. The Minister of Mines and Resources, prompted by the ministrations of Jimmy Gardner, the Liberal Cabinet Minister from Saskatchewan,[198] recommended[199] Frank F.G. Cunningham be appointed to replace Perkins who had decided not to return to Yellowknife from his absence on military leave. Cunningham appointed 16 April 1946,[200] took up his duties at Yellowknife in early May.

Fraser and Cunningham were to become 'intense rivals'; yet a mutual respect for each other's abilities led to a team work productive of positive results.[201] Two years later in part to ease this rivalry, in part to give new scope to Cunningham and Fraser's energies, Fraser departed for Fort Smith, A.H. Gibson replaced him in Yellowknife and Cunningham went to Ottawa.

Cunningham had practised law in Regina from 1927 until the War, specializing in criminal litigation.[202] He had graduated in 1924 from the University of Toronto with an Arts degree, followed by a further three years at Osgoode Hall.

At the conclusion of the war, with the rank of Lieutenant Colonel,[203] Cunningham was posted to Singapore and charged with establishing military Courts and reorganizing the administration of justice. He performed this task with efficiency and alacrity.[204]

Upon his arrival at Yellowknife Cunningham caught the rising tide of increasing civil litigation so that by the fall of 1947 he could confirm to the Administration in Ottawa that "a barrister with lengthy experience is required as a Stipendiary Magistrate."[205] Bruce Smith KC, defendant's counsel in the civil jury trial heard in July 1947 at Yellowknife, reinforced Cunningham's viewpoint, adding that "the extent of litigation in Yellowknife and the importance and difficulty of legal points . . . requires the provision of an adequate library."[206] The Administration only partially heeded this advice: A.H. Gibson who shortly thereafter replaced Cunningham at Yellowknife was exceptionally well qualified. No adequate library, however, was provided until the late 1970's.

John Parker, who appeared before Cunningham many times, offers a candid assessment of him. He was a marvellous administrator; extremely well organized, he did the work of four men; and on a personal plane he planned his retirement years[207] in advance. He was also beguiling in argument.[208] John's brother Peter, who also practised before Cunningham, adds that Cunningham was overwhelming in presence, and loquacious in speech. Fred Fraser completes the personality profile emphasizing his administrative capabilities: his brain worked like lightning; he was very volatile, and very voluble; he made decisions quickly and processed a voluminous workload.

Clearly Cunningham was suited for administrative advancement. Two years after coming to Yellowknife he left for Ottawa where by early 1951 he had replaced R.A. Gibson, upon the latter's retirement, as Deputy Commissioner. Fraser also in late 1949, was promoted to a senior solicitor position at Ottawa. The judicial appointments of both were revoked in December 1951.[209]

(b) Need for Stipendiary Magistrate at Aklavik - Bouchard's Appointment

Like the Franklin and Keewatin Districts the lower Mackenzie District, until late 1948,[210] was served by irregular circuit visits by the Stipendiary Magistrates. In 1944, Meikle had suggested that a Stipendiary Magistrate, to serve the lower Mackenzie District and resident at Aklavik, be appointed to handle Department matters additional to game matters."[211] Cunningham concurred in the suggestion but no appointment was forthcoming.

The medical officer, Dr. Hayward at Aklavik, came to support Meikle's suggestion. Hayward found his increasing medical duties too onerous, preventing him from attending adequately to his many extra-medical duties.[212] R.A. Gibson's first reaction - to economize and have the medical Officer at Aklavik charter aircraft to delta settlements so he could attend to his many

duties - proved impractical. Gibson then considered, informally, several applicants for a Stipendiary Magistrate at Aklavik. They included a retired RCMP officer and a lawyer in Edmonton. Eventually J.R.E. Bouchard, a newly arrived solicitor at the Department of Mines and Resources, was selected in an open competition to fill the "urgent need for a Stipendiary Magistrate at Aklavik."[213]

Bouchard moved in September 1948 from Ottawa to commence his duties.[214] He remained there until July 1950 when he returned to Ottawa in an administrative position as Secretary to the Territorial Council. For the next five years, and even after his resignation from the Department,[215] he took trials in the Eastern and Central Arctic "when the occasion arose."[216] His judicial appointment was revoked in December 1955.[217]

Bouchard was trained in the law in Quebec. Admitted to the Quebec bar in July 1935, he practised at Sherbrooke until 1940, when he joined the legal branch of the Department of Munitions and Supply. By 1944 he was back in private practice in Montreal until he joined the legal staff of the Department of Mines and Resources in 1948, preparatory to going to Aklavik that fall. He possessed a good mind for administrative matters, and a certain political astuteness,[218] which served to gain for him the position of prosecutor at Yellowknife in May 1955.

His brief time at Aklavik could not have been pleasant, accustomed as he and his wife were to the social amenities of Ottawa and Montreal.[219] Ray Rimstad, the court reporter who did Bouchard's fee billings when he was the prosecutor in Yellowknife in 1955-56, relates an incident that goes some way to elucidating Bouchard's peculiarities. Bouchard kept book "shells"[220] in his office to give the impression of an erudite widely read professional.

(c) Martin - the Final Police Appointment

Douglas James Martin's appointment was the product of that close cooperation between the Police and Ottawa-based Territorial Administrators that had led to Police Commissioner Perry's appointment as a Stipendiary Magistrate 41 years earlier.[221] The Minister of Mines and Resources in writing to his counterpart at Justice observed that "with the completion of the highway [from Northern Alberta] and the rapid expansion of commercial fishing operations, Hay River is increasing rapidly. Superintendent D.J. Martin is available."[222] He was temporarily appointed[223] in December 1948.

Martin was a veteran of the North. After commanding subdivisions at Fort Smith, Fort Norman and Simpson in the 1930's, he assumed command of "G"[224] Division at Ottawa in 1940. He remained in that position until his retirement[225] in late 1948 to take up his duties at Hay River. As head of "G" Division, Martin made annual summer inspection trips by air and water into the Northwest Territories. Exceptionally, he visited the Belcher Islands in April of 1941 to conduct the Belcher Islands murder investigation returning with the court party for the trial in August that same year.

"Tiny," Martin took on the multiple tasks expected of a hybrid appointment.[226] As a bachelor, he had ample time to immerse himself in excessive detail. For example, in his overly meticulous way he noted the serial numbers of each bill used to pay fines he levied.[227] His time as a Magistrate was to come to an inglorious denouement. Martin's clerk who collected the liquor tax used for local financing misappropriated $1200 cash "under Martin's nose."[228] In acute embarrassment, Martin "retired" on 1 July 1951 and returned to Ottawa. His appointment was revoked on 28 December 1951.

(d) Brown - final Hybrid Appointment

Cronyism and politics played their part in Wilfred G. Brown's appointment as a Stipendiary Magistrate in November

1949.[229] Brown, a lawyer,[230] came from Regina, where in legal and political circles he had known Cunningham. Like Cunningham, Brown had participated in Jimmy Gardner's Liberal campaigns.[231] When Fred Fraser was transferred to Ottawa in later 1949, Brown, enticed by Cunningham and of the right political persuasion, showed interest in a judicial appointment. The Minister of Mines and Resources therefore recommended[232] his appointment.

Brown, an easy going man, thought the judicial appointment a secure sinecure until his arrival at Fort Smith to find that his real job was that of Administrator for the Southern Mackenzie District.[233] He remained in Fort Smith until 1952, when he moved to Dawson to replace Fraser as Commissioner of the Yukon.[234] On Fraser's retirement in 1955, Brown, for a third time, replaced him, this time in Ottawa. With Cunningham's early retirement in 1957, Brown became Deputy Commissioner of the Northwest Territories, a position he held until 1965.

Brown's judicial duties were certainly subsidiary to his administrative ones. With a resident Stipendiary Magistrate at Yellowknife, and until July 1951, one at Hay River, Brown spent little time on judical matters, though once he went on circuit to the Mackenzie delta.[235] In his precise hand and with the

lessons learned at the Army staff courses taken at Sandhurst during the War, Brown attended to the increasingly complex matters that engaged the Administrator of the Mackenzie District. Shortly after his promotion to Commissioner of the Yukon in November 1952, Brown's appointment as a Stipendiary Magistrate was revoked.[236]

(e) Phinney - a Full Time Stipendiary Magistrate

Justice Sissons in 1955 paid a deserved compliment to L.H. Phinney. He is of "outstanding ability and qualfication, with a very wide general knowledge and wealth of experience in northern affairs. He is of good judicial mind and character and temperament."[237] Phinney's court reporter[238] more soberly reflected: Phinney was too kind, too much influenced by the shortcomings of human beings to be an outstanding Judge. An example illustrates this tendency.

David Lafferty, a perpetual offender, was convicted of housebreaking by Phinney. With reluctance, Phinney imposed a one year term of imprisonment that started to run in one week.[239] Lafferty had a wedding to attend in three days time and Phinney, generously, gave him three more days to recover before starting to serve his sentence. If that were not sufficiently lenient, two days later Lafferty again came before Phinney charged with breaking and entering. Phinney's immediate concern in view of

this development was that he could not see his way clear to grant Lafferty bail to permit him to go to the wedding!

Phinney was called to the Manitoba bar in 1923. Until the Second War he practised law; and as a bush pilot in Northern Manitoba, organized the aerial section of the Manitoba Game Branch. He had been in the Royal Flying Corps as a pilot, in the first War. In 1942, he rejoined the Air Force. The end of the War found him in Dawson as Special Commissioner for Defence Projects, a position he held until his appointment in 1946 as the Stipendiary Magistrate for the Yukon.[240] Gibben who left Yellowknife in 1941 to take the appointment as Stipendiary Magistrate at Dawson had by 1946 vacated his judicial office to become executive assistant to Jeckell, Controller for the Yukon.

When A.H. Gibson in August 1950 moved to Dawson as Commissioner, Phinney replaced him as Stipendiary Magistrate[241] at Yellowknife. For the next five years, Phinney carried on full time[242] with his judicial duties in the Mackenzie District assisted by the periodic visits of Justice Gibben from the Yukon. Remarkably, he had no administrative tasks to perform. Those were attended to by Brown at Fort Smith, until 1952, and thereafter by his replacement L.A.C.O. Hunt.

In 1955, Phinney relinquished his Stipendiary Magistrate office to become Police Magistrate.[243] He carried on in that office until his retirement[244] in 1962 at the age of 70 years.

Phinney was fondly remembered by his court staff as a fine gentleman - wise in his old age, of sound common sense - happy and contented to run out his final judicial years at Yellowknife.

(f) McBride - A Further Special Appointment

James Boyd McBride ventured back to the North after a 31 year hiatus. After his appearance as counsel before Dubuc in 1924 at Aklavik,[245] he returned to an active and successful legal practice at Edmonton. His defence of Ikalupiak had been spirited, though it lacked the polished eloquence of an experienced barrister. When he returned in January 1954 as a sitting Justice of the Supreme Court of Alberta, he was immeasurably more familiar with court procedure.[246]

McBride's appointment[247] as a Stipendiary Magistrate was, like Justice Plaxton's, the response to a need for an experienced Judge. Phinney and Gibben could not, because of prior involvements,[248] take the second Cardinal murder trial.[249] That left only Bouchard at Ottawa, whose experience was limited.

McBride on his arrival in Yellowknife sensed the Settlement's interest in the trial proceedings. He therefore insisted[250] that the trial be held in the Ingraham Hotel Caribou Room. All sittings of the week long jury trial were crowded. Cardinal being convicted a second time and sentenced to death, McBride returned to his judicial duties in Alberta.

(5) Summation

The 20 year span of the Gibson court saw a number of important developments. Resident Stipendiary Magistates, the first being Meikle, came to be appointed. R.A. Gibson's "brain child," the hybrid Stipendiary Magistrate, proved to be an extremely economical way to administer justice. And thirdly, with the appointment of Gibben, legal training, with a few significant exceptions, came in practice, thereafter to be a prerequisite for appointment as a Stipendiary Magistrate. Of these three developments, the second was clearly the most important. Negative aspects[251] surrounding the exercise of the dual functions of Judge and Executive Officer were to be significant in leading to the demise, in the early 1950's, of the Stipendiary Magistrate's Court.

The significance of the appointments to the Gibson Court requires a brief comment. In the main it may be safely said that

these 20 appointments did not produce a judiciary "steeped in English [and Canadian] jurisprudence."[252] Many of the appointees were legal "light weights." St. Germain and Bouchard are examples. As well, Douglas, Norquay, Meikle, Morrow, McKeand and Urquhart had no legal training at all.

Several appointments were "stop gaps" - persons appointed to fill an immediate need for a Stipendiary Magistrate and chosen because they were, at the time, conveniently located. Dr. Morrow's appointment was the most obvious. Those of Norquay Meikle, Urquhart and McKeand also serve as examples. Some appointments, as for example those of McBride and Plaxton, were responsive to the special need for an experienced Judge at a particular time.

A few of the appointments were probably political payoffs. There seems little doubt this was the case with the appointments of Douglas, St. Germain and Bouchard. There is more doubt when the appointments of Gibben, Fraser, Cunningham and Brown are examined. More likely political connections only assisted in these latter four appointments.

Of real significance is the fact that only one of the 20 appointees, Perkins, had practised law in the Northwest Territories. This dramatically underscored the "southern Canadian" orientation of the Gibson appointments - indeed of all

the 24 appointments to the Stipendiary Magistrate's Court. None of the Stipendiary Magistrates were born or grew up in the Northwest Territories - all were "outsiders" who brought a southern Canadian perspective to their judicial duties. They were, to use the thesis of Professor Zaslow, just another example of "agents of southern expansion"[253] intruding into the North - "harbingers of a new southern way of life."[254]

1. Order in Council, 16 June 1921, PC 2033. He retired officially on 16 May 1951 at 65 years, although because of accumulated unused sick leave he left active service on 31 October 1950. He died 14 August 1953.

2. Richard Finnie's assessment, telephone discussion with the writer, in January 1986. Finnie was O.S. Finnie's son.

3. Gibson, R.A., PAC, RG 32, c.2, Vol.113 (personnel file).

4. W.W. Cory, (1919-1931); H.H. Rowatt (1931-1934); Dr. Charles Camsell (1936-1946); Dr. H.L. Kennleyside (1947-1950).

5. Gibson was especially sensitive about liquor. In his youth, Gibson, drunk at the wheel, killed two friends in a car accident. Thereafter he was especially harsh on those who abused liquor.

6. Activities of H.E. Peffer, Minutes, CNWT, PAC, M-811 to 815, p.2710, 2721, 2722.

7. Fred Fraser, Recollections with the writer. Fraser worked under Gibson.

8. Judy, Territorial Government in the Canadian Northwest Territories and Yukon (University of California: unpublished Ph.D. thesis, 1959) p.117, fn. 33.

9. Supra, fn.2.

10. Peter Parker, Recolllections. Parker practised law briefly in Yellowknife after World War II. He sat as a Police Magistrate from 1962 to 1972 at Yellowknife.

11. PAC, RG 85, Vol.177, 542-3; RG 85, Vol.1870, 540-1.

12. Chapter 4, fn. 12 to 15.

13. The danger in tying an economy to fur is graphically illustrated by drastically fluctuating fur prices. White fox fetched $15.00-$20.00 in 1915, as much as $50.00 in 1929, one year later only $30.00. By 1948-9 the price averaged $9.00 and at one period in 1949-50 it fell as low as $3.50. Jenness, Eskimo Administration: II Canada (Montreal: Arctic Institute of North America, 1964) p.50, 70.

14. Blanchet, Keewatin and Northeastern Mackenzie (Ottawa: Department of the Interior, King's Printer, 1930) p.63.

15. Finnie, Canada Moves North, (Toronto: MacMillan & Co., 1943) p.68.

16. Ibid., p.68; Jenness, Eskimo Administration: II Canada (Montreal: Arctic Institute of North America, 1964) p.49.

16a. Richard Finnie, Recollections.

17. The Territorial Council was a wholly appointed group from Ottawa until 1951. The unrepresentative nature of Council continued throughout the whole of Gibson's tenure as Deputy Commissioner from 1921 to 1950. The Council delegated to R.A. Gibson the day to day administration of the Northwest Territories.

18. Zaslow, The Development of the Mackenzie Basin 1920-1940 (University of Toronto, unpublished Ph.D. thesis, 1957) p.659.

19. Map, M-5.

20. There had been various patrols before World War II notably 1903 (Low), 1907 (Bernier). The last expedition before the First War occurred in 1910-11. (Table 5.)

21. Jenness, op. cit., p.50.

22. To supply oil to the Alaska highway project a pipeline was built in 1942-44 from Norman Wells to Whitehorse. The pipeline was abandoned after the War.

23. An airbase built to facilitate polar route air travel.

24. Parker, Address to Northwest Territories Bar Association, Annual Dinner, 11 December 1970, p.26.

25. Zaslow, op. cit., p.646.

26. Finnie, Canada Moves North, p.69; Fraser Recollections, with the writer, p.53.

27. Fred Fraser Recollections, p.12, 13.

28. NWT Amendment Act SC 1905, c.27, s.8; RSC 1906, c.62, s.32; RSC 1927, c.142, s.34; Chapter 2, fn.18.

29. One is reminded of the jingle: Certes is a breath mint; Certes is a candy mint; Certes is two, two, two mints in one!

29a. The first legally trained "hybrid" was Gibben, appointed in 1938.

30. Memorandum, Gibson to Jackson, 4 February 1941, PAC, RG 85, Vol.1870, 540-1-1-1. It was contemplated that the Stipendiary would assist in financial matters and perform the functions of a legal advisor to the Yukon Council except when the functions of the Stipendiary Magistrate clashed with those of legal advisor.

31. Supra fn.28.

32. Memorandum, Daly to Gibson, of the former's discussions with Mr. Edwards, the Deputy Minister of Justice, 18 March 1941, PAC, RG 85, Vol.1870, 540-1-1-1.

33. Yukon Territory Amendment Act, SC 1941, c.30, s.1 adding s.69A
(1) . . .
(2) Every Stipendiary Magistrate so appointed shall have and may exercise the powers, authorities and functions now vested in the judge of the [Territorial] court.
(3) . . .

33a. This is a central theme of Morrison's Ph.D. thesis.

34. Jenness, p.21; Morrison, Ph.D. thesis, p.364; Zaslow, Ph.D. thesis, p.635-672; RCMP Annual Report, Can., Sessional Papers, 1939, p.32-33; Chapter 4, fn.7.

35. Fred Fraser, Recollections, p.23. The only exception was in 1946-47 at Yellowknife. Cunningham for 1 year was extremely busy with judicial matters.

36. Ibid., p.12, 13. There was one area where R.A. Gibson was a "spend thrift." In making returns of trials Gibson was concerned the record of important trials should be adequate. Thus it was for the Stipendiary Magistrate to decide if the trial evidence was to be transcribed. "The question of expense should be of secondary importance." letter, R.A. Gibson to A.H. Gibson, PAC, RG 85, Vol.1870, 540-1-2.

36a. R.A. Gibson was very candid about this. After a visit to Dawson in 1941 he observed that a Mr. Love, the clerk, had to be told that his job entailed other administrative duties when his court duties were finished. "I straightened this out for him . . . and told Controller Jeckell to see that value was had in the way of service for full remuneration paid." letter, 15 August 1941, R.A. Gibson to Gibben, PAC, RG 85, Vol.9, 20-1A.

Gibson in 1939 suggested that St. Germain be asked to revise the Ordinances of the Northwest Territories. "He is paid a salary and it does not seem unreasonable to ask him to undertake a task of this nature [in his free time] without extra remuneration." Memorandum, R.A. Gibson, 26 October 1939, PAC, RG 85, Vol.895, 9567.

36b. Minutes, CNWT, 21 March 1938, PAC, M-811 to 815, p.1299, recommendations of R.A. Gibson.

36c. Letter, T.A. Crerar to La Pointe, 25 June 1941, PAC, RG 85, Vol.1870, 540-1-1-1.

36d. Memorandum, R.A. Gibson, 25 June 1941, PAC, RG 85, Vol.1870, 540-1-1-1; "Gibben has an excellent record as a Magistrate and is a thoroughly capable executive officer." Minister of Mines and Resources to Minister of Justice, 25 June 1941, PAC, RG 85, Vol.1870, 540-1-1-1.

37. 17 June 1932, Can. Gaz. I, Vol.65, p.3456, PC 1407.

38. An account of this expedition conducted by George M. Douglas, his brother Lionel Douglas and the geologist August Sandberg is found in Douglas, George M., Lands Forlorn, A Story of an Expedition to Hearne's Coppermine (New York: G.P. Putnam's & Sons, 1914).

39. Douglas' appointment was for the same reasons as that of Egbert Owen. Owen, a Conservative appointee, replaced H. Milton Martin in 1931 as public administrator. The stated reason for the change was "the practice in the Government service to accept the statement of the sitting Government member, [in this case - a Conservative from Edmonton] that an employee was guilty of political partisanship.

Milton Martin was a Liberal. When the Bennett Government fell in 1935, Martin still "guilty of partisanship" was reappointed by the Liberals. Zaslow, Ph.D. thesis, p.657 and fn. 116 therein. Letter, Bowker to the author, 21 November 1977, "when the Liberals were in power the counsel were Liberals; when the Conservatives were in power they were Conservatives." So it was also for the Judges.

40. PC 282/33, 2 March 1933.

41. Can. Gaz. Part I, Vol.69, p.2449; PC 735, 30 March 1936.

42. Letter, T.A. Crerar, Minister of the Interior, to La Pointe, Minister of Justice, 18 March 1936, D of J, file #136636.

42a. Chapter 8, fn.14, RCMP Quarterly, October 1941, p.231.

43. Inspector Eames in the winter of 1931 issued the search warrant that sparked Johnson's flight. For details of the pursuit see RCMP Annual Report, Canada, Sess. Papers, 1932-33, #44, p.106-110.

44. Eames served from 1924-26 at Fort Norman and Fort Simpson. In 1930 he returned to the North as officer commanding the Western Arctic sub District, posted first to Herschel Island and then Aklavik.

45. Minutes, CNWT, 1932, PAC, M-811 to 815, p.268.

46. MacBrien differed from his predecessors Perry and Starnes who did not favor police Inspectors sitting as Stipendiary Magistrates. Their concern was that often police officers prosecuted and it was improper to have police officers in those cases sit as Magistrates. Commissioner Wood, successor to MacBrien, also took the view that trials should be heard by non-Police Magistrates. Gibson to Inspector La Pointe, PAC, RG 85, Vol.1433, 542-3-3.

47. 17 June 1932, PC 1407/32 Can. Gaz. I, Vol.75, p.3456.

48. 1 February 1932, PC 222/32 Can. Gaz. I, Vol.65, p.2328.

49. 29 April 1933, PC 793, Memorandum, D.C. McKeand, 27 November 1940, PAC, RG 85, Vol.604, 2511.

50. There is nothing in the Territorial Administration file explaining the reason for the appointment. PAC, RG 85, Vol.581, 504.

51. Cancelled 5 December 1941, forwarded to Department of Justice for cancellation in February 1941; PAC, RG 85, Vol.581, 504; memorandum in 1951, D of J, file #136636.

52. It is unclear who the second Magistrate was. Dubuc's appointment had been revoked in 1932, and Rivet's appointment was uncertain because of his circuit Judge appointment at Montreal in 1928. Douglas was the other Magistrate.

53. Memorandum, 4 January 1933, of D.L. McKeand to Mr. Howe, PAC, RG 85, Vol.177, 542-3-1.

54. NWT Act, RSC 1927, c.142, s.6(1).

55. Indian Act, RSC 1927, c.98, s.152.

56. NWT Act, RSC 1927, c.142, s.6(2).

57. Letter, MacBrien to secretary of the NWT Council, 7 September 1934, PAC, RG 85, Vol.1870, 540-1-1.

58. Criminal Code Amendment Act SC 1934, c.47, s.16 adding s.766A to the Criminal Code. This amendment, unique to the Yukon Territory, came into force 1 September 1934.

59. Supra, fn.46, 57.

60. Ibid.

61. Daly, memorandum on MacBrien's letter, fn.57.

62. Criminal Code Amendment Act SC 1936, c.29.

63. 30 March 1936 effective from 1 April 1936, PC 735/36, Can. Gaz. I, Vol.69, p.2449.

64. Alberta Natural Resources Act, SC 1930, c.3; ALberta Natural Resources Act, SC 1931, c.15.

65. Letter, Minister of Justice to James Douglas, 16 March 1936, D of J, file #136636.

66. Memorandum, 27 January 1936, D of J, file #136636.

67. Letter, Martin to R.A. Gibson, 20 February 1937, PAC, RG 85, Vol.177, 542-3-1.

68. Chapter 6(2).

69. Supra, fn.67.

70. Memorandum, 23 February 1937, of R.A. Gisbon, PAC, RG 85, Vol.177, 542-3-1.

71. Letter, Camsell to Department of Justice, March 1937, D of J, file #136636.

72. 23 April 1937, PC 912/37.

73. Chapter 3 (3), (4).

74. Night lettergram, McCaul to Deputy Minister of Justice, 26 July 1921, PAC, RG 85, Vol.569, 80. McCaul recommended Clerks of the court be stationed in Fort Smith with deputy Clerks at Simpson and Norman and that all jury trials, civil or criminal, be held at Fort Smith.

75. Letter, R.A. Gibson to Deputy Minister of Justice, 16 March 1926, D of J, file #488-1926.

76. Memorandum, 27 March 1926, and letter, Deputy Minister of Justice to R.A. Gibson, 29 March 1926, D of J, file #488-1926.

77. RCMP Annual Report, Canada, Sess. Papers, 1931, #28, p.33.

78. Minutes, CNWT, PAC M-111 to 815, p.296. The Minutes of 9 November 1932 set out Mr. Daly's conclusion:

> "There is no need for resident Stipendiary Magistrates. The present arrangements [summer circuits] were adequate . . . ".

79. Ibid. There was some basis for this view. The Justice of the Peace quarterly returns in 1933 reveal convictions for liquor offenses, petty theft (s.386 Crim. Code theft of $2.00, $3.00, $4.00), game infractions, and dog infractions under the Dog Ordinance. Most of the dispositions are fines, short sentences served at the RCMP guard rooms, confiscation of furs and warnings (the latter not really being a sentence at all). These cases were heard by a JP[2] including Dr. Urquhart at Aklavik, Inspector Eames at Aklavik, MacKay Meikle at Ft. Smith, and Inspector Martin at Ft. Simpson, all of whom with the exception of Eames later became Stipendiary Magistrates. PAC, RG 85, Vol.170, 540-4-1.

    Zaslow in his Ph.D. thesis observes at p.642-643 that the RCMP returns in the 1930's revealed a routine number of cases of vagrancy, drunken disorderly conduct, common assaults, damage to property or mistreatment of animals, thefts or sexual offenses. Zaslow continues "They leave the impression that in general the population either was quite law abiding or police made allowances for the behavior of Indians and Inuit."

80. Memorandum, Cumming to Hume, 16 January 1933, PAC, RG 85, Vol.177, 542-3-1.

81. Chapter 6(2).

82. Letter, Sup't Irvine to Commissioner of Police, 5 September 1935, PAC, RG 85, Vol.177, 542-3-1.

83. Letter, Meikle to Gibson, 2 October 1935, PAC, RG 85, Vol.177, 542-3-1.

84. Small Debts Ordinance, assented to 9 February 1937.

85. Hudson Bay Company supply ship.

86. Letter, Urquhart to J. Lorne Turner, 24 September 1935, PAC, RG 85, Vol.177, 542-3-1.

87. RCMP Annual Report, Canada, Sess. Papers, 1937, #28, p.38.

88. Letter, Minister of Interior to Minister of Justice, 22 October 1936, D of J, files #136636. The other Magistrate was Norquay at Edmonton.

89. 1 December 1936, PC 3042, Can. Gaz. I, Vol.70, p.1509.

89a. Meikle could move to Ottawa in 1939 because Gibben was at Yellowknife and Dr. Urquhart at Fort Smith. Urquhart had shown "considerable administrative experience and excellent judgment." letter, R.A. Gibson to McKay Meikle, 3 March 1939, PAC, RG 32, c.2, Vol.188, 683.

89b. Interestingly, he was also a part-time Police Magistrate for the Province of Alberta. Appointed in September 1937, he shared judicial duties with Magistrate Dempsey at Ft. Fitzgerald. His Alberta appointment was cancelled in 1948. O-in-C, 1326/48, 8 November 1948.

90. See Appendix A.

91. See Chapter 9.

92. 28 December 1951, PC 6978.

93. Recollections, Charles Perkins, GAA, p.5.

94. Recollections, Helen Perkins.

95. Supra fn.93, p.32.

96. Recollections, Fred Fraser. Meikle was not qualified in the sense of lacking the legal knowledge and the personality to make the hard decisions concerning peoples lives. Meikle did not relate easily to people.

97. 26 November 1937, PC 2918, Vol.71, p.1483.

98. D of J, file #136636.

99. Letter, Duncan to Deputy Minister of Justice, 31 August 1937, D of J, file #136636.

100. Letter, Gibson to Deputy Minister of Justice, 5 November 1937, D of J, file #136636.

101. Wire, Morrow to Gibson, 2 December 1937, D of J file #136636; PAC, RG 85, Vol.177, 542-3-1.

102. The Administration hoped to bring in a revised Judicature Ordinance shortly. This was not done until 1949. ONWT 1949, c.17. Nor were the Rules of Court changed until 1949.

103. Letter, R.A. Gibson to Deputy Minister of Justice, 2 December 1937, D of J, file #13636; PAC, RG 85, Vol.177, 542-3-1.

104. Table 3. The six year gap existed between 1932 (Dubuc's replacement by Douglas) and 1938 (Gibben's appointment).

105. Letter to Deputy Minister of Justice, 22 April 1936, PAC, RG 85, Vol.177, 452-3-1.

106. Minutes, CNWT, 21 March 1938, PAC, M-811 to 815, p.1299.

106a Daly in-house solicitor reminded R.A. Gibson that "it is only a matter of time before the Crown becomes involved in some action and assessed for damages much greater than the salary of a properly qualified Stipendiary Magistrate would be." memorandum of Daly, 21 March 1938, PAC, RG 85, Vol.9, 20-1.

107. Urquhart, McKeand and Martin, Table 3.

108. Though apparently not then acknowledged as such. In 1950 Inspector La Pente at Ft. Smith suggested he be appointed a Stipendiary Magistrate to try minor cases where the regular Stipendiary Magistrate was not available. R.A. Gibson replied referring to the "recent" policy that only qualified lawyers be appointed. "Recent" is defined by the appointment of Mr. Martin, a non-lawyer, in 1948. Martin was the last non-legally trained Magistrate. PAC, RG 85, Vol.1433, 542-3-3.

109. 4 August 1938, PC 1941, Can. Gaz. I, Vol.72, p.531. R.A. Gibson wrote to Meikle at Fort Smith to advise of the impending appointment of a qualified lawyer "who will work in your office and assist with the study and recording of legal documents" letter, R.A. Gibson to Meikle, 1 June, 1938, PAC, RG 85, Vol.9, 20-1.

110. Discussion with R. St. George Stubbs, retired Judge of the Family Court, Winnipeg, Manitoba. Crerar was a Liberal Cabinet Minister from Winnipeg.

111. Ibid. "He was a black letter lawyer of no particular imagination."

112. Surrendered up in early 1941 to be cancelled in 1942, D of J, file #136636.

113. 14 August 1941, Can. Gaz. I, Vol.75, p.616.

114. See Chapter 11, 5 July 1950, PC 3054, Can. Gaz. I, Vol.89, p.2488.

115. Chapter 9. R.A. Gibson had forseen this. In March 1938 he remarked to Daly: "a Stipendiary Magistrate with legal qualifications . . . could also be available for a certain amount of office work" memorandum, R.A. Gibson to Daly, 18 March 1938, PAC, RG 85, Vol.9, 20-1.

115a. See Chapter 11, fn.4a.

116. Letter, Worsell to the author, 18 January, 1977.

117. Chapter 6(2).

118. Recollection of Justice Dechene. St. Germain was a "notary" solicitor who did rural real estate conveyancing and dabbled in politics. In the 1930's he was elected as a U.F.A. member, crossed the floor of the Legislature to sit as a Liberal and at the next election in 1935 he was defeated. Thereafter his political career petered out.

119. Letter, St. Germain to R.A. Gibson, 9 December 1938, D of J file #136636.

120. Letter, Deputy Minister of Justice to R.A. Gibson, 29 December 1938, D of J, file #136636.

121. Supra fn.119.

122. Letter, Camsell to St. Germain, 22 May 1940, D of J, file #136636.

123. Letter, St. Germain to Camsell, 5 June 1940, D of J, file #136636.

124. Ibid.

125. SC, 1931, c.27, s.2(i) public moneys applies to "all revenue of the Dominion of Canada from [certain specified sources] and from any other source whatsoever."

126. Zaslow, op. cit., p.632.

127. The Prospector, Vol. 1, #8, Saturday, 8 August 1938, PAC, RG 85, Vol.177, 542-3-2. When Perkins arrived in Yellowknife in 1937 he made application to R.A. Gibson in Ottawa for and received Certificate #1 under the Legal Profession Ordinance to practise as a lawyer before the Courts of the Northwest Territories. There were, however, no Courts at Yellowknife.

128. Charles Perkins, resident lawyer, relied more on the paper than on his legal practice as a source of income. Helen Perkins to the writer, letter, 26 January 1977.

129. Supra fn.127. Charles Perkins confirms that the criminal scene was very quiet. Most criminal cases were "very very routine," though, the Coroner's Inquests, before Dr. Stanton, aroused a good deal of local interest. Several violent deaths from suicide, drowning, accidental shootings, and gas explosions occurred from 1938-41. Helen Perkins occasionally acted as the reporter. Charles Perkins Recollections, GAA, pp.10, 18; Helen Perkins' letter to the writer 26 January 1977.

Gibben comments in March 1939 "Strangely there is no serious crime yet at Yellowknife." Letters, Gibben to R.A. Gibson, March 16 & 17, 1939, PAC, RG 85, Vol.177, 542-3-2.

130. Supra, part (j) and post fn.135.

131. Letter, Camsell to Deputy Minister of Justice, 5 October 1938, D of J, file #136636.

132. 18 October 1938, PC 2593, Can. Gaz. I, Vol.72, p.1084.

133. Letter, Sup't Caulkin to R.A. Gibson, 1 April 1939, PAC, RC 85, Vol.177, 542-3-2.

134. Letters, Gibben to R.A. Gibson, March 16 & 17, 1939, PAC, RG 85, Vol.177, 542-3-2.

135. He moved so he "could earn his money better." In the words of Commissioner Camsell, uttered in the fall of 1938, if he doesn't move to Yellowknife "he'll be sitting around in the winter looking for trouble," since the legal work in Fort Smith is slacking off. Minutes, CNWT, 1938, PAC, M-811 to 815, p.1462, 1463.

136. Minutes, CNWT, 1939, PAC, M-811 to 815, p.1763. A sixth Magistrate, Reames, was retired and living in Vancouver. Supra fn.51.

137. Chapter 8.

138. 12 September 1930, PC 2090, Can. Gaz. I, Vol.65, p.868.

139. He presided over the Albert Johnson (the mad trapper of Rat River) Inquest held at Aklavik on 18 February 1932.

140. He resigned from the Territorial Administration effective 30 September 1943. His patent was delivered up and cancelled on 5 December 1944.

140a. Charles Perkins' Recollections, GAA; Helen Perkins' letter to the author, 26 January 1977.

141. Fraser Recollections.

142. Chapter 8, fn.34.; 30 May 1939, PC 1259, Can. Gaz. I, Vol.72, p.2892.

142a. See Chapter 2, fn.32.

143. Son of Oswald Finnie, and because of his father's position, he had access to McKeand.

144. "McKeand was a Boer War and Great War veteran who still loved a parade." Copland, Livingstone of the Arctic (Ottawa: Canadian Century Publishers, 1978) p.115.

After his retirement, asked by R.A. Gibson to comment on the general issue of a special legal status for the [Inuit] McKeand replied in a cheery rambling letter received 14 July 1947. Mr. Lock's analysis of that reply noted: "It is

evident from the Major's letter that he has no constructive recommendations to put forward at this time." Memorandum, Lock to Meikle, 16 July 1947, PAC, RG 85, Vol.1870, 540-1-1.

Because T.L. Cory forgot to ensure certain court files were packed, they had to be sent to McKeand after he had departed for the Eastern Arctic Patrol in 1943. Anxious to keep the record straight, McKeand on his return placed a detailed memorandum on file laying the blame on Cory and adding "as the files have now been returned, the matter is closed." 26 October 1943, memorandum to T.L. Cory, PAC, RG 85, Vol.1870, 540-1-2. This reveals a petty, overly sensitive nature.

He was "pompous." Recollections of Laco Hunt and Mr. Stevenson meeting with the writer, Ottawa, 1977.

John Bovey, now Provincial Archivist at Victoria, met McKeand in Victoria after McKeand's retirement in 1945. McKeand asserted that he was responsible for the disc system in the Eastern Arctic. (Each Inuit had a number, for example E-134. Even in the early 1970's, Inuit were referred to by their disc number in court informations.) It is highly unlikely that McKeand was solely responsible for this system, though he may have played some part in its being set up. Discussion in May 1986 between Bovey and the writer.

145. Memorandum, McKeand to R.A. Gibson, 5 June 1939, PAC, RG 85, Vol.177, 542-3-2.

146. 5 June 1939. The article was an affront to objective news reporting.

147. The only thing McKeand had in common with a Supreme Court of Canada Justice was that both were section 101, not section 96 appointments. British North America Act (Imper) 1867, c.3, now Constitution Act, 1867, ss. 96, 101.

148. Douglas, Reames, Meikle, Norquay, Morrow and Urquhart.

149. Letter, R.A. Gibson to Deputy Minister of Justice, 7 March 1939, D of J, file #140093.

150. Appendix A.

151. Every year from 1932 to 1945 he left in July to return in late September from the Eastern Arctic.

152. 28 December 1951, PC 978.

153. Appendix A - 1941. The trials were recreated for CBC radio in 1985 "The Scales of Justice" narrated by Edward L. Greenspan Q.C. The narrator drew an analogy to the recent Jonestown religious frenzy. The Department of Justice in 1941 used another analogy - The Salem witch trials in 1600.

154. Minutes, CNWT, 1941, PAC, M-811 to 815, p.2521.

155. D of J, file #143871.

156. Minutes, CNWT, 1941, PAC, M-811 to 815, p.2527. Plaxton was also an author: Plaxton (ed) Canadian Constitutional Decisions of the Judicial Committee of the Privy Council (1930-39) (Ottawa: King's Printer, 1939); and he assisted his brother in an income tax treatise: H.A.W. Plaxton, The Law Relating to Income Tax of the Dominion of Canada (Toronto: The Carswell Company Limited, 1939).

157. In the matter of a Reference as to whether the term "Indians" in 91(24) of the BNA Act includes Eskimo inhabitants in the Province of Quebec [1939] SCR 104.

158. Letter, Chief Justice Rose to Deputy Minister of Justice, 20 June 1941, D of J, file #143871.

159. PC 4930, Can. Gaz. I, Vol.75, p.184.

160. Plaxton was allowed to keep his commission as a souvenir, after it was cancelled. Letter, R.A. Gibson to Deputy Minister of Justice, 7 November 1941, PAC, RG 85, Vol.177, 542-3-2.

161. Chuck Perkins and Helen Perkins graduated from the University of Alberta in 1936. He articled with Wood Buchanan, in Edmonton. They came to Yellowknife in 1937. He maintained a loose connection with Wood Buchanan. Perkins found that legal business was minimal. He did some criminal work, almost no civil litigation and wrote personal letters for clients and did income tax returns.

    Both had a literary bent; she tended to the more erudite, writing at least two articles for the Alberta Law Quarterly; his writing was lighter, editorial and investigative in nature.

161a."You will find it difficult now to understand that there was very little money to be made out of practising law at that time, and we relied heavily on the paper for survival" letter, Helen Perkins to the writer, 26 January 1977.

162. Telegram (coded), R.A. Gibson to Gibben, 26 June 1941, PAC, RG 85, Vol.1870, 540-1-1-1.

163. Telegram (coded), Gibben to R.A. Gibson, 28 June 1941, PAC, RG 85, Vol.1870, 540-1-1-1.

164. Perkins' Recollections, GAA, p.36.

165. Letter, T.A. Crerar to LaPointe, 25 June 1941, PAC, RG 85, Vol.1870, 540-1-1-1.

166. 14 August 1941, PC 6280, Can. Gaz. I, Vol.75, p.616.

167. This suggested arrangement was similar to the position that Gibben had in the Yukon from 1941 to 1946.

168. Although no formal surrender was executed. The appointment was revoked on 29 August 1951, PC 4468.

169. Letter, Helen Perkins to author, 29 January 1977; R.A. Gibson in a letter to the Deputy Minister of Justice, 12 November 1941, described the court system: "We have little organization and that little is extemporized from medical officers, [Urquhart] mining engineers [Meikle] and other Departmental officials [McKeand] available. Most (sic) of these men have had no legal experience or training, and advice and instruction are a long way off." Gibson omits St. Germain.

170. Recollections, Wilbur Bowker.

171. Charles Perkins' Recollections.

172. Appendix A.

172a. Meikle was of the view that one was not immediately required since there were "very few offences . . . which have to be tried by a Stipendiary Magistrate" letter, Meikle to R.A. Gibson, 27 October 1943, PAC, RG 32, Vol.187, Meikle.

173. Letter, Meikle to Cumming, 21 March 1944, PAC, RG 85, Vol.177, 542-3-2.

174. Memorandum, R.A. Gibson, 17 March 1944, PAC, RG 85, Vol.177, 542-3-2.

175. Letter, MacKinnon to St. Laurent, 6 April 1944, PAC, RG 85, Vol.972, 14138; D of J file #136636.

176. 3 May 1944, PC 41/3275; after the war, Darling and his replacement A.H. Gibson were expected "in addition" to their Stipendiary Magistrate duties to act as District Agent when Mr. Meikle was not at Fort Smith. (Memorandum, R.A. Gibson, 17 March 1944, PAC, RG 85, Vol.177, 542-3-2. Darling had advised: "I accept appointment to also handle administrative duties as District Agent during the absence of Mr. Meikle" PAC, RG 85, Vol.972, 14138.)

177. Letter, Meikle to Gibson, 26 June 1944, PAC, RG 85, Vol.1433, 542-3-3.

178. R. v. Beaulieu, committal 22 June 1944 by A.J. Camsell at Fort Resolution. A.H. Gibson took the trial. (Appendix A -1944.)

179. R.A. Gibson repeated this point: "It is a serious case, it should be tried by a Stipendiary Magistrate who is a lawyer." Letter, R.A. Gibson to Deputy Minister of Justice, 13 July 1943, D of J, file #136636.

180. Letter, Minister of Interior to Minister of Justice, 6 July 1944, D of J, file #136636. Incidentally, no relation to R.A. Gibson.

181. PC 31/6000 Can. Gaz. I, Vol.78, p.3780.

182. "You have made a very wise appointment. He has plenty of experience and will not be influenced by misplaced enthusiasm. Letter, Drummond (Edmonton Board of Trade) to R.A. Gibson, 17 July 1944, PAC, RG 85, Vol.1433, 542-3-3. He was very considerate; he was of a sympathetic nature and had a feeling for people. Recollections, Honourable Neil Primrose.

183. He had a wealth of training and experience in police work. Charles Perkins Recollections, GAA, p.16.

184. Whitehorse Star, 31 January 1957.

185. He was not "too tactful at times." Recollections, Honourable Neil Primrose, former Justice of the Court of Queen's Bench of Alberta. This may have contributed to his difficulties with the Aberhart Government in 1937.

    There are two versions concerning the demotion. One involved his failure to acquit an MLA fom Edmonton of defamatory libel (Edmonton Journal, 26 August 1938, The Prospector, 27 August 1938). Gibson had received a 'quiet word' from the Attorney General suggesting an acquittal.

    The other version is that the MLA was convicted of drunk driving charges. Recollections, Fred Fraser.

186. Perkins' Recollections, GAA, p.16.

187. When he heard that three accused had consumed a bottle of rum in the previous five hours, Gibson dryly commented: "Pretty hearty, but not an impossible ration" News of the North, 21 October 1949.

188. Gibson was a prodigious reader and had a remarkable memory. Whitehorse Star, 31 January 1957; Recollections of Honourable John Parker, Territorial Court Judge of the Yukon after Gibben in 1958, and Crown Prosecutor in Yellowknife in the 1940's and early 1950's.

189. 30 October 1944, PC 8347, Can. Gaz. I, Vol.78, 4772.

190. Memorandum, Meikle to Cumming, 8 December 1944, PAC, RG 85, Vol.177, 542-3-2.

191. Fraser Recollections.

192. Fraser Recollections, appointed Stipendiary Magistrate, 30 October 1944, PC 8347, Can. Gaz. I, Vol.78, p.4772.

193. Peter Parker Recollections.

194. Jack Worsell, to use a time worn cliche, commented: "you either loved him or hated him."

195. The paper started up in Yellowknife in 1940. Its editor, John Murray McMeekan, was an avowed hater of lawyers. He placed an advertisement in his paper (The Blade, 8 September 1947)

John Murray McMeekan
Notary Public
See Me Before You go to a Lawyer.

The local lawyers were amused and advised clients that "after you have seen McMeekan, you have to see us."

196. The Blade, 16 January 1948. The News of the North in an editorial on 17 June 1955 commenting on Fraser's retirement from government service got it right referring to "little Napoleon" in a complimentary manner.

197. Fraser remained as a Stipendiary Magistrate, to act in Cunningham's absence. Either could go to Eldorodo on Great Bear Lake "when it was necessary to have a trial" memorandum of R.A. Gibson, 19 March 1946. PAC, RG 85, Vol.994, 15868-1.

198. Cunningham in the 1930's was the President of the Saskatchewan Liberal Association and a protege of Jimmy Gardner. He was Gardner's sometime campaign manager. (Perkins Recollections.) Gardener from 1935 to 1957 was the Federal Minister of Agriculture. "Notably partisan . . . he believed frankly in patronage" The Canadian Encyclopedia, Vol.II, p.719.

199. Letter, Minister of Mines and Resources to Minister of Justice, 10 April 1946, D of J, file #136636.

200. 26 April 1946, PC 1659, Can. Gaz. I, Vol.80, p.3056.

201. Perkins' Recollections. Perkins downplays the rivalry referring to a "brief clash of personalities." Others refer to a rivalry fueled by the ambitions of two powerful personalities.

202. He acted for Ms. Buler in the Estevan Riot of 1933. His fee was paid by The Canadian Labour Defence League.

203. John Parker called him Frank "Junior Grade" [J.G.] Cunningham as he did not atttain the rank of full Colonel.

204. Perhaps he acted too quickly! Two Japanese prisoners brought before him were shot without trial so as to set an example for the populace.

205. Letter, Cunningham to R.A. Gibson, 9 September 1947, PAC, RG 85, Vol.994, 15868-1. Using the Ontario Court structure as a model, Cunningham calculated (A) criminal: 201 summary cases and 39 indictable cases; (B) civil: 34 Supreme Court cases, 9 county court cases, 119 petty civil cases were heard by him in his first year as a Stipendiary Magistrate.

    By early the next year, Cunningham had taken 3 jury trials in Yellowknife, 1 jury trial in Fort Smith, and 20 non-jury trials in Yellowknife. Letter, Cunningham to R.A. Gibson, 20 January 1948, D of J, file #153647.

206. Letter, Cunningham to R.A. Gibson, 6 August 1947, Court Records, Yellowknife Court House, SM 643. Ross v. Lieberman, unreported.

207. That retirement in 1957 was premature. Cunningham was only 54.

208. If his argument were rejected Cunningham would retort "I didn't think you would go for it, but I had to give it a try." John Parker, Recollections.

209. 28 December 1951.

210. Appendix A.

211. Memorandum, Meikle to Cumming, 8 December 1944, PAC, RG 85, Vol.177, 542-3-2.

212. Hayward was a hybrid doctor. He was the District Agent, Mining Recorder, Indian Agent, Crown Timber Agent, Sheriff, Justice of the Peace with the powers of two, and Small Debts Official in addition to being the Government medical officer. PAC, RG 85, Vol.985, file 15163.

213. Letter, Deputy Minister of Mines and Resources to Deputy Minister of Justice, 10 August 1948, D of J, file #136636. He was certainly not to attend only to judicial matters. He would be a hybrid Stipendiary: "He is paid as an administrative officer, grade 5, which position requires him to perform the duties of a Stipendiary Magistrate if he is so appointed by Order in Council" memorandum, A.J. Miall, 17 August 1948, D of J, file #136636.

    In the summer of 1948 there were only two active Stipendiary Magistrates, A.H. Gibson at Yellowknife, and Fraser at Fort Smith. Meikle no longer came to the Mackenzie in the summers, McKeand had left the government service in 1945, and Cunningham had recently moved to Ottawa.

214. 31 August 1948, PC 3836, Can. Gaz. I, Vol.83, p.939.

215. Letter, Bouchard to Commissioner of NWT, 19 January 1955, PAC, RG 85, Vol.1433, 542-3-3 to take effect not later than 28 January 1955.

216. Memorandum, Fraser, 28 January 1955, PAC, RG 85, Vol.1433, 542-3-3; Appendix A.

217. 14 December 1955, PC 55/1836.

218. He took the appointment from John Parker, a Conservative. Bouchard's liberal party connections went back to 1937 when he was appointed a Commissioner under Part I of the Inquiries Act to investigate charges of political partisanship against Quebec government employees. Can. Gaz. I, Vol.71, p.310.

    John Parker described Bouchard as "an experienced Liberal organizer." Letter, Parker to Minister of Justice, 5 May 1955. The fact that Jean Lesage was the Minister of Northern Affairs and Resources in 1955 did not hurt Bouchard's prospects.

219. He was like a fish out of water when at Yellowknife in 1955-56. Recollections, Frank Smith.

220. Blank pages enclosed by hard covers with impressive legal titles.

220. Frank McCall, Recollections. McCall was a civil servant at Aklavik in the late 1940's and early 1950's.

221. Chapter 3.

222. Letter, Deputy Minister of Mines and Resources to Minister of Justice, 28 October 1948, D of J, file #136636.

223. On 9 December 1948, Can. Gaz. I, Vol.83, p.170. The temporary nature of the appointment is odd. There is an intriguing reference to Martin's earlier temporary appointment. "We should consider making the appointment permanent." Memorandum, Daly to Jackson, 5 November 1937, RG 85, Vol.177, 542-3-1. No evidence of an appointment in 1937 can be located.

224. Comprising the police operations for the Northwest Territories.

225. He formally retired to pension on 1 March 1949, 28 RCMP Quarterly, p.160.

226. See Table 4. "As is usual he would be required to act as general Agent for the Administration in addition to his duties as a Stipendiary Magistrate" letter, Minister of Mines and Resources to Minister of Justice, 28 October 1948, D of J, file #136636.

227. Presumably he counted his money too, for he is rumoured to have died leaving an estate of approximately $100,000 in cash.

228. Fred Fraser Recollections.

229. 29 November 1949, Can. Gaz. I, Vol.83, p.4706.

230. A graduate of the College of Law at the University of Saskatchewan he joined the Saskatchewan bar in 1929. He practised law in Regina in the late 1930's and again after the War.

231. He also had run unsuccessfully as a Liberal candidate. This has occasionally been an important factor in a judicial appointment.

232. Letter, Minister of Mines and Resources to Minister of Justice, 31 October 1949, D of J, file #136636.

233. Recollections, Frank McCall.

234. 5 November 1952, PC 4445, Can. Gaz. I, Vol.86, p.3213.

235. Appendix A - 1950.

236. 7 January 1953, PC 1953/8.

237. Letter, Justice Sissons to Minister of Justice, 12 December 1955, D of J, file #166266.

238. Hal Parke's Recollections.

239. This is an improper sentence. Phinney could have remanded Lafferty to be sentenced allowing Lafferty to remain at large for one week.

240. 11 October 1946, Can. Gaz. I, Vol.80, p.6857.

241. 26 October 1950, PC 5088, Can. Gaz. I, Vol.84, p.4111.

242. Not since Senkler in 1910-1912, had a Stipendiary Magistrate served full time in his judicial capacity.

243. Chapter 11.

244. Phinney sent a pithy telegram to the Department of Justice "Is over."

245. Appendix A - 1924.

246. He was a vain, but careful Judge.

247. 29 December 1953, PC 53/2001, Can. Gaz. I, Vol.88, p.187.

248. Phinney had taken the Preliminary Inquiry, Gibben the first trial.

249. Appendix A - 1954; The Alberta Supreme Court, Appellate Division had quashed the first trial based on misdirectionsof the trial Judge Stipendiary Magistrate Gibben. R. v. Cardinal, 10 W.W.R. 403 at 405 (S.C.A.A.D.).

250. News of the North, 15 January 1954.

251. These aspects are explored in Chapter 9(2)(b) and Chapter 11(1).

252. Foster, The Struggle for the Supreme Court: Law and Politics in British Columbia 1871-1885 in Knafla, ed., Law and Justice in a New Land (Calgary: Carswell, 1986) p.170.

253. Morrison and Coates, Northern Visions: Recent Developments in the Writing of Northern Canadian History, unpublished, p.10.

254. Ibid.

Chapter 6

Selected Aspects of the The Court's Jurisdiction

Introduction

To deal with certain selected aspects of the Stipendiary Magistrate's jurisdiction is the object of this Chapter. A pot pourri of four issues will be examined.

(1) Criminal jurisdiction exercised outside the Territories

A lack of perceived "quality"[1] jurors in the Mackenzie delta for the several criminal trials to be heard in the summer of 1923 posed a problem.[2] The most appropriate place to hold these trials was at Herschel Island, where a small group of whites resided, a legacy of the whaling industry that had flourished in the 1890's and the early twentieth century. A police detachment had existed there since the early part of the twentieth century. The police supervised the whaling community who wintered at Herschel Island. Herschel Island, however, was part of the Yukon Territory. The solution: an amendment to the Northwest Territories Act.[3]

The amendment created an extra-territorial jurisdiction in a Stipendiary Magistrate to hear criminal trials outside the Territories if the criminal offense itself had been committed within the Territories. The amendment solved the immediate problem. The several pending criminal trials could proceed at Herschel Island that summer.

The amendment also proved useful in subsequent cases allowing A.H. Gibson in 1949 to complete a criminal trial,[4] begun in Yellowknife, in Edmonton as a convenience to witnesses who resided there. In the previous year this same Stipendiary Magistrate had heard Preliminary Inquiry evidence in Toronto before adjourning to Yellowknife[5] to complete the Inquiry and commit the accused to trial.

The amendment, however, was restricted to Stipendiary Magistrates. It did not give a Justice of the Peace with the powers of two the jurisdiction to conduct a Preliminary Inquiry outside the Territories.

Yet a number of such preliminaries were undertaken by Justices of the Peace. Inspector Wood on 30 October 1923 conducted a Preliminary Inquiry at Herschel Island. The resulting committal of Ikalupiak would appear on a textual analysis of the 1923 amendment to have been void for lack of jurisdiction.[6] Counsel for Ikalupiak at the trial before

Stipendiary Magistrate Dubuc on 7 July 1924 at Aklavik raised the general issue of jurisdiction but not the jurisdiction issue pertaining to the committal for trial.[7] Nor was Ikalupiak's committal an isolated case. The committals of several Inuit accused in 1920's were all open to the same objection.[8] Their trials, arguably, were all void!

The amendment contained a further restriction, limiting trials to those criminal offenses committed within the Northwest Territories. The Doak murder[9] trial was open to objection on this ground. Alikomiak had murdered Corporal Doak at the police barracks at Herschel Island. Had T.L. Cory, the defence counsel been alive to this issue, he might usefully have exploited it to the accused's advantage.[10]

(2) Civil Jurisdiction exercisable outside the Territories?

The issue of the extra-territorial exercise of the Stipendiary Magistrate's civil jurisdiction arose in the context of estate matters. Convenience and economy dictated in 1927 that H. Milton Martin's appointment as public administrator for the Northwest Territories[11] be rescinded. Martin of Edmonton thereafter was reappointed administrator only for the Mackenzie District[12] while W.M. Cory, an employee of the Department of the Interior at Ottawa, was appointed administrator for the Franklin District.

Both Martin and Cory, as non-residents of the Territories, could obtain Orders pertaining to the estates they administered only from provincial Superior Court Justices acting under the concurrent original civil jurisdiction sections of the Northwest Territories Act.[13] Thus Martin, on 7 November 1925 in Edmonton, obtained an Order from His Honour Judge Dubuc, in his capacity as District Court Judge of Northern Alberta and not in his capacity as Stipendiary Magistrate of the Northwest Territories.[14]

Until the mid 1930's no suggestion to amend the Northwest Territories Act to permit non-resident Stipendiary Magistrates to exercise civil jurisdiction outside the Terrritories was forthcoming. Probably this was because Dubuc held a dual appointment until 1932.

In 1934, the Edmonton Bar Association expressed doubts concerning the Edmonton Stipendiary Magistrates' rights to exercise civil jurisdiction outside the Northwest Territories.[15] This doubt was echoed by Stipendiary Magistrate Douglas: "my jurisdiction in civil cases outside the Territories has been raised"[16] and re-echoed two years later by Clare Darling, a practising lawyer from Edmonton: ". . . the Stipendiary Magistrate [Alex Norquay] at Edmonton, is of the opinion that he can only exercise [his] jurisdiction when physically present in the Northwest Territories."[17]

The matter was discussed by the Territorial Council. The Council rejected the Edmonton Bar Association's suggestion to amend the Northwest Territories Act to permit the Stipendiary Magistrate to exercise civil jurisdiction beyond the Northwest Territories.[17a] In doing so, however, the Council did not grapple with the legal issues raised by the Bar Association's suggestion. The Council, rather, saw the suggested amendment as a convenience to Edmonton merchants doing business with territorial residents. The Council appreciated that the Stipendiary Magistrate resided in Edmonton and it took notice of the practice of Alberta Justices to encourage concurrent civil jurisdiction matters to be heard by Douglas and later Norquay and St. Germain. The Council rejected the Bar's suggestion as being inconvenient to Territorial residents, while at the same time choosing to initiate a debate[18] on whether Stipendiary Magistrates should be resident in the Territories. Had that debate resulted in the cancellation of non-resident appointments, later legal uncertainties could have been avoided.

The Council, regrettably, was ill served by its legal advisors. Its "in-house" legal advisor[19] neither advocated the appointment of only resident Stipendiary Magistrates, nor did he apparently do the appropriate research to conclude that the requested amendment offended the principle that a territorial limitation is imposed on any legislation enacted by the

Territorial Council.[20] The Department of Justice in 1935 did prepare a draft Bill to amend the Act[21] but this did not proceed. R.A. Gibson, advised in May 1935, that the Territorial Council was of the view that there was not "any necessity for legislation"[21a] of this kind.

The issue raised by the Bar Association lingered. Chief Justice Harvey, of the Supreme Court of Alberta, Appellate Division, raised it again in 1938.[22] His concern was that under sections 35 to 37 of the Northwest Territories Act only the Justices of the Supreme Court of Alberta could exercise concurrent civil jurisdiction. In Alberta, Surrogate Court matters were regularly attended to by District Court Judges. The practice had developed in Territorial estate matters of having the District Court clerk check the papers and have a Supreme Court Judge issue the appropriate fiat. The solution proposed by Harvey, since he did not want Superior Court Judges burdened with estate work,[23] was an amendment to permit Stipendiaries to exercise civil jurisdiction outside the Territories. Then a Stipendiary Magistrate "located in Edmonton with sufficient legal qualification . . . might solve the difficulty for the time being."[24] This would mean that the Edmonton based Stipendiary could exclusively look after estate matters.

The suggested amendment did not proceed.[25] Instead the Territorial Administation proceeded on two fronts. In August 1938, Omer St. Germain of Morinville, a lawyer, was appointed. The major part of his judicial business concerned estates in the Mackenzie District.[26] St. Germain proceeded to issue Orders and process in several estates.[27] Secondly in 1940, section 35 of the Northwest Territories Act was amended to permit provincial Courts having surrogate powers to exercise surrogate jurisdiction throughout the Territories.[28]

The jurisdictional doubt again rose in 1945 when the Department of Justice was asked to give a formal opinion. Mr. E.A. Driedger opined that the Stipendiary Magistrates could exercise civil jurisdiction only within the Territories, while Mr. Miall, also of Justice, with some doubt, agreed with Mr. Driedger.[29]

Once advised of that opinion, H.M. Martin raised the spectre of the invalidity[30] of all Orders and process issued by St. Germain. Several solutions were offered to correct matters including special validating legislation.[31] Henceforth, Mr. Martin was advised either to use a Stipendiary Magistrate residing in the Territories or else to utilize Alberta Surrogate Court Judges under the concurrent jurisdiction sections of the

Northwest Territories Act. Mr. Martin opted for the former; and Stipendiary Magistrate A.H. Gibson in 1945, at Fort Smith, was asked to grant letters of administration in the Vachon estate.[32]

H.M. Martin, sensibly, enquired what purpose was there in continuing to have a Stipendiary Magistrate outside the Northwest Territories? Ottawa reacted, and revoked Mr. St. Germain's appointment.[33] H.M. Martin, more querously, asked: How did it come about that Mr. St. Germain was appointed for this special purpose to deal with civil matters?[34] To that R.A. Gibson had no credible response. Gibson had confirmed, in 1936, in correspondence to Clare Darling "that the Stipendiary Magistrate ha[d] no power to hear and determine civil cases while outside of the Northwest Territories."[35] He had concurred then in Norquay's refusal to hear a divorce action and a partnership dispute outside the Territories.[36]

Surprisingly, not all the appointments of Stipendiary Magistrates not resident in the Northwest Territories were revoked. McKeand heard circuit matters in August in the Keewatin and Franklin Districts. So too did Bouchard in the early 1950's. No evidence suggests that either exercised their civil jurisdiction outside the Eastern Arctic.

(3) Concurrent Civil and Criminal Jurisdiction

This section will explore two facets of the jurisdictional overlap between provincial Superior Courts and the territorial

Stipendiary Magistrate's concurrent jurisdiction. Concurrent criminal jurisdiction was found in the Criminal Code. Concurrent civil jurisdiction was contained in the Northwest Territories Act. Present-day lawyers will recognize the concept of concurrent jurisdiction when reference is had to the jurisdiction provisions in the Federal Court Act.[37] These provisions give to the Federal Court, in some cases, an overlapping jurisdiction to that vested in Provincial Superior Courts. The overlap has been described by one Federal Court Justice as "mystifying, frightening and lamentable."[38] Such language in some measure describes its utilization in reference to the Northwest Territories.

Concurrent jurisdiction reposed in Provincial Superior Courts the right to decide issues affecting persons and property in the Northwest Territories. When exercising this jurisdiction, an Alberta court, for example, applied not the law of the forum, being Alberta law, but rather the law of the Northwest Territories. It did this under Alberta choice-of-law rules by which the Alberta court incorporated[39] substantive Northwest Territories law into domestic Alberta law for the purpose of resolving disputes emanating from the Northwest Territories. To do otherwise and apply sustantive Alberta law to a Northwest Territories dispute would, arguably,[40] give an unconstitutional extra-territorial application to Alberta law. The commentators are divided on this latter point, and the resolution of the differing viewpoints need not be attempted for our purposes.

(a) Concurrent original Civil Jurisdiction

(i) statute provisions

In 1905, additional and parallel to the Stipendiary Magistrate's jurisdiction there was a concurrent original civil jurisdiction "in any Judge of any Court of any Province"[41] to determine any civil proceeding arising within the Territories. This broad enunciation of jurisdiction was restricted in 1908 to Superior Courts of the provinces of Ontario and Western Canada with respect to persons and property in that portion of the Northwest Territories lying west of the 80th Meridian of west longitude.[42] The restrictive amendment deleted most of Baffin Island from the operation of this parallel jurisdiction.

In 1940, a clear east-west dichotomy was created. The Superior Courts of Ontario, Quebec, Nova Scotia, New Brunswick and Prince Edward Island exercised a concurrent jurisdiction over those civil matters occurring in the Territories east of the 89th Meridian of west longitude, while the Superior Courts of Manitoba, Saskatchewan, Alberta and British Columbia exercised this same jurisdiction to the west of the 89th Meridian of west longitude.[43] In the debate dealing with this amendment the Minister of Mines and Resources, T.A. Crerar, touched on the rationale for concurrent jurisdiction: in the absence of this concurrent jurisdiction "the federal administration will probably

be under the necessity of setting up its own courts in the Northwest Territories."[44] It was because of the perceived lack of a sophisticated court structure in the Northwest Territories that the Superior Courts of the provinces were looked to as a backup to administer civil justice.

The east-west division of concurrent civil jurisdiction remained in place until the legislative restructuring of the courts that occurred in 1952.[45] By that time it was felt that adequate facilities[46] for the trial of actions were available in the Mackenzie District. Concurrent civil jurisdiction was accordingly limited to the Superior Courts of the Provinces of Saskatchewan, Manitoba and those of Eastern Canada with respect to matters in the Territories east of the 102nd Meridian of west longitude.[47]

(ii) Why concurrent jurisdiction

A graphic example illustrates the potential usefulness, and hardships, of the exercise of concurrent original civil jurisdiction. The law firm of Friedman, Lieberman and Newson, of Edmonton, in 1937, acted for a client wishing to enforce, by court proceedings, a Miner's Lien filed at the Mining Recorder's office in the Northwest Territories. The Miner's Lien Ordinance[48] called for the commencement of proceedings and the filing of a Certificate within 90 days of the filing of the

Lien. Those court proceedings were to be instituted by the Stipendiary Magistrate of the Northwest Territories. The proceedings were to be styled "In the Court of the Stipendiary Magistrate of the Northwest Territories." Believing that the Stipendiary was a "persona designata"[49] under the Ordinance, the client was advised to fly North, to Ft. Smith, with the court documents, there to seek out the Stipendiary Magistrate and to have him issue the court papers. M.I. Lieberman Q.C. takes up the narrative: "on arriving at Fort Smith, [our client] found that the Stipendiary, Mr. Meikle, had left for an inspection trip of the Territories in another capacity. Fortunately [Meikle] was travelling by steamer and was only a few hours out of Fort Smith and accordingly our client was able to overtake him by plane and so have the [Originating] Summons issued and the Certificate signed."[50]

In his suggestion to his client to go North, Lieberman, arguably, was right but for the wrong reason. It is submitted that the need to appear before the Stipendiary Magistrate arose because of the personal jurisdiction[50a] the Magistrate possessed when discharging his judicial functions, not because he was a "persona designata."

Regrettably for Lieberman's client, the concurrent original civil jurisdiction provisions of the Northwest Territories Act providing for the initiation of proceedings in Edmonton could

not be resorted to. Lieberman could not focus on the Superior Court jurisdiction that the Stipendiary Magistrate exercised and call on the Alberta court of equivalent superior jurisdiction to initiate the court process. The extraordinary efforts of his client could not be avoided. A relatively quick, familiar, and convenient procedure for initiation of the proceedings could not be substituted.

(iii) hardships and abuses

Until just before the Second War, there were neither resident lawyers nor resident Stipendiaries in the Territories. Debt claims were thus filed in the Provinces, and the debtor defendants were served, under an Order ex-juris, in the Territories. Even when a resident lawyer and resident Stipendiaries were available in the Territories, creditors continued to utilize the provincial Superior Courts, principally those of Alberta. Lane v. DeMelt is illustrative.

Vera Lane, proprietor of the Southern Fried Chicken eatery in Yellowknife, brought action against DeMelt and others, in debt, in the Alberta Supreme Court, Trial Division at Edmonton. Charles Perkins of Yellowknife, engaged by DeMelt, filed a defence through Edmonton legal agents. All parties resided in Yellowknife. The expense and delay to bring witnesses to trial proving considerable[51] Justice Ives of the Alberta Court on 19

June 1939 ordered the case transferred to Yellowknife for trial before a Stipendiary Magistrate. This had the effect of pleasing the defendants but not the plaintiff's lawyers.

Dyde and Becker of Edmonton voiced their displeasure to R.A. Gibson, Deputy Commissioner: "the $225.00 fee for Alberta lawyers going to Yellowknife for the trial is just as prohibitive as witness expenses. We ask for a nominal fee for occasional appearances."[52] The alleviation of one hardship had created another. Becker reasoned that such a consideration was only appropriate given the concurrent civil jurisdiction provisions allowing territorial matters to be heard in Alberta. The Territorial Council thought there was force to this argument. It amended the Legal Profession Ordinance in August 1939, to permit temporary appearances[53] on payment of a nominal fee.

The Lane case further illustrates how plaintiffs could misuse the concurrent civil jurisdiction provisions. It may be speculated that Lane, a resident of Yellowknife, commenced her civil debt action in Alberta to annoy and inconvenience the defendants, also residents of Yellowknife. Realizing that to secure legal agents in Edmonton might prove prohibitively costly for the defendants, she may have hoped to obtain judgments by default. If so, she was frustrated, but only because the Alberta court directed that the trial proceed in Yellowknife.

(b) Concurrent original Criminal Jurisdiction

(i) historical use

The Uluksuk and Sinnisiak trials,[54] held outside the Territories, were the last of several trials held in a jurisdiction adjacent[54a] to the Northwest Territories. The Department of Justice, in arranging these trials in Alberta, invoked the concurrent original criminal jurisdiction residing in the Alberta Supreme Court, one of the Superior Courts of the provinces empowered under section 586[55] of the Criminal Code to hear this case. The origins of this concept of concurrent original criminal jurisdiction, termed artificial venue[56] by C.C. McCaul, prominent prosecuting counsel in the Uluksuk and Sinnisiak trials, can be traced back several centuries.

Concurrent jurisdiction resided from 1873 to 1880 in the Manitoba Court of Queen's Bench[57] for certain serious offenses committed in the Territories. Prior to that, it resided, after 1803,[58] in the courts of Upper and Lower Canada for matters arising in the Indian Territory[59] and, arguably, after 1821[60] for matters coming as well from Rupert's Land.

Under the 1803 legislation Charles de Reinhard [61] was tried in May 1818 at Quebec City for a murder committed at the Dalles near modern day Kenora. In like manner, Baptiste Cadien[62] was tried in 1838 at Quebec City for murders committed at a Hare Indian hunting camp near Great Bear Lake.

Concurrent jurisdiction had resided since 1541 in the Courts of England for matters of treason and murder committed within or without the King's Dominions.[63] Under a special Commission of Oyer and Terminer issued by the King-in-Council, de Reinhard's trial could have been heard in London. Cadien's trial, though, could not, as the 1541 legislation, repealed in 1828, was not replaced until 1861.[64]

Concurrent jurisdiction further resided under the Hudson's Bay Company Charter granted in 1670, in the Courts of England for matters arising in that part of Rupert's Land where no Governor and Council sat.[65] Pursuant to this 1670 Charter provision, the de Reinhard and Oiseaux du Plan cases could have been heard in London.[66] The earlier Nadeau and Le Compte case by contrast[67] could not since those offences were committed in the Indian Territory.

In Sinnisiak and Uluksuk, the concurrent original criminal jurisdiction residing in the Alberta Court was invoked, as in earlier cases, to meet a vacuum in judicial authority. In 1917

the Stipendiary Magistrate's Court was not functioning in the Northwest Territories,[68] just as in 1838 there had been no Court in the Mackenzie District to try Cadien, or in 1818, in what is now the extreme western part of Ontario, to try de Reinhard.

(ii) evils and hardships

The exercise of this concurrent criminal jurisdiction had its "evils and hardships." These were articulated as early as 1802. The Grand jury presentment at Montreal on 10 September 1802, detailed them:

> The very heavy expense incident to the conveyance of offenders from the Territory . . . with the necessary witnesses on both sides, and the cost of prosecution and defence, [might lead] . . . to the guilty escaping punishment, and the innocent being sacrificed from the distance of time and place of trial; the death or absences of witnesses . . . ; a prosecutor coming from and at a remote day, when the accused may be destitute of pecuniary means, and the exculpatory evidence may either be dead, removed, or otherwise beyond his reach, who at all events (however innocent he may finally be found) will have undergone a long and painful confinement, far removed from his Family and Connexions, and perhaps ruinous to every prospect he had in life."[69]

By 1920, the Territorial Administration and the Department of Justice had come to appreciate their significance.[70] Because of these concerns and for other reasons[70a] criminal trials henceforth were held in the Northwest Territories.

(4) Divorce jurisdiction

The issue of jurisdiction in divorce[70b] vexed the Stipendiary Magistrates as it had Judges of the courts in Alberta,[71] Saskatchewan,[72] Manitoba,[73] British Columbia[74] and the Yukon.[75] All these Courts had previously decided that the provisions of the English Divorce and Matrimonial Causes Act, 1857[76] were in force in their respective jurisdictions. Dubuc in 1925 did likewise.

W.W. Cory, Commissioner of the Northwest Territories, related Stipendiary Magistrate Dubuc's views in correspondence to the Deputy Minister of Justice: the Stipendiary Magistrate's Court of the Northwest Territories has the power to grant divorces.[77] In coming to this conclusion, Dubuc relied upon the Privy Council reasoning in the Board, Walker, and Watts decisions. That reasoning included an analysis of the jurisdiction section of the 1886 legislation[78] granting to the Supreme Court of the Northwest Territories all the powers and authorities incident to a superior court in England as of 15 July 1870. Dubuc then merely looked to his own jurisdiction[79] derived from that exercised by a Judge of the Supreme Court of the Northwest Territories, to confirm that this jurisdiction remained analogous to that of a Superior Court in England. Board had decided that there was a presumption of divorce jurisdiction in such a Superior Court, unless expressly stated to the contrary.[80]

Dubuc's view was shared by Mr. Daly,[81] in-house solicitor, and Mr. Edwards,[82] Deputy Minister of Justice. Yet doubts remained.

In 1939 J.E. Gibben, in correspondence with the Deputy Commissioner, R.A. Gibson, assumed he had the power to adjudicate in divorce proceedings but wished confirmation.[83] His query provoked a rethinking of the issue within the Territorial Administration with the result that the Territorial Council was informed on 2 April 1942 that the Stipendiary Magistrate had not the authority to hear divorces but only to effect judicial separations.[84]

Coincident to this advice to the Council, the Deputy Minister of Justice advised Urquhart in lengthy correspondence on the procedure in an action for judicial separation.[85] The matter of divorce was not then touched on. Little more than two months later, at the request of the Commissioner of the Northwest Territories, the Deputy Minister of Justice followed up on his 7 April 1942 letter to Urquhart, asserting that "the law of divorce as it existed in England on July 15th, 1870, is in force in the Territories . . . and Stipendiary Magistrates appointed for the Territories have jurisdiction to hear divorce cases."[86] The Territorial Administration had been overruled.

Fred Fraser had occasion to test the Court's divorce jurisdiction in two cases in the latter part of 1945. In the Fiske case,[87] the action foundered on the issue of domicile.

The plaintiff[88] wife could not establish that her American husband was domiciled in the Territories. Under Canadian law the husband's domicile was the sole test of the Court's jurisdiction. To get a divorce,Mrs. Fiske was left to "advertise her husband's infidelity extensively, in accordance with parliamentary rules, and apply to the Parliament of Canada for a private bill granting relief."[89]

Fraser, the following month, did grant a divorce. In Hosenberg,[90] domicile being in order and grounds being proven, he granted a decree nisi on 18 December 1945, made absolute three months later.

Yet doubts still lingered among the small resident bar as to the Stipendiary Magistrate's divorce jurisdiction. They were dispelled by two events: the Supreme Court of Alberta Appellate Division's decision in Ross v. Lieberman,[91] to the effect that the Stipendiary Magistrate had all the authority which a Judge of any of the Superior Courts of England had as of 15 July 1870;[92] and a spring conference[93] in Yellowknife in 1948 attended by John and Peter Parker, Ray Mahaffey, and Bruce Smith KC,[94] that concluded that the Stipendiaries could exercise divorce jurisdiction. Thereafter, divorces that because of these doubts had previously been commenced in Edmonton, were filed in Yellowknife.

No discussion of this issue would be complete without a brief reference to the Vogell case.[95] Domicile again played a destructive role in the adjudicative process. Justice Sissons, on pleadings amended on the court's own motion after trial, granted the wife a divorce in the Northwest Territories despite the husband's domicile in Alberta. Sissons J. refused to follow the Privy Council dictate that "each Province of Canada is a separate country or law district for the purpose of divorce jurisdiction,"[96] preferring to exercise jurisdiction where "the husband is domiciled anywhere in Canada and either party, [as here the wife was], is bona fide resident in the Northwest Territories."[97]

The Northwest Territories Court of Appeal refused to sanction the Canadian domicile approach, treating the Northwest Territories "as if [it] were a province,"[98] and affirming the Privy Council "separate province" approach. The husband not being domiciled in the Northwest Territories, and the wife not being within the exception provided by the Divorce Jurisdiction Act,[99] the Decree Nisi was rescinded for lack of jurisdiction. Modern legal practitioners will see in Justice Sissons' approach the foreshadowing of the domicile and residency rules incorporated into the Divorce Act[100] of 1968.

1. Debates, H of C, 13 February 1923, p.270, 271; Edmonton Journal, 7 June 1923. Quality jurors were those who could speak english.

2. Appendix "A", 1923 trials at Herschel Island.

3. NWT Amendment Act, SC 1923, c.21, s.1;
S.59A(1)
> Every Stipendiary shall, with respect to any criminal offense committed . . . within the Northwest Territories, have and may exercise, not only within the Northwest Territories, but also in any part of Canada . . . .

RSC 1927, c.142, s.63; RSC 1952, c.331, s.26. Before the amendment the Stipendiary Magistrate could exercise criminal jurisdiction only within the Territories.

4. R. v. Jacobs, unreported, #33 criminal cases NWT, Court Records, Yellowknife Court House. Jacobs was convicted on 1 April 1949 of break, enter and theft and fined $300.00.

5. R. v. Killoran, unreported, Court Records, Yellowknife Court House and News of the North, 16 July 1948 and 30 July 1948. The Preliminary Inquiry testimony was heard in Toronto on 6-8 July 1948. No order to take Commission evidence was needed. The Inquiry was completed in Yellowknife before A.H. Gibson on 23 July and 26 July . Killoran was acquitted.

6. The King v. Ikalupiak, unreported. The trial transcript comes from the private papers of the Dubuc family. Also see Appendix "A" - 1924. Had MacBride, the defence counsel raised the issue of the jurisdiction of the JP[2] to conduct the Preliminary Inquiry outside the Territories the Court would have been in a quandry. Enormous expense and time had been expended to get the court party from Edmonton to Herschel Island. If the court accepted the lack of jurisdiction argument, the trial could not have proceeded without another properly constituted preliminary. Perhaps that could have been done right away. If not, there would have been a significant delay putting this trial over to the following year. McBride might have tried to plea bargain a reduction to manslaughter. This is not an idle suggestion as the accused convicted of murder, was sentenced to death. The accused was hanged later that year.

7. Appendix B.

8. Appendix A - 1923, 1924, 1926, 1929.

9. Appendix A - 1923.

10. Supra, fn.6.

11. Commissioner's Order in Council (O in C), 14 June 1922.

12. Commissioner's O-in-C, 28 December 1927. It was more convenient to have Constable Maisonneuve's estate (he died at Dundas Harbour) administered through Ottawa. Cory was appointed administrator for the District of Keewatin by Commissioner's O-in-C, 29 December 1936. Martin's jurisdiction was expanded by Commissioner's O-in-C, 14 April 1938, to include Bank's and Victoria Islands and further expanded by Commissioner O-in-C, 14 March 1947, to include all islands in the Franklin District west of the 95th degree west longitude.

13. NWT Act, RSC 1927, c.142, ss. 34-37; see also concurrent jurisdiction in this Chapter, part (3).

14. Le Mouel estate #70, Martin's files, Yellowknife Court House. The style of the order is "In the Supreme Court of Alberta, for the Northwest Territories." Louis Madore, solicitor of Edmonton, acted for Martin.

    "To confuse the issue the preamble of the Order refers to Dubuc, Stipendiary Magistrate for the Northwest Territories, in Edmonton. He had no jurisdiction to act in this capacity outside the Territories in civil matters. (see fn.20, infra). More accurately the Order should have been styled 'In the Surrogate Court of Alberta.'"

15. Letter, from E.W.S. Kane, secretary of Edmonton Bar Association to Guthrie, Minister of Justice, 28 April 1934, PAC, RG 85, Vol.177, 542-3-1; PAC, RG 13, A2, Vol.401, 544-1934.

16. Letter, Douglas to Deputy Minister of Justice, 1 May 1934, PAC, RG 85, Vol.177, 542-3-1.

17. Letter, Darling to R.A. Gibson, 15 September 1936, PAC, RG 85, Vol.177, 542-3-1.

17a. Minutes, CNWT, PAC, M-811 to 815, p.654.

18. Explored in Chapter 5(3)(f).

19. Mr. Daly neither suggested resident Stipendiary Magistrates would solve the problem nor did he look at the implications of an amendment to the NWT Act. The impression one gains from his memoranda on this issue and others is of an overly cautious, conservative legal advisor who frequently restated the obvious, adding little imaginative or creative thought. He seemed to sense the result desired by R.A. Gibson and moved in that direction.

20. Hogg, Constitutional Law of Canada, 2nd. 3d. (Toronto: Carswell Company of Canada, 1985) p.267-268, 276. The rationale is explained by Hogg. "A province, whose government is elected by and responsible to only those people within its territory, should not have extensive powers outside its territory - where other provincial governments have a better claim to govern." Why, to use this reasoning, by analogy, should a Stipendiary Magistrate in Edmonton have the power to apply Territorial Ordinances outside the Territories? To fully rely on Hogg's reasoning, the Northwest Territories must be equated to a province. The Interpretation Act does this: RSC 1906, c.1, s.34(22); RSC 1927, c.1, s.37(22).

The Driedger and Miall analysis (see fn.29 infra) is a textual one, and assumes no amendment to the NWT Act. That analysis, in format, parallels Hogg's analysis of the limited territorial power of Provincial Legislatives - Hogg and other constitutional writers refer to the limiting words in section 92 of the Constitution Act, 1867 - "in the province."

There is another point of view that stems from the judicial pronouncements that Territorial Ordinances are laws of Canada for purposes of the Bill of Rights, RSC 1970, Appendix III,

S.5(2)

> "The expression of "law of Canada . . . means an Act of the Parliament of Canada . . ., any order, rule or regulation thereunder, and any law . . . that is subject to be repealed, abolished or altered by the Parliament of Canada.

S.5(3)

> "The Provisions of Part I shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada."

R. v. Drybones (1970) 9 D.L.R. (3d) 433 at 480 per Ritchie J:

> "The Ordinance in question (Liquor Ordinance) is a law of Canada within the meaning of s.5(2) of the Bill of Rights (see Northwest Territories Act, RSC 1952, c.331, s.15)";

and A.G. of Canada and Rees v. Canard [1975] 3 W.W.R. 1 at 16 per Ritchie J:

> "This is not the situation as in Drybones "where there was to be inequality before the law because of the interaction of two federal statutes (Liquor Ordinance and Indian Act)";

and at 31 per Beetz J. who rationalizes Drybones in a legislative context to be the use of federal powers such as the power to enact penal laws for the promotion of temperance and the prevention of drunkenness (Liquor

Ordinance) which would not stand on the same footing vis-a-vis the Canadian Bill of Rights as the power to make laws for Indians and lands reserved for the Indians. These pronouncements, arguably, give Territorial Ordinances the same territorial scope as federal legislation. Hogg's comment at p.148, fn.67, (paraphrasing): The Territorial Council is a delegate of Parliament seems to be the rationale for the pronouncements of Justices Ritchie and Beetz.

The delegate rationale is open to challenge. Jordan, The Constitution of the Northwest Territories (University of Saskatchewan: unpublished LL.M. thesis, 1978) at p.50, concludes that the Territorial Council exercises a plenary, not a delegated, jurisdiction. He cites high judicial authority in support of this position, commencing at page 34 of the thesis, referring to the Queen v. Burah (1878) 3 App Cas 889 at 904:

> "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation as large, and of the same nature, as those of Parliament itself."

Jordan's analysis calls into question the underpining of the Drybones and Lavell pronouncements and Hogg's delegation postulate.

The idea that civil legislation can have no extra-territorial effect, that the legislative power of the Territorial Council is territorially limited must be contrasted to the different situation in a criminal context. The Stipendiary Magistrate can sit outside the Territories. See Part (1) of this Chapter.

21. The draft proposed subsection 3 be added to section 34, RSC, c.142.
    (3) Every Stipendiary Magistrate so appointed may exercise in civil matters with respect to persons and property in the Territories the said powers, authorities, and functions in Canada as well without as within the Territories.
    PAC, RG 13, A2, Vol.401, 544-1934.

21a. Letter, R.A. Gibson to Deputy Minister of Justice, 11 May 1935, PAC, RG 13, A2, Vol.401, 544-1934. There is no indication that the Department of Justice in 1935 grappled with the extra-territorial question.

22. Letter, Harvey to Deputy Minister of Justice, 21 February 1938, PAC, RG 85, Vol.177, 542-3-2.

23. By legislation in Alberta the Superior Court has seen surrogate work to be the responsibility of the District Court.

24. There was no requirement that the Stipendiary Magistrate have legal training. The Chief Justice was being polite in his use of might - he meant would.

25. The Territorial Council's opposition continued, supra fn.21a.

26. Letter, H.M. Martin to Gibson, 3 March 1945, PAC, RG 85, Vol.177, 542-3-2. St. Germain is "to co-operate as much as possible with our Public Administrator" (Minutes, CNWT, Report of R.A. Gibson, tabled, PAC, M-811 to 815, p.1389). The Minister of Justice, La Pointe, was largely responsible for this appointment. Letter, Martin to R.A. Gibson, PAC, RG 85, Vol. 177, 542-3-2.

27. Le Febvre estate, letters of administration granted 20 February 1940, #46 estate files, Yellowknife Court House; Wolkie estate, a statement of claim styled "In the Supreme Court of the Northwest Territories" showing H.M. Martin administrator as plaintiff against Peffer defendant was issued, in his capacity as Clerk of the Supreme Court of the Northwest Territories, by Omer St. Germain, at Edmonton, Stipendiary Magistate. As Clerk, St. Germain signed and entered his own orders. Neil Maclean acted for Martin, Mr. Becker for the defendant Peffer, #117 civil actions, Yellowknife Court House. Albert Johnson estate Order granted by St. Germain 28 February 1939. North, The Mad Trapper of Rat River, at p.135.

28. NWT Amendment Act, SC 1940, c.36, s.1, repealing and substituting a new s.35.

29. Mr. Driedger's opinion in essence relies on:

(1) R. v. Coyne [1917] 3 W.W.R. 622 at 623 per Beck JA: "It requires no authority for the proposition that a magistrate may not sit and adjudicate upon any case in a a locality beyond the limits of the territory within which he has jurisdiction."
(2) Sections 35 and 36 of the Northwest Territories Act, RSC 1927, c.142 impliedly exclude Stipendiary Magistrates from exercising jurisdiction outside the Territories.
(3) Section 62 of the Northwest Territories Act, RSC 1927, c.142 only refers to criminal jurisdiction.
(4) Sections 14, 15, 18, and 30 of the Northwest Territories Act, RSC 1886, c.50 limit jurisdiction to "within the Territories" - It will be recalled that the Stipendiary Magistrate's jurisdiction was that of the a Northwest Territories Supreme Court Justice existing as of 1 September 1905, SC 1905, c.27, s.8.

Mr. Miall, on balance, agreed with Mr. Driedger but also observed:

(1) Section 83 of RSC 1927, c.142 provides no words of limitation: "may hold court . . . at such times and places as he thinks proper."
(2) The lack of express limitation in section 34 suggests that Parliament intended to repeal the limitation set out in the earlier statutes (see #4 under Driedger above).

Mr. Miall's points are of doubtful persuasion. Both opinions, that of Driedger dated 1 February 1945, and that of Miall dated 19 February 1945, are found in D of J, file #148493.

30. Letters, Martin to R.A. Gibson, 3 & 5 March 1945, PAC, RG 85, Vol.177, 542-3-2.

31. Letter, Martin to R.A. Gibson, 3 March 1945, PAC, RG 85, Vol.177, 542-3-2; T.L. Cory in-house legal advisor was of the view that the affected estates should be left in abeyance until consideration can be given, at an opportune time, to ratification by Parliament. Memorandum, 9 May 1945. Cory spoke to Mr. Miall who advised to "let those [estates] of the past lie quietly," memorandum, 19 May 1945, PAC, RG 85, Vol.895, 9567.

32. #1 estates, Court Records, Yellowknife Court House.

33. 2 August 1945, PC 5372.

34. Letter, Martin to Gibson, 5 March 1945, PAC, RG 85, Vol.177, 542-3-2.

35. Letter, 23 September 1936, R.A. Gibson to Darling, PAC, RG 85, Vol.177, 542-3-1.

36. R.A. Gibson's handwritten note appears on Darling's letter of 15 September 1936. Indeed, as early as 1922 Finnie suggested that Justices of the Peace with the powers of two be given petty civil jurisdiction since it was "highly unlikely that Stipendiary Magistrates outside the Territories could exercise civil jurisdiction" memorandum, Finnie to K.R. Daly, 19 January 1922, PAC, RG 85, Vol.177, 542-3-1.

37. Federal Court Act, RSC 1970 (2nd. Supp.) c.10, s.22(1):
(1) The Trial Division has concurrent original jurisdiction . . . in all cases [pertaining to navigation and shipping].
(2) Without limiting the generality of subsection (1) it is hereby declared for greater certainty that the Trial Division has jurisdiction with respect to . . . the following (a) through (s) as enumerated.
Note the absence of exclusive original jurisdiction as utilized in s.17(2) of the Federal Court Act.
sec. 23:
The Trial Division has concurrent original jurisdiction [with respect to bills of exchange and promissory notes, aeronautics and interprovincial workings and undertakings].

38. Pacific Western Airlines v. Queen (1979) 105 D.L.R. (3d) 44, 57 (F.C.T.D.) per Collier J. referred to by Hogg, (2d. ed.) Constitutional Law of Canada (Toronto: Carswell Company Limited, 1985) p.148.

39. Hogg, op. cit., 281. Also see NWT Act, SC 1908, c.49, s.3, RSC 1927, c.142, s.36, the "procedure and practice of the [concurrent] court in the exercise of its ordinary jurisdiction shall apply to . . . the exercise of the jurisdiction so conferred." Note the absence of reference to the substantive law of the concurrent court.

The Magrum case [1944] 3 W.W.R. 486 (A.S.C.A.D.) illustrates the point. The trial of this Northwest Territories matter was heard in Alberta before Chief Justice Ives. On appeal Chief Justice Harvey at p.493 in part observed: "this [case] involves a consideration of the law of the Northwest Territories where all the acts in question took place. He goes on to set out portions of the pleadings filed in the Alberta action. The Statement of Defence refers to the Rules of the Supreme Court of the Northwest Territories and certain federal legislation.

40. Hogg, op. cit., p.281, refers to the different viewpoints of Castel and Edinger.

41. NWT Act SC 1905, c.27, s.9. "The Governor in Council may vest in any judge of any court of any province the power of hearing and determining, either in the first instance or on apppeal, any civil or criminal proceeding arising within the Territories and, in case of appeal, may prescribe the procedure in respect thereof," re-enacted NWT Act, RSC 1906, c.62, s.32. The criminal concurrent jurisdiction was removed in 1908, NWT Act, SC 1908, c.49, s.2.

42. NWT Act, SC 1908, c.49, s.2; RSC 1927, c.142, s.35 "The superior courts of the Provinces of Ontario, Manitoba, Saskatchewan, Alberta and British Columbia respectively shall have and exercise in civil matters the like jurisdiction and powers with respect to persons and property . . . as they have with respect to persons and property within the territorial limits of their ordinary jurisdiction . . .".

43. NWT Amendment Act SC 1940, c.36, s.1. repealing and substituting a new s.35.

44. Debates, H of C, 28 May 1940, p.277. T.A. Crerar is wrong in suggesting that there were no Courts. When the Stipendiary Magistrate acted the Stipendiary Magistrate's Court functioned.

45. See Chapter 11.

46. Minutes, CNWT, May 1951, PAC, M-811 to 815, p.3917.

47. Debates, H of C, 18 June 1952, p.3408; NWT Act RSC 1952, c.331, s.29(1). The remaining concurrent jurisdiction provisions were repealed in 1970, RSC 1970, c.48 (1st Supplement) s.23 repealing RSC 1970, c.N-22, s.34 to 36.

48. Miner's Lien Ordinance, assented to 23 March 1937, s.10.

49. To act in a non judicial, that is an administrative, capacity. This term is still vexing courts today viz A.G. Canada v. Morrow J [1973] 6 W.W.R. 150 at 153 (F.C.T.D.) per Collier J. The term persona designata is an unfortunate one. The late Chief Justice Laskin has observed: "it is high time to relieve the Courts of the interpretative exercises that have been common in this country when they think that a decision has to be made whether a statutory jurisdiction has been vested in a Judge qua Judge or as persona designata." Herman v. Deputy A.G. of Canada [1979] 1 S.C.R. 729 at 731. Laskin, CJ in the same case approved the observation of D.M. Gordon: "the whole persona designata conception could be scrapped without the slighest inconvenience or the least distortion of legal principles."

50. Letter, M.I. Lieberman Q.C., 1 November 1937, D of J, file #137324.

50a. See Chapter 2, fn.3 and 4.

51. Airplane travel from Yellowknife to Edmonton took at least three days one way.

52. Letter, Dyde and Becker to R.A. Gibson, 26 June 1939, Minutes, CNWT, 1939, PAC, M-811 to 815, p.1901.

53. Legal Profession Ordinance assented to 21 March 1938, as amended by Legal Profession Ordinance assented to 24 August 1939 adding subsection (3) to s.2 authorizing the issuance of a Permit to Practise Temporarily.

54. Appendix C - 1917.

54a. Sometimes the connection had to be stretched. See Appendix C. England was not an immediately adjacent jurisdiction nor was Lower Canada with respect to the Indian Territory (the major portion of which became the Mackenzie District).

55. SC 1907, c.8, s.2 repealing and substituting section 586:
S.586.
(1) All offenses committed in any part of Canada not in a province duly constituted as such and not in the Yukon Territory may be inquired of and tried within any district, county or place in any province so constituted or in the Yukon Territory as may be the most convenient.
(2) . . .
(3) . . .
S.587.
The several courts of criminal jurisdiction in the provinces aforesaid, and in the Yukon Territory, incuding justices, shall have the same powers, jurisdiction and authority in case of such offenses as they respectively have with reference to offenses within their ordinary jurisdiction as provincial or territorial courts.

There is a jurisdiction argument that counsel in the Uluksuk and Sinnisiak trials could have raised, had they chose to, to prevent the Alberta Court from hearing these cases. Section 12 of the 1821 legislation (post fn.60) and section 1 of the Northwest Territories of America Act (Imper.) 1859 c.26 were not repealed until 1950. Statute Law Revision Act (UK) 1950, c.6.

Until 1931 (Statute of Westminster (Imper.) 1931, c.4, s.2(1)) when there was any conflict between the mandatory sections of the 1821 and 1859 legislation (specifying cases from the Indian Territory be heard in the courts of Upper Canada or British Columbia) and section 586 of the Criminal Code, the Imperial legislation (because of the operation of the Colonial Laws Validity Act (Imp.) 1865, c.63, s.2) prevailed.

Colonial Laws Validity Act (1865)
s.2 Any colonial law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any Order or Regulation made under authority of such Act of Parliament, or having in the Colony the Force and Effect of Such Act, shall be read Subject to such Act, Order, or Regulation, and Shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

The result: Only the appropriate courts of Ontario and British Columbia had jurisdiction to try these cases.

The other side of the argument is that section 91(27) of the Constitution Act 1867, Imperial legislation subsequent in time to that of 1821 and 1859, impliedly repealed the mandatory sections of the 1821 and 1859 legislation.

Constitution Act, 1867
S.91 The exclusive legislative authority of the Parliament extends to:
The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

Chief Justice Harvey would not have been amused, it is submited, if he had had to relinquish jurisdiction over these significant trials.

Apparently no jurisdiction argument as set out above was raised before Harvey CJ.

56. McCaul, Precursors of the Bench and Bar, (1925) 3 C.B.R. 25 at 40.

57. NWT Act, SC 1873, c.35, s.5; NWT Act, SC 1875, c.49, s.66; removed by NWT Act, SC 1880, c.25, s.77.

58. Courts of Justice, Canada Act (Imper.) 1803 43 Geo. 3, c.138, s.1 also referred to as the Canada Jurisdiction Act repealed Statute Law Revision Act 1872. The Company sought legal advice and was advised by Sir Samuel Romilly and other counsel in a joint opinion rendered in 1805 that the 1803 legislation did not apply to Rupert's Land. (Harvey, The Early Administration of Justice in the North West (1934-35) 1 A.L.Q. 1 at 3.

For background concerning the enactment of the 1803 legislation see Morton, The Canada Jurisdiction Act (1803) and the Northwest, in Transactions of the Royal Society of Canada, Section II, 1938, Vol.32, p.121. Its form comes in part from An Act for Punishing Mutiny and Desertion in America (Imper.) 1775 15 Geo. 3, c.15, s.29 specifying that felonies committed by his Majesty's marine forces in places where there were no courts may be tried in the Province next adjoining where a court structure existed. Prior to 1803, no authority vested in either Governor of the Canadas to issue a special commission in like form to that which could be issued by the King under the 1541 legislation. Report of the Archives, Canada, Sess. Papers, 1893, #7A, Note E, Courts of Justice for the Indian Territory, 136 at 141 per the Attorney General. The case that brought all to a head occurred in the winter of 1801 when one Lamothe killed King, a rival fur trader, at a fort on the North Saskatchewan River. Appendix C - 1801.

59. See Map M-1 (shaded green), now essentially the Mackenzie District. The "Indian Territory" terminology comes from the Courts of Justice, Canada Act 1803.

60. British North America Act (Imp.) 1821 1 & 2 Geo. 4, c.66, s. 5, 6, 14 (partially repealed, Statute Law Revision Acts of 1874 and 1890, fully repealed Statute Law Revision Act 1950).

Section 5 declared the Act of 1803 to extend to Rupert's Land. The problem was that an ambiguity between section 5 and 6 existed. Section 6 did not refer to Rupert's Land. The Hudson's Bay Company took the position that because it had set up its own court structure the 1821 Act did not apply to Rupert's Land.

Section 14 preserved the Hudson's Bay Company Charter rights. Under the Charter the Company had drafted in 1815 an Ordinance for the more Effectual Administration of Justice in the Colony of Rupert's Land (HBCA, call #1815-1) and Instructions Relating to the Administration of Justice in the Colony of Rupert's Land (HBA, call #1815-2).

Messrs. Scarlett and Holroyd, barristers, in May 1815, were of the opinion that it seemed highly proper if not necessary, that the Company should bring into force the proposed Judicature Ordinance (HBCA A/39/3 folio 22a to 35). The Ordinance seems not to have been utilized. Rather the Company published a Code of Penal Laws in September 1815 for the Southern Department (the Mackenzie Basin was the Northern Department) Oliver (ed.), The Canadian Northwest, Its Early Development and Legislative Records (Ottawa: King's Printer, 1915) Vol.2, p.1285. The Company also passed Resolutions in May 1822, at the General Court of the Company, Oliver, Vol.1, p.219, establishing a minimal court structure.

There was a very real problem as to the exact boundaries of Rupert's Land. The drainage basin of Hudson Bay is vague in the extreme (see Map M-1 [shaded pink]). This problem has proven vexing even to modern Courts viz R. v. Sikyea (1964) 46 W.W.R. 65 at 67 (A.S.C.A.D.) per Johnson JA, appeal dismissed (1964) 49 W.W.R. 306 (S.C.C.).

61. Appendix C - 1818. Simpson, Report of the Trial of Charles de Reinhard (Montreal: James Lane, 1819) passim. The Territorial jurisdiction issue is dealt with in the preface and in Chief Justice Sewell's judgment on the motion for arrest of judgment and a new trial, commencing at page 280. The issue was the location of the Dalles, on the River Winnipic, whether it was west or east of the western boundary of Upper Canada. The Court found Dalles not to be within Upper Canada. The Court assumed the Dalles was in the Indian Territory. Yet the Dalles was in Rupert's Land since it was located in the Hudson Bay drainage basin. This was belatedly realized: de Reinhard was subsequently pardonned (Regina Leader 11 May 1925).

62. Morton, supra, p.136; H.B.C.A. B/200/6/8 folio 8; D/5/4 p.194, 237.

Cadien was a metis attached to the Ft. Norman Hudson Bay Post. Fearing Indian retaliation the Hudson Bay Company sent Cadien "outside" for trial. On legal advice of eminent counsel in England and law officers of the Crown in Canada it was determined to forward Cadien (with La Graisse and Jourdain) to Canada for trial. H.B.C.A. D/4/23 p.84, letter, Simpson to MacPherson, dated 30 June 1837; and A/39/7 p.37 ff.

The Company held a hearing, akin to a Preliminary Inquiry in the summer of 1937, at the conclusion of which it was determined to send Cadien to Lower Canada for trial. The hearing was held under the general judicature provisions of the Hudson's Bay Charter.

63. An Act to Proceed by Commission of Oyer and Terminer Against Persons Who Commit Treason and Murder (Imper.) (1541) 33 Hen. 8, c.23, s.1; Morton, supra, at 124.

64. The 1541 legislation was repealed by the Offenses Against the Person Act (Imper.) 1828 9 Geo.4, c.31, s.1 effective 1 July 1828, as it pertained to other than the East Indies. Its provisions were replaced and extended by The Offenses Against the Person Act (Imper.) 1861, 24 and 25 Vict., c.100, s.9 by which any British subject charged with murder or manslaughter in any part of the world could be tried in England. Tarring, Law Relating to the Colonies 4th Ed. (London: Stevens and Haynes, 1913) 38 where the author describes the trial of Governor Wall, in 1802 at the Old Bailey, initiated under a special Commission under the 1541 legislation. Convicted of the murder of a soldier by excessive flogging while Governor at Goree, an island off the coast of Africa, Wall was executed!

65. The Royal Charter, 1670. Oliver, Vol.1, p.135 ff.
"and in case any crime . . . shall be committed in any of the Company's plantations . . . where judicature cannot be executed there for want of a Governor and Council, then . . . the party, together with offense [may be transmitted] to such other plantation . . . where there shall be a Governor and Council, where justice may be executed, or into this Kingdom of England, as shall be thought most convenient . . . ".

66. Appendix C - 1804, 1817.

67. Nadeau and Le Compte were acquitted at Quebec in 1788 of the murder of John Ross, the proprietor of a fort on the Athabaska River, Morton p. 124; Appendix C - 1788.

68. Chapter 3, fn.49.

69. Report of the Archives, Canada, Sess. Papers, 1893, #7A, Note E, Courts of Justice for the Indian Country, 136 at 140.

70. Chapter 8, (1)(b).

70a. Ibid.

70b. Although Parliament had constitutional jurisdiction over divorce [Constitution Act 1867, S.91(26)] it had never exercised it except in private Bills. The Provinces and two Territories were left to fall back on the English law as of their respective reception dates.

71. Board v. Board [1919] A.C. 956; [1919] 2 W.W.R. 940 (P.C.) on appeal from [1918] 2 W.W.R. 633 (A.S.C.A.D.).

72. Fletcher v. Fletcher [1920] 1 W.W.R. 5 (Sask. C.A.) reversing [1918] 3 W.W.R. 283.

73. Walker v. Walker [1919] A.C. 947; [1919] 2 W.W.R. 935 (P.C.) on apppeal from [1918] 2 W.W.R. 1 (Man. C.A.).

74. Watts v. Watts [1908] A.C. 573 (P.C.) on appeal from (1907) 13 B.C.R. 281 (B.C.S.C.).

75. Thornback v. Thornback [1923] 4 D.L.R. 810 (Y.T.C.).

76. The Divorce and Matrimonial Causes Act (Imper.), 1857, c.85.

77. Letter, Cory to Deputy Minister of Justice, 15 January 1925, D of J, file #140328.

78. Board, W.W.R. (P.C.) at 942; NWT Amendment Act 1886, SC, c.25, s.14; NWT Act 1886, RSC, c.50, s.48.

79. NWT Act, RSC 1906, c.62, s.32(2). Every Stipendiary Magistrate shall have, and may exercise, the powers, authorities and functions which were vested in a Judge of the . . . Supreme Court by the Northwest Territories Act on 31 August 1905.

80. Board, W.W.R. (P.C.) at 946.

81. Memorandum of Mr. Daly, 2 October 1924 "The Territorial Court, if one exists, has power to hear and decide divorce cases just as the courts of Manitoba, Alberta, Saskatchewan and the Yukon have." One existed, it was the Stipendiary Magistrate's Court.

82. Letter, Deputy Minister of Justice to Cory, 25 January 1925 ". . . the Stipendiary Magistrates have jurisdiction to hear [divorce] cases." D of J, file #140328.

83. Letter, Gibben to R.A. Gibson, 17 April 1939, D of J, file #140328.

84. Minutes, CNWT, 1942, PAC, M-811 to 815, p.2781; also see Perkins, Law Practise in the Territories (1942) A.L.Q. 201 at 207. Writing in 1942, Helen Perkins related that "the legal advisor to the Department of Mines and Resources has ruled that [divorce] jurisdiction does not exist [in the Stipendiary Magistrate]."

85. Letter, Deputy Minister of Justice to Urquhart, 7 April 1942, Minutes, CNWT, PAC M-811 to 815, p.2776.

86. Letter, Deputy Minister of Justice to Urquhart, 25 June 1942, Minutes, CNWT, PAC, M-811 to 815, p.2839, 2844 concerning the Whitford divorce.

87. Fiske v. Fiske, Court House, Yellowknife, #3 civil NWT, 1 November 1945.

88. The action was brought by statement of claim and not petition. This arguably was fatal. See Fletcher v. Fletcher [1920] 1 W.W.R. 6 at 7, 9 per Taylor J. (Sask. K.B.); also see The Divorce and Matrimonial Causes Act 1857, supra, fn.76, s.27 "It shall be lawful . . . to present a Petition to the court . . . ".

89. Fletcher v. Fletcher [1918] 3 W.W.R. 283 at 284 per Taylor J. (Sask. K.B.).

90. Hosenberg v. Hosenberg, Court House Yellowknife, #6 civil NWT.

91. [1947] 1 W.W.R. 1070 at 1073 per Harvey CJ for the Court.

92. NWT Act RSC 1906, c.62, s.12 (reception date for English law); NWT Act RSC 1927, c.142, s.14.

    One of the concerns in Board had been the absence of any reference to the "Court for Divorce and Matrimonial Causes" in the enumeration of Courts in the 1886 legislation. Supra fn.76. The Privy Council neatly disposed of that contention: "If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed that alone is sufficient to give jurisdiction to the King's Courts of Justice" [1919] 2 W.W.R. 941 at 945 per Viscount Haldane. In the Ross case, supra fn.91, Chief Justice Harvey refers to a Judge of any of the Superior Courts which seems to be an implied acceptance of the Privy Council's approach.

93. Discussion with Ray Mahaffey, lawyer, resident in Yellowknife in 1948.

94. The only non-resident, later Chief Justice of the Northwest Territories Court of Appeal constituted in 1960.

95. Voghell v. Voghell and Pratt (1959) 30 W.W.R. 289 (N.W.T.T.C.).

96. Ibid., at 304.

97. Ibid., at 309.

98. Voghell v. Voghell and Pratt (1960) 33 W.W.R. 673 at 683 (N.W.T.C.A.) per Macdonald JA for a five man court on the domicile issue; see also Morrow, Mr. Justice John Howard Sissons, (1967) 5 A.L.R. 254 at 259.

99. RSC 1952, c.84, s.2 where the wife has been deserted she may sue in the province where she is domiciled.

100. S.C. 1968, c.24, s.s. 5, 6.

Chapter 7

Procedure

Introduction

This chapter explains certain procedures of the Stipendiary Magistrate's Court. Those dealing with civil and criminal appeals will be examined first followed by a discussion of the Court's civil process.

(1) Appeals

(a) Civil Appeals

(i) to a Provincial Court of Appeal

From 1905 to 1908 a right of civil appeal from a decision of the Stipendiary Magistrate to the Provincial Courts of Appeal[1] was extant. Then without comment, in either the House of Commons or the Senate, this right was removed.[2] Not until 1948[3] was it restored.

Between 1908 and 1948 a right of civil appeal to two forums remained: the Supreme Court of Canada as of right and the Judicial Committee of the Privy Council by leave. A further intriguing possibility was an appeal to three Stipendiaries sitting en banc as a Court of Appeal. Each will now be examined.

(ii) as of Right to the Supreme Court of Canada

Chief Justice Harvey confirmed this right of civil appeal when speaking for the Appellate Division of the Supreme Court of Alberta in Ross v. Lieberman.[4] Bruce Smith K.C.[5] had argued otherwise, asserting that despite the Interpretation Act provision stipulating that the Northwest Territories was a province, it was doubtful whether the Stipendiary Magistrate's Court was the highest Court of final resort established in any province.[6] Properly, it is submitted, the Alberta court rejected Smith's submission. The Court held that it had no jurisdiction to entertain the appeal.

In the period under review there is no evidence that any Stipendiary Magistrate's judgment in a civil case was appealed to the Supreme Court of Canada.[7] No doubt cost considerations played a part in this, though ignorance of this right of appeal may have played a greater part.

(iii) by Leave to the Privy Council

Sir Wilfred Laurier at the Colonial Conference at London in 1907 was in no doubt that "the King had retained his prerogative of allowing anyone who chooses, to take an appeal before the Judicial Committee of the Privy Council."[8] Scott in his text on

the Canadian Constitution[9] confirmed and amplified Sir Wilfred's position, distinguishing the inherent prerogative right,[10] from appeals concerned with any subject-matter as a matter of grace.[11] This prerogative exercised by petition was abrogated on 23 December 1949.[12]

No Stipendiary Magistrate judgment in a civil case was ever appealed to the Privy Council.

(iv) Stipendiaries Sitting en Banc

Helen Perkins suggests and dismisses the possibility of Stipendiaries sitting en banc as a Court of Appeal.[13] The suggestion is intriguing and deserves analysis. Superficial support for the notion is found in the jurisdiction sections in the Northwest Territories Acts of 1905, and 1906.[14] Yet the Stipendiaries exercised only the jurisdiction of a Judge of the Northwest Territories Supreme Court. By contrast, three of those Judges sat as a court en banc to hear civil appeals.[15] An appreciation of the distinction between the jurisdiction of a Judge and that of a court en banc is crucial. It is submitted that Helen Perkins' view is the correct one.

There was not a third route available to counsel considering a civil appeal from a judgment of a Stipendiary Magistrate. The delay and greater costs[16] of a Supreme Court of Canada or Privy Council appeal, had one been taken, could not be avoided.

To sum up, no civil case tried in the Northwest Territories until after World War II was ever appealed. Only the issues raised in Ross v. Lieberman in 1947 brought out the need for an appellate court less costly and more accessible than the Supreme Court of Canada or that of the Privy Council.

(b) Criminal Appeals

(i) to a Provincial Court of Appeal

Until 1908, a right of appeal in criminal cases from a decision of the Stipendiary Magistrates resided in any Provincial Court of Appeal.[17] With the 1908 amendment to the Northwest Territories Act this right was removed, not to be resurrected until 1943.[18] The Criminal Code amendment[19] of that year specified that for those parts of the Territories west of the 89th meridian of west longitude the Courts of Appeal for any of Manitoba, Saskatchewan, Alberta or British Columbia could hear the appeal. For those parts of the Territories east of that dividing line the Courts of Appeal of Ontario, Quebec, Nova Scotia, New Brunswick or Prince Edward Island were the applicable appellate forums.

The Criminal Code amendment in 1943 came in response to the Rivet case.[20] Rivet, convicted of the indictable offense of incest by Meikle at Fort Norman on 15 July 1942 had been sentenced to three years imprisonment. He launched an appeal to Dr. Urquhart returnable on 6 November 1942. Department of Justice officials reviewed the statutory basis of the appeal and advised that "there is no Court of Appeal available to Rivet."[21] Section 2(1)(7) of the Criminal Code had designated no Court of Appeal for the Northwest Territories. R.A. Gibson "in view of the Department of Justice ruling," advised the Commissioner of the RCMP that "it is not possible for Dr. Urquhart of Fort Smith to entertain the proposed appeal and it will be necessary for the sentence to be carried out as imposed by the trial Court."[22]

This ruling perturbed Mr. Meikle: "I think in fairness to a convicted man there should be provision whereby he can appeal."[23] It more than perturbed the Supreme Court of Alberta, Appellate Division. Mr. Justice Howson observed: "I regret exceedingly that in refusing to sanction Rivet's appeal to the Alberta Court I am forced to this conclusion, because I am satisfied that on the evidence submitted upon the trial this man should not have been convicted."[24] Howson JA added this observation for the purpose of bringing the case to the attention of the Minister of Justice for his consideration. It had no effect.

The situation did not, surprisingly, perturb Mr. Daly: "I think we should first get the opinion of the Department of Justice as to the need for such a Court [of Appeal]."[25] This is surprising since two years earlier Mr. Daly had supported an amendment to the Criminal Code to provide for criminal appeals from Stipendiary Magistrates. The increasing complexity of cases, and the fact that there was only one[26] Stipendiary Magistrate with legal training had convinced him that an amendment was needed.[27]

The Territorial Council in December 1942 recommended that the Department of Justice be requested to amend the Criminal Code so that "an appeal"[28] from the Stipendiary Magistrates could be taken.[29] Bill 107 was introduced in 1943, passed and given Royal Assent on 24 July 1943, too late, however, to be of any assistance to Rivet.[30]

(ii) the Administration's Procrastination

The Territorial Administration could take no pride in this belated criminal amendment. Procrastination and delay had characterized its dealings with the criminal appeal issue.

C.C. McCaul, in July 1921, recently returned from the Le Beaux trial[31] at Fort Providence had suggested that the Supreme Court of Alberta be the Court of Appeal from all decisions of the

Stipendiaries.[32] One year later Commissioner Cory in correspondence to the Clerk of Committees of the Senate had remarked that there was no machinery for criminal appeals in the Northwest Territories and "at present the conditions in the Territories do not warrant the creation of such machinery."[33] This was a rather callous statement. Surely Le Beaux should have had the right to appeal from his conviction and sentence of death!

In 1938 the Department of Justice in response to an enquiry from Mr. Becker, a lawyer in Edmonton, had been asked to consider what Court in criminal cases exercised control over the Stipendiary Magistrates.[34] The Department's response was limited to the narrow issue of the time limit for appeal in the Dalziel case. If the Department of Justice had wrestled with the larger issue, an amendment to the Criminal Code might then have been forthcoming.

The next year, Gibben wrestled with a similar issue, pointing out to R.A. Gibson that rules for an appeal to the Stipendiary Magistrate were lacking.[35] R.A. Gibson in predictable fashion, commented: "it seems logical that those who wish to appeal should make a deposit to cover the costs of the Court especially where the Stipendiary Magistrate is going to be required to travel some distance from his headquarters."[36]

Cy Becker, in 1940, again enquired as to what method of appeal existed from a conviction by a Stipendiary Magistrate in a criminal case.[37] R.A. Gibson sought the advice of the Justice Department. The Deputy Minister curtly confirmed there was no method of appeal, an amendment to the Criminal code would be necessary and that such was not proposed at the present[38] session of Parliament.

The Territorial Council in March 1941 reviewed the matter.[39] The next month R.A. Gibson proposed a method of appeal similar to the concurrent civil jurisdiction procedure under the Northwest Territories Act[40] - a right of appeal to the Courts of Appeal of all the provinces.[41] Had the necessary amendment then been brought forward, the distressing Rivet situation would have been avoided.

After 1943, criminal appeals from the Mackenzie District invariably went to the Supreme Court of Alberta, Appellate Division.[42] This continued even after 1955. In 1960 the Northwest Territories Court of Appeal was constituted.[43] The Judges of the Court were the Judges of the Appellate Division of the Supreme Court of Alberta together with the Judges of the Territorial Courts of the Yukon and Northwest Territories.[44]

(iii) to the Supreme Court of Canada

Until 1943, no appeal to the Supreme Court was possible!

Mr. Justice Ford pointed out in the Rivet case that from 1908 until 1943[45] no Canadian court had jurisdiction to hear an indictable appeal from the Northwest Territories.[46] No Court of Appeal for the Northwest Territories had been designated in the Criminal Code.[47] Accordingly, no appeals could be taken. This Criminal Code omission was a remarkable oversight. It is even more remarkable considering the number of serious criminal trials in the Northwest Territories in the period 1921 to 1943.[48]

(iv) to the Privy Council

No appeal was ever taken to the Privy Council during the period under review; and the existence of a right to seek leave to appeal was acknowledged for only a short interval.

No opinion was expressed in 1885, in the Riel[49] case, by the Privy Council whether the prerogative to grant a criminal appeal directly[50] to the Judicial Committee still existed.[51] Assuming it did exist, it was the "usual rule"[52] of the Committee not to grant leave to appeal in criminal cases, except where some clear departure from the requirements of justice had taken place.

The Canadian Parliament sought to abolish criminal appeals to the Committee in 1887.[53] Thirty-eight years later the

Judicial Committee ruled this amendment to the Criminal Code to be ultra vires.[54] A right to seek leave remained until 1 July 1933, when it was abolished in a constitutionally valid manner.

In the Rivet[55] case,Chief Justice Harvey quoted with approval the earlier remarks of Sir W.J. Ritchie, Chief Jusice in 1891 of the Supreme Court of Canada to the effect that the Courts in Canada "have nothing to do with the right of appeal to the Privy Council." If this were a subtle nudge to Neil Maclean, K.C. to take an appeal to London, that, sadly for Rivet, was no longer possible. Though the Rivet facts evidenced a clear departure from the requirements of justice[55a] criminal appeals to the Privy Council had been barred by legislative action taken by Parliament in 1933.[55b]

(v) Stipendiaries Sitting en Banc

In the Rivet case Justice Ford in dissent lent support to Helen Perkins' musings earlier noted. He quoted with approval the pronouncement of Lord Haldane:

> "If the right exists the presumption is that there is a court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisidiction to the King's Courts of Justice."[56]

Lord Haldane's remark was made in the context of divorce jurisdiction.[57] In a superficial way it served to underpin the

argument that the Stipendiary Magistrates in 1905 inherited not only the original jurisdiction of Judges of the Supreme Court of the Northwest Territories but also their appellate jurisdiction. But the Judges of the Supreme Court had no appellate jurisdiction only the Supreme Court en banc did. Again, however, this questionable appeal route was never attempted.

Justice Sissons recognized the utility of an en banc form of appeal when, in 1960, he recommended the creation of an en banc Appeal Court composed of the Judge of the Yukon, the Judge of the Territories and the several deputy Judges of the Territorial Court. This would serve, he argued, to introduce a local flavor and an appreciation for local problems into the appellate process.

(2) Civil Process

(a) Initiation of Civil Actions

C.C. McCaul in his prescient way suggested in 1921 "some Code Civil Procedure required necessitating appointment of Clerk of Court to issue Process, Attachments, Guaranishee (sic) Executions, Etc. Suggest Headquarters at Smith, deputies at Simpson and Norman."[58] The Territorial Administration reacted predictably. Inertia prevailed. No court Clerks were appointed. Presumably, the cost was thought not to be warranted.

Dubuc had brought his own Clerk with him to Fort Providence for the Le Beaux trial.[59] He continued to do so on all his subsequent circuits. Rivet in 1923, did likewise as did Douglas in 1932, 1934, and 1935. By 1939 after Stipendiary Magistrate Gibben's arrival at Fort Smith still no court Clerk was in place in the Northwest Territories. This caused confusion.

Wishing to file a Statement of Claim against Vera Lane of Yellowknife, Charles Perkins sent the claim by mail to Fort Smith for Gibben to file. Perkins sent along $4.00 as "we are not aware of the filing fee and would be glad to remit any difference or receive back any excess."[60] Gibben as Stipendiary Magistrate issued the Claim on 5 May 1939 and returned $2.00 to Perkins.

Later that year after his move to Yellowknife, Gibben as Clerk of the Court,[61] started to file statements of claim. They were styled "In the Court of the Stipendiary Magistrate for the Northwest Territories." Shortly thereafter the typist in the Mining Recorder's office at Yellowknife, Lloyd Bonneyman, assumed the duties of Clerk of the Stipendiary Magistrate's Court and Court Reporter to the extent one was needed.[62]

The delay in appointing a person to attend to clerking duties underscores the lack of civil business in the Territories. In practice the majority of civil actions originated out of the Alberta courts in the 1930's. That situation continued after the Second World War.[63]

(b) Judicial Districts

The newly appointed Bonneyman found himself Clerk of a Judicial District comprising the whole Northwest Territories. A proposal a few months before his appointment to set up two Judicial Districts, splitting the Territories at the 80th meridian of west longitude, had become stalled.[64] This enormous Judicial District remained intact until 1949 when three Districts emerged from the revisions to the Judicature Ordinance.[65] Then, the Clerk in place at Yellowknife serviced the new Yellowknife Judicial District while the Clerk at Fort Smith looked after judicial business in the Mackenzie Judicial District. No clerk was appointed to the Arctic and Hudson Bay Judicial District since "it is, of course, not proposed at the present time to appoint [one]."[66] Prior to 1955, if one were ever appointed, he took up his duties at Ottawa.[66a]

Effective 1 January 1953 the merger of the Yellowknife and Mackenzie Districts suggested by Phinney, occurred.[66b] Thence forward all court process pertaining to the consolidated Yellowknife-Mackenzie Judicial District issued out of Yellowknife. A need to standardize court procedure in the Mackenzie Region had prompted this action.

(c) Rules of Court

The lack of relevant Rules of Court proved a severe

hindrance to the development of an efficient responsive court process. Calls for modernization of the Rules, inherited from the pre-1905 Northwest Territories Supreme Court,[67] came in the mid-1930's. Mr. Edwards, Deputy Minister of Justice, received word in 1937 that immediate consideration "would be given to the drafting of a Judicature Ordinance and Rules of Practice designed to meet present day requirements."[68] This proposed action coincided with the Department of Justice's internal view that the Judicature Ordinance appeared to require "urgent treatment."[69] One year earlier George Auxier, a lawyer at Edmonton, no doubt expressing the opinion of the Edmonton Bar, viewed the Judicature Ordinance as "meaningless when applied to a country like the present Territories with no organized courts and court officials."[70]

The problem, Mr. Miall of the Department of Justice opined, stemmed from the fact that the laws effective in the Northwest Territories in 1905, when the Provinces were carved out, "continued to be in force."[71] Proceeding on this basis, three Stipendiary Magistrates on 6 November 1945 at Ottawa formulated a minor change to the Rules of Court.[72] Mr. Miall ten years before had foreseen this course of action and expressed doubts as to its validity. "Because there are no longer Supreme Court Judges the power given to them to make Rules of Court[73] [has] simply died of inaction."[74] Thus the question: did the Stipendiary Magistrates possess the power to amend the Rules of Court?

No evidence exists to suggest this question was considered in 1945. Nor in 1939, when Gibben received instructions by telegram:

> "to draft as quickly as possible a Judicature Ordinance and Rules of Practice which would to a reasonable extent meet present day requirements of the Northwest Territories. Thepractice in the Prairie Provinces should be followed as closely as possible having regard for the fact we do not intend to appoint additional staff to carry out procedure."[75]

On balance, Mr. Miall's view seems preferable, though not free from doubt. The Stipendiary Magistrate's exercise of the powers and authority of the Northwest Territories Supreme Court Justices was restricted to those powers outstanding as of 1 September 1905. On that date the Stipendiary Magistrate's rule-making powers and authorities were frozen, effectively preventing them from making any changes to the Rules of Court.[75a]

Perhaps, belatedly, concerned about the uncertainty of the Stipendiary Magistrate's rule-making powers or reacting to the spate of civil actions arising from the short-lived mining boom, the Territorial Administration proceeded in 1947 to put the final touches on a new Judicature Ordinance. Prompting from the Law Society of Alberta speeded up the process. "There is much uncertainty as to whether the Judicature Ordinance of the Northwest Territories is applicable and in force."[76]

The final hurdle, should the Rules of Court be those of Alberta or those of Saskatchewan, was resolved by the Stipendiary Magistrates[77] and the few resident lawyers[78] in favor of the former. On 1 July 1949 a new Judicature Ordinance and Rules of Court came into force.

(d) Tariff of Fees

Like the Rules of Court, the Fee Tariff was the product of the Judges of the Supreme Court of the Northwest Territories.[79] It provided, for example, the sum of $2.00 to draw a Statement of Claim. Though unchanged since 1903, R.A. Gibson advised the Stipendiary Magistrates in 1942, that "this Tariff will remain in force until revised at some future date."[80] By whom was not clear since the Tariff, like the Rules of Court, was a creature of the Justices of the Northwest Territories Supreme Court. By 1947 no revisions had been made to the 1903 Tariff, prompting A.H. Gibson to observe when taxing costs in Ross v. Lieberman that the Tariff "settled in the old Territorial days, is ridiculous."[81]

(e) Implications

Little speculation is needed to explain the slow development of civil business in the Territories. Antiquated Rules of Court and a glaringly low Tariff of fees discouraged non-resident

lawyers from initiating civil actions in the Territories. Besides, the concurrent original civil jurisdiction provisions of the Northwest Territories Act sanctioned the use of the familiar provincial procedure.[82] Outdated Ordinances described by Horace Harvey[83] as "in many instances . . . a complete Chinese puzzle to both the Bar and the Bench of the Territories"[84] added to the reluctance of even the few resident lawyers to institute sophisticated civil actions.[85]

Predictably, this influenced the Stipendiary Magistrates . Deprived of the intellectually stimulating aspects of civil practice, they found their energies largely devoted to the physically demanding yet intellectually dull criminal side of the adjudication process. The Judges remained limited in their focus, unchallenged by the intricacies of civil practice questions, being left to adjudicate the monotony of numerous assault and theft charges.

1. NWT Act, SC 1905, c.27, s.9; RSC 1906, c.62, s.33.
S.33 The Governor in Council may vest in any Judge of any Court of any province the power of hearing and determining, either in the first instance or on appeal . . . .

2. NWT Act, SC 1908, c.49, s.1, repealing s.33 and replacing it with a new section 33. Debates, H of C, 14 July 1908, col.13052.

3. NWT Act, SC 1948, c.20, s.2 adding s.38A; Debates, H of C, 28 April 1948, p.3423 to 3425.

4. Ross v. Lieberman, [1947] 1 W.W.R. 1070 (S.C.A.A.D.) at p.1074. See also Supreme Court Act, RSC 1906, c.139, s.36; RSC 1927, c.35, s.36; RSC 1952, c.254, s.36.
S.36 (paraphrased)
An appeal lies from any final Judgment of the highest Court of final resort established in any province, whether such court is a Court of Appeal or of original jurisdiction in cases in which the court of original jurisdiction is a Superior Court.

The Northwest Territories was a province under the Interpretation Act, RSC 1906, c.1, s.37(22).

5. Who in 1970 became Chief Justice of Alberta, presiding over the Appellate Division of the Supreme Court of Alberta, and Chief Justice of the Northwest Territories Court of Appeal.

6. D of J, file #150118.

7. The one caveat is that the court records are sketchy and incomplete.

8. Commentary on the Memorandum on the Question of Judicial Appeals prepared for the 1907 Conference, Ollivier (ed.) The Colonial and Imperial Conferences from 1887 to 1937, 3 vols. (Ottawa: Queen's Printer, 1954) at 270.

9. Scott, The Canadian Constitution Historically Explained (Toronto: The Carswell Company, 1918) p.130. Scott is careful to delineate the terms under which a case in Canada will be heard - "a case of gravity, involving matters of public interest, of some important question of law." This only affirms the discretionary nature of the prerogative.

See also R. v. Riel, 9 C.R.A.C. 214 at 216 per Lord Halsbury where the Law Lord sets out the rule in criminal cases: "only where some clear departure from the requirements of justice has taken place."

10. Ibid., at 130 "and on all proper occasions the duty of the Queen in Council [is] to exercise an appellate jurisdiction."

11. See also Howell, The Judicial Committee of the Privy Council 1833-1876 (London: Cambridge University Press, 1979) p.35, 40-43, 94.

12. Supreme Court Amendment Act, SC (1949), c.37, s.3, repealing section 54 Supreme Court Act, RSC (1927), c.35 and deleting the saving royal prerogative found in the original section 54. This left the Judgments of the Supreme Court of Canada, in all cases, final and conclusive. Subection 2 and 3 of the new section 54 specifically repealed the royal prerogative and the application of the 1833 and 1844 Judicial Committee Acts. The 1949 amendment was proclaimed in force December 23, 1949.

    See also Laskin, The Supreme Court of Canada: A Final Court of and For Canadians in Lederman (ed.) The Courts and the Canadian Constitution (Toronto: McClelland and Stewart, 1964) 125; and A.G. for Ontario v. A.G. for Canada (1947) A.C. 127 at 148, 153 per Lord Jowitt recognizing the effect on the Colonial Laws Validity Act (1865) of the Statute of Westminster (1931) which paved the way for federal legislation to abrogate appeal rights given under the 1833 and 1844 Judicial Committee Acts, in relation to Canada.

13. Perkins, Law Practice in the Territories (1942) 4 Alta. L.Q. 201 at 210. Mrs. Perkins suggests two, though the Supreme Court Justices sat on a panel of three. NWT Act, RSC 1886, c.50, s.49.

14. NWT Act, SC 1905, c.27, s.8; RSC 1906, c.62, s.32.

15. NWT Act, RSC 1886, c.50, ss. 41, 50.
    S.41 The Supreme Court [is a court] of record of original and appellate jurisdiction.
    S.50 The court sitting en banc shall hear and determine . . . all appeals.

16. "An appeal direct to the Supreme Court of Canada is a very expensive method of questioning the soundness of a Judgment or Order of a Magistrate." Letter, E.W.S. Kane to R.A. Gibson, 18 November 1947, D of J, file #137324. Kane was writing on behalf of the Law Society of Alberta.

17. Supra, fn.1.

18. R. v. Rivet [1944] 2 W.W.R. 132 (S.C.A.A.D.) per Harvey CJ for the majority of the five man panel.

19. SC 1943, c.23, s.1 adding paragraph (k) to s.2(1)(7) of the Criminal Code, RSC 1927, c.36; Bill 107 post fn.30.

20. Appendix A - 1942, supra fn.18.

21. Letter, Deputy Minister of Justice to R.A. Gibson, 9 November 1942, PAC, RG 85, Vol.1870, 540-1-2.

22. Letter, R.A. Gibson to Commissioner Wood, 12 November 1942, PAC, RG 85, Vol.1870, 540-1-2; see also Rivet, supra fn.18 at p.136 per Ford JA.

23. Memorandum, Meikle to Daly, 16 November 1942, PAC, RG 85, Vol.1870, 540-1-2.

24. Rivet, supra fn.18 at p.143.

25. Memorandum, Daly to Meikle, in response to Meikle's memo, PAC, RG 85, Vol.1870, 540-1-2.

26. Daly was thinking of Gibben at Yellowknife. He had forgotten about St. Germain at Morinville.

27. Memorandum, Daly to R.A. Gibson, 20 December 1940, PAC, RG 85, Vol.1870, 540-1-2. "With the best will in the world and the greatest care it is inevitable that miscarriages of justice will from time to time occur. If proper provisions for appeal are made this will not be so serious."

28. Although not specified, the intent was to deal only with criminal appeals.

29. Minutes, CNWT, 8 December 1942, PAC, M-811 to 815, p.2923.

30. Rivet, supra fn.18 at p.133 per Harvey CJ:

> ". . . in the absence of an apparent intention that [this amendment] should have a retrospective effect legislation affecting substantial rights shall not be given such effect."

Neil Maclean KC for Rivet had argued that this amendment was procedural not substantive in nature. If procedural retrospective operation resulted. He convinced only Justice Ford of the five man Court.

31. Appendix A - 1921.

32. Night lettergram, McCaul to Deputy Minister of Justice, 26 July 1921, PAC, RG 85, Vol.569, 80.

33. Letter, 11 April 1922, PAC, RG 85, Vol.1870, 540-1-1. Also see Debates, the Senate, 22 March 1922, p.53.

34. Telegram, Cy Becker to Deputy Minister of Justice, 15 June 1938, D of J, file #139329.

35. Letter, Gibben to R.A. Gibson, 4 August 1939, PAC, RG 85, Vol.1870, 540-1-1.

36. Memorandum of R.A. Gibson, 18 August 1938, PAC, RG 85, Vol.1870, 540-1-2.

37. Becker won an acquittal for three miners at Yellowknife before Gibben. They were charged with causing a disturbance. Becker posed the hypothetical question, what if they had been convicted; Minutes, CNWT, 1940, PAC, M-811 to 815, p.2290.

38. Letter, Deputy Minister of Justice to R.A. Gibson, 21 May 1940, PAC, RG 85, Vol.1870, 540-1-2; D of J, file #141194, memorandum of Miall, 9 May 1940; Minutes, CNWT, 1940, PAC, M-811 to 815, p.2290.

39. Minutes, CNWT, 26 March 1941.

40. NWT Act, RSC 1927, c.1, ss. 35-38.

41. Letter, R.A. Gibson to Deputy Minister of Justice, 30 April 1941, PAC, RG 85, Vol.1870, 540-1-2; D of J, file #141194.

42. For example, R. v. Magnum [1944] 3 W.W.R. 486; R. v. Lilyedahl, NWT cases #36, appeal heard 12 January 1948 dismissed, unreported; R. v. Scheck and Spivak appeal as to conviction and sentence dismissed, unreported, News of the North, 7 October 1949; R. v. Morin, Gardner, Bulmer, unreported, News of the North, 9 October 1953.

43. NWT Act, SC 1960, c.20.

44. Justice John Parker of the Yukon Territorial Court and Justice J.H. Sissons of the Territorial Court of the Northwest Territories. The first Court sitting was at Yellowknife on 18 October 1960.

45. Infra, fn.19.

46. Rivet, supra fn.18, at p.136. Helen Perkins expresses a different view. Perkins, Law Practise in the Territories (1942) 4 A.L.Q. 201 at 210. She however does not analyze the Supreme Court Act, post fn.47.

47. An appeal in a criminal case could go to the Supreme Court of Canada only under the procedure set out in the Criminal Code. Until 1943, there was no Court of Appeal for the Northwest Territories prescribed in the Criminal Code. Supreme Court Act, RSC 1906, c.139, s.36; RSC 1927, c.35, s.36; RSC 1952, c.259, s.40.

(1906) S.36
Except as . . . provided, an appeal shall be to the Supreme Court . . .
(b) there shall be no appeal in a criminal case except as provided in the Criminal Code.

48. Appendix A - 1921-1943. In this period there were several murder convictions leading to a sentence of death.

49. Queen v. Riel, 9 C.R.A.C. 214 at 216 per Lord Halsbury.

50. By passing the Supreme Court of Canada, termed a per saltum appeal.

51. The Judicial Committee Act (1833) 3 & 4 Wm 4, c.41; The Judicial Committee Act (1844) 7 & 8 Vic, c.69 provided for the admission of any appeal . . . from any judgments . . . of any Court of justice within any British Colony or Possession abroad; see also the discussion in Nadan v. King [1926] A.C. 482 at 491, 492 per Viscount Cave, "But however widely [the section 91] powers are construed . . . they did not appear to their Lordships to authorize the Dominion Parliament to annul the prerogative right of the King in Council to grant special leave to appeal"; Howell, The Judicial Committee of the Privy Council 1833-1876 (London: Cambridge University Press, 1979) p.55; British Coal Corporation v. The King [1935] A.C. 500, 510-512 and 523 per Viscount Sankey.

52. Riel , supra fn.49, at 216 per Lord Halsbury.

53. An Act to Amend the Criminal Code, SC 1887, c.50, s.1, "Notwithstanding any royal prerogative, or anything contained in the Interpretation Act or in the Supreme and Exchequer Courts Act, no appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any Court of Appeal . . . by which appeals or petitions to His Majesty in Council may be ordered to be heard.

54. Nadan v. The King [1926] A.C. 482 at 491; Hogg, (2d ed.) p.40.

55. Rivet, supra fn. 18 at p.135.

55a. R. v. Riel, supra fn.49.

55b. An Act to Amend the Criminal Code, SC 1933, c.53, s.17. The wording is almost identical to that contained in the 1887 legislation supra fn.53. This 1933 legislation was challenged. The Privy Council ruled it to be intra vires the Parliament of Canada. The enactment of the Statute of Westminister (1931) proved to be decisive giving to the Parliament of Canada the power after 1931 which it lacked prior to that date. British Coal Corp. v. King [1935] A.C. 500 at 519.

Maclean did launch an appeal to the Supreme Court of Canada, but it was later abandoned. D of J, file #143764.

56. Rivet, supra fn.18, at p.139.

57. Chapter 6(4).

58. Night lettergram, McCaul to Deputy Minister of Justice, 26 July 1921, PAC, RG 85, Vol.569, 80.

59. Appendix A - 1921.

60. Connolly v. Lane, Yellowknife Court House, #19 civil, letter, Perkins to Gibben, March 1939.

61. YK Supplies Ltd. v. McGannon, Yellowknife Court House, #4 civil. The claim was issued on 21 September 1939 at Yellowknife.

62. Perkins Recollections, GAA, p.33. Bonneyman was Gibben's employee. Gibben was at that time also the Mining Recorder.

Nor did that mean that a Clerk was henceforth a fixture at Yellowknife. Fraser in 1945 confirmed that A.H. Gibson and Fraser served as their own Clerk. Fraser kept a record of the fees in his capacity as Clerk. Letter, Fraser to R.A. Gibson, PAC, RG 85, Vol.1870, 540-1-2.

63. Principally because there were no resident lawyers in the Territories until 1937. Then there was only Perkins. After the war, in 1947, three lawyers - John Parker, Peter Parker, Ray Mahaffey - were at Yellowknife; and none were elsewhere in the Territories. By 1950 the number had dwindled to two - John Parker and Don Hagel.

64. Letter, Miall of Justice to R.A. Gibson, 6 July 1939, D of J, file #140385; letter, Nason, Departmental Solicitor for Mines and Resources, to Driedger, 20 September 1947, D of J, file #137324 "No Judicial Districts [as of 1947] were ever established in the Territories."

65. Judicature Ordinance assented to 19 May 1949 to come into force 1 July 1949, ONWT, 1949, c.17.

66. Letter, R.A. Gibson to Driedger, 11 May 1946, D of J, file #137234/46.

66a. Letter, Phinney to Cunningham, 3 July 1952, PAC, RG 85, Vol.1503, 540-1-3. The merger occurred under O in C, 5 December 1952.

66b. Letter, Phinney to Cunningham, 3 July 1952, PAC, RG 85, Vol.1503, 540-1-3. The merger occurred under Order-in-Council, 5 December 1952.

67. The Rules were those promulgated under the Judicature Ordinance CONWT 1898 c.21.

68. Letter, R.A. Gibson to Edwards, 27 November 1937, D of J, file #137324.

69. Memorandum, 5 November 1937, D of J, file #137324.

70. Letter, Auxier to J.A. Mackinnon MP, 31 July 1936, D of J, file #137324. Auxier added "I have had several discussions with the other lawyers in the City and all are agreed that if business is to be carried on to any great extent in the Territories a complete overhaul of the Ordinances and the legal procedure must be made."

71. Opinion of Mr. Miall of the Department of Justice, 18 June 1935, D of J, file #13964; also see Magnum v. McDougall [1944] 3 W.W.R. 486 at 494 per Harvey CJ. ". . . the Rules of the Judicature Ordinance . . . continued to be the law . . . of the new Northwest Territories."

72. A.H. Gibson, Fred Fraser and Mackay Meikle added Rule 595A pursuant to section 22 of the Judicature Ordinance CONWT 1898 c.21. In 1947, Mr. Nason, Departmental Solicitor, advised that this 1945 amendment was the only change "ever made by the Stipendiary Magistrates," letter, Nason to Driedger, 20 September 1947, D of J, file #137324.

73. Under sections 20-22 of the Judicature Ordinance.

74. Supra, fn.71.

75. Telegram, R.A. Gibson to Gibben, 20 March 1939, PAC, RG 85, Vol.177, 542-3-2. The telegram was prompted by Gibben's suggestion that civil procedure be simplified. Letter, Gibben to R.A. Gibson, 17 March 1939, PAC, RG 85, Vol.177, 542-3-2. Gibben drafted a Stipendiary Magistrate Court Ordinance but it was not enacted. Chapter 9, fn.29c.

75a. The other view is that since the Stipendiary Magistrates had the power of Justices of the Supreme Court this included the power to amend the Rules. The rule-making powers were inherent.

76. Letter, E.W.S. Kane to R.A. Gibson, 18 November 1947, D of J, file #137324 including memorandum, 28 June 1947, prepared by the Law Society of Alberta.

77. Letter, R.A. Gibson to Minister of Justice, 8 January 1948, D of J, file #137324.

"We should adopt the Alberta Rules of Court as a good deal of litigation will be in the hands of the Alberta firms and uniformity of practice is desirable," letter, A.H. Gibson to R.A. Gibson, 26 March 1947, PAC, RG 85, Vol.1870, 540-1-2. Ten years earlier J.A. MacKinnon MP at Edmonton in correspondence with the Department of Justice reminded Mr. Picard that "as most of the litigation in the Territories is handled in Edmonton, it is, I believe, desirable that the procedural law relating to the Territories should be kept in line as much as possible with the procedural law in Alberta" letter, MacKinnon to Picard, 28 January 1937, D of J, file #137324.

78. Letter, Nason to Driedger, 4 November 1948, D of J, file #137324.

79. Promulgated in 1899 (PC 147, 29 January 1899) and revised in 1903 (PC 1633, 5 October 1903) printed in the Western Law Reporter 1900.

80. Letter from R.A. Gibson, 8 April 1942, PAC, RG 85, Vol.177, 542-3-2.

81. Letter, A.H. Gibson, acting as Clerk of the Stipendiary Magistrates Court, to Bruce Smith KC, 18 October 1948, Yellowknife Court House Court Records, unreported.

82. With the jurisdiction of the Stipendiary Magistrates not clear and their method of procedure unsettled, "most lawyers have preferred to use Provincial Courts and the jurisdiction conferred on them by section 35 of the Northwest Territories Act." Letter, Auxier to James MacKinnon, 31 July 1936, D of J, file #137324.

83. Later Chief Justice of the Supreme Court, Trial Division, and after 1924 Chief Justice of the Appellate Division. For a brief time he was a Justice of the Supreme Court of the Northwest Territories.

84. Letter, Harvey to Clerk of the Executive Council, 29 April 1896, A.S. (Saskatoon) A.G. "G", 594L.

85. In a letter to R.A. Gibson, John Parker pointed out a number of shortcomings, serious omissions and duplications giving rise to uncertainty in the Ordinances. "In addition of course there are many Ordinances which remain unrepealed but which are wholly inapplicable to the Northwest Territories in these days. The application of the Judicature Ordinance to the Court of the Stipendiary Magistrate . . . is being questioned by Alberta solicitors and there is no doubt they can make a good case . . . . [I]t should be possible for a

person to ascertain what the law is in the Northwest Territories and at the present time we must frankly admitthat in many cases it is virtually impossible for us, or anyone else, to give a clear answer to this question. Letter, Parker to R.A. Gibson, 1 March 1947, D of J, file #137324.

Chapter 8

Criminal Circuit Court

"It has long been the practice of this Court to hold trials in the community, where the events in question occurred and where, usually, most of the witnesses reside.[1]

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[1] Boychuk v. N.W.T. Housing Corp. [1985] N.W.T.R. 159 at 162 per de Weerdt J.

Introduction

This chapter explores various aspects of the Stipendiary Magistrate's circuit system, that venerated institution, exported to Canada from England, of taking justice to the people.

(1) Circuit Court (1921-1955)

Several erroneous statements have been made about the lack until the 1950's of a circuit system in the Territories. Justice Sissons wrongly asserted that prior to 1955, "for decades [Inuit] charged with serious offenses (sic) were tried in Edmonton, Calgary, Winnipeg, Ottawa or some other point 'convenient' for the authorities . . . . Justice from now on would be taken to every man's door."[1] Sissons was laudably adamant that the "Queen's writ [would] run to the Northern outposts,"[2] he was just not the first Judge to visit them.

Justice Morrow fell into the same error, ascribing to Sissons the first initiative of taking the Court to the people.[3]

Most emphatically, the Stipendiary Magistrate's Court was a circuit court.[4] Circumstances dictated that it was only a criminal circuit court however, since sophisticated civil business, in the period under review, never developed outside Yellowknife.[5]

(a) Origins of the Criminal Circuit Court

It is true that between 1905 and 1921, any significant criminal case requiring the attention of a Stipendiary Magistrate was heard outside the Northwest Territories.[6] Contrary to the dicates of Magna Carta, justice was delayed to be administered once the accused and witnesses had been transported "outside" for trial. The Uluksuk v. Sinnisiak[7] case illustrates the point eloquently.

The Catholic priests, Rouvier and Le Roux, were murdered in November 1913 near the mouth of the Coppermine River on the Arctic coast. The painstaking investigation, after the delayed reporting of the murders, continued over 1914 and 1915. Inspector La Nauze arrested Sinnisiak and Uluksuk in the spring of 1916 at separate hunting camps off the arctic coast in the vicinity of Coronation Gulf. After both were committed for trial[8] by the same Inspector La Nauze, sitting as a Justice of the Peace with the powers of two, at Bernard Harbour, they were taken via Herschel Island out to Edmonton, on instructions from the Department of Justice. Sinnisiak only was tried in early August 1917 at Edmonton for the murder of Rouvier and acquitted. Both were tried later that month in Calgary for the murder of Le Roux. At the second trial, both were found guilty by a jury and sentenced to death.[9] A longer delay than four years between the

commission of the crime and the trials was only prevented by the Police Inspector's "extraordinary good fortune to locate and arrest [the two Inuit] so quickly."[10]

(b) First Criminal Circuit Trials

The next case from the Territories precipitated a change in official thinking. Ougangwak[11] was arrested in February 1920 in the vicinity of Baker Lake for the murder of two Inuit brothers. The investigating officer following previous cases[12] brought the accused out via Churchill and Ft. Nelson to The Pas, Manitoba, where he was committed for trial before a Justice of the Peace.[13] The police awaited instructions as to the place of trial adding that a trial in civilization "presented grave difficulties": all the witnesses were in the Baker Lake region. The Department of Justice's instructions were firm. The committal at The Pas should be quashed, an inquest held at Baker Lake, the accused returned to Chesterfield Inlet on the "SS Nascopie," and a court party sent to Chesterfield Inlet to hold the trial there in August 1921.[14]

Why did the policy change? Several reasons emerge, not all of which became clear at once.

(i) It was perceived that a court at Chesterfield Inlet would have a beneficial, moral effect on the Inuit, and thereby limit

the alarming increase in Inuit murders.[15] This had been the hope with the Sinnisiak and Uluksuk trials,[16] yet the punishment had an effect opposite to that intended. Sinnisiak and Uluksuk returned to relate delightful experiences: ample food, security, and marvelous things that happened when a button was pushed and "the moon came into the room."[17]

(ii) It was thought that it would be more economical[18] to hold a trial at Chesterfield Inlet than to bring 15 witnesses "outside" for trial. Commissioner Wrigley's 1885 viewpoint had finally been vindicated. This step, incidentally, would spare the accused and the witnesses a long toilsome journey "outside," though the court party would have an equally toilsome journey, by water into the place of trial.

(iii) It was realized that court circuits followed logically the pattern set of police patrols and parallelled the evolution of medical patrols. Police winter patrols undertaken since the turn of the century, in part to create a government presence,[19] foreshadowed court circuits undertaken to extend the enforcement of Canadian law, especially to the Inuit. Analogous medical patrols were undertaken by government medical officers. Dr. Livingstone and Dr. Stuart on Baffin Island[20] patrolled from their base at Pangnirtung, and Dr. Urquhart and Dr. Martin did likewise from their bases at Aklavik and Coppermine. These medical officers frequently held appointments as Justices of the

Peace with the powers of two enabling them to adjudicate minor criminal matters.

(iv) It was rationalized that several high profile, even though expensive, circuit trials utilizing non-resident Stipendiary Magistrates that sought to impress[20a] the Inuit and Indian inhabitants would, in the long run, be less costly than the expenditure to set up a permanent court structure in the Territories. On this basis the Le Beaux trial in 1921, and the trials at Pond Inlet and Herschel Island[21] in 1923 proceeded.

(v) It may be surmised that the Department of Justice expected a northern jury to be less sympathetic to the plight of the Inuit in their interaction with the increasingly intrusive white population. The jury acquittal of Sinnisiak at Edmonton in July 1917 had been unexpected and embarrassing.

(vi) Finally, the laudable, but naive principle that justice would be administered without regard to cost seemed to play its part in the policy change.[22] This reasoning, if justice were equated with "on the spot" adjudication, came the closest to satisfying the Magna Carta dictum. Almost immediately, though, the principle that in theory seemed so attractive, came, in practice, under strong attack.

(c) Cost Considerations

The attack came predictably from the Territorial Administration. Objecting to the excessive cost in 1921 of Dubuc's "judicial retinue," Oswald Finnie suggested that the Minister of Justice appoint the Territorial Administration's in-house lawyer as a Stipendiary Magistrate in order to conduct the upcoming Herschel Island cases "more cheaply and expeditiously."[23] The solemnity and dignity of the full panoply of British justice had proven too costly. In this suggestion Finnie was overruled by the Department of Justice. Rebuked, but not cowed, Finnie persuaded the Department of Indian Affairs to pay any costs incurred by T.L. Cory, of the Territorial Administration's in-house legal staff, to act for the accused.[24]

This exchange between federal government officials merely exposed the larger issue as to which federal Government Department [24a] was to pay for the various expenses related to criminal court circuits. The issue did not receive extensive analysis until 1939.[25] The pending Katcho trial at Pangnirtung and Selamio trial at Aklavik led R.A. Gibson, Deputy Commissioner, to pose three questions to the Department of Justice concerning the upcoming trials:

> "1. Whether it will be necessary to have a lawyer defend and one to prosecute,
> 2. Whether a Stipendiary Magistrate is to be sent from Ft. Smith to Aklavik by the first aeroplane or whether the trial can wait until it is possible to make the trip by boat, which is a great deal more economical,
> 3. Whether all these expenses will be paid by the Department of Justice."[26]

Justice theorized and replied:

> "1. The decision to appoint counsel for the Crown and the defence is that of Attorney-General for the Northwest Territories who is the Attorney General of Canada.[27] Counsel's fees and expenses are the responsibility of the Territorial Administration. It is desirable in these cases that counsel be appointed.
> 2. The Department of Justice must "afford the opportunity of a case being heard under reasonably favorable conditions at a place fairly approximate to the scene of the crime and at a time calculated to minimize prejudice to the accused." The trial might properly occur as soon as normal transportation facilities allow.[28] This is a decision for the Territorial Administration.
> 3. The Department of Justice will pay only those expenses "to have the Court ready at Aklavik on the predetermined date prepared to hear the case." Justice will not pay counsel fees."[26a]

The last answer devolved from a close comparison of section 92(14) of the then British North America Act, 1867 with section 10(1)(j) of the Northwest Territories Act.[29] The answer meant the Department of Justice would "produce the Court and functional machinery on the spot" and thereafter "all responsibility for expense . . . incidental to taking advantage of the Court's presence [would] devolve upon the Territorial Administration charged with the administration of justice."

In practice, Justice would pay the expenses[30] of the Clerk, Sheriff and Reporter, the expense of getting the Stipendiary Magistrate and above named court officers to and from the place of trial, any expense to secure a place to hold the trial,[31] and any expense for the accommodation of these court officers at the place of trial. Crown and defence counsel fees, witness fees, interpretors' fees, jurors' fees, jury guard fees, and any incidental travel and accommodation expenses for these persons were payable by the Territorial Administration.

R.A. Gibson quickly retorted,[32] resurrecting Finnie's arguments of almost 20 years before: the Territorial Administration had not budgeted to cover the extraordinary courtexpense. Hence to keep costs down he proposed that at Aklavik the RCMP should prosecute before Gibben and Dr. Livingstone, the local medical officer should defend. At Pangnirtung, McKeand, the government officer in charge of the Eastern Arctic Patrol, should be appointed a Stipendiary Magistrate with an RCMP officer to prosecute, and Dr. Orford or Mr. Daly, in-house solicitor, to perform defence counsel duties. The Department of Justice partially demurred: independent legally trained defence counsel were appointed,[33] although the RCMP did prosecute in the Selamio trial. As well, McKeand was appointed despite the Justice Department's "disfavor"[34] towards the appointment of an administrative officer to adjudicate in criminal cases.

The cost issue seemed to revolve around counsel appointments. The Territorial Council perceived[35] that the appointment of private practising lawyers led to high trial costs. If "in house" department counsel could be utilized, costs would be kept within manageable limits.

The cost dilemma for R.A. Gibson was ongoing.[35a] While the Department of Justice policy, in place from 1939, was generally followed,[36] there were significant exceptions.[37] R.A. Gibson sought to defend these exceptions by asserting that permanent government officers should be associated with these trials "so that their advice would be available about the unusual features which mark the administration of justice among the native people."[38] This nonsensical generalization sustained the "exceptional" appointments, but had adverse implications.

(d) Adverse Implications

Competent experienced defence counsel are of significant assistance to both the accused and the presiding judge. For the accused, they ensure that "full answer and defence" is made to the charge. Equally, experienced counsel ensure that an inexperenced Judge performs adequately if the latter has the sense to be patient and look to counsel for assistance. Deprived of experienced counsel, inexperienced Judges left largely to their own resources find their task infinitely more difficult.

Accused persons, deprived of experienced counsel, find that their defence may be compromised. Such occurred when McKeand, inexperienced and untrained in the law, took a series of serious criminal trials during the Second World War.

McKeand, on two Eastern Arctic circuits, found himself assisted by police prosecutors and department solicitors. In the 1943 circuit, of the two pending murder and manslaughter trials, Constable Delisle was to prosecute one and Sergeant McBeth the other. T.L. Cory was to defend both. This was the same Cory who defended Alikomiak[39] in 1923, before Dubuc at Herschel Island. A comparison of the transcript of the Alikomiak trial with that of the Ikalupiak[40] trial, heard the next year when J.B. McBride defended, reveals startling contrasts in defence strategy.[41]

McBride was feisty and aggressive; he several times interjected to argue points of evidence. The issue of the Court's jurisdiction was raised by him, though oddly with little vigour. He made an enlivened attempt to establish the defence of custom and useage calling three witnesses and the accused for the defence. He left a forceful impression.

T.L. Cory did not. It is doubtful if twenty years of doing the work required of an in-house solicitor at Ottawa, from 1923 to 1943, materially honed Cory's negligible criminal counsel skills.

Would Cory give the two accused a competence defence? Probably not.[44] The spirited exchanges between counsel that often characterize serious criminal trials were, in the Alikomiak trial, entirely absent. His cross examination was not incisive and crisp. He called no defence evidence.[42] He seemed not to have benefited from the baptisms of fire that produce experienced criminal defence counsel. His performance, in sum, was lamentable.[43] The accused's defence, accordingly, suffered.

On the 1945 Eastern Arctic circuit, among the charges were those of incest and manslaughter. At the trials, at Chesterfield Inlet and Fort Ross,[45] Inspector Peacock prosecuted and Captain Macleod of the Judge Advocate General's Branch of the Department of Defence acted as defence counsel. It may be surmized that Macleod's court room manner was more polished than Cory's. But whether the accused, Kalooarse, received the defence that an experienced criminal defence counsel would have provided is highly debateable. Would not an experienced defence counsel have refused to allow the accused to plead guilty, when the prime Crown witness, the daughter, was not available to testify? Also, in the [45a] Miktoeyout case would not an experienced defence counsel have pointed out to the inexperienced McKeand that to banish the convicted Inuit was, in a legal sense, a highly questionable sentencing technique?

One further example illustrates the point. Cardinal,[46] charged with murder, was convicted by a jury at Aklavik in July 1953 and sentenced by Gibben to death. Donald Thorson,[47] of the Department of Justice, had defended. The trial was unsatisfactory on a number of counts: the charge to the jury on the issue of insanity was defective; the charge of motive was not supported by the evidence, and Crown counsel made an unfortunate comment during cross examination of the Crown's first witness. When an appeal was taken,[48] prominent counsel from Edmonton appeared for the accused. A new trial was ordered.

Two observations may be made. Mr. Thorson was probably uncomfortable in the role thrust upon him by the Department of Justice. At that time he was not the experienced counsel he was later to become. Granted he could not have controlled the Judge's jury misdirections. A more experienced defence counsel may have been able, though, to diminish the prejudice to the accused of Crown counsel's unfortunate remark.[48a]

R.A. Gibson's successors must have reacted unfavorably to the necessity of a second trial for Cardinal. Set against the cost savings of having Thorson appear at the first trial were the "expensive legal costs"[49] charged by the Edmonton lawyer to take the appeal, to act as counsel at the second trial before

McBride,[50] and to take a second appeal before the Alberta Supreme Court, Appellate Division. And with the same result for Cardinal was convicted again. R.A. Gibson's short term objective of paring costs[51] proved sometimes to have longer term negative repercussions.

The Cardinal lesson appears to have been learned. In the Kikkik trial in 1958 before Justice Sissons, Sterling Lyon[52] was appointed to act for the defence as he had "considerable experience in the criminal courts and should . . . prove to be of the calibre required for a case such as this."[53]

(2) Circuits: Common Features and Significant Differences

Climate and geography initially determined the circuit courts' perambulations. In the Court's 1.3 million square mile jurisdiction its inhabitants were located on the waterways of the Mackenzie Basin and in pockets along the coasts of the Arctic Ocean and Hudson Bay. Until the advent of air travel in the 1930's, a summer circuit court, one which could travel by open water to the isolated communities, was the rule.

Two Stipendiary Magistrate water circuits evolved - the Mackenzie circuit, travelling down the Mackenzie River to the delta, and the Eastern Arctic circuit, that visited the small

remote posts on Baffin Island and on the west coast of Hudson Bay. There were common features to both, and some significant differences.

(a) Common Features

(i) By Water

In late June, on the Mackenzie circuit, Dubuc and later Douglas, prepared for the train and water journey to Fort Smith there to link up with the Hudson's Bay Company "SS Distributor" that would take them down river to the Mackenzie delta. Their circuits, done eight times between 1921 and 1935, visited the principal posts and disposed of the cases awaiting trial.

In the Eastern Arctic, only one water circuit occurred before 1939. Rivet, in 1923, travelled on the "CGS Arctic" to Pond Inlet where he heard the Janes[54] murder trial. Then followed a 16-year period[55] before another Stipendiary Magistrate circuit, that of McKeand in 1939 to Pangnirtung.

Rivet's court party had left in early July from Quebec, not to arrive at Pond Inlet until late August. After their four day trial concluded, the court party reboarded the "Arctic" to return home in late September 1923. Rivet's three month circuit had

taken longer than those of Dubuc and Douglas which routinely[56] lasted less than two months.

(ii) By Air

Both water circuits were supplanted by air circuits. This came first on the Mackenzie circuit when Gibben flew to Aklavik in 1939 to take the Selamio incest trial.[57] Five years earlier Douglas had flown to Coppermine to take the Ahigiah[58] manslaughter trial. But Coppermine on the Arctic Coast was not part of the Mackenzie water circuit. After 1939, Stipendiary Magistrates continued sporadically to go down river;[59] though after the Second War, except for Fraser's "all purpose" circuit down the Mackenzie by motor launch in 1948, all were air circuits.

Air circuits in the Eastern and Central Arctic developed later.[60] The first, except for the hastily arranged return airflight of the court party from the Belcher Islands in 1941,[61] arose in 1951. Bouchard, in that year, flew with counsel from Ottawa to Eskimo Point.[62] He repeated that circuit in March 1955.[63]

Eastern Arctic circuits continued exclusively by water from 1939 until McKeand's retirement in 1945, and again from 1951 until Bouchard's retirement in 1955. Bouchard, in that later

period as had McKeand in the former period, accompanied the Eastern Arctic Patrol ship on its visits to various coastal settlements in Hudson Bay and Baffin Island.[64]

(iii) Attended by Ceremony

Circuits were attended with their own form of ceremony. Though similar in purpose, the ceremonies differed in kind from those once followed in England and Wales, where the Judges were met at the town boundary and escorted in by trumpeters, the sheriff and other local county officers. In England into the nineteenth century "the ensuing cavalcade" was "one of some significance, attended by pike-and-liverymen,"[65] bells and music. In the Territories, the "antics"[66] surrounding the twice-yearly visits of the English High Court Judges were lacking.[66a]

In the Northwest Territories, the RCMP provided a "touch of ceremony"[67] for the court party. This could be a mere presence in ceremonial uniform[68] at the trial, as still continues in criminal Superior Court trials in Canada in the 1980's; or a travelling escort, such as that which accompanied Dubuc[69] down river to Herschel Island in 1923. On the Eastern Arctic circuit a police escort of sorts always travelled with the court party, since one of the Patrol's principal purposes was to relieve and supply police detachments in the Franklin and Keewatin Districts.

On the Mackenzie circuit an official escort seems to have been unique to Dubuc's circuits. By the 1930's the court party's use of small air craft allowed it to travel as a single entity to the place of trial.

The police, though, provided more than pageantry. Acting as reporter, Constable Richard Wild accompanied Dubuc north to Fort Providence in 1921 and Herschel Island in 1923.[70] At various times,RCMP officers acted as clerks and reporters.[71] Additionally, the police occasionally made transportation arrangements for the judicial party,[72] and often arrangements for the trial itself.[73] Under police auspices, trials were held at police detachments at Herschel Island and Pond Inlet in 1923; the tiny living room of the police detachment at Pangnirtung in 1939; and the police barracks at Coppermine in 1946.[74]

On circuit the ceremony and formal trappings of a Supreme Court trial in "civilization" were preserved. Counsel and the Stipendiary Magistrate, gowned, observed the essentials of court procedure.[75] McKeand specifically alluded to the importance of preserving the dignity of the administration of justice on the Eastern Arctic circuit believing "that the impression on the native mind would have a lasting effect."[76]

(iv) Effect on the Natives

Did these irregular visits to the remote communities "create a profound impresssion"[77] on the local inhabitants? Did the pomp

and solemnity of the proceedings impress the native mind? Not as much as was anticipated.

The Le Beaux trial in 1921 was attended on the first day by a large number of Slavey Indians, who responded to the invitation extended by the trial judge.[78] Before the trial began, Dubuc, through an interpreter, addressed the assembly, explaining the functions of the various officials of the court. On the second day, the native onlookers were considerably reduced in number prompting one news report to speculate that those absent "did not care particularly what the outcome might be."[79]

Dubuc, two years later at Herschel Island, at the opening of the several trials he presided over, addressed the "half a dozen Inuit"[79a] spectators "at great length, through an interpreter, explaning the different functions of the different officials comprising the court and jury, and the purpose of these trials."[80] When the first day's proceedings came to a close they "departed unconcernedly. They were frankly uninterested."[81] By contrast, on the last day of the circuit, the barrack room was filled with natives[82] who gathered to watch Dubuc pass sentence, through an interpreter, on some of "their brethren . . . . Even when the death sentence was passed not an [Inuit] blinked an eye."[83]

Approximately two weeks later, at the remote settlement of Pond Inlet on the northern tip of Baffin Island, Stipendiary Magistrate Rivet, at the conclusion of the Janes murder trial,

addressed the entire Inuit population of the settlement. Through an interpreter, they were advised "they could expect kindness and protection from the police if they behaved well, but if they committed any crime they could expect to be punished. They all immediately afterwards joined in three generous cheers for the Judge."[84]

Despite such occasioned manifestations of Inuit enthusiasm these trials had not the "salutory effect[85] on the future conduct of those few lawless [Inuit] . . . so confidently"[86] predicted when Dubuc's court returned from the north in September, 1923. Crime among the Inuit did not decrease.[87]

Circuit trials continued to attract "great interest"[88] or "none at all."[89] It can be safely said that for those migrating Inuit, not settled in any community visited by the circuit court, regular police patrols had more impact on them than did second hand accounts of the pageantry and solemnity of infrequent circuit trials.

(v) Schedule

A successful circuit was one that allowed for adequate time to deal comprehensively with pending cases. "The straight jacket forced on [English] Assizes by the need for the Court to move on, in conformity with a pre-arranged timetable, causing great inconvenience and complaint",[90] had to be avoided. Judged by

this standard, circuits in the North West Territories allowed for the time necessary to mete out justice. The light docket of cases assisted in meeting this objective.

Any suggestion that trials at settlements on the Mackenzie River in the 1920's and early 1930's were "cut-short" to allow the "SS Distributor" to move on are rejected.[91] Similarly there is nothing to suggest that docket cases heard by McKeand on the Eastern Arctic circuit during the Second War were prematurely terminated to facilitate the Patrol ship's itinerary.[92] Air circuits undertaken to dispose uniquely of judicial business were as flexible as the weather and the whims of the Judge allowed. Such an unscheduled pace, though, did not prevent the court from sitting at odd hours, finishing some trials at midnight[93] or two in the morning.[94]

(vi) Interpreters

Yet even if there were an abundance of time, a circuit could be undermined were not adequate interpreters available. For language was a barrier to effective communication between the court and Indian and Inuit accused. Chief Justice Harvey, in the Sinnisiak and Uluksuk trials, had understood the need and had relied heavily on the interpreter "Patsy."[95] Appreciating the need for competent translations, Dubuc and McKeand ensured that local interpreters became a regular part of circuit trials.

Some interpreters were existing or former traders. Henry T.Ford, the interpreter at the Katcho trial in Pangnirtung in 1939, was a retired Hudson's Bay Co. trader known throughout the North as "the white man who speaks Eskimo better than the Eskimo."[96] Duval, an employee of the Hudson's Bay Company, was the interpreter at the Janes murder trial at Pond Inlet in 1923.[97] Others came from established local families. Mr. Norn, who acted as interpreter at the Le Beaux trial in 1921, was one such example.[97a]

While interpreters assisted the natives in comprehending the court process, it seems that until Justice Sissons' time, criminal circuit courts utilized usually only one interpreter. That interpreter acted for the Court. A later practice then developed of having two interpreters available, the second to assist uniquely the accused and his counsel.[98]

(vii) Logistics

Something needs to be said about the logistical side of court circuits. The court party could be likened to an "asiatic caravan, taking all their books, records and impedimenta with them."[99]

The earliest retention of court circuit records dates from 1939, when a court clerk was appointed at Yellowknife.

Thereafter in the Mackenzie District, a modestly successful effort was made to retain circuit records at Yellowknife.[100] Prior to 1939, circuit records for the Mackenzie District were retained in Ottawa.[101] Records of Eastern Arctic circuits never found their way to Yellowknife, but rather were collected in the offices of the Territorial Administration in Ottawa.

The lack of a central repository for court records of the Stipendiary Magistrate's Court was one manifestation of the loose administrative control that characterized the court circuit system in the Territories. With no regular administrative staff, this "remarkable travelling circus"[102] comprising a Judge, barristers, ad-hoc clerks and reporters, occasional police officers, accused, witnesses, and sometimes prospective jurors, saw to transporting rudimentary office equipment, court forms and like papers to the tiny settlements.

At the settlements in the Mackenzie District with no regular lodgings available,[103] the court party, if it needed to stay more than one day, dispersed among the settlement inhabitants.[104] On the Eastern Arctic circuit, McKeand's court parties remained on board ship [104a] emulating Dubuc's earlier court parties who travelled on the "SS Distributor" in the 1920's. Indeed, on at least two occasions,Dubuc did not disembark from the Distributor, holding court once in the ship's saloon[105] and another time on the Distributor's foredeck.[106]

(b) Significant Differences

(i) Importance of Court Matters

The Eastern Arctic Stipendiary Magistrate circuits were an ancillary part of the Government's Eastern Arctic Expedition. Until 1930, the central thrust of the summer patrol to the Eastern Arctic remained to engage in exploratory and scientific pursuits. Typically, the expedition in 1929 included in addition to the Officer-in-charge, an ornithologist, a medical doctor, four RCMP constables, a photographer, but no Stipendiary Magistrate.[107] After 1930, these annual visits were downgraded to carrying supplies to government and RCMP posts. Stipendiary Magistrates accompanied the annual patrols only in 1923,[108] from 1939 to 1945[109] and from 1951 to 1954.[110] At these times, pending judicial cases were "fitted in" to the patrol's settled itinerary.[111]

This subservient position forced upon the circuit court in the Eastern Arctic can be juxtaposed to the situation in the Mackenzie District. Consistently from Dubuc in 1921, to Phinney in the early 1950's, Mackenzie court circuits were undertaken to meet solely judicial needs.[112]

(ii) Hiatus in the Eastern Arctic

As noted already, no Stipendiary Magistrate trials were

heard between 1923 and 1939 in the Eastern Arctic. By contrast, in the Mackenzie District, circuit trials proceeded apace before Dubuc and his successors. The explanation for the sixteen year gap in the Eastern Arctic lies in a number of factors.

(A) Principal among them was the lack of reporting of serious crime. Deficient language skills on the part of the police and a lack of proficient interpreters hindered timely or any reporting. Reticence,[113] fear[114] and distrust of the police, and ignorance[115] of the policeman's role also played a part in the Inuit's reluctance to confide in the police. Dudley Copland, long time Hudson's Bay Co. trader gives two examples.[116]

An Inuit hunter, on the trail 100 miles from Lake Harbour, forced to abandon his son, afflicted by polio and unable to walk, left the boy inside a hastily built ring of stones. The father returned the next day to find that wolves had terrified the boy during the night. Despite the boy's pleas, the hunter could not take his son further so he shot him, rather than have the wolves devour him. Grief stricken, he confided in Copland, then at Lake Harbour, the story that he "couldn't tell the police."[117]

Religious frenzy[118] erupted near Lake Harbour in 1927. The terrified Inuit elicited the assistance of Mr. Learmouth, a Hudson's Bay Company trader, to track down the Inuit "fanatic." A "posse" shot him in his igloo near Lake Harbour. The participants in this community purge[119] were sworn to secrecy.

When the police belatedly heard of the killing, a constable from Pangnirtung pointedly reminded Learmouth that the Hudson's Bay Company had surrendered judicial control over the Territories in 1870.[120]

(B) This pointed police comment raises another factor to explain the hiatus. The Inuit partially continued to rely on their own dispute resolution mechanisms,[121] their own customary law, to solve social problems,[122] or else looked for assistance to trusted[123] and respected traders and missionaries who unlike the RCMP, were long term residents of the Baffin Region.[124] In either case, the police were initially by-passed. In a 1939 memorandum Assistant Commissioner T.B. Caulkin took the long view when commenting on the contact between Inuit and the criminal process: "only by contact and gradual familiarity over a number of years will the Inuit become educated to the fact that they must not take the law into their own hands."[125]

(C) Cost considerations too played a factor. Itergooguk, arrested in the High Arctic in King William's Land, was being held at Tree River in the Mackenzie Delta for an alleged murder that had occurred a few years previously near Baker Lake. The Commissioner of the Police in his annual report commented: "The case proved a perplexing one . . . [I]f he were tried, it would be necessary to return him to Chesterfield Inlet and while Sergeant Barnes regarded this as practicable, it would be expensive and inconvenient to do this . . . . Of course this

was only a matter of detail."[126] The Department of Justice was consulted and decided that the chances of obtaining a conviction were not sufficient to justify proceedings.[127] Itergooyuk was released.

(D) Some accused committed suicide making trials unnecessary. In 1927, near Pangnirtung, Kaska shot his wife and then himself.[128] On 5 February 1930, a "halfbreed" Inuit, Mike Herschel, committed suicide in King William's Land, after he had, in a drunken frenzy, badly beaten an Inuit boy.[129]

(E) The exercise of police discretion not to charge meant that, at times, the police proceeded no further than the investigation stage. In 1930, Inspector Eames did "not feel justified in charging"[130] Kaiaryuk who had assisted her crippled and aged husband Makhagaluk to commit suicide by hanging. Inspector Phillips in 1920 acquiesced in the Coroner's jury verdict that recommended no criminal charges be laid for the murder of Ketaushuk.[131] The deceased, insane and threatening an Inuit group on the Belcher Islands, met his fate after the band council determined to act to protect the rest of the group. Phillips contented himself with warning the group not to take the law into their own hands[132] another time.

(iii) Non-Resident Judges in the Eastern Arctic

The sporadic nature of Stipendiary Magistrate criminal

circuits in the Eastern Arctic, coupled with the absence in the region of any civil proceedings, meant that there was no demand for resident Judges in either the Keewatin or Franklin Districts. Accordingly, all four Stipendiary Magistrates who served on the Eastern Arctic circuit were non-residents. Rivet came, in 1923, from Montreal; McKeand, during the war years, came from Ottawa; Plaxton, in 1941, came from Toronto; and Bouchard, in the early 1950's came also from Ottawa.

While some Stipendiaries undertaking the Mackenzie criminal circuit were non-residents - notably Dubuc in the 1920's and Douglas in the early 1930's - by the late 1930's Stipendiary Magistrates, resident at Fort Smith or Yellowknife, performed the vast majority of the circuit duties. Gibben and Perkins did so before the Second War, and A.H. Gibson, Fraser, Cunningham and Phinney did the vast bulk of the circuit work after the War. Of necessity, in 1954, McBride journeyed to Yellowknife from Edmonton for the Cardinal #2 trial; and by design, after 1950, Gibben came periodically from Whitehorse to take certain serious criminal trials.

Whether these resident Judges injected a less harsh, more lenient element into the criminal circuit process is debateable. Certainly through personal experience, they could identify more readily with the harsh realities of northern living - the isolation, the lengthy winters, the transportation and

communication difficulties. This in turn may have made them more tolerant and understanding of misconduct when it occurred, though no concrete evidence of this has emerged.

(iv) Continuity of Counsel

In England, circuit facilities encouraged cameraderie among counsel. The Bar lodged and ate together at each assize town.

In the Territories, water circuits, of necessity, brought counsel together for extended periods of time. With the development of a resident bar at Yellowknife - Perkins before the Second War, the Parker brothers, Ray Mahaffey, and Don Hagel, after the War -a continuity of counsel from circuit to circuit in the Mackenzie District slowly grew up.[132a] After the Second War, until 1955, John Parker usually prosecuted.[133] Mahaffey, and then Hagel, shared defence counsel duties with outside counsel. At day's end, the battles of the court room were put aside and counsel ate and drank as friends.[133a]

The Eastern Arctic circuit, by contrast, without the development of a resident bar,[134] was staffed by a succession of counsel drawn from Manitoba and Ottawa.[135] A continuity of counsel never evolved. Many of these counsel probably were not licenced to practise law under the Legal Profession Ordinance, 1938[136] even after the non-resident provision was added in 1939.[137]

(3) Responsiveness to the Magna Carta Dictum

Did accused persons, tried by Stipendiary Magistrates on circuit, receive "speedy, impartial, uniform"[138] justice from a jury of their peers? The record was checkered at best.

(a) Jury of Their Peers?

Circuit juries until the late 1940's were invariably composed of white males.[139] This had "the effect, if not the intention, . . . [of ensuring] a 'packed' jury of superior social status which would prove receptive to instructions from the bench."[140] To ensure that enough whites could be empanelled for a jury was the express reason for holding the trials in 1923 at Herschel Island.[141] At subsequent trials, air force personnel,[142] ships' crew members,[143] and traders, trappers and government personnel[144] - all white - were seconded to jury duty.

The first Indian juror sat on the Lamont trial in 1947 at Fort Smith while the first Inuit juror, as foreman, presided at the Cambridge Bay trial of Alikomiak in 1951. As a postcript, in the period after 1955, "as much as possible, native people [were] called for jury duty."[145]

In this respect, circuits in the Territories fell decisively short of the ideal. The community of peers was deprived of the opportunity to express through a jury verdict their view of the accused's conduct.

(b) Speedy?

The record on speedy justice, the "turn around time"[146] was little better. Handicapped by transportation difficulties, by the fact of widely scattered isolated communities and by difficulties of communication, early circuits were delayed in adjudicating criminal charges.

Director Finnie early on set the tone referring in the summer of 1922 to the pending Peter Baker case at Fort Smith. "There is no immediate necessity that this case be tried at once."[147] Baker was on bail and accessible. "It was quite satisfactory to all concerned if the Baker case be left over"[148] until the following year to be heard by Dubuc on his journey down river to take several pending Inuit trials. Satisfactory to all except perhaps the accused who was not even consulted! Finnie then abruptly added: "If it is necessary, Baker's bail could be renewed or he could be held until his trial comes up next summer."[149]

Using this case as a guidepost, it was not unusual for a delay of one year between the Preliminary Inquiry and the trial.[150] This delay was lauded by some: "all cases were held over until the opening of water navigation without in any way defeating the administration of justice"[151]; and criticized by others: the accused could be evacuated at the first opportunity instead of being "held over nine, ten, eleven months pending the arrival of the judicial party."[152]

Nor were delays attributable only to transportation difficulties. Kennedy's incest trial at Fort Smith did not proceed until May 1940 due to the absence of defence counsel, Charles Perkins, from the Territories during the winter of 1939-40.[153] The Beaulieu trial was delayed for approximately nine months until September 1944 for want of a legally trained resident Stipendiary Magistrate.[153a]

In the Mackenzie District, with the increasing use of air travel and better communications,[154] the time between committal for trial and the trial itself decreased markedly. One or two months became the norm[155] though occasionally and rather presumptuously, the Preliminary Inquiry was held days before the trial commenced. This occurred in 1946 when Inspector Martin conducted the Mafa[156] Preliminary Inquiry at Coppermine on 17 August, two days before the trial commenced before A.H. Gibson. The court party and Martin had arrived days apart on separate police air craft.

In 1951, the interval was reduced to one day! Inspector Simmons, at Cambridge Bay, committed Alikomiak[157] for trial on 11 April 1951. The next day Phinney, recently arrived at Cambridge Bay, presided over the Inuit's jury trial. Presumably the Crown was entirely confident of a committal since the expense to bring Phinney's court party by air from Yellowknife was not inconsiderable.

In the Eastern Arctic, the reliance on water transportation into the mid-1950's meant that delays of up to one year could occur between committal and the hearing of criminal trials.[158] Two reasons explain this situation - budget constraints and perceived air travel hazards.

(A) The Territorial Administration had early on conceived the cost of court circuits to be the responsibility of the Department of Justice.[159] Reviewing the costs of Rivet's circuit in 1923, and those of Dubuc in 1921 and 1923, and Douglas in 1932, McKeand reported that these costs should be paid by the Department of Justice "in the same way that the salaries of County and Superior Court Judges are provided for by that Department."[159a] Hence, McKeand cautioned, no special item in the Territorial Administration's budget should be allocated for Judges' expenses, lest an unfortunate precedent be established. After the "clarification",[160] that occurred in 1939, the Territorial Administration continued to utilize the summer patrol ship for court circuits in the Eastern Arctic so as to keep costs to a minimum.

(B) Air travel in the Central and Eastern Arctic was a hazardous pursuit. Even in the late 1950's Justice Sissons' air circuits still had to contend with unpredictable weather conditions,[161] and a lack of navigational landmarks[162] and aids. Inconvenience and risk still prevailed.[163] Indeed, in the first six months of 1956, the circuit Court's single engine plane had been "forced down four times."[164]

These Eastern Arctic water circuits retained an Ottawa flavor. On McKeand's retirement in 1945, J.G. Wright of the Territorial Administration assumed command of the Eastern Arctic Patrol. As he "will probably be required to hear four cases"[165] he was appointed a Justice of the Peace with the powers of two.[166] Later departmental officers accompanying the Patrol obtained similar appointments.[167]

After 1955, the Territorial Administration sought to maintain control over Eastern Arctic circuits, a control that up to then had produced significant delay in the adjudication of criminal cases.[167a] Sissons and Phinney were discouraged from extending their Mackenzie court circuits to the Keewatin and the Franklin Districts.[168] Justice Sissons saw no merit in Ottawa's stance: "the Department of Justice seeks to exercise the control over the [Territorial] Court which it had over the Stipendiary Magistrates. I must object. It may as well be recognized and accepted that the day of the old inadequate routine was past and gone when the Territorial Court was [in 1955] established."[169] Sissons concluded: "I cannot accept the unusual and startling proposition that the Attorney General [of Canada] should exercise control over my travelling . . . because the question of expense necessarily arises in determining the Court's itinerary."[170]

Sissons went by air to settlements on the west side of Hudson Bay in July 1956[171] and the following July to the Eastern Arctic.[172] The Police Magistrates though, with the exception of Phinney's DEW-line hopping to Frobisher Bay in 1956, did not

venture into the Eastern Arctic until the Mingeriak murder case at Frobisher Bay in 1963.[173] Until then, Ottawa resident Police Magistrates, from 1958[174] onwards, attended to the required criminal work.[175]

(c) Uniform?

The English circuit system's chief merit was that Judges going from London on circuit provided "a high and uniform standard of justice."[176] The collegiality and cohesiveness of the Judges, experienced during term time at Westminster, was renewed on the Judges return from their twice yearly circuits. The "great order and uniformity of proceedings"[177] fostered by the central Courts at London provided guidelines for the "Red Judge"[178] when he went on circuit.

Lacking the "continuity, social intimacy and clerical esprit"[178a] created when Judges of similar training and experience[179] resided in a central place and operated under established court procedures,[180] the desired uniformity in the Territories was absent. Little contact existed between Judges who resided in Ontario[181] and conducted Eastern Arctic circuits[182] and those who attended to circuit work in the Mackenzie District. The latter were residents initially of Alberta and then of Fort Smith and Yellowknife. At no time did more than two Stipendiary Magistrates ever reside in the same place at the same time.[183] The desired internal cohesiveness was lacking.

An attempt to inject some degree of uniformity occurred after the Second War. At the impetus of Fred Fraser, the only amendment to the Rules of Court was passed.[184] Similarly, at Fraser's urging, A.H. Gibson, Cunningham and Fraser developed "loose sentencing guidelines"[185] in the period 1946 to 1948. Absent these minimal efforts, the judgments of the Stipendiary Magistrates and "their administration of common justice [did not] carry a consonancy, congruity and uniformity, one to another."[186]

(4) The Political Function of Circuit Judges

As Professor Cockburn has brilliantly elucidated, before the eighteenth century the circuit system in England was "less judicial than consciously administrative and political."[187] How intriguing then to skip two centuries to find Judges in the Territories[188] on circuit exercising political functions additional to their judicial duties. Their executive political role had two aspects.

(a) Conveying the Views of the Executive

Though no equivalent of the Star Chamber charge guided them, Dubuc and Rivet were certainly aware of their proselytizing responsibilities when going North to the Arctic coast in the summer of 1923. To acquaint the Inuit with the standards of British justice was their objective. They performed it with

zeal. In his charge to the jury Dubuc cautioned them to bring in a true verdict "[un]swayed by sentiment of pity and mercy alone. I speak . . . for a special purpose because it has come to my ears that some members of the Jury had already expressed before the trial ideas of mercy and acquittal, unmindful no doubt of the consequences. Our government has not undertaken this expensive Judicial Expedition to have established here a mockery and a travesty of Justice before these primitive people.[189]

The following year, Dubuc began the Ikalupiak trial with an explanation, through an interpreter, to the assembled Inuit observers, of the laws "in the whiteman's country."[190] His charge to the jury admonished them to "decide according to the evidence and bring the realization to these Northern wards of ours that the stern but just hand of British justice extends also to these far away shores."[191] He concluded with the warning:

> "You cannot decide this case lightly . . . . It would be deplorable and laden with disastrous consequences if perchance, a travesty of justice was exhibited before these simple minded but honest Eskimo who are bewildered by this long, tedious trial procedure. This expensive Judicial expedition was sent to enlighten them of the fairness and justice of the whiteman's law."[192]

Although no transcript of Rivet's charge at Pond Inlet is readily available, nor those of McKeand made during his circuits from 1939-1945, it is probable that similar admonitions and exhortations were embodied in their jury charges.

They were certainly contained in Plaxton's urgings "to maintain friendly and peaceful relations amongst themselves"[193] when concluding his remarks to the Inuit observers at the Belcher Island trials in 1941.

(b) Circuit Reports

On their return from circuit, Stipendiaries occasionally supplemented their required[194] judicial reports made to R.A. Gibson with piquant summaries containing their impressions of the pulse of the communities. Fraser returned from his circuit down river to Tuktoyaktuk in 1948 by motor launch[195] to detail at length, in his report, the status of each community and the needs of the District as a whole.[196] Gibson could not but be pleased with and assisted by, this source of reliable intelligence.[196a] Nor could he not but be pleased with a companion report[197] detailing the welfare and problems of the Inuit in Northern Baffin Island, that Stevenson compiled after his return from the Eastern Arctic circuit in 1948.

McKeand concluded his extensive judicial report of the Katcho trial in 1939[198] by appending the report of one of the circuit observers.[199] That appendix in part called for a reexamination of the relation between the Inuit and the law: "one could not help feeling, however, that some revision in the Law Code, as it at present stands could be made when dealing with

Eskimo problems."[200] This view accorded with McKeand's own impressions.

At the urgings of the Territorial Administration and his superiors at the Department of Justice, R.A. Olmstead specifically addressed the issue in his extensive report on his return from the Belcher Islands in 1941.[201] In the end, predictably, any suggestion of a special law for the Inuit was seen to be fraught with problems and thus its implementation too problematic.[202]

In conveying their impressions and thoughts on a variety of issues, not restricted to judicial concerns, Fraser and McKeand merely followed in the course set earlier by Dubuc. His extensive observations made in 1923 to the Deputy Minister of Justice upon his return from the Inuit trials at Herschel Island[203] supplemented his formal report to the Secretary of State.[204] In his supplement, Dubuc dealt with abuses in the jury system in the Territories, the inadequacy of witness fees and the inappropriateness of prison sentences. He implied that jury trials should be abolished in the Territories, and directly advocated an amendment to the Criminal Code empowering the Judge to sentence an Inuit to imprisonment "on bread and water and to inflict the lash.'" Dubuc concluded:

> "There are many other things and many more important details of the ways and customs of the Inuit and native likely to be of interest to you and to your Department regarding the administering and enforcing of our laws in the North."[205]

1. Sissons, Judge of the Far North (Toronto: McClelland & Stewart, 1968) p.66. Auburn was of the view that the court did not go on circuit but that accused were brought to distant courts. Auburn, Antarctic Law and Politics (Bloomington: Indiana University Press, 1982) p.22.

2. Letter, Sissons to Macleod of Dept. of Justice, 5 March 1956, D of J, file #166266.

3. Morrow, "Riding Circuit in the Arctic" (1974) 58 Judicature 236 at 237.

4. See Appendix A.

5. The first civil business in the Territories dated from the enactment of the Small Debts Ordinance assented to 9 February 1937. There was little civil business in the Territories even after 1937 because creditors in debt matters continued to utilize the concurrent jurisdiction provisions of the Northwest Territories Act RSC 1927, c.142, s.34-37. Actions were brought in the Supreme Court of Alberta, Trial Division. If the debts were less than $200.00, they could be heard by a Small Debts official. (Chuck Perkins' Recollections, GAA, p.13.) There was some complicated civil work in Yellowknife right after World War II. Ross v. Lieberman, unreported, SM 643, a civil jury trial heard by Cunningham, SM, was the principal example.

6. I am ignoring the exception, "old" Keewatin in the period 1905-1912. See Appendix "A" - 1907 Fiddler case and the apparently non-official trip of Judge Noel in 1910. Not all cases came to trial. In 1907, an Indian woman at Ft. McPherson complained of rape. The RNWMP and Commissioner White solicited the opinion of the Department of Justice. After much correspondence it was determined that the evidence was not strong enough to warrant the expense of bringing everyone concerned south for a trial. Financial pragmaticism had prevailed! Morrison, Ph.D. thesis, p.217.

7. See Appendix C - 1917.

8. Sinnisiak on 17 May 1916, and Uluksuk on 29 May 1916, RNWMP Annual Report, Canada, Sess. Papers, 1917, #28, p.201-203.

9. Comments on the case include: Moyles, British Law and Arctic Men (Saskatoon: Western Prairie Producer Books 1979); RNWMP Annual Report, Canada Sess. Papers, 1918, #28, p.11; Schuh, Justice on the Northern Frontier, (1980) C.L.Q. 74, at 86-92; PAC, RG13, c.1, Vol.1484; Keedy, "'A Remarkable' Murder Trial: R. v. Sinnisiak" (1951) 100 U.Pa.L.R. 48.

10. RNWMP Annual Report, Canada Sess. Papers, 1917, #28, p.203, Inspector La Nauze. In the Radford and Street murders that occurred in the barren lands near Bathurst Inlet in June 1912, the RNWMP investigator did not determine the full facts until January 1918 while on patrol. In accordance with instructions of the Government, Inspector French did not arrest the Inuit offenders: "You are to ascertain the facts. It is assumed there was provocation, if so it is not the intention of the Government to proceed with prosecution." RNWMP Annual Report, Canada Sess. Papers, 1919, #28, p.14. "Handsome Harry" Radford had indeed, through his ignorance, precipitated a scuffle with his Inuit guides.

11. RCMP Annual Report, Canada, Sess. Papers, 1921, #28, p.13-15.

12. Cpl. Joyce at Fullerton on the west coast of Hudson Bay in his 1910 report alluded to the practice: recommend the appointment of non-commissioned officers as Justices of the Peace so as to be able to try minor offenses and inflict light punishment without having to take prisoners and witnesses to Ft. Churchill for prelimimary hearing. Joyce's suggestion was faulty. Only Justices of the Peace with the powers of two could conduct preliminary hearings. RNWMP Annual Report, Canada, Sess. Papers, 1911, #28, p.265.

13. Ibid.

14. Before the case came to trial the accused, returned to Chesterfield Inlet by sea in September 1920, fled the custody of Inspector Reames in a January night blizzard and died. (RCMP Annual Report, Canada, Sess. Papers, 1922, #28, p.36.) Almost immediately the Le Beaux case arose, allowing the new policy to be put into effect. Le Beaux murdered his wife in December of 1920. He was committed for trial on 27 January 1921 by Inspector Fletcher at Ft. Smith. Inspector Fletcher, not aware of any policy change, brought Le Beaux after an arduous dog journey to Edmonton, the assumed place of trial. The accused was brought back by police escort for his trial on 30 June 1921 at Ft. Providence. (RCMP Annual Report, Canada, Sess. Papers, 1922, #28, p.46.)

15. There was a rash of Inuit trials heard in 1923, see Appendix A.

16. Chief Justice Harvey asked the interpreter Patsy: "You might tell them that when they get back home, if they do, they must let their people know that if any of them kill any person they will have to suffer death. They now know what our law is." Schuh, p.91. The message had not gotten through.

17. RCMP Annual Report, Canada, Sess. Papers, 1928, #28, p.38.

18. The cost factor was emphasized the following year. "That should Agnaviak be committed for trial no action is to be taken to bring him outside . . . until a decision is reached as to whether or not the evidence available would justify the expense of placing this native on trial for the alleged murder of his wife." Memorandum, Assistant Commissioner Starnes, 18 April 1921, PAC, RG 85, Vol.581, 480.

19. RNWMP Annual Reports, Canada, Sess. Papers, 1903-30, #28. This is a central theme dealt with by Morrison, Ph.D. thesis.

20. Livingstone travelled north to Pond Inlet and into southern Baffin Island.

20a. "It was thought the criminal Courts should be made as imposing as possible in order to impress the natives." Minutes, CNWT, 1939, PAC, M-811 to 815, p.1711. Indeed as early as 1906 Commissioner White in writing to the Deputy Minister of Justice remarked: "It is scarcely necessary for me to point out that speedy trials within the district where an offence has been committed have greater deterrent effect than the taking of a prisoner hundreds of miles for trial, with the consequent delay and expense," letter, 25 May 1906, RG 85, Vol.177, 542-3-1.

21. Schuh, p.95, refers to Godsell's estimate that this series of trials cost $75,000.00. Godsell's accounts are highly sensationalized. To be accepted as accurate they must be corroborated.

22. Even if it were more costly to try the cases on the spot than "outside"; see also, Schuh, p.110. Morrison, p.245, fn.2, cites the Edmonton Bulletin 12 December 1913 with reference to Sinnisiak and Uluksuk: "bring the perpetrators to justice if it costs a million dollars." The Vancouver Sun, 16 September 1923, espoused the same sentiment in commenting on the Herschel Island trials. "A few weeks ago (sic) a judge and court officials set out from Edmonton through hundreds of miles of ice and snow to try them . . . . This is the kind of Canadian justice that is worth preserving. It knows no limits of space, time or hardship."

23. Schuh, p.111. There had been a flurry of memos concerning the camping equipment, costing $212.00, purchased and retained by Dubuc for the Le Beaux trial. The Territorial Administration ordered it forwarded to Ottawa. (PAC, RG85, Vol.569, File #80.) The retinue increased in 1923, Dubuc brought his whole family plus a gardien d'enfants.

24. PAC, RG85, Vol.1870, 540-1-1.

24a. A word of explanation is needed. The Territorial Administration (the government of the Northwest Territories) was a branch of the Federal government Departments of the Interior (1921-36), of Mines and Resources (1936-50) and of Northern Affairs and Natural Resources (1950-55).

25. There were no Eastern Arctic judicial circuits between 1923 and 1939. There were, after 1923, four more Mackenize circuits by Dubuc followed by two circuits by Douglas by water in 1932 and 1935, and one by air in 1934.

Cost complaints continued. Commissioner Rowatt complained of the expenses for Douglas' court party to visit Aklavik in 1932. "It was not contemplated when the estimates were framed that any provision would be required as regards the expenses of trials in the Northwest Territories . . . . These expenses have always been paid by the Department of Justice" letter, 29 June 1932, Rowatt to Minister of Justice, D of J, file #136636.

26. D of J, file #140093: memorandum, Deputy Minister of Justice, dated 15 February 1939, prepared by Mr. Miall; PAC, RG85, Vol.1870, 540-1-1: letter, 28 January 1939, Gibson to Deputy Minister of Justice.

26a. Ibid.

27. There was some doubt about this but Mr. Miall opined that "at least under present conditions this was the case." (Miall's 15 February 1939 memo at p.4.)

In 1943 Miall observes that the Territorial Administration has accepted that the Minister of Justice "as the Territorial law officer of the Crown will decide whether Counsel should be employed." Memorandum, Miall, 24 June 1943, D of J, file#135033.

28. Ten years previously air transportation was not normal. In 1939 without a road system and water transportation for only two to three months each year, air transportation, in the Mackenzie District, was normal in the sense of being available all year round. In the Central (District of Keewatin) and Eastern (District of Franklin) Arctic air navigation aids and landing facilities were not extensive

until the late 1940's, early 1950's. Even in the mid-1950's Phinney, then a Police Magistrate, hitchhiked by air along the DEW line to Igloolik before crossing Foxe Basin on his way to Frobisher Bay. The American Dew Line sites had the best navigational facilities at that time.

29. Constitution Act, 1867:
92(14)
> The administration of justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts both of Civil and Criminal Jurisdiction and including Procedure in Civil Matters in those Courts.

NWT Act:
10(1)(j)
> The administration of justice in the Territories including the constitution, organization and maintenance of territorial courts of civil jurisdiction and procedure in such courts but not including the appointment of any judicial officers or the constitution, organization and maintenance of courts of criminal jurisdiction or procedure in criminal matters.

The underlining emphasizes the differences. This is a dangerous comparison since Stipendiary Magistrates were section 101 judges, not section 96 judges. Interestingly the first part of section 101 makes reference to the constitution, maintenance and organization only of the Supreme Court of Canada; the second part of the section refers to "courts for the better administration of the laws of Canada."

30. There were no salaried Clerks until 1939, no full time Sheriff and Reporters till after the Second World War.

31. There were no court houses, as such, in the Northwest Territories until the 1970's. Permanent court rooms in federal or other buildings date from the late 1940's. For example, the Yellowknife court room was in the Federal building where the Mining Recorder's office was also located. In 1955 the court room at Yellowknife moved to the Federal Post Office Building, there to remain until the late 1970's.

32. Letter, 7 March 1939, Gibson to Deputy Minister of Justice, D of J, file #14093; supra fn.23.

33. Appendix "A", 1939 Katcho and Selamio cases. Their fees, approved by the Department of Justice, were paid by the Dept. of Mines and Resources. Interestingly, the Dept. of

Justice had paid Perkin's flat fee of $300.00 in the Ducharme case in 1938. Miall comments in his 15 February 1939 memo that Mr. Edwards, when Deputy Minister of Justice, "has on occasion expressed himself to be at a loss for ground of responsibility for the expenses - [at one time or another Justice had paid prosecuting and defence counsel fees] - but has apparently assumed them without instructing an officer to theorize."

34. Minutes, CNWT, 1939, PAC, M-811 to 815, p.1754.

35. Minutes, CNWT, 1939, PAC, M-811 to 815, p.1711.

35a. In 1941, R.A. Gibson and Mr. Edwards, Deputy Minister of Justice, exchanged correspondence over counsel fees on the Belcher Island trials. (D of J, file #143871.) The Department of Justice paid Madden's fee and the expenses of Olmsted. (Letter, Varcoe to R.A. Gibson, 30 October 1941, PAC, RG 85, Vol.174, 541-2-1-2.)

In 1946, Cunningham, then a Stipendiary Magistrate, prosecuted at the Mafa trial to save costs (Appendix A - 1946).

36. D of J, file #136636. Miall in a memo in response to Gibson's letter of 13 July 1944 concerning the pending Beaulieu trial restates that the Department of Justice in serious cases "may be expected in accordance with custom . . . to nominate a solicitor to represent the accused, who will not be an agent of the Minister of Justice." W. Rea KC of Edmonton was appointed for this trial.

Who is an agent is vague - a wide interpretation would prohibit all federal government in-house counsel, restricting the appointment to private practising lawyers.

37. In 1943, T.L. Cory accompanied McKeand on circuit. Cory was a legal officer in the Department of Mines and Resources. Cpt. McLeod of the Judge Advocate General's branch defended on McKeand's 1945 Eastern Arctic circuit. D.T. McDonald of Justice defended in the Eeriykoot case in 1949. Don Thorson of Justice acted for Cardinal at Aklavik in 1953.

38. Letter, 23 June 1943, Gibson to McKeand PAC, RG85, Vol.1870, 1540-1-2. What Gibson was alluding to was the on-and-off debate within the Territorial Administration concerning a "special law" for the Inuit. Olmstead of Justice specifically addressed this issue when he returned from the Belcher Island trials in 1941. He proposed a special status for the Inuit in the criminal code (Memorandum of Olmstead, 11 October 1941, PAC, RG 85, Vol.174, 541-2-1-2). Gibson sympathized but in the end rejected the proposal. Yet when it suited his purposes to reduce costs by utilizing an in-house legal officer, he justified that course by asserting

that permanent department officers had a special appreciation for the needs of the Inuit in the criminal process. This is highly suspect. T.L. Cory had only acted once before for anInuit in a criminal trial. That was in 1923 at Herschel Island.

39. Appendix A - 1923.

40. Appendix A - 1924.

41. Both transcripts are with the writer.

42. In fairness, Cory had little to work with. Corporal Doak was murdered while asleep in his bed. The accused had also given a full statement.

43. When the accused's statement was introduced through the first Crown witness, Inspector Wood, Cory objected to its admission. The interpreter had an interest in the case as he had lived with the deceased's wife since the murder. Cory could have called the wife in the voir dire held to determine whether the statement was voluntary. He did not.

44. Dubuc in 1923 stated: "Mr. Cory in a masterly manner defended the accused to the best of his ability, but his efforts were curtailed by the previous admissions and confessions of the prisoners." Letter, Dubuc to Secretary of State, 22 September 1923, PAC, RG 13, C-1, Vol.1526. The key part is "to the best of his ability." The doubt lingers that Cory in 1923 approached his task in a robust manner. He arguably prejudged the case. In 1922 he wrote: "Kindness and clemency have not had the desired effect upon the native . . . I strongly recommend that the law should take its course and those [Inuit] found guilty of murder should be hanged." (There is a subtle assumption of guilt in this passage.) Memorandum, 12 September 1922, T.L. Cory, PAC, RG 85, Vol.607, file #2580.

In the end, Cory was not put to the test. The Miktaeyout case scheduled to be heard at Fort Ross was not because ice conditions prevented the Court from reaching Fort Ross. The Simmonnee case went no further than the Coroner's Inquest (Appendix A - 1943). The medical evidence revealed that the accused's wife died of natural causes.

45. Appendix A - 1945.

45a. It is not clear if there was a plea of guilt or a finding of guilt. What is clear is that: "Macleod understands nec[essity] of getting K[arlooarse] away from District and agrees case can go to trial even tho[ugh] daughter not here, willing to allow conviction . . . [Karlooarse] admitted the offense and said he knew it was against white man's law,

said he would tell same story tomorrow. Macleod decided case could go ahead." Diary of T.G. Wright, government officer in charge of the Eastern Arctic Patrol, 16 August 1945, PAC, RG 85, interim Vol.2, 84/85/554.

It was sloppy practice for Macleod to interview the accused in the presence of Wright. Wright could have been subpoened to testify against the accused. As well, without the daughter's evidence and without a confession to the police, there was insufficient evidence to convict unless Macleod allowed the accused to give evidence. The impression is left that it was "decided" to let a conviction go because this was perceived to be in the best interests of everyone.

46. Appendix A - 1953.

47. Now Mr. Justice Thorson of the Ontario Court of Appeal.

48. R. v. Cardinal (1953) 10 W.W.R. (N.S.) 403 (A.S.C.A.D.).

48a. Ibid. at p.405. "When the first witness, Constable Komache, was being cross examined as to whether he had noticed anything, during the week preceding the trial, concerning Cardinal's state of mind and what complaints of ill health or symptoms thereof Cardinal had mentioned to the constable, Crown Counsel said "He is manufacturing his own evidence" whereupon the judge said "Yes" and Crown Counsel added: "I think it is good as far as it stands." The constable did not notice anything."

Thorson was pursuing an entirely legitimate line of cross examination. He might have tried to limit this exchange in the presence of the jury, asking that the jury be excused, or his timely and forceful objection might have limited the damage. Or Thorson might have indignantly commented in front of the jury that the line of questioning was entirely proper, and that Crown Counsel's remarks were entirely inappropriate.

49. McLean's fee for the first appeal was $2500.00. It was reduced to $1250.00. McLean's fee for the second trial and second appeal is not known. In another case where McLean acted for the Territorial Administration, R.A. Gibson complained, in part, that "we have had to pay expensive legal costs." Letter, R.A. Gibson to Miall of Department of Justice, 16 April 1945, D of J, file #144555. The case involved George Magrum [1944] 2 W.W.R. 374 (S.C.A.T.D.) per Ives CJ; [1944] 3 W.W.R. 486 (S.C.A.A.D.) on appeal.

50. Appendix A - 1954.

51. The hiring of Charles Perkins as defence counsel was done on the basis of the "best deal possible . . . so that any needless expense may be avoided." letter, R.A. Gibson to Plaxton, Deputy Minister of Justice, 29 October 1938, D of J, file #135033.

52. Of Winnipeg, later Attorney General for Manitoba and Premier of Manitoba.

53. Letter, A.J. Macleod of the Department of Justice to Justice Sissons, 31 March 1958, Yellowknife Court House.

54. Appendix A - 1923.

55. Post (2)(b)(ii) herein. The 16 year gap is explained.

56. Dubuc's 1923 circuit to Herschel Island, exceptionally, lasted longer than three months.

57. Appendix A - 1939.

58. Appendix A - 1935.

59. Gibben in 1940-41, Fraser in 1948.

60. Air navigational aids and landing strips were lacking until after the Second War in the Eastern and Central Arctic.

61. Appendix A - 1941.

62. Appendix A - 1951 Okalik case.

63. Appendix A - 1955.

64. D of J, file #136636. There is some doubt about this. The Department of Justice file refers to Bouchard accompanying the Eastern Arctic Patrol. Yet the diaries of the officers in charge of the Eastern Arctic Patrol in the early 1950's do not make reference to Bouchard as one of the passengers. Also, the Officers-in-Charge held appointments as Justices of the Peace with the powers of two and thus lookedafter all but the very serious criminal trials.

65. Cockburn, p.65.

66. Hay, p.27. The antics occurred each February and July.

66a. Though Olmstead, of the Department of Justice, refers to "the unusual antics of the whiteman's justice" when reporting on the Belcher Islands trial. Memorandum, 11 October 1941, PAC, RG 85, Vol.174, 541-2-1-2, at p.9.

67. Zaslow, Ph.D. Thesis, p.640.

68. In the Janes murder trial "Constables Fairman and Fielder, escort to the prisoners are brilliant in scarlet and glitter of button." Longstreth, The Silent Force, (New York: Appleton, 1934) p.337.

69. PAC, RG 85, Vol.607. The escort was under the command of Sergent Spriggs. Edmonton Bulletin, 21 September 1923. Dubuc commented that the RCMP escort "attended to our accommodation during our long trip, as usual in a thorough and most satisfactory manner." Letter, Dubuc to Secretary of State, 22 September 1923, PAC, RG 13, C-1, Vol.1526.

70. Appendix A - 1921, 1923.

71. For example, the Belcher Island trials in 1941, and the Rivet case in 1942; Appendix A.

72. All the arrangements for Ahigiak's trial in 1934 were made by the Police. RCMP Annual Report, Can., Sessional Papers, 1935, #28, p.60. The court party in 1946 flew from Yellowknife to Coppermine on the police Grumman Goose, 29 August 1946, News of the North.

73. Arrangements were made by the police for the 1921 trial at Fort Providence, RCMP Annual Report, Can., Sessional Papers, 1922, #28, p.46; and the 1923 trials at Herschel Island, RCMP Annual Report, Can., Sessional Papers, 1924, #28, p.32;

    Inspector Martin in 1941 went in to the Belcher Islands before the court party arrived to "get everything in readiness for the arrival of the judicial party." RCMP Annual Report, Can., Sessional Papers, 1941, #28, p.36.

74. Appendix A.

75. RCMP Annual Report, Can., Sessional Papers, 1930, #28, p.79, commenting on the Okchina trial at Aklavik before Dubuc in 1929; News of the North, 29 August 1946, commenting on the Mafa and Ananagiah trials at Coppermine before A.H. Gibson; letter, Dubuc to Secretary of State, 22 September 1923, PAC, RG 13, C-1, Vol.1526, commenting on the Herschel Island trials in 1923; Longstreth, The Silent Force (New York: Appleton, 1934) p.337, commenting on the Janes murder trial at Pond Inlet in 1923.

    Honourable John Parker confirms that A.H. Gibson always gowned. Cunningham did also for the Ross v. Lieberman civil jury trial in Yellowknife in July 1947.

76. Memorandum, 10 October 1945, McKeand, D of J, file #135033.

77. As the regular visits of the Judges in England did (Cockburn, p.6) and as T.L. Cory predicted in 1922 "The advantage in having the accused murder tried in their own community among their own people, will be to bring home to the natives the result of their comrade's actions. Hearing and seeing that result and also the dignity of the court will impress the native mind." Memorandum, T.L. Cory, 12 September 1922, PAC, RG 85, Vol.607, file #2580.

78. Edmonton Bulletin, 26 July 1921.

79. Edmonton Bulletin, 26 July 1921.

79a. Toronto Star Weekly, 27 October 1923. A note of caution must be sounded. Some newspaper accounts of the 1923 trials were highly sensationalized.

80. Letter, Dubuc to Secretary of State, 22 September 1923, PAC, RG 13, C-1, Vol.1526. Vancouver Daily Province, 5 September, 1923.

81. Toronto Star Weekly, 27 October 1923.

82. Dubuc observed at the sentencing: "I am pleased to notice that the whole population has turned up to attend the closing of the Court on this great occasion." R. v. Alikomiak, unreported, trial transcript, p.45.

83. Toronto Star Weekly, 27 October 1923.

84. RCMP Annual Report, Canada, Sess. Papers, 1924, #21, p.34.

85. Edmonton Journal, 20 September 1923. Dubuc also "felt sure that the whole court proceedings would have a salutory effect for law and order in the Far North." Letter, Dubuc to Secretary of State, 22 September 1923, PAC, RG 13, C-1, Vol.1526.

86. Edmonton Journal, 20 September 1923.

87. Appendix A - 1926, 1929; supra fn.55.

88. "A great interest was shown in these trials by the delta natives." RCMP Annual Report, Can., Sessional Papers, 1930, #28, p.79, referring to the Okchina trial at Aklavik in 1929, Appendix A - 1929. Dubuc addressed "a great number" of Inuit present at the Ikalupiak trial at Aklavik in 1924. R. v. Ikalupiak, unreported, trial transcript, p.12.

89. The Katcho hearing at Pangnirtung in 1939 was attended by only two Inuit besides the accused. Minutes, CNWT, PAC, M-811 to 815, p.1969 to 1951.

90. Beeching, p.37, para. 76.

91. Wilbur Bowker, deck hand on the "SS Distributor" in 1929. Correspondence, Bowker to writer, 21 November 1977.

92. The itinerary was set in advance but it was assumed the exigencies of weather and court cases would lead to some variation in expected times of arrival and departure. In 1943, R.A. Gibson remarked "I think everyone realizes that on account of the unavoidable delays, [to conclude the Simmonee Inquest] the schedule for the Eastern Arctic Patrol was very much upset and everyone had to arrange his business to get the best results possible within the limited time allowed" memorandum to McKeand, 6 November 1943, PAC, RG 85, Vol.951, 13170.

93. Appendix A - 1932, Norberg's trial; 1945, Miktaeyout trial.

94. Appendix A - 1924, Ikalupiak trial.

95. Appendix C - 1917.

96. Minutes, CNWT, PAC, M-811 to 815, p.1953. Was Henry the model interpreter?

97. Montreal Gazette, 27 June 1923.

97a. Edmonton Bulletin, 26 July 1921, Norn was an Indian.

98. In the Ikalupiak trial, in 1924, a second interpreter replaced the first one, who was exhausted, during the cross examination of the accused. R. v. Ikalupiak, unreported, trial transcript p.110. In the Belcher Island trials in 1941 two interpreters were used - Ernest Snowboy and Harold Udgarden, D of J, file #143871.

99. Mars-Jones, Beeching - Before and After on the Wales and Chester Circuit (1972-73) 23 Cambrian Law Review 81 at 82.

100. The records are incomplete. What there are are presently in the Government Record Centre at Yellowknife. They were removed, fortunately, from the Court House basement at Yellowknife, one week before that basement was flooded.

101. At either the Department of Justice or the Public Archives of Canada (PAC).

102. Which continues to this day. Criminal circuits of only the Territorial Court (not including those of the Supreme Court) in 1985 numbered more than 60. These circuits emanate from Hay River to the communities south of Great Slave Lake, from Inuvik to the communities in the Mackenzie delta, and from Yellowknife to the remaining communities in the Mackenzie, and Central and Eastern Arctic.

    In the early 1920s, Finnie referred to "Dubuc's judicial retinue." Between 1939 and 1945, the Eastern Arctic circuit could be characterized as "McKeand's Parade." McKeand was a Great War Veteran "who still loved a parade." Chapter 5, (3) McKeand.

103. There were none of the amenities of the English circuits - special circuit hotels and Judges' lodges, butlers, cooks, and marshalls to assist the court party.

104. Appendix A - 1946 - the Judge and counsel during the two trials stayed on the RCMP vessel the "St. Roch."

104a. Appendix A - 1945, Miktaeyout.

105. Appendix A - 1929.

106. Appendix A - 1924.

107. Canada, Department of the Interior, Report of the Director of the Northwest Territories and Yukon Branch (Ottawa: King's Printer, 1939) p.11 ff. The Patrol visited Godhaven, Greenland, Dundas Harbour, Craig Harbour, Bache Peninsula, Pond Inlet, Pangnirtung, and Lake Harbour before returning to North Sydney on 3 September 1929. It had lasted 45 days.

108. Rivet, Appendix A - 1923.

109. McKeand, Appendix A - 1939, 1943, 1945.

110. Bouchard, Appendix A - 1951-1954. Yet note supra fn.64.

111. The one exception is the Belcher Islands murder trials, Appendix A - 1941. Though within that settled itinerary there was flexibility, supra fn.92.

112. This is not to say that non-judicial matters were not attended to, Appendix A - Fraser's circuit of 1948.

113. The commanding officer at Lake Harbour in 1929 observes "although it has been two years since the detachment was established the Inuit are only just now beginning to realize that they can get assistance . . . in regard to anyone causing a disturbance at their camps. Previous to this they have been reluctant in giving any information . . . . " RCMP Annual Report, Canada, sess. Papers, 1929, #28, p.83.

114. During a patrol to Southhampton Island in 1930, the officer discovered that the Inuit "were under the impression that the police would kill any native who committed a wrong." RCMP Annual Report, Canada, Sess. Papers, 1931, #28, p.89.

115. Sergeant Makinson addressed the Inuit at Peterson Bay, King William Island on 9 April 1936 through an interpreter on the subjects of law and order, game regulations, and the functions of the police. Of the approximately 45 Inuit in this camp only two or three of the older members had previously seen a member of the RCMP.

    Sgt. Joy, at Pond Inlet in 1923 remarked: "None of the natives with whom I came in contact have any idea who or what the police are, or what they are doing in the country." RCMP Annual Report, Canada, Sess. Papers, 1923, #28, Appendix A, p.43.

116. Both come from discussions with Copland in April 1977.

117. Copland omits part of this story in Copland, Coplalook (Winnipeg: Watson and Dwyer Publishing Ltd., 1985) at 133.

118. Like that in the Belchers in 1920 and 1941.

119. The last apparent community purge occurred in April 1966. R. v. Shooyook, unreported, referred to in Morrow, A Survey of Jury Verdicts in the Northwest Territories (1970) Alta. L.R. 50 at 51.

120. In the Keewatin District the Police had the same "difficulty" with the Hudson Bay Company. Superintendent Moodie in 1908 observed at Churchill: "The natives have

until the last two years been entirely under the control of the Company and it is difficult to get them to understand that the Company's orders are not the laws of Canada." RNWMP Annual Report, Can., Sessional Papers, 1909, #28, p.268.

121. A number of people have written on this subject. Geert van den Steenhoven, Legal Concepts Among the Netsilik Eskimos of Pelly Bay report for the Department of Northern Affairs and Natural Resources 1959; Hoebel, The Law of Primitive Man (Cambridge: Harvard University Press, 1954); Gluckman, Politics, Law and Ritual in Tribal Society (Oxford: Basil Blackwell, 1965); Green, "Civilized" Law and "Primitive" Peoples, (1973) 13 Osgoode L.J. 233, p.13.

"Many of the Hudson's Bay Co. men believed, according to Copland, that the Inuit should be left as they were.

122. The police were of the opinion that "infanticide was still practised extensively [but] it is now hidden, where it used to be done openly." Evidence in such cases was "hard come by because the Inuit will not tattle." RCMP Annual Report, Canada, Sess. Papers, 1926, #28, p.79.

123. Some of the traders like Swaffield, a long time Hudson Bay Company man, could speak Inuktituk. Bob Pilot, a RCMP officer stationed at Griese Ford in the 1950's successfully undertook his duties, in part because he learned the local Inuit dialect (discussion with Pilot).

124. RCMP detachments begin to appear in Baffin Island in the 1920's.

125. Memorandum by Caulkin, 22 March 1939, D of J, file #140093.

126. RCMP Annual Report, Canada, Sess. Papers, 1926, #28, p.74. It was seemingly also only a matter of detail for the police in 1928. "In time this [young, 17 year old primitive Inuit woman] will be tried for [her] crime [of cannibalism], but the remoteness of the region - south of Baker Lake in the barren lands - offers considerable obstacles." RCMP Annual Report, Canada, Sess. Papers, 1928, #28, p.89. So considerable that no trial took place.

127. Ibid.

128. RCMP Annual Report, Canada, Sess. Papers, 1927, #28, p.69.

129. RCMP Annual Report, Canada, Sess. Papers, 1931, #28, p.101.

130. RCMP Annual Report, Canada, Sess. Papers, 1930, #28, p.79, 84.

131. RCMP Annual Report, Canada, Sess. Papers, 1921, #28, p.18.

132. Police discretion took a variety of forms. When Makogliak went insane in 1925 in a remote hunting camp on the Southwestern tip of Baffin Island and killed his parents and another, the remaining members of the hunting party drowned him. The investigating police officer elected not to lay charges because of the great difficulty arranging transit and of the extreme hardship for the group such charges would bring. RCMP Annual Report, Canada, Sess. Papers, 1929, #28, p.87.

The exercise of discretion continued into the 1940's,sanctioned by the Territorial Council. Remarking on an alleged bigamous charge against an Inuit woman at Chesterfield Inlet, Councillor Audette stated: "How can the Inuit involved be prosecuted in view of their habits and customs?" She was not prosecuted. Minutes, CNWT, 17 June 1948, PAC, M-811 to 815, p.3556.

132a. The continuity of Judge, prosecutor and defence counsel continues to be important to the effectiveness of the circuit Court. Gargrave, North to Bella Coola, (1986) 44 The Advocate 213 at 214.

133. Appendix A. There were exceptions, Cunningham for example, in 1946, prosecuted.

133a. John Parker speaks very highly of Don Hagel. His word was absolutely to be trusted." Theirs was a relationship developed from several circuit trial encounters.

134. No resident lawyers even in the 1980's are in private practice in the Eastern Arctic.

135. Appendix A - 1939, 1941, 1943, 1945, 1951, 1955.

136. For example, the records of the NWT Bar do not indicate that Olmstead or Madden, counsel in the Belcher Island trials in 1941, were so licenced. The records are admittedly sketchy.

137. Legal Profession Ordinance assented to 21 March 1938, as amended by an Ordinance to amend the Legal Profession Ordinance, assented to 24 August 1939.

138. Cockburn, p.150.

139. Appendix A, passim.

140. Cockburn, p.119. This is "receptive" in two senses: first capable of comprehending English which many natives were not, and secondly capable of understanding and applying the concepts of "British justice."

141. This was the reason underlying the amendment to the North West Territories Act in that year. NWT Act SC 1923, C.21, 51.

142. Appendix A - 1951, Alikoniak; 1949, Eeriykoot; 1946, Mafa.

143. Appendix A - 1923, Janes murder trial at Pond Inlet; part of the jury in the trials at the Belcher Islands in 1941; 1939, Katcho; 1951, Okalik.

144. Appendix A - 1929, Okchina.

145. Morrow, A Survey of Jury Verdicts in the Northwest Territories (1970) 8 A.L.R. 50.

146. Time from the Preliminary Inquiry to the trial.

147. Letter, Finnie to Commissioner Cory, 28 August 1922, PAC, RG 85, Vol.177, 542-3-1.

148. Ibid.

149. Ibid.

150. Appendix A - The Janes murder Preliminary Inquiry in July 1922 was followed by the trial in August 1923; Ikalupiak's murder preliminary in October 1923 led to a trial in 1924; Ikayeena's Preliminary was held in the summer of 1925 followed by a trial in June 1926; Sarniyak was committed for trial 27 October 1928 and tried July 1929; Ahigiah committed for trial 8 May 1933, and appeared at trial on 20 August 1934.

    Though, Alikomiak committed 23 April 1923 for trial was brought to trial on 18 July that same year.

151. Memorandum from McKeand to Hume, 4 January 1933, PAC, RG 85, Vol.177, 542-3-1.

152. Letter, Commissioner of Police to Secretary of the NWT Council, 7 September 1934, PAC, RG 85, Vol.1870, 540-1-1.

153. Appendix A - 1940; D of J, file #141197. Perkins had received a Department of Justice counsel appointment in the summer of 1939.

153a Appendix A - 1944. The offence arose in the fall of 1943. Urquhart had resigned and Meikle was to leave the Territories in November 1943. Before leaving Meikle advised R.A. Gibson that the trial could not be arranged until "several Weeks" after the Preliminary Inquiry which itself could not be heard until late 1943. "Under the circumstances [Beaulieu] might be held in custody here over the winter." Letter, Meikle to R.A. Gibson, 27 October 1943, PAC, RG 32, Vol.187, Meikle. The Preliminary Inquiry was not heard until June 1944. Chapter 5, fn.178.

154. The wireless came to the North in the 1930's.

155. Appendix A - In the Belcher Islands case, the Preliminary was held in late July 1941 before Inspector Martin, the trial in late August 1941; in the Beaulieu case the preliminary was in June 1951, and the trial later that same month; in the Paulette case, the Preliminary Inquiry was held before Phinney on 25 June 1951, the trial was heard by Gibben on 19 September 1951; in Cardinal #1, the Preliminary was heard by Phinney in June 1953, the trial by Gibben in July 1953 at Aklavik.

156. Appendix A - 1946.

157. Appendix A - 1951.

158. Justice Sissons cites a startling example of delay and asserts that it was not unique. Kopak, an Inuit hunter at Rankin Inlet, allegedly committed an offense in 1952. The accused was apprehended in July 1953 in anticipation of a court party arriving by ship. Released in October 1953, when no court party came to dispose of the case, Kopak was not tried until July 1956. Sissons, Judge of the Far North, p.79. Letter, Sissons to Department of Justice, 16 August 1956, D of J, file #166266.

    Appendix A - 1945, Miktaeyout's trial was delayed from 1943 to 1945 because ice conditions prevented the court party from reaching Fort Ross in 1943.

159. Supra, (1)(c), Cost Considerations.

159a. Memorandum, McKeand to Hume, February 1933, PAC, RG 85, Vol.177, 542-3-1. McKeand made this comment in the context of whether Douglas' salary should be paid by the Territorial Administration.

160. Supra, fn.159.

161. Lengthy periods of low visibility plagued the court when attempting to fly into some settlements viz Cape Dorset, Pangnirtung.

162. The court had to fly over barren, flat, treeless tundra.

163. Sissons was not perturbed by the risks: "I am not particularly concerned about such risks and am prepared to accept them as an occupational hazard of the job." letter, Sissons to Department of Justice, 8 November 1955, D of J, file #166266. Mark de Weerdt, Crown prosecutor, was not so sanguine: "Going over Foxe Basin in winter in a single engine Beaver, flying 50 feet above the frigid water, brought me closer to the Almighty." De Weerdt in converation with the writer.

164. Letter, Sissons to Department of Justice, 16 August 1956, D of J, file #166266.

165. Two applications under the Insane Persons Ordinance, one charge of trapping out of season under the Game Ordinance, one charge of assisting to commit suicide. Letter, Gibson to Deputy Minister of Justice, 30 May 1946, D of J, file #140309.

166. Order-in-Council, PC 2354, 11 June 1946.

167. J.C.A. Stevenson: "who will be called upon to perform certain judicial duties at the various ports of call" of the "C.D. Howe" was appointed a JP[2] in 1951, Order-in-Council, PC 2981 - 13 June 1951; R.E.G. Johnston obtained a Justice of the Peace with the powers of two appointment in 1952, Order-in-Council, PC 3404, 28 June 1952. Bouchard because of these appointments may not have accompanied the C.D. Howe in these years. Supra fn.64.

167a. Infra, fn.158.

168. The exchange of correspondence between Sissons and the Department of Justice begins in the spring of 1956 culminating in a 10 page bristling letter from Sissons on 16 August 1956, D of J, file #166266. The Deputy Minister raised the problem of getting security clearance to visit D.E.W. sites staffed by American forces.

Sissons refers to Ottawa's efforts to keep the Court "out of their preserve in the eastern Arctic." Sissons, Judge of the Far North, p.78.

169. Letter, Sissons to Varcoe, Deputy Minister of Justice, 16 August 1956 (10 pages in length) D of J, file #166266.

170. Ibid., Sissons, Judge of the Far North, p.80.

171. Sissons describes this circuit in his book Judge of the Far North at p.76ff.

172. Ibid., at p.93ff. Though Sissons continued to have problems with Ottawa. In October 1960 Sissons sat in Frobisher Bay. The prosecutor, Beddoe, and the reporter and Clerk were from Ottawa. Sissons' regular prosecutor, de Weerdt, and his reporter, both from Yellowknife, did not go to Frobisher Bay. Ottawa reasoned that it was cheaper to send counsel from Ottawa. Sissons demurred: "I do not like my helpful team of Crown Prosecutor, Clerk of the Court and Court Reporter being benched." Letter, Sissons to Deputy Minister of Justice, 3 November 1960, D of J.

A year later, when Ottawa suggested that Sissons go to the Eastern Arctic by scheduled air craft, accompanied by counsel and a reporter from Ottawa, Sissons was constrained to object: "I have strong objections to any interference by the civil authority with the functioning of the Court. . . . I do not wish an outside staff - the legal officers of Justice are unacquainted with the realities of the North."

173. The Preliminary was heard by Police Magistrate Peter Parker.

174. The 1952 amendments to the Judicature provisions of the NWT Act, 1952, RSC, c.331, s.32(2), proclaimed in force April 1, 1955 specified that Police Magistrates would reside in the Territories. A simple amendment in 1958 cured that problem. Thereafter Deputy Police Magistrates could be appointed who did not need to reside in the Territories. NWT Amendment Act, SC, 1957-58, c.30, s.2.

175. One such deputy was Dan Chilcott of Ottawa appointed in 1961 who attended "when needed to sit and hear cases." letter, Chilcott to the writer.

176. Beeching, p.34, para.68.

177. Cockburn, p.150.

178. Balogh v. St. Alban's Crown Court [1975] 1 Q.B. 73 at 86 per Lord Denning M.R. describing the circuit Judges.

178a. Cockburn, p.xi.

179. Chapter 5. The diverse nature of the appointments is immediately evident.

180. Chapter 7(2).

181. Two - McKeand and Bouchard lived in Ottawa. Plaxton lived in Toronto. Rivet came from Montreal.

182. McKeand never visited the Mackenzie District between 1939-1945. He had visited the Mackenzie in 1921; Bouchard was at Aklavik for one year in 1949. By 1950, he was in Ottawa where he remained for the next four years.

183. Table 2.

184. Fred Fraser Recollections.

185. Chapter 7.

186. Cockburn, p.2.

187. Cockburn, p.3; Chapter 1, fn.47, 48.

188. Up to 1955.

189. R. v. Alikomiak, unreported, trial transcript p.38.

190. R. v. Ikalupiak, unreported, trial transcript p.12.

191. Ibid., p.117.

192. Ibid., p.121.

193. Letter, Plaxton to Deputy Minister of Justice, 30 December 1941, PAC, RG 85, Vol.174, 541-2-1(1A).

194. As required by section 52, NWT Act, RSC 1927, c.142.

195. Clearing up minor cases at Fort Resolution, Hay River and Ft. Simpson.

196. Fred Fraser, Recollections.

196a. To equate Fraser to an intelligence officer is not so farfetched. Gibben in 1939 was required to transmit "confidential reports in code." Chapter 9, fn.30a.

197. Minutes, CNWT, PAC, M-811 to 815, p.3610. Appendix to 20 January 1949.

198. Minutes, CNWT, PAC 811 to 815, pp.1951-1969.

199. R.A. Morriott.

200. Supra fn.198, p.1952.

201. Memorandum, 11 October 1941, PAC, RG 85, Vol.174, 541-1-2.

202. "We are inclined to agree with [Olmstead] but we are at a loss to suggest something to take the place of the Code." R.A. Gibson to Varcoe, 12 November 1941, PAC, RG 85, Vol.174, 541-2-1-2.

203. Letter, Dubuc to Secretary of State, 22 September 1923, PAC, RG 13, c-1, Vol.1526. As required in a capital case under the Criminal Code.

204. Letter, Dubuc to Deputy Minister of Justice, 22 September 1923, PAC, RG 13, c-1, Vol.1526.

205. Ibid.

Chapter 9

Roles Played by the Stipendiary Magistrates

Introduction

This chapter will concentrate on the roles - judicial and extra judicial - undertaken by the Stipendiary Magistrates. First the diverse judicial roles, and the numerous extra-judicial roles will be discussed. Then the negative and positive aspects of the exercise of these roles will be evaluated. Finally, the exercise of extra judicial roles will be put in historical perspective.

(1) Diverse Judicial Roles

The Stipendiary Magistrates were not just Judges. While holding appointments as Stipendiary Magistrates, some acted as clerks, prosecutors, defence counsel and sheriffs. Occasionally, the same Stipendiary Magistrate conducted a Preliminary Inquiry and subsequently presided at the trial by jury.[1] Expediency and cost considerations dictated this course of events.

(a) Clerks

As already noted, Senkler acted as his own clerk[1a] and reporter. So in 1935 did Douglas at Arctic Red River.[2] And

Perkins,[3] and Fraser,[4] did likewise on their circuits down the Mackenzie River in the early and late 1940's. Cunningham, in 1947, even filed the appeal from his own interlocutory order,directing a jury in Ross v. Lieberman.[5] Having filed the appeal, in his Clerk capacity, for the want of a local lawyer to act as the defendant Counsel's agent, Cunningham attended to service of the appeal upon John Parker, counsel for the plaintiff. Subsequent to the trial heard by Cunningham in July 1947 at Yellowknife, A.H. Gibson, another Stipendiary Magistrate acting as clerk, taxed the Bill of Costs.[5a]

(b) Prosecutors

Much more unusual was Gibben, while holding his Stipendiary Magistrate appointment, conducting the prosecution of Ducharme[6] in 1938, and Kennedy in 1940.[7] The rationalization for this lay in the fact that of the five Stipendiary Magistrates,[8] only Gibben and St. Germain, at Morinville, were legally trained. It was thought preferable to have two legally trained counsel - Gibben and Perkins - assist the non-legally trained Meikle than to pay for two counsel and have Meikle stand idly by. This cost effective rationalization was deplorable.

But Fraser's prosecution in 1946 of L.A. Granham[9] could not even be rationalized. Fraser then the Mining Recorder and a Stipendiary Magistrate had taken Granham's Statutory Declaration

describing certain mineral claims Granham had supposedly staked. The contents of the Declaration being false, Granham was charged with perjury. Fraser opened the hearing[10] as prosecutor, stepped into the witness box to describe the circumstances surrounding the swearing of the Declaration, then returned to the counsel table to sum up the Crown's case. Even though at Yellowknife in 1946 only Fraser, Cunningham and John Parker were trained in the law, Fraser should have declined to act as counsel. A.H. Gibson[11] or an outside counsel should have prosecuted, despite the added expense and delay. Fortunately, no immediate harm was done in that case, since Stipendiary Magistrate Cunningham discharged[12] the accused.

Cunningham too prosecuted. In 1946, he did so in the Anangiah and Mafa trials at Coppermine 'to keep costs down."[12a] As well, both Cunningham and Fraser provided "advice" to the police concerning charges to be laid. Cunningham in 1948 alluded to this situation when advocating the need for a Crown prosecutor at Yellowknife.[12b]

(c) Defence Counsel

Stipendiary Magistrates also occasionally found themselves acting as defence counsel. Perkins did so in 1940,[13] and Bouchard in 1948[14] defended Charlo at Ft. Simpson before A.H. Gibson. Lack of available legal talent meant that if a

Stipendiary Magistrate did not act the accused went without legal representation.

Fraser sought to extend the role too far. He was of the view that once Cunningham came to Yellowknife in 1946, and until a second legal firm was established there, he could "place [his] services at the disposal of litigants who [could] not obtain the advice and assistance of Messrs. Parker and Parker."[14a] Fraser reasoned that any cases would come before Cunningham, from whom an appeal went to the Court of Appeal.[14b] Perturbed, the Deputy Minister of Justice advised "that such a practice could not be allowed."[14c] Fraser acquiesced, and did not pursue the suggestion.

(d) Sheriff

For a brief period, Stipendiary Magistrate Meikle[15] acted as Sheriff of the Northwest Territories. He succeeded to the office when Police Commissioner Wood in 1938 asked to be relieved of this duty.[16] As Deputy Sheriffs, Meikle had J.A. Urquhart[17] at Ft. Smith and P.E. Trudel,[18] acting Mining Recorder at Yellowknife.

R.A. Gibson's suggestion in 1938 that Gibben, then a Stipendiary Magistrate at Ft. Smith, be appointed a Deputy Sheriff was sensibly resisted by Mr. Daly.[19] Daly foresaw that

"adverse criticism" might arise from the exercise of these dual offices.This same concern voiced in 1943 by the Deputy-Minister of Justice led the Territorial Council to conclude that the office of Stipendiary Magistrate should be divorced from that of Sheriff.[20] W. John Taylor, residing at Fort Smith, succeeded[21] Meikle in 1943.

(e) Taking Both the Preliminary Inquiry and the Jury Trial

Several times Stipendiary Magistrates proceeded to try, with a jury, accused they had committed for trial. Cunningham did so in 1947[22] and 1948.[23] A.H. Gibson followed this practice in 1947[24] and 1950,[25] but Phinney did not.[25a] This post Second War practice appears to have been an outgrowth of police reluctance to take preliminary inquiries, as they had earlier done.[26]Such a practice, apparently restricted to Yellowknife, produced a quick "turn around"[27] from committal to trial avoiding the cost and delay of waiting for another Stipendiary Magistrate to come to Yellowknife to take the trial.[28] Yet concern for cost efficiency had its negative side: it called into question the magistrate's impartiality.

(2) Numerous Extra-Judicial Roles

(a) Description

The concept of hybridization has already been explored.[29]

Meikle was the first to perform a variety of administrative duties additional to his minimal judicial duties. A full list of those performed by him and other Stipendiaries is set out in Table 4. A sampling of their wide-ranging character reveals that Fraser, for example, was at various times a Mining Recorder, Land Agent, Chairman of the Local Trustee Board, Superintendent of Child Welfare, Regional Superintendent of Indian Agents, and Superintendent of Wood Buffalo National Park. And this was not an exhaustive list!

Occasionally Stipendiary Magistrates gave their opinion on various legislation. This could be volunteered as Dubuc did in suggesting amendments to the Northwest Territories Act in 1926,[29a] or it could be solicited. In 1939 Daly sought out the opinion of J.E. Gibben on the draft Workmen's Compensation and Employer's Liability Ordinance.[29b] In that same year, Gibben at R.A. Gibson's request, drafted the Stipendiary Magistrates Court Ordinance "to form a court [to] take the place of the old Supreme Court."[29c] The draft was dropped from the Territorial Council agenda when changes were proposed to the existing Judicature Ordinance to provide for a Stipendiary Magistrate's Court.[29d]

Judicial appointments subsequent to Meikle's with the exception of St. Germain, Phinney, and McBride attracted, in their turn, a variety of administrative appointments.[30] Prior to World War II, judicial duties were not onerous and the

Stipendiary Magistrate earned his salary attending to his multiple administrative tasks.[30a] That remained the situation after the War until Phinney's appointment in 1950, except during Yellowknife's brief mining boom.

Then Fraser and Cunningham divided their tasks in a sensible manner. Fraser, because of his administrative background, concentrated principally on the Mining Recorder's work. Cunningham with a private legal practice background, occupied himself with the majority of the pressing judicial business. Neither, however, absented himself completely from exercising his other function. Fraser took criminal appeals; Cunningham served as Chairman of the Yellowknife Trustee Board. This convenient duality persisted until 1948.

Professor Morrison has observed that before 1939 "the police acted as substitutes for virtually the entire apparatus of the Federal Government."[31] This is only partially correct. Professor Zaslow more correctly, but still not wholly accurately, places the responsibility for the exercise of a large part of local government, up to 1940, upon "policeman, doctors and traders."[32] To this must be added Stipendiary Magistrates! Stipendiary Magistrates from 1936, played a significant part in the exercise of territorial government.

(b) Implications of Combining Judicial and Extra-Judicial Duties

The implications of hybridization were numerous and diverse.

(i) Role Conflict

Hybridization produced role conflict. To whom did the Stipendiary Magistrate owe his first loyalty? Was the Stipendiary to promote government interests, or the interests of seeing justice done between the parties who appeared in his Court? This conflict placed a burden on the Stipendiary Magistrate to try to keep his judicial and administrative functions separate.

Meikle was not successful in doing so. In the Ducharme trial, he entered a conviction for common assault when he should have acquitted[32a] because he feared an outright acquittal might provoke an unwelcome response from the complainant's Indian relatives. Wearing his District Agent hat, Meikle was concerned lest the predominantly Indian community overreact to the perceived misbehavior of Ducharme.

(ii) Close Ties

Their exercise of administrative functions led to close ties

between Stipendiary Magistrates and senior executives in Ottawa. This facilitated an easy movement between judicial and executive office.

A.H. Gibson in 1950 moved from his office of Stipendiary Magistrate at Yellowknife to that of Commissioner of Yukon Territory. When Fraser replaced A.H. Gibson as Commissioner in 1951, having left his Stipendiary Magistrate appointment two years before, A.H. Gibson returned to the judicial forum as a Police Magistrate at Dawson. Cunningham left his judicial duties at Yellowknife in 1948 to take up a senior solicitor appointment at Ottawa. Three years later he was the Deputy Commissioner of the Northwest Territories. In 1952, at Ottawa, Cunningham was joined by Fraser who had left his post as Commissioner of the Yukon to take on senior administrative tasks at Ottawa. As well, in 1952 Brown left his Stipendiary Magistrate office at Fort Smith to replace Fraser, as Commissioner of the Yukon, at Whitehorse.

Gibben epitomized the facile transition from one function to the other. In 1941, he resigned his Stipendiary Magistrate position in the Northwest Territories to take up a similar appointment at Dawson, Yukon. By late 1946, he was executive assistant to Commissioner Jeckell, by 1948 Commissioner of the Yukon, by 1950 the Territorial Court Justice of the Yukon and again a Stipendiary Magistrate for the Northwest Territories.

This interchange of functions produced judicial officers knowledgeable and capable of introducing, even subconsciously, administrative policies into their judicial decisions. Their close ties to the executive meant that Stipendiary Magistrates in their other capacities were privy to,and had a contribution to make to, the policies and decisions made in Ottawa. Thus the administrative policy to preserve the endangered muskox translated into stiff penalties for those caught with muskox hides.

Because of these close ties, the executive took liberties that were surprising. Such were manifested in several ways.

(A) Criticism of judicial decisions came from the wrong quarter - the executive, and singularly R.A. Gibson - rather than from the appeal process.[33] Those criticisms in the Ducharme[34] case in 1938 were forceful and entirely out of place.

Perkins had defended for a fee of $125[35] and Gibben, though a Stipendiary Magistrate, had prosecuted. R.A. Gibson, on learning of the "acquittal" on the more serious charge of rape,[36] stated to in-house counsel his annoyance that Meikle, the trial judge, had not given him an "adequate report" of the trial. He then continued: one of the [Stipendiary Magistrates at Fort Smith] "should [have] taken the trouble to question [the] complainant carefully, especially when the acceptance of a

serious charge means the outlay of considerable Government funds to bring the matter to trial."[37]

This was an incredible statement that wholly misconceived[38] the function performed by a trial Judge.[39] Even more incredibly, in-house counsel replied, following the course dictated by Gibson:

> "The Stipendiary Magistrates in a small place should have their ears to the ground. Dr. Urquhart (Stipendiary Magistrate) at Aklavik[40] (sic) would not have made a mistake of this kind. Gibben is a newcomer and cannot be expected to know all the slants of the local population. But I understood when he was appointed that he had sufficient training and experience to enable him to deal with cases of this kind with a certain amount of judgment."[41]

The case was discussed before the Territorial Council on 18 January 1939.[42] Gibson, still agitated, explained that

> "with two Stipendiary Magistrates at Fort Smith - one of them an experienced lawyer - it should be possible to secure sufficient preliminary evidence before the information is laid . . . . The expense involved was an important factor and the greatest care should be exercised in laying a charge which would stand in court . . . . Mr. Daly should take the departmental file and discuss the case with Commissioner Wood."

The last point had an ominous ring. Were the police now going to evaluate Gibben's performance? Yes! This occurred one year later.

This later criticism by Gibben also implicated Meikle. Acting Assistant Commissioner Caulkin voiced his displeasure to R.A. Gibson about several cases. The essence of the complaints was that the Stipendiary Magistrates in the Northwest Territories were not backing up the police "as they should," but on the contrary "showed a tendency[43] to placate local opinion by making light sentences or gratuitous comments on the action of the police."[44]

R.A. Gibson took up the matter with Gibben prompting an exchange of correspondence prefaced with Gibson's expressed desire not to be "unnecessarily critical."[45] Gibben responded in a well reasoned, clear, cogent manner, giving evidence of thought and concern, and examining in detail each criticism. He closed by asserting:

> "I do take my duties as a Magistrate very seriously and I dispense justice without fear or favor and I am definitely impartial. Naturally then I take umbrage at the suggestion [of Caulkin's that I favor the defendants] . . . [I]t ill becomes the Acting Assistant Commissioner to impugn the bona fides of a judicial officer [A Police Officer] frequently unconsciously, develops a prosecution complex and becomes imbued with the idea that all prosecutions should result in convictions."[46]

That should have ended the matter. But R.A. Gibson, tactlessly, referred Gibben's letter to Caulkin for comment[47] assuring Caulkin that he, Gibson, was going to write Gibben a reassuring letter. He did so on 25 June 1940: "we have every confidence in your judgment." But did he really?

R.A. Gibson certainly had no confidence in Meikle's judgment. After noting all the trial evidence in the Kennedy incest case, Gibson enquired of Meikle "we would appreciate an explanation as to your reasons for imposing a sentence of only ten months retroactive to the date of arrest"[47a] in view of the serious nature of the crime of which Kennedy was found guilty.

Nor had he any confidence in Urquhart's judgment. Grant Savage had been convicted at Fort Smith for contravention of the Wood Buffalo Park Game Regulations. After receiving Urquhart's letter return Gibson wrote to him: "we do not presume to advise the Stipendiary Magistrates as to the judgments they should hand down but we comment . . . ".[48] Gibson then subtly, in a critical tone, commented that Urquhart had no jurisdiction to hear the case as the offence had taken place in Alberta, and advised him that the sentence was illegal.[49]

R.A. Gibson's critical bent, moreover, did not diminish over time. In 1945, Fraser had suggested to the putative father in a paternity case[49a] that an appeal might be warranted. The father had appeared before Fraser without counsel. A.H. Gibson on the trial de novo on additional evidence, reversed Fraser's judgment. R.A. Gibson suspected Fraser of ulterior motives: "in this case we do not object to the new trial because we know that [Fraser] at Yellowknife wants to get some advice from [A.H. Gibson] at Ft. Smith about a number of legal points,"[49b] and reprimanded him. Fraser retorted that he would not take instructions from R.A. Gibson on how his Court was to be conducted.

In 1951, though R.A. Gibson had by then retired, the Territorial Administration expressed its deep concern about the "light sentences"[49c] given by Phinney. Col. Craig in his inspection report revealed its depth: "if the Stipendiary Magistrate imposes an inadequate sentence, the result is that the prestige and effectiveness of the police force is weakened."[49d]

(B) Additionally, Stipendiary Magistrates were made subject to "executive control." Three "Executive Circulars" were sent out by R.A. Gibson on 1 February 1939,[50] on 16 December 1940,[51] and on 30 January 1950.[52] Their origin was an outgrowth of the Ducharme case in 1938.

On 19 January 1939, Mr. Daly suggested to R.A. Gibson that "we might . . . circularize our Stipendiary Magistrates and Justices of the Peace explaining to them"[53] what should be considered before a warrant to arrest under section 655 of the Criminal Code is issued. Gibson sought the advice of Mr. Anderson at the Department of Justice who opined that the Territorial Administration was well within its rights in advising Stipendiary Magistrates and Justices of the Peace that they "should make sure that there was ample evidence to support the charge that is made."[54] With that blessing, and the blessing of the Territorial Council,[55] fifty copies of the Circular were distributed to all the Stipendiary Magistrates and Justices of the Peace with the powers of two.

This first "Executive" Circular was another manifestation of executive control. An earlier form of control had encouraged non-legally trained Stipendiary Magistrates and Justices of the Peace to consult with the Administration at Ottawa on legal points. R.A. Gibson in part persuaded Dr. Morrow to accept an appointment as a Stipendiary Magistrate in 1937 by assuring him "if you require advice upon any particular point which may arise you should defer judgment and refer the matter here."[56] A year earlier, Mr. Turner had instructed a dubious Dr. Livingstone as to his Justice of the Peace duties: "Your duty is to adjudicate without prejudice. If [you have any] doubt wire here for an opinion which we can obtain for you from the Department of Justice."[57] The practicality of this procedure was not explained.[58]

(C) A further consequence was an unacceptable executive interference with the judicial process. This usurpation of the Court's process occurred in disturbing circumstances.

In 1939 R.A. Gibson having reviewed the weak Preliminary Inquiry evidence in the Edward Nazon[59] case, informed the Department of Justice "because the case is weak, we do not wish to incur the expense of sending a Stipendiary Magistrate to Aklavik to try the case."[60]

In 1941 Perkins was to try a theft case at Yellowknife. Two enterprising young men[61] working in Con Mine's Assay office had

collected several gold buttons, the residue of the melting process. R.A. Gibson, before the case had been tried, wrote to Perkins "directing[62] him to find the two men guilty and deal with them severely. In the end the two pleaded guilty and light sentences of three months were assessed. A letter from R.A. Gibson followed which rapped Perkins' "knuckles very, very severely."

While R.A. Gibson might attempt to influence the court process where certain[63] Stipendiary Magistrates sat, he was not successful with others. Fred Fraser by temperament was not open to suggestions of this nature.[64] Nor was Cunningham, the intellectual equal or better of R.A. Gibson. A.H. Gibson was too experienced and knowledgeable to entertain these tactics. Hence as the Stipendiary Magistrate's Court matured, as it was staffed by legally trained Judges of independent character, the opportunities for executive interference diminished.

(iii) Inattention to Judicial Duties

Hybridization, as well, took the Stipendiary Magistrate away from his primary function - the judicial one. That was how he was classified, as a Judge and not as a civil servant, and that was how he was paid.[65] Just as police officers, acting as Mining Recorders in the Nahanni in 1933 could not leave their post to undertake their normal winter investigative patrols,[66] so

too Fraser in 1946 because of the great volume of work in the Mining Recorder's office at Yellowknife had to forego the exercise of all but minimal judicial duties.

(iv) Separation of Powers Convention

Basically, the exercise of a dual function engendered doctrinal concern. By acting in a dual capacity the Stipendiary Magistrate offended the "separation of powers"[67] convention. The danger was that the Stipendiary, when acting in his judicial capacity, might be perceived by the public to be partial to a particular party because of some administrative position he held. No one could suggest in the Cranham facts earlier mentioned[68] that had Fraser been the trial Judge his Mining Recorder affiliation would not have been viewed[69] as influencing his decision.

(3) Historical Perspective

Professor Lederman reminds us that in the early nineteenth century in Upper Canada Judges were "usually either pawns or partisans of the [colonial] Governor and were often leading members of the Executive or Legislative Councils, or both."[70] Chief Justice Robinson best exemplified this situation. In 1830, additional to his judicial duties, Robinson drafted government legislation, held the position of President of the Executive Council, gave advice to the Governor and acted as Speaker of the

Legislative Council.[71] In 1831, upon the urgings of the Colonial Secretary, Lord Goderich, that he "exhibit a cautious abstinence from all proceedings by which he might be involved in any political contention of a party nature"[72] Robinson resigned from the Executive Council.

Like Robinson, Chief Justie Begbie, in the mid-nineteenth century in the colony of British Columbia found himself part of that "very small apparatus" which administered a very large colony. He was as much a member of the Government as a supposedly impartial jurist.[73] The Stipendiary Magistrates in that same colony until 1867 often did the work of Indian Agent, Land Commissioner and Gold Commissioner, in addition to their judicial duties.[73a]

By the late nineteenth century examples can still be resurrected to show the close ties between the Executive and the Judiciary. Stipendiary Magistrate Richardson up to 1886, acted as law clerk[74] to the Legislative Council of the Northwest Territories and legal advisor[75] to the Lieutenant-Governor. In 1896, Chief Justice Strong of the Supreme Court of Canada, became "closely involved"[76] in the restructure of the Conservative Cabinet after the Federal election held earlier that year.

Little wonder then that Stipendiary Magistrates in the "colonial" atmosphere that characterized the Northwest Territories in the 1930's and 1940's performed a variety of duties. The Stipendiaries, as part of a very small coterie of experienced and qualified persons, found thrust upon them the tasks and duties that no one else was able and qualified to do.

1. This was sanctioned by the Department of Justice, letter, Plaxton to R.A. Gibson, 7 November 1938, PAC, RG 85, Vol.9, 20-1.

1a. Chapter 3, (4)(b).

2. Appendix A - 1935.

3. Appendix A - 1941-42.

4. Appendix A - 1948.

5. Order granted 15 January 1947.

5a. The Bill of Costs was $1704.75 taxed on 15 November 1948.

6. Appendix A - 1939, Perkins acted for Ducharme; Meikle heard the case. R.A. Gibson advised Gibben: "Your services will be required as prosecutor." letter, 19 April 1940, R.A. Gibson to Gibben, PAC, RG 85, Vol.9, 20-1A.

7. Appendix A - 1940, Perkins acted for Kennedy; Meikle heard the case. Urquhart then a Stipendiary Magistrate was a witness for the prosecution. Perkins relates that Gibben in this case and the Ducharme case was very fair as a prosecutor. He took "very seriously that the accused was innocent until proven guilty." Perkins Recollections, GAA p.17.

8. The others were McKeand at Ottawa; Meikle as of 1939 at Ottawa and in the Mackenzie District only in the summer; St. Germain in Edmonton and Urquhart at Fort Smith.

9. R. v. Cranham, Yellowknife Court House, Court Records, SM #480; News of the North, 25 July 1946, Fraser prosecuted. Cunningham heard the matter on 24 July 1946. John Parker defended.

10. It appears that this was a Preliminary Inquiry.

11. Stipendiary Magistrate since 1944 at Ft. Smith.

12. The accused had been asked "are these facts correct" and not "Do you swear the contents of this Declaration are true?"

12a. Recollections, John Parker.

12b. Letter, Cunningham to R.A. Gibson, 29 January 1948, D of J, file #153647.

13. Appendix A - 1940.

14. Appendix A - 1948.

14a. Memorandum, 24 September 1946, Fred Fraser, PAC, RG 85, Vol.1005, 16951.

14b. Fraser was wrong. The only civil appeal route until 1948 was to the Supreme Court of Canada or the Privy Council.

14c. Letter, R.A. Gibson to Fred Fraser, 1 October 1946, PAC, RG 85, Vol.1005, 16951. Gibson had consulted the Deputy Minister of Justice and relayed his advice. The advice was based on the fact that a Stipendiary Magistrate exercises the powers of a Superior Court judge. Superior Court judges are prohibited from practising law. Judges Act, RSC 1927, c.105, s.36. "It is a necessary inference that Stipendiary Magistrates in the Northwest Territories also should not practise."

15. Meikle was appointed 20 July 1938, PC 1693; Can. Gaz. I, Vol.72, p.251.

16. The Police Commissioners had held the office of Sheriff of the Northwest Territories since 1905 - Perry (1905-1922), Starnes (1922-1931), MacBrien (1931-1938). The reasons for giving up the position were twofold. It was felt that there was a need for a resident Sheriff and the Police Commissioner residence in Ottawa. (Judy, Ph.D. thesis, p.214.) More importantly the police had tired of the process serving and execution proceedings, which had brought the Commissioner and his bailiff constables into conflict with those whom they in their police capacities were trying to work with.

17. Medical officer recently come from Aklavik to the mission hospital at Fort Smith, appointed a Stipendiary Magistrate in 1938 and Deputy Sheriff 11 January 1940.

18. Also, the Indian agent, holding by virtue of this office the jurisdiction of a Justice of the Peace with the powers of two, when dealing with Indians. Indian Act, RSC 1927, c.98, s.152.

19. Memorandum, Daly to Gibson, 5 August 1938, PAC, RG 85, Vol.177, 542-3-2. Why Urquhart was appointed a Deputy Sheriff in 1940 remains a mystery when two years earlier Gibben was not.

20. Minutes, CNWT, PAC, M-811 to 815, p.2944, 3059.

21. Appointed by the Commissioner under s.4 of the Northwest Territories Act, RSC 1927, c.142.

22. R. v. William Morgach, Yellowknife Court House, Court Records, NWT cases #35 Criminal. Cunningham committed the

accused on 6 September 1947. The jury convicted Morgach of rape on 16 September 1947 at Yellowknife and Cunningham sentenced him to a fine of $500.00, in default three months imprisonment with hard labor at Ft. Smith. John Parker prosecuted. Ray Mahaffey defended.

23. R. v. Schwartz, Yellowknife Court House, Court Records, NWT cases #37 Criminal. Cunningham committed the accused who was then acquitted of forgery and uttering by a jury on 19 January 1948 at Yellowknife. Corporal Robstone prosecuted. Ray Mahaffey defended.

24. R. v. Killoran, Yellowknife Court House, Court Records. A.H. Gibson took the Preliminary Inquiry and the jury trial both at Yellowknife. Appendix A - 1948. See Lamont case Appendix A - 1947.

25. R. v. Proulx, Nelson and Mahoney, Yellowknife Court House, Court Records, NWT cases #62 Criminal. Gibson took the jury trial on 3 July 1950 at Yellowknife. John Parker acted for the Crown, the three accused unrepresented at trial, were convicted of break and enter and sentenced to one year, five months and five months imprisonment.

25a. Because Justice Gibben took the trials. Appendix A - 1951, 1953.

26. Appendix A - The Preliminary Inquiries in the 1920's and 1930's were generally conducted by police inspectors sitting as Justices of the Peace with the powers of two though Inspector Fitzsimmons took the Preliminary Inquiry in 1951 at Cambridge Bay - Appendix A.

27. Chapter 8, fn.146.

28. After 1948, A.H. Gibson sat at Yellowknife. Fraser, when he sat, as his duties were primarily administrative, did so in the Fort Smith region.

29. Chapter 5(3)(a).

29a. Minutes, CNWT, PAC, M-811 to 815, p.41.

29b. Minutes, CNWT, PAC, M-811 to 815, p.2026; PAC, RG 85, Vol.177, 542-3-2.

29c. Memorandum of J.E. Gibben, 1939, PAC, RG 85, Vol.177, 542-3-2.

29d. To meet the concerns raised in Chapter 2(2), Minutes, CNWT, PAC, M-811 to 815, p.2049. The amendments did not come through until 1949. ONWT 1949, c.17.

30. See Table 4.

30a. Gibben as the chief governmental respresentative in the Yellowknife area was "required to despatch confidential reports in Code" memorandum, A.L. Cumming, 18 December 1939, PAC, RG 85, Vol.9, 20-1.

31. Morrison, op. cit., p.364.

32. Zaslow, op. cit. p.659.

32a. In the end Meikle acquitted on the rape charge after a trial. The Police then laid a common assault charge to which Ducharme pleaded guilty and was sentenced to one month. Ducharme was whisked out of town on the plane as quickly as possible. Perkins' Recollections. GAA p.9.

The problem with this procedure is that a successful defence of autre fois acquit should have been raised when the common assault charge was laid. Common assault was an included offense to the charge of rape. That set of circumstances had been litigated. No conviction for the included lesser offense of common assault being registered in the rape trial, it was not open to the Crown to lay a subsequent charge of common assault.

33. Although no criminal appeal was possible until 1943.

34. Appendix A.

35. D of J, file #135033.

36. Since anything less than a conviction for rape, given the money spent on a defence counsel, was perceived to be an acquittal. Supra, fn.32a.

37. Memorandum, R.A. Gibson to Mr. Daly, 13 January 1939, PAC, RG 85, Vol.177, 542-3-2. R.A. Gibson's policy was that a report of a trial should be prepared in each case. This followed from his interpretation of "return" in the NWT Act, RSC 1906, c.62, s.50; RSC 1927, c.142, s.54.

> "Returns of all trials and proceedings, civil or criminal, shall be made to the Commissioner in such form and at such time as he directs."

The idea of a return had its historical roots in the NWT Act, SC 1875, s.64(6), in wording substantially similar to the 1906 and 1927 sections, and in the Criminal and Civil Jurisdiction Act (Imp.) 1821, c.66, s.3.

The idea of a return to an executive official is foreign to a Provincial Superior Court Judge except in capital cases where such a report is considered when deciding whether to exercise the royal prerogative of mercy.

The form of the return - whether the Stipendiary Magistrate's notes, a reporter's transcript or a letter report - was "for the Stipendiary Magistrate himself to decide" memorandum of R.A. Gibson, 5 January 1945, PAC, RG 85, Vol.1870, 540-1-2.

38. And failed to consider the possibility that the police had "overcharged." As the facts came out at trial, the Crown's best charge was one of indecent assault. Memorandum of Mr. Daly, 19 January 1939, PAC, RG 85, Vol.166, 542-3-2.

39. J.E. Gibben had, unfortunately, acted as prosecutor. R.A. Gibson and Mr. Daly, in-house solicitor, assumed the Stipendiary Magistrate should have done some preliminary investigation or at least come to the case with some background knowledge of the witnesses.

40. He resided in Fort Smith from the end of 1938.

41. Memorandum, K.R. Daly, 14 January 1939, PAC, RG 85, Vol.177, 542-3-2. Why Daly did not tell R.A. Gibson that the Stipendiary Magistrate does not do the investigation, and that the prosecutor usually does not do it either, leaving this aspect of a criminal matter to the police is left unexplained.

42. Minutes, CNWT, 18 January 1939, PAC, M-811 to 815, p.1665.

43. R.A. Gibson exhibited a tendency to side with the police. Perhaps this was so because he often sided with the Commissioner of Police on the Territorial Council.

44. Memorandum, R.A. Gibson to A.L. Cumming, 6 June 1940, PAC, RG 85, Vol.1870, 540-1-2. The actual words of Caulkin were slightly different: "one cannot help but conclude that there is an unfortunate tendency of the Courts to favor the defendants, instead of disposing of the cases in a fair and unbiased manner." Letter, Caulkin to R.A. Gibson, 6 June 1940, PAC, RG 85, Vol.1870, 540-1-2.

45. Letter, R.A. Gibson to Gibben, 7 June 1940, PAC, RG 85, Vol.1870, 540-1-2.

46. Letter, Gibben to Gibson, 17 June 1940, PAC, RG 85, Vol.1870, 540-1-2.

47. Caulkin replied, commenting on the merits of only one case and adding "I do not wish to make further comments but only ask that we receive a reasonable amount of fairness extended in our endeavors to keep Yellowknife in a fair state of law and order."

47a. Letter, R.A. Gibson to Meikle, 25 June 1940, PAC, RG 85, Vol.1870, 540-1-2, Appendix A - 1940, R. v. Kennedy #SM21, unreported.

48. Letter, R.A. Gibson to Urquhart, 5 February 1942, PAC, RG 85, Vol.177, 542-3-2.

49. The matter should have been heard by an Alberta court. The game pelts were forfeited to the Crown and thus their confiscation should not have been part of the sentence levied.

49a. Lessard v. Jacobs (file #14950) PAC, RG 85, Vol.1870, 540-1-2; Fraser Recollections, p.22.

49b. Letter, R.A. Gibson to Varcoe, 22 January 1945, PAC, RG 85, Vol.1870, 540-1-2.

49c. "We are all pretty well agreed that a number of Stipendiary Magistrate Phinney's decisions have been most lenient" undated memorandum of Sinclair, PAC, RG 85, Vol.1503, 540-1-3.

49d. Memorandum of Col. Craig, 6 July 1951, PAC, RG 85, Vol.1503, 540-1-3.

50. PAC, RG 85, Vol.177, 542-3-2; Appendix C.

51. PAC, RG 85, Vol.177, 542-3-2, dealing with liquor convictions.

52. PAC, RG 85, Vol.1433, 542-3-3, again dealing with liquor convictions.

53. Memorandum, Daly to Gibson, 19 January 1939, PAC, RG 85, Vol.177, 542-3-2.

54. Memorandum, R.A. Gibson, 20 January 1939, PAC, RG 85, Vol.177, 542-3-2.

55. Minutes, CNWT, 1939, PAC, M-811 to 815, p.1675.

56. Letter, Gibson to Morrow, 2 December 1937, PAC, RG 85, Vol.177, 542-3-1 as approved by K.R. Daly, legal advisor. In a letter on the same date to the Deputy Minister of Justice, Gibson acknowledged that while awaiting a legally trained Stipendiary Magistrate "Mr. Meikle and Dr. Morrow should be able to take care of the situation; consulting Ottawa by wire when information is required on legal points. PAC, RG 85, Vol.177, 542-3-1.

In 1945, R.A. Gibson advised the newly appointed Stipendiary Magistrate Fred Fraser, to make a "careful investigation of the files at Yellowknife dealing with judicial matters that show that Magistrates Gibben and Perkins were given legal advice" PAC, RG 85, Vol.1870, 540-1-2.

57. Telegram, Turner to Livingstone, 21 April 1936, PAC, RG 85, Vol.176, 542-1-1.

58. One envisages the Stipendiary interrupting a trial to seek advice by wire then resuming it a day or two later.

59. Nazon was charged with incest with his sister. The Preliminary was held on 30 December 1939 at Arctic Red River before Inspector Ballard.

60. Letter, R.A. Gibson to Deputy Minister of Justice, 29 February 1940, D of J, file #141134.

61. Perkins' Recollections, GAA, p.13, 14. One of the men was Speed Hewitt, a former copy boy on the Prospector.

62. Ibid., p.36, "R.A. Gibson was too accomplished an administrator to have literally directed me, but it was an inescapable inference from his letter." In the 1980's, Cabinet Ministers have resigned when interference on behalf of the accused has become known.

    In 1943, the John Salois case came before Gibben at Dawson. George Black, Salois' counsel, appealed the sentence of 3 months. Black approached both St. Laurent, the Minister of Justice and Crerar, the Minister of Mines and Resources, to have the case disposed of in favor of Salois on appeal. Instructions filtered down to R.A. Gibson who wired Commissioner Jeckell "to please talk the case over with Gibben." This occurred before the appeal was heard. Wire, Gibson to Jeckell, 19 June 1943, PAC, RG 85, Vol.1870, 540-1-1-1.

63. Non-legally trained civil servants. Meikle would be the prime example.

64. Supra, fn.49b.

65. Chapter 11 and the comments concerning A.H. Gibson's pension difficulties.

66. Minutes, CNWT, 1933, PAC, M-811 to 815, p.1933.

67. A convention, and not a rule of law, since unlike the American Constitution the Constitution Act 1867 and amendments contain no explicit separation of the Executive, Legislative and Judicial functions. Hogg (2d ed) p.150.

68. Supra, fn.9.

69. The Supreme Court of Canada has enunciated the rule that it is a reasonable apprehension of bias in addition to actual bias that is objectionable. Committee for Justice and Liberty v. The National Energy Board [1978] 1 S.C.R. 369 (S.C.C.).

70. Lederman, The Independence of the Judiciary, in Lederman (ed) Continuing Canadian Constitutional Dilemmas (Toronto: Butterworths, 1981) 109 at 148.

71. Brode, John Beverly Robinson (Toronto: The Osgoode Society, 1984) pp.181, 183, 185.

72. Brode, p.183.

73. Williams, Begbie and Duff (1985) 43 The Advocate 749.

73a. Foster, Law and Priorities in British Columbia, in Knafla, ed., Law and Justice in a New Land (Calgary: Carswell, 1986) p.177.

74. Debates, H of C, 11 May 1886, p.1204.

75. Journals, CNWT, 1887, p.28.

76. Snell and Vaughan, The Supreme Court of Canada: A History of the Institution (Toronto: The Osgoode Society, 1985) p.71.

CHAPTER 10

Judicial Traits

Introduction

"To penetrate behind the inscrutable faces"[1] of the Stipendiary Magistrates is the difficult hurdle to be overcome in this chapter. "How can [one] hope to evaluate the amalgam of psychological and social forces which shape the individual judicial ratiocination which, in turn, moulded the role and the character" of the Stipendiary Magistrates?[2]

And if one could - if one could prove "the likes and dislikes, the predelictions and the prejudices, the complex of instincts and cautions and habits and convictions, which make the Judge - [still one would face] the daunting task of relating these factors to the end product of the judicial process, the individual reasoned opinion."[3] That the prospect of complete success is remote is quickly appreciated. The required insight of them is lacking. Judges resist the gathering of data. Without sophisticated methods of evaluating the minimal data obtained one falls back on reminiscences of those who knew the Judges, and the Judges own meagre writings, and conjecture.

In this study, an extensive analysis of the decisions of the Stipendiary Magistrates is impossible. Few decisions were recorded, let alone reported. The court records are incomplete[4] - those that do exist are sketchy synopses, scanty skeletons that do not adequately recreate the atmosphere, the drama, the 'cut and thrust' of the court room.

Reminiscences too, at least of the earlier Stipendiary Magistrates, are minimal. As of 1986, all but Charles Perkins are deceased.[4a] This leaves unverified supposition. Yet to ascribe a clear philosophy about the judicial process to the Stipendiary Magistrates is to walk a short plank overhanging a deep ravine.

This chapter examines the judicial traits of the Stipendiary Magistrates in five groupings: the police tradition, the medical tradition, the political tradition, the civil service tradition, and the legal tradition.

(1) The Police Tradition

Perry, Reames and Martin represent this group. Did these "police" Stipendiary Magistrates display a certain pattern of personality, a distinctly recognizable personal philosophy of

life and work "that emerges from the fact that statistics of crime and its punishment . . . are meticulously kept?[5] Martin certainly did. His was not a wise appointment - he was "too much a policeman."[6] His penchant for meticulous detail, a hold over from the required procedure for recording a prisoner's effects, has already been noted.[6a]

Perry proved to be less "rule orientated," perhaps because of his broader training, perhaps because he rose rapidly to senior Officer status spending little time in the "rank and file" of the police. Sympathetic to the petition from Norway House for Joseph Fiddler's[7] reprieve, Perry was disposed to leniency after Fiddler "ha[d] been confined for a sufficient period to have a deterrent effect on the band of Indians to which he belong[ed]."[8]

Of the two, supposition suggests Perry would have been less blunt and formalistic in sentencing than Martin. Of Reames no such speculation can be made since there is no record of any cases heard by him.[9]

Their impact as Stipendiaries was minimal. All three were regional appointments limited to short time periods: Martin at Hay River, from 1948 to 1951, Perry in the southern District of Keewatin from 1907 to 1909 and Reames for four years from 1933 to 1937.

Perry through his direction of all Police in the Territories could have exercised a unity of command and coordination between the police and the Office of Stipendiary Magistrate that would have been the envy of Sir John Fielding.[10] No evidence exists that he exploited this opportunity.

(2) The Medical Tradition

Two doctors - Urquhart and Morrow - comprise this group.

Medical practitioners are generally perceived to be sympathetic, caring and sensitive. Dr. Urquhart certainly exhibited a "kindly interest"[11] in the Inuit of the Mackenzie delta, when a medical officer at Aklavik in the 1930's.[12] Of Urquhart's predecessor at Fort Smith, Dr. Morrow, little is known. Reputed to be a good doctor[13] his tenure as Stipendiary Magistrate was too short to reveal any significant judicial traits. The Hurtubise appeal seems to have been his only case.

Of Urquhart more is known. He displayed a thoughtful demeanor[14] though he was inclined[15] to let his personal prejudices and biases interfere with his judgment. An example, related by Sgt. Abraham, illustrates this tendency. A keen golfer, Urquhart took pride in the condition of the five hole course at Fort Smith. Local prisoners groomed the fairways. When the course needed tending it was said that those accused

persons normally fined were imprisoned for one week![16] It may be safely concluded that Urquhart could be tough in sentencing in minor cases.[17]

Like the police, the medical Stipendiary's influence on the development of jurisprudence in the Territories was minimal. Restricted to sitting in the Fort Smith area, their span of judicial activity encompassed only the years from late 1937 to early 1944.

(3) The Political Tradition

Douglas stands alone in this category. Fueled by his longstanding interest in the Mackenzie Basin,[18] he optimistically predicted on May 1, 1934, the "likelihood of considerable activity in civil court actions in the Northwest Territories owing to the mining movement."[19] In his efficient practical[20] manner, he designed a seal for the court, and had it made at a cost of $12.00. His more important legacy was his insistence that the Stipendiary Magistrates be paid a salary[21] and a living allowance while travelling in the performance of their duties.[22]

His lack of legal training and judicial experience allowed him, arguably, to be manipulated by the Department of Justice. Three accused at Arctic Red River in 1935[23] were deprived of

counsel after indicating they would plead guilty: "In view of this fact [the Department of Justice advised] . . . it would be an unwarranted expense to provide counsel"[24] for them. Douglas should have insisted that the accused be allowed at least to consult counsel to confirm their intended course of action; though perhaps such criticism is more appropriate from a modern-day perspective where the importance of counsel is more readily recognized.[25]

On balance, Douglas did yeoman's service relying on competent counsel to guide him in the Norberg trial in 1932 and the Ahigiah trial of 1934 at Coppermine. All the more reason why he should have insisted on counsel to accompany him on his 1935 circuit.[25a]

(4) The "Civil Service" Tradition

This group has two sub-categories. Those civil servants - Meikle and McKeand - who lacked legal training - will be dealt with first.[26]

(a) Non-Lawyers

Faced with vast tracts of isolated territory, a minority white population that by 1950 had only reached 5000 persons, and formidable transportation and cost barriers to development,

public sector involvement in the economy became essential. A few private entrepreneurs slowly emerged in the Upper Mackenzie District, at Yellowknife, Hay River and Fort Smith; but this was overshadowed by the heavy public dependency of the majority native population whose territorial hunting and trapping existence was changing rapidly. This political-economic milieu influenced the values of some of the Stipendiary Magistrates.

McKeand sanctioned a subtle promotion of government interests and a concession to the authority of the senior administrators at Ottawa. This civil servant Stipendiary Magistrate came under the influence of R.A. Gibson.[27]

This did not mean he was abjectly subservient to R.A. Gibson's dictates. Gibson was too subtle for that.[28] Rather the interventionist tone of R.A. Gibson's Administration, when it came to dealing with the Inuit, moved McKeand to intercede in the judicial process. Thus McKeand, in 1939, anxious to emphasize the "special place"[29] for the Inuit in the criminal law, had several pre-trial discussions with counsel concerning the Katcho case. "En route [from Churchill, on board the Nascopie] I again discussed the case with Messrs Maclean and Whitaker separately. I offered the service of an interpreter and suggested they make independent inquiry of Eskimo life and conditions at each port of call."[30] He gave vent on later circuits to his view of the

"special place" for the Inuit. Miktaeyout[31] was sentenced to the exceedingly light term of two years imprisonment when convicted of manslaughter in 1945. On the same circuit Karlooarsee[32] received a suspended sentence when convicted of incest.

Meikle was a civil servant who sought to make the rules of law accord with his religious principles. Dismayed by the facts in the Rivet incest trial he registered a conviction. The Supreme Court of Alberta Appellate Division had harsh words for him[33] though on jurisdiction grounds the appeal court could not overturn the conviction. In the Rivet case, Meikle's fund of common sense deserted him and his religious scruples overrode any notions he had of the proper weight to be given to evidence.[34] Analyzing the trial transcript for appeal purposes, A.F. Duncan of Edmonton, writing to Rivet, criticized Meikle: "The Magistrate could not decide when your daughter was lying."[35] This was reasonable doubt that should have led to an acquittal.

Meikle could display a peremptory autocratic side. Having convicted Hurtibise of supplying liquor to a young Indian girl and having sentenced him to three months with hard labor,[36] Meikle unilaterally and without consultation with defence counsel set down the appeal advising Duncan "if this appeal is not prosecuted [on the date set down it] will be dismissed."[37]

He also exhibited an efficiency bent. His itineraries for

his yearly inspection trips north each summer were packed with meetings and side trips. Indicative of the importance he accorded his judicial duties was the brief note in his 1940 itinerary of the upcoming Kennedy trial,[37a] sandwiched between a mine inspection and the meetings scheduled for the same brief period he proposed to spend at Fort Smith.[37b]

In summation, both Meikle and McKeand perceived their judicial role to be confining and restricted,[38] an appendage to their administrative duties, but a role to be dutifully performed so as to obtain preferment with R.A. Gibson at Ottawa.

(b) Lawyers

Professor Lederman[39] reminds us that in the twelfth and thirteenth century when the Central Royal Courts were appearing in England Judges were drawn from "the nascent civil service of the day."[40] The parallel with the Northwest Territories is immediately obvious[41] when viewing Stipendiary Magistrate appointments that began in the mid-1930's.

Gibben's appointment in 1938 continued the parallel. Just as in England in the fourteenth century when civil service Judges gave way to appointments of those trained in the law,[42] Gibben's appointment signalled a move to legally trained Stipendiary Magistrates. These legally trained Stipendiaries - Gibben and Perkins before the Second War, Darling, Fraser, Cunningham,

Bouchard and Brown after the War - with the exception of Bouchard at Aklavik, resided at Yellowknife or Fort Smith. It might be expected that the "residents" would make the law respond to local needs and conditions but no clear examples of such a tendency have surfaced.

Before proceeding to analyze the judicial traits of these seven Stipendiary Magistrates it is useful to recall that all[43] were in varying degrees part-time Judges, and all saw their judicial duties as secondary to their administrative functions.[44]

(i) J.E. Gibben

Gibben's Clerk, Jack Worsell, offers this revealing comment of him:

> Gibben was "tempermentally (sic) unfitted to be a Judge. He felt strongly for people, and, through sympathy, became deeply involved emotionally[45] in the cases that came before him. Sentencing in criminal cases was very much an ordeal for him - in imposing heavy sentences, he was likely to choke up and tears were not far away. Sordid cases . . . left him with a feeling of having been personally besmirched. At the end of the day's sitting, he would shower interminably - as though to wash away the stains."[46]

He must have had great difficulty with the Beaulieu trial in 1951.[47] The facts were appalling. Subsequent to the rape-murder of Mary Norn, Beaulieu shot two of her children, who, sleeping nearby, had started to wake up. At the end of the trial, distracted, Gibben had forgotten to fix the date of the hanging

and had to make a special trip to Fort Smith on 1 December 1951 to do so. The Beaulieu case was not, however, yet over.

The hangman[48] faced with several "bookings" objected to the short notice.[49] It was suggested that when "you begin a murder trial you might telegraph . . . the approximate date you have in mind for the execution in the event that there is going to be one."[50] Gibben replied: "the procedure suggested offends the sensibilities and from a judicial viewpoint I question the propriety or wisdom of following it."[51] This prompted the rejoinder from the Deputy Minister of Justice that "with only one executioner in Canada, the exigencies of the situation require that you adhere to the procedure outlined."[52]

Gibben was not slow to react when he sensed that the proper procedures had been short circuited. Learning of the discreditable investigation technique of hanging a thirteen year old Indian child by her tied hands until she spoke the truth, led to his report of complaint to the Police Inspector at Fort Smith.[53]

He was also too old a "soldier" to quail before a raucous miners claque. Trying an assault case[53a] where the accused was a miner Gibben refused to be intimidated when the accused's fellow workers closed down the mine for the day to attend the 'cause celebre.' Two hundred miners stood outside the little court room as Gibben entered. Although anxious, Gibben, imperturbable,

convicted though he did so in a calm manner, acceptable to all those present.

During his first term as Stipendiary Magistrate from 1938 to 1941, Gibben attended to minor criminal cases,[54] the Selamio incest trial at Aklavik[55] and a restaurant partnership dissolution case.[56] None of these were difficult legal cases. Nor did they demand any extensive time committment from him. Clearly during his first term, Gibben was more an Administrator than he was a Judge.

On balance, Worsell's comment seems harsh, at least with respect to Gibben's three year term as a Stipendiary Magistrate at Fort Smith and Yellowknife. Worsell is probably more accurate when dealing with Gibben's time as a Justice of the Territorial Court of the Yukon after 1950.

(ii) C.A. Perkins

When Perkins replaced Gibben in 1941, he took over his residence on Joliffe Island. Perkins also possessed Gibben's sense of fair play. In the gold buttons theft case,[57] the accused appeared without counsel. Perkins saw his duty to look to the interests of the two young men: "I had to do the plea on their behalf in my mind."[58] Having sentenced them to short terms of imprisonment he put on his "counselling hat" and had a heart-

to-heart talk with one of the young lads persuading him to enlist in the armed forces when his sentence had expired.

Perkins' short term as a Stipendiary Magistrate did not allow him to test fully his judicial potential. In his idle time on circuit, he found time to compose short stories.[59] At Yellowknife he exercised a sympathetic protective attitude toward those who appeared before him.[60] He continued to act as counsel,appearing for Rivet in July 1942 at Ft. Norman. His assessment of the evidence differed from that of the Supreme Court of Alberta, Appellate Division[60a] raising the question of what decision he would have reached on similar evidence had he tried the case. Had he perceived the evidence as Meikle had, a comment that he tended towards prosecution bias would not have been misplaced.

(iii) E.C. Darling

Of Darling little can be said. Before his judicial career was cut short in its first month,[61] Darling had attended to several court cases and had given "promise of being a very satisfactory [District] Agent."[62] Speculation based on past performance suggests that he would have grown into his judicial role and brought a courteous, helpful atmosphere to his Court. His correspondence displayed a pleasant, rambling style, lacking in clear forceful conclusions.[63] He had not grown to legal

prominence in Edmonton, and could not have brought to his judicial role the finely honed skills of a leading barrister.

(iv) Fred Fraser and F.J.G. Cunningham

Of Fraser and Cunningham much can be said. Fraser was a Stipendiary Magistate of "no great depth of legal training"[64] who possessed a "good grasp of human nature."[65] The suspicion exists that had Fraser not been so much the administrator in his between-the-war careers and had he acquired court room skills,[66] his judicial talents could have been considerable. He certainly had the required "intellectual baggage."[66a] On the negative side Fraser's Irish-Scottish ancestry fostered a mercurial temper that deprived him of that calm reasoned rationality so helpful to the smooth carrying out of judicial office.

Fraser's opinions were firmly taken and not easily changed.[67] He seemed to have an empathy for the native; and he supported the decision to keep the Mackenzie Valley "dry."[68] This meant that relatively few liquor cases came before him and his fellow Judges in the late 1940's.

Cunningham was viewed as an "excellent"[69] Stipendiary Magistrate. He certainly acquitted himself well in the summer of 1947 handling with aplomb a week long civil jury trial,[70] a

criminal negligence causing death trial[71] and an eight day long civil mining trial.[72] Among counsel appearing before him in those trials were Bruce Smith, KC and Angelo Branca, KC, both later Court of Appeal Justices. Neither overwhelmed Cunningham.

Yet the suggestion emerges that Cunningham could be less than forthright. In the civil jury trial, the jury brought in a verdict for the plaintiff. Cunningham denied John Parker'smotion to record that verdict, finding on a point of law[73] in favor of the defendants. When the jury had retired, the inexperienced clerk-reporter allowed the whole Mining Recorder's file to go to the jury, without separating out the exhibits.[73a] Cunningham, in Parker's view,[74] ruled on the technical legal point in favor of the defendants as a convenient way to get around the exhibits problem.[75] When reporting to R.A. Gibson,[76] Cunningham made no mention of the exhibit problem, which lends support to Parker's contention.

Cunningham's few written decisions convey a lucid careful style. His court notes are in a clear precise hand, sprinkled with shorthand notations. Each bench book bears evidence of prolonged concentration on court matters; the notes are comprehensive, and the cases are alphabetically indexed.

There was a practical side to complement Cunningham's quick and capable judicial mind. To keep his feet warm, Cunningham kept his spaniel under the bench. Occasionally the dog's snoring

punctuated the court proceedings necessitating a silencing kick from his master.[77]

(v) J.R.E. Bouchard

Because Bouchard lacked extensive courtroom skills[78] he must have been uneasy in his judicial role. Mr. MacLeod of the Department of Justice, who appeared before Bouchard in the spring of 1955, adds that "Bouchard was not particularly familiar with criminal procedure or the rules of evidence."[79]

His judicial duties while at Aklavik were minimal. Those cases he had were not especially demanding. Rather they involved disputes over game and trapping matters. When at Ottawa from 1950 to 1955, he took two serious murder cases.[80] If his performances as a prosecutor at Yellowknife after 1955[80a] were indicative of his knowledge of criminal trial practice, it may be surmised that he only superficially delved into the issues that confronted him in these two serious cases.

(vi) Brown

Brown spent little time on his judicial duties in the two years that he spent at Fort Smith. Only one of his cases appears to have been commented upon - a liquor related criminal matter heard by him as a Crown appeal. In dismissing the appeal he

remarked on the "flagrant and open lying in the witness box"[81] and was disturbed enough to suggest to the authorities that a further examination into the facts be made to ascertain if there were grounds for a perjury charge. Like Fraser, one is left with the impression that Brown had much more to offer in a judicial capcacity, if his administrative responsibilities had not been so onerous and the number of cases had been more plentiful.

(5) The "Legal Profession" Tradition

This category isolates out career lawyers and Judges from the civil servants with legal training. Like the previous category, this one may be further subdivided. Those non-resident Judges - Dubuc, Plaxton, Gibben in his second term and McBride - seconded from the Courts in other jurisdictions to sit in the Northwest Territories will be examined first.

(a) Judges

(i) His Honour Judge Dubuc

For this Stipendiary Magistrate an ominous task awaited - to bring the "Whiteman's Justice" to the Mackenzie District. Dubuc met the challenge in a quiet, dignified, courteous manner.

His search for the moving phrase though, led him in his jury charge in the Doak murder[82] trial to a spate of exaggeration:

> "Corporal Doak . . . was one of those lonely and fearless sentinels of Law and Order posted somewhere on some barren and desolate point in the Polar Sea . . . . Corporal Doak, one of the ablest and kindest members of that distinguished Force . . . was brutally murdered defenceless in his sleep, in one of the most cold-blooded manners known in the Annals of the Force, a victim of his kindness to the accused . . . . The blood of Corporal Doak does not cry for vengeance, and it is possible, when he turned on his death bed to look in the eye of [his] aggressor that his last thought in that moment's awakening before his eternal sleep, may have been one of Christian forgiveness; let us hope so.
>
> . . . when appeals [for mercy] are made to you, do not forget the innocent victim . . . . Remember that after all it is hands drenched with the blood of . . . his . . . white benefactor, which are lifted to you for mercy."[83]

Graphic, admittedly; stirring, undoubtedly; in the nature of an unbiased and unemotional jury address, assuredly not!

The impression is left of a compassionate individual who was suited to the task of introducing the Inuit of the Mackenzie delta to only the broad principles of the "white man's justice." There is no evidence, however, that Dubuc delved extensively into Inuit customs or their mode of living. Rather he introduced the formal trappings of the white man's justice leaving it to later Magistrates, such as A.H. Gibson, and Phinney, and still later Justices of the Territorial Court, to try to apply, with sensitivity, the substance of the white man's law to the Inuit.

(ii) Mr. Justice C.P. Plaxton

Charles Percy Plaxton came to the Belcher Island[83a] trials with little or no criminal trial experience. His counsel work

with the Department of Justice had been of a constitutional nature.[84] Only appointed to the High Court of Ontario, six months previously, Plaxton had not the time to immerse himself extensively in criminal law and procedure. Even so his charge to the jury in the various trials was correct and thorough, bearing evidence of concentrated preparation. His brief recitation of the facts, in attractive language, was followed by an able elucidation, at times in eloquent language, of the law needed to assist the all-white jury.[86]

Plaxton tried no further cases in the Territories. His judgments in Ontario in 1942 and 1943 display a careful mature analysis of the issues coupled with a tendency to find for the defendant. It would appear that Plaxton demanded a high standard of proof from the party having the onus in cases that he heard.[87]

(iii) Mr. Justice J.B. McBride

Like Plaxton, McBride presided over only one trial in the Northwest Territories. The Cardinal #2[88] trial presented no difficult issues to challenge his judicial abilities. Assisted by experienced counsel, especially Neil Maclean from Edmonton, McBride also had as a guide on several thorny issues the views of the Supreme Court of Alberta, Appellate Division.[89] His manner of handling the trial was that of a "dispassionate arbitrator," who chose to remain aloof and remote. A hint of this is contained in the newspaper report of his charge to the jury: "He

concluded his remarks, in the course of which, no one was allowed to leave or enter the court room . . .".[90] To impose such a restriction on the approximate three hundred observers at the trial was a little unrealistic.

(iv) Mr. Justice Gibben

The break between Gibben's first[91] and second term as a Stipendiary Magistrate was nine years. During part of that period Gibben undertook judicial duties[92] but the major thrust of his energies remained directed towards administrative concerns. His second term began in July 1950.

Jack Worsell, his Clerk in the Yukon, again[93] assists in revealing Gibben's judicial personality:

> "He was by no means a brilliant Judge. He had been in the game a long time, worked hard over his judgments and knew the Yukon [and the Mackenzie District] and [their] ways . . . . He was a gentleman and he did know a little law. For his time, in the North, he was certainly an adequate Judge."[95]

He can be criticized in Cardinal #1,[96] a jury trial at Aklavik in 1953, not so much for his misdirections[97] to the jury but for his failure to check Crown Counsel's unfortunate remarks.[98] The Alberta Supreme Court, Appellate Division, remarked unfavorably on several aspects of the trial including his jury direction on the defence of insanity. Tempering this criticism is the fact that jury charges are notoriously fruitful areas from which to extract points of appeal.[99]

During the latter stages of his second term as a Stipendiary, liquor became a source of some extra-judicial concern. "He was a drinking man of some considerable capacity,[100] though it never interfered [outwardly] with the performance of his judicial duties."[101] He found the loneliness[101a] of being the only Judge increasingly burdensome.[102] Liquor perhaps helped him to alleviate the stress of wrestling alone with his conscience.

(v) Summation

All four were part-time Stipendiary Magistrates. Coming to the Northwest Territories only once as did Plaxton and McBride, or for the purpose of taking serious criminal trials, as did Dubuc and Gibben, in his second term, these four Judges owed no allegiance to the Stipendiary Magistrate's Court. Distracted from their primary responsibility to their own Courts, their judicial visits to the Territories were, with the exception of Gibben, in the nature of seasonal interludes.[103]

(b) Lawyers

Five Stipendiaries comprise this sub-category: Rivet and St. Germain, non-residents, and Senkler, A.H. Gibson and Phinney, three full-time residents of the Northwest Territories.

(i) Rivet and St. Germain

Neither of these Stipendiary Magistrates left an indelible print on the judicial fabric of the Stipendiary Magistrate's Court.

Rivet appeared in 1923[103a] as an "apparition"[104] to the uncomprehending Inuit at Pond Inlet. When the "CGS Arctic" sailed away with the prisoner at the end of the trial, the "slow-voiced Judge . . . disappeared into Codloona-noona, White Man's Land."[105]

To have chosen the appropriate sentence for Nookdulah was undoubtedly a decision requiring Rivet's anxious consideration. Too long a period of imprisonment in Southern Canada might lead to death by tuberculosis. To imprison the Inuit in the guard room at Pond Inlet might be too lenient. The ten year sentence chosen seemed to be moderate when measured against other sentences in that period.

St. Germain shared Rivet's French culture and language, though not his counsel skills. As an "estate" Judge, he diligently performed the tasks required of him by the public administrator Milton Martin. By 1945, there was "no useful function"[105a] left[106] for him to perform. His tenure of seven years as a part-time Stipendiary Magistrate quietly came to an end.

(ii) Senkler, A.H. Gibson and Phinney

Nothing of interest[107] pertaining to Senkler's judicial decisions survives. His misfortune was to have come on the judicial scene in the Northwest Territories twenty-five years too early. Had Senkler been available in the late 1930's at Yellowknife, R.A. Gibson would have found his services "exceedingly useful."[108] The admixture of extensive administrative training coupled with a healthy dollop of judicial experience,[109] both of which Senkler possessed, was exactly what the Territorial Administration was seeking in 1937. When Gibben was appointed in 1938 he fulfilled the second requirement. By 1941, through on-the-job training, he came to fulfill the first.

To move from one end of the time spectrum to the other takes our enquiry from Senkler in 1910 to A.H. Gibson and Phinney in the late 1940's and early 1950's.

Both A.H. Gibson and Phinney were gentlemen. Both had a special affinity for the natives and juveniles. Gibson at Fort Saskatchewan, prior to his appointment, had taken "an active part in Indian affairs."[110] This interest remained with him in judicial office. Phinney too possessed a "deep understanding of human beings."[111] "He was especially good with Indian cases outside Yellowknife."[112]

Phinney's "lenient tendencies"[113] prevented him from dealing severely with juveniles. It was particularly difficult for the Police to get a conviction in car theft cases. Invariably that type of case ended up as joy riding. In his efforts not to convict young persons, he came to strain the proper bounds and was corrected on appeal. One such example involved young Ron Avery. Clearly driving while under the influence of liquor, Avery stopped his vehicle and fell out the driver's side. His explanation, which Phinney accepted, was that while driving he was not impaired but feeling himself "becoming impaired" he stopped his truck and jumped out. On appeal, Justice Sissons registered a conviction.[114]

A.H. Gibson shared Phinney's concern for juveniles. He exerted a fatherly influence requiring convicted juveniles to write essays on Saturdays as part of their sentence. The jaundiced-eyed Sgt. Abrahamson saw this only as extra work for the Police and of little value since the young offenders made fun of Gibson behind his back.[115]

Gibson and Phinney shared more than humanitarian tendencies. Both were approximately the same age when appointed Stipendiary Magistrates in the Northwest Territories: A.H. Gibson was 61 years old and Phinney was 58 years of age. Both brought an "old school attitude"[116] and previous judicial experience to bear on the responsibilities they undertook as Judges. Both would probably have been kind to young counsel.[116a]

A rotund, happy, contented person, Phinney in his soft spoken manner imposed a quiet sense of dignity over his Court. His bench books[117] convey a lack of attention to detail and precision. The hand is scrawly and free flowing. Not surprisingly procedural laxity crept into his Court proceedings. In the Lepine[118] case, since Phinney failed to comply "strictly with the provisions of the Criminal Code" he lacked jurisdiction to try Lepine on an offense of break and enter. It is doubtful if the same error would have occurred in Gibson's Court.

In his compact hand and succinct style A.H. Gibson kept careful trial notes. A "lawyer's" Judge he was a "joy to appear before."[119] Courteous, his style was to listen impassively and patiently to argument. Conscientious to a fault,[120] his health suffered. A heart attack in February 1949 that confined him to hospital in Yellowknife did not deter him from completing the Jacobs[121] trial in Edmonton late the next month.

A.H. Gibson eschewed ostentation. In his report[122] on the Killoran trial[123] the prose is direct, precise and matter-of-fact. In a sense it is fitting that his "quiet style" was carried on by Phinney when the latter replaced him at Yellowknife in 1950.

(6) Summation

Have the inscrutable faces become less so? Perhaps a little.

Some clear statements may be made of the Stipendiary Magistrates. Prior to the triumvirate of Fraser, Cunningham and A.H. Gibson judicial conservatism prevailed. That is not to imply that these three Judges were judicial activists, just that their immediate pre-Second War predecessors were timid and restricted in their judicial approach. Meikle and McKeand typified this tendency.

Some of the twenty-four Stipendiary Magistrates were "touched, in varying degree, with the occupational hazard of Judges - the proclivity to confuse themselves, on occasion with the Supreme Being."[124] Some wore this trait on the surface of their personalities: McBride, Bouchard, Cunningham, McKeand and Dubuc. Some quietly kept it submerged: A.H. Gibson and Gibben. Some tried to suppress it: Meikle for one. Some entirely lacked it: Phinney for example.[124a]

All but two were capable of dispensing justice.[125] Only perhaps Bouchard and Cunningham lacked the moral competence for the job. None seemed to lack the required intellectual competence.[126]

At first blush the twenty-four Stipendiary Magistrates seem not to have come from a homogeneous professional group.[127] But a close examination of their education and experience[128] reveals sixteen with legal training, two with medical training, three with police training and the balance, with the exception of Douglas, with training in the civil service. Indeed after Meikle's appointment in 1936, of the remaining sixteen appointments only three lacked government service. This government training can only, it may be surmised, have injected a subtle shaping of the attitudes of the Judges toward social problems in the North.

Within the broad rubric of their collective experiences various shades of opinion were certainly discernible. But the "golden thread" running through their collective experiences was, from 1921 to 1950, an exposure to the dominating personality of the Deputy Commissioner, R.A. Gibson.

Most were at least in their middle forties when appointed, and at least ten were in their fifties or early sixties. Only two - Bouchard, who was 36 years of age, and Perkins, at 29 years - were young appointments. Perkins handled himself well, having a quick appreciation for northern problems. He was the only Stipendiary Magistrate to have practised law and resided in the Northwest Territories prior to his appointment.

Though political affiliations played a part in some of the appointments,[129] no evidence of political orientation overtly emerges in the Stipendiary's judicial decisions. This is not surprising since no constitutional cases with political ramifications[130] came before the Stipendiary Magistrates for decision.

Absent these broad generalizations, little more can be said at this time.

The Court did not produce strong leaders for the Stipendiaries never grew into a cohesive unit to enable evaluations of that nature to be made. Few written decisions meant that no peculiar trends evolved from the irregular sporadic adjudicative process. To characterize a particular Judge's style as clear, authoritative and right or as terse, vigorous and vivid could not, with certainty, be done.

To engage in a deeper analysis of the Stipendiary Magistrates' judicial traits presumes further study. It is only with much more extensive data that specific tendencies may be discerned. That this is unlikely to happen stems more from the lack of extensive civil cases[131] than from a lack of trying. Often, only in complicated civil matters are the abilities of the Judges truly tested. Dealing with intricate issues develops the facility to handle precedent, and to strike the appropriate balance between equity in the individual case and desirable certainty in a particular area of the law.

1. Blom-Cooper and Drewry, Final Appeal: A Study of the House of Lords in its Judicial Capacity (Oxford: Clarendon Press, 1972) p.154.

2. Ibid., p.154.

3. Ibid., p.155.

4. Some are at the Record Centre, maintained by the Government of the Northwest Territories at Yellowknife, NWT. Some significant criminal decisions are at the Public Archives at Ottawa, RG 85 or RG 13, or at the Department of Justice offices in Ottawa.

4a. Bouchard might still be alive. Efforts to trace him have proven unsuccessful.

5. M.M. de Weerdt, Indians, Eskimos in the Administration of Justice in the Northwest Territories, unpublished, 1966, p.4. de Weerdt is uniquely qualified since he served as an RCMP officer before becoming a lawyer. He is now a Supreme Court justice at Yellowknife.

6. Recollections, John Parker.

6a. Chapter 5, (4)(c) fn.227 and 228.

7. Appendix A - 1907.

8. Letter, Perry to Deputy Minister of Justice, 6 August 1908.

9. Chapter 5, fn.51.

10. Chapter 1. fn.28.

11. Moran, Report of an Inspection of the Mackenzie District (Ottawa: King's Printer, 1930) p.34.

12. He prided himself on the number of miles he covered, summer and winter, visiting communities in the delta. Letter, Dick Finnie to writer, 29 November 1977.

13. Recollections of Sgt. Red Abraham.

14. His comprehensive analysis of the quarantine of boats in the Herschel Island region and comments on a draft Health Ordianance to prevent the spread of venereal disease appear in the Council Minutes, CNWT, 1930, PAC, M-811 to 815, p.154. His common sense analysis of the proposal for a game preserve in the Mackenzie delta is found in Moran, Report of an Inspection of Mackenzie District, 1930 (Ottawa, King's Printer, 1931) p.33.

15. Recollections, Charles Perkins.

16. Recollections, Sgt. Red Abraham.

17. Another example illustrates this tendency. As a JP[2] in December 1931 at Aklavik, Urquhart sentenced Mr. Rivet to 3 months with hard labour at the RCMP guardroom at Aklavik for theft of mink. This may have been the same Rivet convicted of incest by Meikle in 1942 at Fort Norman. Appendix A - 1942.

18. Letter, Douglas to Deputy Minister of Justice, PAC, RG 13, A2, Vol..401, 544-1934.

19. He wrote the foreword to Lands Forlorn, A History of an Expedition to Hearne's Coppermine River (New York: G.P. Putnam's Sons, 1914) written by George M. Douglas.

20. He was a practical man. Recollections, T.L. Cross, defence counsel at the Norberg trial. Appendix A - 1932.

21. Chapter 5, fn.40.

22. O-in-C, PC 51/700, 3 March 1934.

23. Appendix A - 1935.

24. Letter, Acting Deputy Minister of Justice to Douglas, 18 July 1935, PAC, RG 13, A-2, Vol.2020, 135033.

24a. See Appendix A - 1935.

25. The criticism has more force when it is realized that only in serious offences would the Department of Justice consider appointing counsel. Yet Douglas had raised the issue first asking if the three accused were to have the benefit of Counsel. The Minister of Justice decided it would "not be necessary" PAC, RG 13, A-2, Vol.2020, 135033.

26. Norquay is also in this sub-category but his judicial work related entirely to estate matters.

27. Who controlled their prospects of promotion in the Territorial Administration, and to whom they reported.

28. Fred Fraser, Recollections.

29. Chapter 8. The debate was ongoing into 1948. Memorandum of Wright, 10 January 1947, T.L. Cory, 8 November 1946; and T.L. Cory, 22 June 1945. All found in PAC, RG 85, V.1870, 540-1-2.

30. Memorandum of McKeand, 7 October 1939, PAC, M-811 to 815, p.1969.

31. Appendix A - 1945.

32. Ibid.

33. Appendix A - 1942.

34. There was not much use arguing law in front of him. Charles Perkins' Recollections. Meikle also could have been reacting to police criticism of his ten month sentence of Kennedy for incest in 1940. "From a persual of the evidence adduced at the preliminary hearing . . . the offence justified a more severe penalty than that imposed." Letter, Assistant Commissioner Caulkin to R.A. Gibson, 6 June 1940, PAC, RG 85, Vol.1870, 540-1-1.

35. Letter, Duncan to Rivet, 22 September 1942, D of J, file #143764.

36. Excessive especially as both the prosecuting police officer and defence counsel had suggested a fine was appropriate. A.F. Duncan commented in a telegram, 1 November 1937, to J.A. MacKinnon M.P. "Jail sentence ridiculous, nominal fine would be adequate. D of J, file #136636.

37. Letter, Meikle to Duncan, 21 October 1937, D of J, file #136636. In those days it took three or four days to go by air from Edmonton to Yellowknife. Transportation difficulties necessitated some consultation and flexibility.

37a. Appendix A - 1940.

37b. PAC, RG 32, c.2, Vol.188, 683.

38. Helen Perkins remarks that Meikle was precise in manner and a strict adherent to the written rules. Letter to the writer, 26 January 1977. He was not flexible.

39. In his oft quoted article on The Independence of the Judiciary (1956) 3 C.B.R. 769-809, 1139-1179.

40. Ibid., p.113.

41. McKeand was the sixth civil servant appointed. Civil servant appointments totalled 14.

42. In 1316 the Order of Serjeants was formed. Serjeants were leading practitioners. Only Serjeants could be appointed to the bench. This did not change until the Judicature Act 1873, although by the sixteenth century, if a lawyer were to be appointed to the Bench, he was first made a Serjeant. Lederman, p.115, fn.16.

43. Except Gibben during his second term as Stipendiary Magistrate (1950-55) when he also was a Justice of the Territorial Court of the Yukon.

44. Chapter 9, part (2) Numerous extra-judicial roles.

45. Helen Perkins offers the opinion that Jack Gibben was highly emotional. He suffered much tragedy in his life in the North. Letter to the writer, 26 January 1977.

46. Letter, Jack Worsell to writer, 18 January 1977. Worsell was Gibben's clerk in the Yukon.

47. Appendix A.

48. Camille Branchard of Montreal.

49. 15 February 1952.

50. Letter, Young to Gibben, 5 February 1952, D of J, file #160947.

51. Letter, Gibben to Young, 18 February 1952, D of J, file #160947.

52. Letter, Deputy Minister of Justice to Gibben, 6 March 1952, D of J, file #160947.

53. Charles Perkins, Recollectins, G.A.A. p.37.

53a. Charles Perkins, Recollections, G.A.A. p.40.

54. His first cases at Yellowknife are described in the Prospector, 27 May 1939, at p.1.

55. Appendix A - 1939.

56. "The hearing occupied the greater part of three days during which a mass of evidence and exhibits was introduced." The Prospector, 26 August 1939, p.1.

57. Chapter 9, fn. 61.

58. Charles Perkins' Recollections, G.A.A., p.14.

59. Appendix A - 1941-42.

60. This attitude was a carry over from his practice. Perkins had acted for clients who lived in the close knit community that was Yellowknife. One of his clients, Cassidy, was a prospector with some valuable claims. Cassidy was also an alcoholic. An unscrupulous Mr. Philipps, a self-declared lawyer, had tried to extract a promising gold property from

Cassidy. Perkins persuaded Cassidy to place the claims in trust with Perkins to prevent the Irishman from transferring them in a weak moment. Charles Perkins' Recollections, p.44.

60a. In Perkins' view there were no grounds for appeal. Memorandum of Olmsted, 6 June 1942, D of J, file #143764. The Appeal Court, if it had jurisdiction, would have quashed the conviction, R. v. Rivet [1944] 2 W.W.R. 132 (A.S.C.A.D.).

61. Chapter 5, (18)(a).

62. Letter, Meikle to Gibson, 26 June 1944, PAC, RG 85, Vol.1433, 542-3-3. Meikle's analysis is more directed to the administrative side of Darling's duties.

63. In his letter of 15 September 1936 to R.A. Gibson, PAC, RG 85, Vol.177, 542-3-1. Darling essentially asks R.A. Gibson, a non-lawyer, for a legal opinion.

64. Recollections, John Parker.

65. Ibid.

66. In the Cranham case, Fraser's questions in direct examination are grossly leading, one of the indications that he had spent little time in a court room. It will be remembered that in this case Fraser prosecuted.

66a. Fraser matriculated at age 16, winning the Lt. Governor's medal. He then started his articles with a firm in Vancouver.

67. A characteristic neither helpful to an advocate nor a Judge. John McNiven, a lawyer in Calgary, confirms that Fraser was a man of strong conviction who early on made his views known. Conversation with the writer in May 1986.

68. Fred Fraser Recollections.

69. Hon. Neil Primrose, former Justice of the Alberta Court of Queen's Bench.

70. Ross v. Lieberman, unreported, July 1947, NWT Government Records Centre, SM #643. John Parker appeared for the plaintiffs, Bruce Smith KC for the defendants.

71. At Yellowknife, Angelo Branca appeared for the accused, who was acquitted.

72. Re Quartz Mining Regulations, unreported, heard at Yellowknife in September 1947. John Parker acted for the applicant, and Ray Mahaffey for the Mining Recorder, Fred Fraser.

73. The issue was complex. Bruce Smith successfully argued that a joint, not a several, cause of action resided in the plaintiffs. As only three of the five prospector claimants were joined as plaintiffs, Cunningham dismissed the actionreserving to the plaintiffs the right to commence another action upon joinder of the remaining two prospectors.

73a. He did this on the insistence of Fred Fraser, the Mining Recorder. Fraser would not allow the exhibits to be extracted from the file. In this Fraser was wrong. This underlines Fraser's inexperience in the handling of court matters.

74. John Parker's Recollections.

75. There were a number of factors involved. Cunningham knew that Smith had a ground of appeal concerning the documentation not in evidence that had gone to the jury. Such an appeal would have been to the Supreme Court of Canada: Ross v. Lieberman [1947] 1 W.W.R. 1070 (S.C.A.A.D.). He probably also suspected that the plaintiffs did not have the money to take an appeal (which Parker confirms was correct). Cunningham probably was anxious not to embarrass the new Reporter-Clerk Paul Rimstad.

76. Letter, Cunningham to R.A. Gibson, 6 August 1948, NWT Records Centre, Yellowknife, SM 643. Cunningham asserts that he alerted John Parker to the joint versus several argument at an interlocutory motion stage. John Parker could presumably have corrected the problem then.

77. Recollections, Ray Mahaffey, a resident lawyer in Yellowknife in 1948.

78. In his first trial as prosecutor in the fall of 1955 before Justice Sissons he attempted to put in the accused's alleged confession, taken through an interpreter, without calling the interpreter. The confession was ruled inadmissible.

In the Angulailik case heard in 1957 by Justice Sissons a key Crown witness was not called at the Preliminary Inquiry conducted by Bouchard. Sissons refused Dunne, who prosecuted at the trial, leave to call that witness at trial. It is submitted that Bouchard should have tried to ensure that this evidence was put in at the Preliminary Inquiry stage even if this meant an adjournment of the Inquiry or else extracted some agreement from defence counsel to ensure that the witness could be called at trial.

79. Memorandum, Macleod, 30 March 1955, D of J, file #170890.

80. One such was the trial of Okalik - Appendix A - 1951.

80a. Supra, fn.78.

81. News of the North, 27 June 1950.

82. Appendix A - 1943.

83. R. v. Alikomiak, unreported, trial transcript, p.33ff.

83a. Appendix A - 1941.

84. M. LaPointe in the Foreword to Plaxton (ed) Canadian Constitutional Decisions of the Judicial Committee of the Privy Council (Ottawa: King's Printer, 1939) p.v.

85. On 27 January 1941.

86. PAC, RG 85, Vol.174, 541-2-1 (1A).

87. This follows from a survey of the few reported decisions of Plaxton's contained in the Ontario Reports of 1942 and 1943.

88. Appendix A - 1954.

89. R. v. Cardinal (1953) 10 W.W.R. (N.S.) 403.

90. News of the North, 22 January 1954.

91. Supra, (4)(b)(i).

92. From 1941 to 1946 he was the Stipendiary Magistrate for the Yukon, though as in the Northwest Territories his duties in the Yukon were also administrative in nature.

93. Supra, fn.46.

94. He was a gentleman of the very finest kind. Charles Perkins, Recollections, G.A.G. p.7.

95. Letter, Worsell to the writer, 18 January 1977. There was an interesting exchange in the House of Commons concerning Gibben's travelling allowance. Diefenbaker: Is [Gibben] appointed? Is he ad hoc or permanent? Garson [Minister of Justice]: permanent. Diefenbaker: An excellent Judge? Garson: Yes. Debates, H of C, 14 May 1953, p.5390.

96. Appendix A - 1953.

97. R. v. Cardinal (1953) 10 W.W.R. (N.S.) (A.S.C.A.D.) 403, 405.

98. Chapter 5, fn.48a.

99. As any experienced criminal counsel; and Court of Appeal Justice, will confirm.

100. "He could take care of his share of a bottle of whiskey without any trouble at all" Charles Perkins, Recollections, G.A.A. p.44.

101. Worsell, fn.95.

101a. Gibben in 1950, proposed to the Department of Justice that he be permitted to reside in Edmonton "where there is a first class library and where I would have the opportunity to associate with other Judges and members of the legal profession." D of J, files #136636, 166266.

Justice Macaulay had resided in Vancouver from 1922 to 1941 coming every summer to the Yukon on circuit.

102. The lawyers in Whitehorse complained because "he has no one to discuss legal problems with, he cannot make up his mind" memorandum of E.R. Olson, 3 January 1957, D of J, file #166266. John Parker adds he found it difficult to give judgment against anyone.

103. All but Gibben and McBride came to the North only in the summer. Appendix A - 1921, 1923, 1924, 1926, 1929, 1931, 1941, 1951, 1953 and 1954. Gibben's visits in 1951 and 1953 were in all seasons except the winter. McBride's winter visit in January 1954 was probably not a pleasant interlude.

103a. Appendix - 1923.

104. Longstreth, The Silent Force, p.339. "Out of the thin air [Staff Sgt. Joy] had assembled solemn faces that spoke seldom words. [They] carried off strong Nookudlah without a struggle."

105. Ibid., p.339.

105a. Letter, Camsell to Deputy Minister of Justice, 18 June 1945, D of J, file #148493.

106. Chapter 6.

107. Chapter 3, fn.55.

108. Chapter 5, fn.36d.

109. Chapter 3 (4)(b).

110. Whitehorse Star, 31 January 1957.

111. Memorandum of Mr. Faibish, 5 September 1960, PAC, RG 85, Vol.1453, 542-3-3.

112. Ibid. Faibish had been asked to assess Phinney's performance as the Territorial Administration wished to remove Phinney from office. A recommendation for his removal went forward from the Minister, Robert Winters, to the Minister of Justice, Davie Fulton. Fulton was not impressed with the Administration's concerns over Phinney's "too soft" sentences and inconsistency. Fulton's solution, presumably motivated by this case, was to set a policy that all Police Magistrates in the Northwest Territories retire at age 70. Phinney retired in 1962 at 70 years of age.

113. Chapter 9, fn.49c; supra, fn.112.

114. Mary Driscoll, Recollections. The Driscoll sisters, Josephine and Mary, were Clerks of the Magistrate Court.

115. Red Abramson, Recollections.

116. Frank McCall, Recollections.

116a. Phinney was kind to de Weerdt. Discussions with Justice de Weerdt, May 1986.

117. His bench books and those of A.H. Gibson are at the Territorial Government Records Centre at Yellowknife.

118. R. v. Lepine 13 C.R. 380, 381 (S.C.A.A.D.).

119. Ray Mahaffey, Recollections; John Parker, Recollections "He gave admirable jury charges."

120. He is conscientious, but can no longer cope with the volume of cases. He is heedless of the need to work with his Clerk. He looks upon the job as a one man operation. Memorandum of E.K. Olson, 3 January 1957, D of J, file #166266.

Peter Parker adds that he was meticulously honest.

121. Chapter 6, fn.4.

122. Letter, A.H. Gibson to R.A. Gibson, 4 August 1948, Yellownife Court House, Court Records, SM 1103.

123. Appendix A - 1948.

124. Jack Worsell, letter to the writer.

124a. Discussions with Justice de Weerdt.

125. "It has been said that in the long run there is no guarantee of justice except the personality of the Judge. Grange, Justice and the System (1985) 19 The Law Society of Upper Canada Gazette 125, 136.

126. Table 3. Of the Police, Reames was exceptionally well regarded. Martin was perhaps too rule-oriented.

127. Superior Court Judges appointed in the 1980's are at least drawn, in large number, from the practising Bar.

128. Table 3.

129. Ibid. and Chapters 3, 4 and 5 and particularly Chapter 5(5).

130. As might occur when deciding the scope of the powers set out in section 10 of the NWT Act 1927, c.142. Section 10 hs some obvious similarities to section 92 of the Constitution Act, 1867.

131. The criminal circuit court, that was the essence of the Stipendiary Magistrate's Court, occupied itself with issues colored by the "primitive" nature of the persons appearing before it. The need to be innovative in sentencing; the need to look at the equity of the case and temper, if possible, the harshness of the Criminal Code; and the need to avoid being too legalistic and cold where sympathy and tact and understanding of native problems were required, were all important.

Chapter 11

The Court's Demise

Introduction

This chapter will closely analyze the various stages in the "dis-establishment" of the Stipendiary Magistrate's Court. The process from gestation to completion took five years;[1] though the crucial Federal Department memorandum, the Territorial Council Debate and the federal amending legislation all occurred within two years. A brief glimpse at the new Court and its first Judge will then be offered. Finally the implications of this development will be noted.

(1) Stages in the Court's Demise

(a) Federal Department Memorandum

Department policy crystallized in the Deputy Minister's memorandum dated October 27, 1950.[1a] The functions of the Stipendiary Magistrates had been under consideration since early that year. Of concern were the dual functions they exercised - judicial and administrative. In the past R.A. Gibson, especially, had justified this duality on the grounds of expediency.[2] That expediency, as has been noted, was multi-faceted.

The new policy set out the major components of a reorganized court structure. The Supreme Court[3] of the Northwest Territories would be re-established. It would take the jurisdiction of the major civil and criminal cases leaving minor cases to be handled by the newly created Police Magistrate's Court. The Stipendiary Magistrate's Court would be abolished.

The first step in abolishing the office of Stipendiary Magistrate had been taken with the appointment[4] on 5 July 1950, of Justice Gibben of the Yukon Territorial Court, as a Stipendiary Magistrate in the Northwest Territories. Henceforth Gibben would handle those important[4a] criminal cases in the Mackenzie District formerly handled by the Stipendiary Magistrates. The latter would be confined to hearing minor cases.

By June of 1951, implementation of the new policy had progressed only as far as the Gibben arrangement. Cunningham, now Deputy Commissioner of the Northwest Territories, sought to revive the court reorganization proposal. He suggested[5] that the necessary legislation be passed at the next session of Parliament[6] and that thereafter Justice Gibben be appointed ex-officio to the new Supreme Court of the Northwest Terrritories. Significantly, no mention was made of vetting this course of action before the Territorial Council.

(b) Territorial Council Debate

Almost as an afterthought, it was deemed prudent to bring the matter before the Territorial Council. This occurred on December 10, 1951 at Yellowknife. It is not appropriate here to analyze, in depth, the relationship of the Territorial Council to the federal Department of Northern Affairs and Natural Resources.[7] The Council had been, until 1951, an appointed interdepartmental committee of "most distinguished and capable . . . federal civil servants,"[8] all of whose members were resident, with one exception, at Ottawa. In 1951, three elected members had joined it. The session at Yellowknife was the first ever held outside Ottawa.

The Territorial Council, in committee, considered the court reorganization under Reference item Number 6.[9] Deputy Commissioner Cunningham forcefully and persuasively introduced the new Court proposal. He dealt cogently with the concern that this proposal "at first sight . . . sounds as though it might [lead] into an elaborate organization and a lot of expense."[10] He explained that the Yukon Territory presently had a Supreme Court[11] whose functions were performed by a single Justice. It was possible that Justice Gibben could also serve as Judge of the Supreme Court of the Northwest Territories. In conclusion, he remarked: "we would get a system of justice better suited to our increased population at very little additional expense."[12] Put that way, the Committee could not resist, especially as the

remuneration of the judiciary would continue to "come entirely"[13] out of Federal, not Territorial, funds.

The Committee reported favorably on the replacement of Stipendiary Magistrates and suggested that the Supreme Court consist of "one Judge assisted in the administration of justice by one travelling Police Magistrate and a number of Justices of the Peace in various settlements."[14] Given its composition[15] and its Federal Government orientation anything but a favorable response from the Territorial Council to this federal Department legislative initiative would have been wholly unexpected. Six months later the matter came before Parliament.

(c) Debates in the House of Commons and the Senate

On June 5, 1952 the Minister of Northern Affairs and Natural Resources, Robert Winters, introduced a resolution in the House of Commons to revise and consolidate the Northwest Territories Act. Several measures were proposed including provision for the "establishment of a Territorial Court, for the appointment in certain cases of Deputy Judges thereto, and the creation of a Police Magistrate's court."[16] That resolution was considered in Committee the following day.

Relying on the argument that to re-establish the Territorial Court would "facilitate the administration of justice,"[17] Winters

encountered little opposition. The only point of substance raised came from Mr. Green, who enquired why the Judge from the Yukon would also have to adjudicate in the Northwest Territories. Such an arrangement, he observed, would surely tax severely the Judge who would "be required, by flying or by some other method, to go many thousands of miles."[18] Separate Judges for each Territory would be preferable. Gamely, Winters retorted that "although the Territory is large, the population is not dense and the load of work is not too heavy."[19] This was specious reasoning since one of the justifications for the more sophisticated court structure was the increase in population.[20]

The resolution reported was read the second time and concurred in. Winters thereupon, with leave of the House, introduced Bill 337,[21] which met with no opposition. In Committee, on second reading, the only flurry of activity that interfered with the monotonous agreement of each section occurred when one honourable member objected that the Chairman was proceeding too fast. The Chairman agreed to go slower but chastized the member for waiting to make up his mind to speak five or ten minutes after the section was called.[22] On June 19, 1952 the Bill was read a third time and passed.[23]

The Senate, next day, in their turn reviewed the legislation. Senator T.A. Crerar boldly stated that this progressive and necessary legislation went "an additional step forward in the development of that part of Canada which until

very recently was regarded as a frozen and useless waste."[24] Now, the government was proceeding "along the right lines, provid[ing] for the establishment of Courts and the administration of justice."[25]

For Crerar to make such a statement is surprising. As Minister of the Department of Mines and Resources, in the 1935 King Government, he had been responsible for the Territorial Administration. Surely he knew then that a Stipendiary Magistrate's Court structure had long been in place. Other general platitudes were voiced before the Bill was referred to the Senate Standing Committee on Banking and Commerce and then passed.

The legislation, in final form,[26] creating the Police Magistrate's Court bore some conspicuous similarities to the 1901 Yukon legislation, when the office of Police Magistrate was created there. For example, four of the exceptions to the Police Magistrate's civil jurisdiction found in the 1901 legislation were repeated almost verbatim in the 1952 Northwest Territories legislation.[27] The Territorial Court provisions, in contrast, did not parallel those providing for the existing Yukon Territorial Court.

(2) Phinney's Comments

Magistrate Phinney throughout these debates had been left largely uninformed. On July 3, 1952. apparently unaware of Parliament's June activities, Phinney wrote Cunningham suggesting some procedural changes in Judicial Districts.[28] He alluded to the uncertainty surrounding the title of the new Court and queried whether there was to be a merger of the Yukon and Northwest Territories courts. In doing so, he did not question his own status in the pending changes. Cunningham promptly replied[29] advising of the new federal legislation and offering to send a copy of the Bill as passed as soon as it was printed. Phinney's procedural suggestions were to be referred to Mr. Nason, Department legal advisor, for comments. Cunningham concluded by apprising Phinney that "it [was] not expected that the new Act [would] come into force until almost the end of the year so that [there would be] plenty of time to adopt [court] procedures."[30]

Cunningham made no reference to Phinney's continuing status in the new Court hierarchy other than to report that the Yukon justice would be ex officio the Judge of the Territorial Court. This implied that Phinney would become a Police Court Magistrate. That no serious consideration seems to have been given to the appointment of Phinney was puzzling.[30a] Phinney had given faithful service as a full time Stipendiary Magistrate. He would not have been amused to see in Hansard, Minister Robert

Winters' remark made during second reading of Bill 337 that "the increase in population in recent years has resulted in an increase in the number of civil and criminal cases requiring trial by an experienced Judge."[31] For Phinney was an experienced Judge.[32] Seemingly Winters was speaking euphemistically, and meant "a more respected" Judge. Criticism had been levelled at Phinney for his lenient sentencing practices.[32a]

(3) Appointment of Justice Sissons

Between the enactment of the 1952 legislation and early 1955, the Government met Mr. Green's[33] criticism. A decision was taken to appoint a separate Judge for the Northwest Territories. This prompted the inevitable departmental memorandum[34] setting about to evaluate the potential appointees to the office. John Parker, resident Crown attorney had already pushed for Phinney's[35] appointment. Some within the Department of Resources and Development agitated for the appointment of one of their own - Fred Fraser. In the end neither Phinney nor Fraser[36] were appointed. Sissons was.

That appointment had been eagerly awaited. The Inuit, Kaotok, accused of murder, had been awaiting his trial since July in cells at Yellowknife. Gibben because of the amendments in July to the Northwest Territories Act[37] could not take the trial. The local press was agitating for an "immediate appointment."[38] It finally came in September. Sissons was sworn

in in October and the new Territorial Court immediately began to function.[39]

Jack Worsell, Sisson's clerk, when Sissons sat as an ex-officio Yukon Judge, paints this engaging portrait of him:

> "Jack Sissons always got a good press; he was colourful and controversial and he was certainly picturesque with a wolfskin (sic) parka, mukluks and his characteristic limp . . . [A] journalist, sometime, in search for the felicitous phrase, described Sissons as an 'angry old Man.' Sissons liked this - he began referring to himself as an angry old man. The image so intrigued him that he began to work unnecessarily hard at being an angry old man. Thus, in his later years, he was often angrier than he need have been, quicker than necessary to be at odds with Ottawa on matters touching the North."[40]

(4) The Reasons for the Demise

The issue of the continued existence of the Stipendiary Magistrate's Court arose in odd circumstances. R.A. Gibson had developed an appreciation[41] for A.H. Gibson's qualities as a Stipendiary Magistrate. In correspondence with Mr. Meikle,[41a] R.A. Gibson mused that were A.H. Gibson,[42] then 64 years of age, classified as a civil servant, his salary and pension benefits might be considerably improved. On further study, it was

realized that A.H. Gibson was "too old to get a permanent posting as a civil servant"[43] with the Public Service Commission.

Trying another tack, R.A. Gibson sought the advice of the Deputy Minister of Justice, suggesting an Order in Council extending A.H. Gibson's appointment until he was 75 years of age. The Deputy Minister rejoined, recommending an amendment to the Northwest Territories Act to protect the Stipendiary Magistrate while reminding Gibson that an Order-in-Council could itself be revoked or amended by a further Order-in-Council.[44] That recommendation was accepted by the Territorial Council on 27 October 1949.[44a]

Robert Winters followed this up and contained within a confidential memorandum to Cabinet dated 6 April 1950 was the suggested amendment that a "Stipendiary Magistrate not a civil servant may hold office during good behavior until 75 years and that on retirement a pension be payable.[45] The cabinet memorandum reasoned, oddly,[45a] that as Stipendiary Magistrates exercised similar powers to those of a Supreme Court Judge in a Province, this amendment would for pension purposes place the Stipendiary on the same pay scale basis as a County Court Judge. It added that of the four Stipendiaries only Bouchard of Aklavik was classed as a civil servant and therefore the only Stipendiary Magistrate entitled to a pension on retirement.[46]

The suggestion got no further. Instead it prompted an examination of the continued existence of the Stipendiary Magistrate's Court. The exact reason for this examination has not, to date, been determined.[46a] Within a few months, the decision to jettison the Stipendiary Magistrate's Court had been made.

The double appointment of Gibben signalled the policy shift. Gibben on 5 July 1950 was appointed the Territorial Court Judge in the Yukon and a Stipendiary Magistrate in the Territories.[47] The first appointment signalled the "reopening of the [Yukon Territorial] Court[48] and the second presaged the reopening of the Territorial Court in the Northwest Territories. Gibben's taking of serious criminal cases in the Northwest Territories foreshadowed his ex officio appointment as Judge of the new Court.[49]

(a) Need to Separate Judicial from Administrative Functions

Various reasons existed to justify the court reorganization. In his 8 June 1951 memorandum Cunningham restated reasoning that had proved attractive to his Minister the year before: "the performance of senior judicial functions and of administrative functions by the same person is unsound in principle and has in the past only been justified on grounds of expediency."[50] Cunningham relied on this principle when addressing Territorial Council, in Committee on 11 December 1951,

drawing on his own personal experience in 1946 when an active Stipendiary Magistrate:

> "as Chairman of the Local Trustee Board I was instrumental in passing bylaws; as a Stipendiary Magistrate I was instrumental in prosecuting (sic) people for infringements of them; now that very thing contravenes a basic principle of British justice: the separation of the judicial and the administrative and the legislative functions."[51]

The concern was valid but no one suggested a simpler solution - simply dissociate the Stipendiary Magistrates from all but their judicial functions.[52] And appoint others to perform the non-judicial functions formerly done by the Stipendiary Magistrates.

(b) Need for an Experienced Judge

In second reading on Bill 337, in Parliament, the Minister, Robert Winters, advanced additional reasons. The increase in population had led to an increase in the number of civil and criminal cases requiring adjudication by a sophisticated judge.[53] In a sense, Winters was only borrowing reasoning advanced by David Mills 66 years before, in that same forum, when speaking to the Bill to do away with the first Stipendiary Magistrate's Court. "The Government recognizes the fact that the condition of things in the Northwest Territories is not now what it was a short time ago, and this altered condition of the inhabitants renders it necessary that the Government make different . . . provisions for the administration of justice."[54] The Territorial Court of the Northwest Territories was the result.

Yet because of the St. Laurent Government's low regard for the abilities of the Stipendiary Magistrates, and the stated need for an "experienced judge," the 1952 transition differed from its earlier counterpart. Of that first transition Sir John A. Macdonald stated: "The Bill simply changes the name of the Stipendiary Magistrates to Judges."[55] It was not thought propitious to do so simple a task a second time.

(c) Need to Curtail Concurrent Jurisdiction

Robert Winters also alluded in Parliament to abuses of the concurrent civil jurisdiction provisions in the Northwest Territories Act. He cited the example of Aklavik based trade creditors who had filed collection claims in Edmonton against Inuit residents of Aklavik.[56] Now that a Territorial Court was to be established these abuses would be curtailed. The Government, confident in the justice to be administered by the Territorial Court Judge, could dispense with the concurrent civil jurisdiction provisions for the Mackenzie District.

(d) Public Image

None of these reasons really, though, got to the heart of the matter. In the final reckoning what was to be the achilles heel of the Stipendiary Magistrate's Court was its poor public image. It was not perceived to be a Superior Court.[57] Rodney Adamson of York West, speaking in Parliament, in June 1952,

during second reading of Bill 337, unknowingly stated that public perception: the "hope one can have is for the establishment of a Superior Court."[58] It was, in final sum, only a Magistrates Court!

1. The 1952 Federal legislation was not proclaimed in force until April 1, 1955. The three year delay occurred because:
   (1) The Department of Justice did not assume financial responsibility for the officers in the new Court until 1 April 1953;
   (2) Criminal Code amendments were not passed until 1953;
   (3) There was no urgency. Cunningham had thought the 1952 legislation would come into effect later that year, post fn.30.

1a. A portion of which is reproduced in F.J.G. Cunningham's 4 page memorandum of 8 June 1951, PAC, RG 85, Vol.1433, 542-3-3.

2. See Chapter 5(3)(a).

3. When re-established, it was named the Territorial Court. RSC 1952, c.331, s.20. "There shall be a Superior Court of record in and for the Territories to be called the Territorial Court . . .". The Supreme Court of the Northwest Territories did not emerge from the Territorial Court until 1972. SC 1972, c.17, s.2. This was just a name change.

4. A reappointment in reality, see Table 1. Gibben held an appointment as Stipendiary Magistrate from 1938 to 1941. In 1950, Gibben held the appointment as Justice of the Territorial Court of the Yukon. He could hold the Stipendiary Magistrate appointment so long as he held no other "office of emolument." He therefore performed his duties as Stipendiary Magistrate without extra pay. letter, Deputy Minister of Justice to R.A. Gibson, 25 July 1950, PAC, RG 85, Vol.20, 20-2 (part 3).

4a. One month before Gibben's appointment, R.A. Gibson observed: "Our thought has been that a Judge with headquarters at Whitehorse could take care of the important judicial business in all parts of the present Yukon-Mackenzie River area. letter, R.A. Gibson to Varcoe, Deputy Minister of Justice, 7 June 1950, PAC, RG 85, Vol.10, 20-3.

5. F.J.G. Cunningham 4 page memorandum, 8 June 1951, PAC, RG 85, Vol.1433, 542-3-3.

6. Which started October 9, 1951 and lasted to December 29, 1951. (The next session commenced February 28, 1952.)

7. Jordan, The Constitution of the North West Territories (University of Saskatchewan: unpublished LL.M. thesis, 1978); Zaslow, The Development of the Mackenzie Basin 1920-1940 (University of Toronto: unpublished Ph.D. thesis, 1957) p.646.

8. Zaslow, Ph.D. thesis, p.648; Chapter 5, fn.25.

9. Debates, CNWT, 10 December 10, 1951, p.29 ff.; PAC RG 85, Vol.1503, 540-1-3.

10. Ibid., p.29.

11. Called the Territorial Court.

12. Debates, CNWT, 10 December 1951, p.30.

13. Ibid., p.30. This had been the case since 1 April 1953, memorandum of C.K. LeCapelain, 25 November 1953, PAC, RG 85, Vol.1503, 540-1-3.

14. Ibid., p.30.

15. The Commissioner, General Young, and the Deputy Commissioner were officers in the Department of Northern Affairs and Natural Resources.

16. Debates, H of C, June 5, 1952, p.2973. This is the first official mention of the Territorial Court. Earlier references were to the Supreme Court.

17. Debates, H of C, June 6, 1952, p.3297.

18. Ibid., p.3299. This point was well taken. There was no direct air route from Whitehorse to Yellowknife. Travelling would be both time consuming and exhausting. No change to the 1952 legislation was made. The 1955 amendment provided for a separate Judge of the Northwest Territories SC 1955, c.48, s.9 repealing and substituting a new s.20. "There shall be a . . . Territorial Court, consisting of one Judge . . . ".

19. Ibid., p.3299.

20. Debates, H of C, June 18, 1952, p.3408.

21. Debates, H of C, June 6, 1952, p.3300. Enacted as legislation it became the Northwest Territories Act, RSC 1952, c.331.

22. Debates, H of C, June 18, 1952, p.3411.

23. Debates, H of C, June 19, 1952, p.3417.

24. Debates, Senate, June 20, 1952, p.483.

25. Ibid., p.482.

26. RSC 1952 c.331, royal assent July 4, 1952, proclaimed in force April 1, 1955, SOR 54/683, 18 November 1954, Can. Gaz. Part II, p.97.

27. Yukon Territory Amendment Act SC 1901, c.41, s.8(d)-(g) contrasted to The Northwest Territories Act RSC 1952, c.331, s.34(2)(a)-(d).

28. Letter, Phinney to Cunningham, July 3, 1952, PAC RG 85, Vol.1503, 540-1-3.

29. Letter, Cunningham to Phinney, 14 July 1952, PAC RG 85, Vol.1503, 540-1-3.

30. Ibid., in fact the Act did not come into force until April 1, 1955.

30a. Had the situation in the Yukon been duplicated (where Gibben, after a brief stint as Commissioner, became Gibben J) Phinney would have risen to become Mr. Justice Phinney. Gibben was "promised a judicial appointment whenever he wished to leave the position of Commissioner of the Yukon" letter, Phinney to Department of Justice, 4 November 1955, D of J, file #136636.

31. Debates, H of C, June 18, 1952, p.3408.

32. Arguably as experienced as Gibben though not in the number of years as a Sitting Judge.

32a. See Chapter 9, fn.49c.

33. Supra, fn.18.

34. Memorandum, 30 March 1955, D of J, file #170890.

35. Letter, 7 October 1954, Parker to Deputy Minister of Justice, D of J, file #170890. Unfortunately for Phinney, Parker was a conservative with little political muscle. Simmons, on the other hand, the sitting Liberal member from Yukon-Mackenzie, successfully pushed for Gibben's elevation in 1950 to Justice of the Yukon Territorial Court.

36. Memorandum, 30 March 1955, D of J file #170890. Macleod observed of Fraser that although efficient and conscientious his legal judgment was not "too sound." It was doubtful if Fraser were competent to review Phinney's judgments!

37. Judges Act Amendment SC 1955, c.48, s.9 repealing and substituting a new s.20 in the NWT Act. Gibben lost his ex officio appointment to the NWT Territorial Court effective 11 July 1955.

38. News of the North, editorials on 5 August 1955, and 19 August 1955.

39. News of the North, 21 October 1955, "Court takes Shape," "NWT Takes Another Step Forward."

40. Letter, 13 January 1977, Worsell to the writer, also Sissons, Judge of the Far North. The wolfskin parka was a muskrat parka. Discussion with Justice de Weerdt, May 1986.

41. Letter, Gibson to Meikle, 9 September 1947, PAC RG 85, Vol.1433, 592-3-3. This would be a matter in the mind of R.A. Gibson as he himself retired in 1950.

41a. "A.H. Gibson has given us very good service" memorandum, February 1949, R.A. Gibson, PAC, RG 85, Vol.972, 14138.

42. A.H. Gibson performed some administrative duties; but they were minimal. He was classified as a Stipendiary Magistrate, and not as a civil servant.

43. Letter, Cunningham to Deputy Minister of Northern Affairs, 29 June 1951, PAC RG 85, Vol.1433, 542-3-3.

44. Letter, Deputy Minister of Justice to Gibson, 7 October 1949, PAC, RG 85, Vol.1433, 542-3-3. It is to be recalled that absent an express exception, all Governor General appointments were "during pleasure."

44a. Minutes, CNWT, PAC M-811 to 815, p.3708.

45. Memorandum to Cabinet, 6 April 1950, PAC RG 85, Vol.1433, 542-3-3.

45a. Why not on the same scale as a Provincial Superior Court Judge??

46. The other Stipendiaries were Gibson at Yellowknife, Martin at Hay River and Brown at Ft. Smith.

46a. There is a crucial gap in the documents at the PAC. The Stipendiary Magistrate file and the Administration of justice file do not explain the reason for the policy shift.

47. See Table 1; supra fn.30a.

48. News of the North, 21 July 1950, p.1. This was only partially correct. Since 1941 (SC, 1941, c.30, s.1 enacting s.69A under which Stipendiary Magistrates exercised the power of a Territorial Court Judge) the Territorial Court had functioned without a Territorial Court judge. Two Stipendiaries had sat: Gibben from 1941 to 1946 and Phinney from 1946 to 1950. In 1950, after a nine year hiatus a Territorial Court Judge was appointed.

49. Memorandum, Cunningham to Assistant Deputy Minister, 8 June 1951; PAC RG 85, Vol.1433, 542-3-3, p.1 & 2; Debates, H of C, 18 June 1952, p.3408.

50. Memorandum, Cunningham to Assistant Deputy Minister, 8 June 1951, PAC, RG 85, Vol.1433, 542-3-3 restating and referring to 27 October 1950 memorandum approved by the Minister.

51. Debates, CNWT, 10 December 1951, p.29.

52. In 1950-51, Phinney was performing only judicial functions, as was Gibben; but Brown, at Ft. Smith, Martin at Hay River, and Bouchard, at Aklavik and then Ottawa, were also performing administrative functions.

53. Debates, H of C, 18 June 1952, p.3408. The Minister used the term "experienced judge." Infra fn.31.

54. Debates, H of C, 25 May 1886, p.1483.

55. Debates, H of C, 25 May 1886, p.1484. As indeed it did since three of the four Stipendiaries were elevated. Travis was not because he had gotten into severe difficulties with the citizens of Calgary and proven himself of an unsuitable "judicial disposition."

56. Debates, H of C, 18 June 1952, p.3408.

57. Though the Stipendiary Magistrates exercised a Superior Court jurisdiction, some "sat ungowned at a bureaucrats desk without so much as a separate court room. They were seen as bureaucrats holding court" comment of Justice de Weerdt. This would not be accurate of Stipendiary Magistrates holding jury trials while on circuit. cf Chapter 8, fn.75.

58. Debates, H of C, 18 June 1952, p.3409.

Chapter 12

Conclusion

(1) Diverse Realities

The North has been a source of myth and romance and excitement and disillusionment. The Klondike gold rush captured the imagination of thousands of seekers of fortunes. Then the harsh realities of deprivation, isolation and foreboding cold cruelly intruded to smash their dreams.

In the Northwest Territories, the same aura and myth and excitement and romance were present. But an overriding attribute - apathy - prevailed. In 1939 Vilhjalmur Steffansson, arctic explorer, observed: "Canada is less interested in her Arctic domain than most people suppose . . . ".[1] This observation was echoed by Prime Minister Louis St. Laurent, in 1952, in an oft-quoted passage: Canada "ha[s] administered these vast Territories in an almost continuing state of absence of mind."[2]

For everyone interested in the Northwest Territories, resident and non-resident, an experience unique to each evolved. The "reality" of the non-resident onlooker was different from that of the resident participant. Southern Canadians viewed the North through spectacles fitted with lenses ground to individual specifications. Investors, adventurers, explorers,

environmentalists, anthropologists, "do-gooders", missionaries, government administrators, judicial officers - all saw the Territories differently.

This Thesis has attempted to compare the diverse "realities" of Ottawa bureaucrats, a varied group of Stipendiary Magistrates, and those who were affected by the administration of justice in the north.

With respect to the Stipendiary Magistrate's Court, two telling points are worthy of comment: The Stipendiary Magistrates were not impartial, and they did not enjoy judicial independence. This led to a "cheapening" of their status as Judges.

(2) Not Impartial

The place to start is with the well-known pronouncement of Lord Hewart:

> "A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[3]

How could hybrid Stipendiary Magistrates be impartial? They were not neutral. They did not operate with detachment and at "arms length" from the Government.[4] "With an eye to the future, an eye

to promotion"[5] the hybrid Stipendiary Magistrates were open to the charge that they hewed a line "dependent" on instructions from the Executive. They were as "lackeys of the Crown," reduced to the "status of mere civil servants,"[6] pawns who were "exceptionally useful"[7] to R.A. Gibson. They were the receivers of confidential coded communications,[8] and the purveyors of community intelligence[9] - Judges upon whom the Executive could rely.

(3) Not Independent

The Stipendiary Magistrates lacked the three essentials of judicial independence:[10] security of tenure, financial security, and institutional autonomy.

(a) Security of Tenure

No constitutional[11] or legislative[12] provision accorded them tenure "during good behavior." All were subject to being removed at the whim of the Executive. Douglas and Senkler and St. Germain were so removed.[13] Others, such as A.H. Gibson, Fraser, and Cunningham, were promoted to senior civil service positions. Still others, such as Norquay, Urquhart, and McKeand, were simply forced to retire.

(b) Financial Security

Salaries of the Stipendiary Magistrates were neither established by law, nor protected from Executive interference.[14] The Executive could and did arbitrarily alter the salary of certain Stipendiaries. St. Germain saw his salary slashed in half in 1940.[15] The Stipendiary Magistrates enjoyed little or no pension rights.[16] In sum, they did not "enjoy a reasonable measure of financial independence."[17]

(c) Institutional Autonomy

The minimal requirement - "judicial control over the . . . assignment of Judges, sittings of the Court, and court lists, as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions"[18] - was lacking. Until the late 1940's there were no functionaries to direct,[19] nor any court rooms to allocate. Sittings of the Court as late as 1945 were fitted into the Eastern Arctic Patrolship's itinerary.[20] Plaxton and McBride were assigned to trials in 1941 and 1954, respectively, by the Department of Justice.[21]

Yet as Justice Le Dain has remarked "the concept of judicial independence has been an evolving one."[22] Even when security of tenure and financial independence were legislated in 1955,[23] the

Territorial Administration at Ottawa sought to frustrate institutional independence. Ottawa's control over Court circuits in the Eastern Arctic was only reluctantly surrendered.[24]

It took a special kind of Judge, as Sissons was, to wrest control from the Ottawa bureaucrats: a "crusty, old fighter;"[25] a Judge who lived up to the ideals propounded by Lord Atkin:

> "It has always been one of the pillars of freedom . . . that the Judges . . . stand between the subject and any attempted encroachments on his liberty by the executive . . ."[26];

a Judge who would "make a clean break" with the Stipendiary Magistrate's Court system, tainted and coloured with the influences of Government; a Judge who "objected very strongly to [his] Court being treated as if it were a branch of a colonial Government department and subject to departmental direction and control and to being pushed around."[27]

It is not surprising that the concept of judicial independence did not find immediate favor in the Northwest Territories after 1955. At least three factors influenced this situation: entrenched government attitudes; an initially powerless, fledging Bar; and a disinterested public, both in the Northwest Territories and in the rest of Canada.

The Territorial Administration's point of view, articulated by Fred Fraser in 1951, lingered:

> "Every consideration should be rendered by the Administration [including its hybrid Stipendiary Magistrates] to the RCMP in its efforts to maintain law and order in the Mackenzie District."[28]

This "teamwork operation" that had Judges assisting the police, and indirectly the Executive, had dangerous implications.[29] At what point was the independence of the Court threatened when "every consideration" was rendered? Would not the Stipendiary Magistrates, following Fraser's exhortation, introduce into the decision-making process a bias towards the police?

The handful of lawyers resident at Yellowknife after the Second War were raw and untested.[30] Though lacking in experience, they were still trained in the traditions of an independent Bar and Bench. Recognizing that an independent Bar fostered the development of an independent Court, the few legal practitioners sought, over time, to strengthen the two institutions. Strong-minded lawyers, Mark de Weerdt in particular, worked, ultimately with success, with a strong-minded Justice Sissons to attain the third "badge" of judicial independence, control over the administrative aspects of the Court's adjudicative process.

(4) Trends and Themes

This Thesis attempts to give a measure of understanding of how the Stipendiary Magistrate's Court functioned in the period 1905 to 1955. Meaning can be "squeezed out of the data."[31] Themes and developments of the Stipendiary Magistrate's Court can be identified and some of them can be "allied with [the] political, social and economic . . . history"[32] in the Northwest Territories in the period 1905 to 1955.

During this period, the pattern of economic organization changed in the Northwest Territories. "A diffused, primitive, individualistic pattern [of society], based on the wild life resources, which was characteristic of the early stages of [economic] development [gave way to a pattern] of new industries, which were mainly organized on specialized, hierarchical lines and gave rise to urban communities and wage earning labour forces."[33] Court structure changes reflected the economic changes. A two-tiered system composed of the Supreme Court and the Police Magistrate Court replaced, in 1955, the diffused jurisdiction previously exercised by the Stipendiary Magistrate's Court. A more complex economic organization called for a more sophisticated court structure just as in the Yukon Territory in 1901 a two-tiered court structure had evolved in response to the economic changes wrought by the gold rush.

Also, during this period, southern Canadians pressed north into Canada's last frontier. These "agents of southern expansion"[33a] brought their social values and customs with them. They sought to "civilize"[34] the native, and sometimes to assimilate or to submerge and subsume the native culture and customs.

The twenty-four Stipendiary Magistrates, none of whom was indigenous to the Northwest Territories, while on circuit participated in this southern acculturation. They became, unknowingly, instruments in the "civilizing" process. With varying success they sought to bridge the "deep cultural chasms"[35] that separated the white and native cultures. Dubuc's approach was blunt: he took little account of the native concepts of justice.[36] Later Magistrates were more sensitive to the tensions betwen the alien whiteman's law and native legal customs. Phinney, A.H. Gibson and McKeand sought in sentencing to promote the acculturation of the native to the whiteman's law.[37]

The frontier society that was the Northwest Territories in the period 1905 to 1955, offered opportunities for innovation, demanded adaptation, and permitted a relaxation of standards established elsewhere. On circuit, the Stipendiary Magistrates held court in unconventional court premises such as the foredeck of the "SS Distributor" and the living room of the local police detachment.[38] The circuit court compensated for the lack of

court personnel by engaging the police as reporters and clerks and permitting the police to arrange the circuit itinerary. Early on, the Stipendiaries adapted circuit travel to the available mode of transportation, travelling in the summer by water when the remote settlements were accessible. Their adaptation, though, led the Stipendiaries, on circuit, to fall short of the Magna Carta principle that each accused be tried by a jury of his peers in a speedy, uniform way. Yet little criticism of the delays in the delivery of justice resulted.

Over the period between 1905 and 1955 the structure of society in the Northwest Territories became more formal and sophisticated. This led to more identifiable institutions and a gradually more responsive government bureaucracy. In the same period judicial controls evolved. The fur traders' "rough justice" gave over to the policeman's "paternal" justice that in time was supplanted by the circuit court's formal justice. Resident, legally-trained Stipendiary Magistrates after World War Two travelled out on circuit several times a year into the Mackenzie District.

During this period, the Northwest Territories operated outside of the mainstream of southern Canada. In consequence, the "back-water" that was the Northwest Territories, was largely ignored. This had a number of ramifications. The Territories remained under the "authoritarian and centralizing methods" of

the Territorial Administration at Ottawa. That administration, responding to the dictates of White, Finnie and Gibson, and the restrictions imposed by the "Great Depression", regulated the Northwest Territories in a parsimonious "penny-pinching" manner. Economy in the guise of efficiency became the watchword to be observed. This parsimonious regulation coupled with the tendencies of inertia and habit produced shortsightedness, neglect[40] and indifference. With a small population, the majority of whom were natives, few complaints were voiced. The Administration, taking a short-term view, in the Eastern Arctic, "insisted that so long as the Inuit lived within the law, they should be encouraged to maintain their own way of life."[41]

Significant legal developments that came to be accepted as a matter of course in southern Canada either lagged or did not occur in the Northwest Territories. For example, from 1867, provincial Superior Court Judges were taken to have attained the first badge of judicial independence, that of security of tenure.[42] By 1887, the Government of Canada had legislated a criminal appeal procedure that culminated at the Supreme Court of Canada.[43] In the Northwest Territories, the Stipendiary Magistrates never had security of tenure, though they exercised a superior court jurisdiction. Until 1943 no criminal appeal from the judgment of a Stipendiary Magistrate was possible at all.[44] Until 1948, a civil appeal from their judgments went directly to the Supreme Court of Canada.[45] Yet, until the Rivet[45] case in

1942, there were apparently no complaints, and when complaints[46] were registered that year, no prerogative review was undertaken.

This lack of the first tenet of judicial independence, and the lack of effective appeal procedures, would have shocked the legal community in southern Canada had the situation been publicized. But indifference towards the "judicial back-water", that was the Stipendiary Magistrate's Court, allowed this unsatisfactory situation to persist.

Other facets of the Stipendiary Magistrate's Court structure would have equally shocked segments of the population of southern Canada had they been aware of them. Yet no criticism was raised that Stipendiary Magistrates, who exercised a superior court jurisdiction, also undertook administrative duties; or that the Stipendiaries did not need to be legally trained; or that there were no Judges at all of the Court from 1912 to 1921 and in the Eastern Arctic only in 1923, from 1939 to 1945, and from 1950 to 1955; or that there were no Stipendiary Magistrates resident in the Mackenzie District until 1936, and never any resident Stipendiary Magistrates in the Eastern Arctic; or that the Executive interfered with the adjudication process and criticized the decisions of the Stipendiary Magistrates in highly unorthodox ways; or that the Stipendiary Magistrate's Court functioned until 1949 with antiquated Rules and a ridiculously low fee tariff, or that the Court shared its jurisdiction with the Superior Courts

of all the Provinces; or that some Stipendiaries who didn't sit retained their patents as Meikle did for 9 years after he last presided in 1942; or that the Stipendiary Magistrates developed and preserved close links with senior civil servants at Ottawa; or . . .

Of all these facts the general populace of Canada was blissfully unaware, and the few persons that were aware of them seemingly didn't care.

The Northwest Territories in the period 1905 to 1955 had a colonial system of government. This colonial society was ruled by a Commissioner, the Federal government's plenipotentiary, who had almost unlimited power and discretion to govern the Territories as he wished. For appearance sake he was assisted by a small coterie of officials and an appointed Council.

The colonial atmosphere begat a colonial legal system. The Judges were part of the "very small apparatus" of government - hybrids performing judicial and administrative functions. The Judges were appointed "at pleasure." They were not indigenous to the Territories. Rather they were sent out (in this case up) to "the colony" to administer justice, just as other Stipendiary Magistrates had been sent out to "the colony" of the Northwest Territories between 1870 and 1886 to administer justice in what is now Alberta, Saskatchewan, and Manitoba.

(5) Perception of the Stipendiary Magistrate's Court

The lack of status accorded the Stipendiary Magistrates was certainly a question of perception. Magistrates connoted an inferior court, Judges connoted a superior court. Lacking the formal trappings of a Superior Court Justice, no one treated them with the respect given to a Justice in one of the Provinces. The aura and prestige of that office was denied them.[47]

The Stipendiary Magistrate's Court was misconceived. It had never been a Superior Court in the Northwest Territories in the period from 1873 to 1886; or in the Canadas or the colony of British Columbia[48] before Confederation; or in England. In 1955, its relegation to the status of a Police Magistrate Court was a return to its earlier inferior jurisdictional status. In the Northwest Territories it had been an aberration, a Court exercising superior jurisdiction disguised under the name of an inferior court.[49]

The misconceptions were pervasive. Newspaper reports detailed that A.H. Gibson, in 1949, presided in "Police Court."[50] Justice Clinton Ford, of the Alberta Supreme Court, Appellate Division, in the reported case of A.B.[51] referred to the "learned Police Magistrate" J.E. Gibben. Even the police viewed the

Stipendiary Magistrate's Court as of an inferior status.[52]

The twenty-four Stipendiary Magistrates who administered justice in the Northwest Territories between 1905 and 1955 performed that function reasonably well, given the difficult circumstances under which they were required to operate. The widely held perception that the Court was an inferior one was among the more unfortunate of those circumstances. This perception was, to some extent, both cause and effect of the undermining of the Judge's impartiality and independence.

The arctic flower that was the Stipendiary Magistrate's Court, that had blossomed sporadically since 1905, and even somewhat profusely following World War II, inevitably withered and died. Though the immediate cause of death was the chill icy blast of the 1952 legislation, the deeper cause was its inferior public perception fostered by the lack of impartiality and independence of its Judges. Its roots could just never take hold in the north's frozen soil.

1. Steffansson, The American Far North (1939) 17 Foreign Affairs 517.

2. Debates, H of C, p.697, 698.

3. R. v. Sussex Justices [1924] 1 K.B. 256, 259.

   In 1886 Mr. Davies in the House of Commons, when objecting to section 7(2) of the NWT Act, RSC 1886, c.50 that permitted Judges of the Supreme Court to be appointed to the Territorial Council stated: "It is just as important that the people should believe they are getting justice done as that justice should be done." Mr. Muloch added the telling point: "If the Judge holds more than one job he will be unable to enjoy the entire confidence of the community as a Judge" Debates, H of C, 21 May 1886, pp.1461, 1462.

4. Hunter v. Southam Inc. [1984] 2 S.C.R. 145 at 164 per Dickson CJ. As the Director under the Combines Investigation Act must do.

5. Debates, H of C, 21 May 1886, pp.1461, 1462.

6. Cockburn, p.233. Judges viewed in this way lost all credibility. Montague Brere, barrister, in 1857 commented on the legality of the grant to the Hudson's Bay Company of an exclusive licence to trade. He advised that the opinion given in East India Co. v. Sandys (10 State Trials; 35 and 36 Car 11; 23 ER 362 at 364; 90 ER 62, 76, 91, 103) could not be relied upon. "The motives of the Judges in those days [1683] were probably too corrupt and their desire to uphold the prerogative too strong to allow their opinion to be quoted with authority." Opinion of Montague Brere, the Middle Temple, 27 April 1857, HBCA A/39/7 folio 310ff.

7. Chapter 5, fn.36d.

8. Gibben corresponded sometimes with R.A. Gibson in code.

9. Fraser, Appendix A - 1948; Chapter 8, fn.196a.

10. As recently enumerated in R. v. Valente 64 N.R. 1 (S.C.C.) per Le Dain J. for the seven man Court.

11. See generally Chapter 2(1)(c), Constitution Act, 1867, s.99.

12. Ibid.

13. Chapter 5(3)(b).

14. There was no mention of salary at all in the Northwest Territories Act, RSC 1926, c.142; Valente supra fn.10, at p.35, 36. One of the most obvious ways to interfere with a Judge's independence is to control his salary and tenure of office. The Independence of the Judiciary in Canada (Ottawa: Canadian Bar Foundation, 1985) p.27, fn.5.

15. Chapter 5, fn.122.

16. Chapter 11, fn.42, 43.

17. Debates, H of C, 21 June 1955, p.5075, comments of E. Davie Fulton, in opposition, in Committee, when considering the Judges Amendment Act.

18. Valente, supra fn.10.

19. Fraser was serving as his own clerk in 1945. Chapter 7, fn.62.

20. Chapter 8, fn.92.

21. Chapter 5(4)(f).

22. Valente, supra fn.10, p.18. Others have said the 'same thing'. Shetreet, Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary (Amsterdam: North-Holland Publishing Co., 1976) 383-384.

23. Judges Amendment Act, SC 1955, s.9 (repealing and substituting a new s.20, NWT Act, RSC 1952, c.331) so as to establish tenure during good behavior, and s.3 (repealing and substituting a new s.18 Judges Act, RSC 1952, c.159) setting out the salary of the Justices ofthe Territorial Court of the Northwest Territories.

24. Chapter 8, fn.167a to 175.

25. Farewell speech by J.H. Sissons when leaving Lethbridge in 1955. Sissons' clippings book. "I did not seek the appointment and I still do not know why I was appointed but I have tried to figure it out. I have thought that it may be because I am a rough and tough Judge . . . . If you don't think I am rough and tough take a look at my picture as it appears in the Lethbridge Herald. What do I look like? I look like a broken down prize fighter. It may be that someone in the Department of Justice looked at the pictures of all the Judges in Canada and picked me as the roughest and toughest looking of the bunch."

26. Liversidge v. Anderson [1942] A.C. 206 per Lord Atkin in lone dissent at p.244.

27. Sissons, Judge of the Far North, p.115.

28. Memorandum of Fred Fraser for Le Capelain, 10 August 1951, PAC, RG 85, Vol.1503, 540-1-3.

29. The Independence of the Judiciary in Canada (Ottawa: The Canadian Bar Foundation, 1985) p.23.

30. John Parker, Ray Mahaffey, Peter Parker, Don Hagel, and Robert Bouchard.

31. See page i.

32. Flaherty, Writing Canadian Legal History: An Introduction, in Flaherty (ed.), Essays in the History of Canadian Law, Vol.I (Toronto: The Osgoode Society, 1981) 3-4.

33. Zaslow, The Opening of the Canadian North 1870-1914 (Toronto: McClelland and Stewart, 1971) p.281.

33a. This is a central thesis of Professor Zaslow and his "followers" - sometimes called the Zaslow School.

34. Even in the 1980's the veneer of civilization may be very thin.

35. Re Walton (1985) 15 C.C.C. (3d) 65 at 79 per de Weerdt J.

36. The natives did have a system of justice, though significantly their system did not include jails.

37. This process is ongoing. See R. v. Curley et alia [1984] NWTR 263, sentence increased on appeal; R. v. Curley [1984] NWTR 281; also see Saila v. R. [1984] NWTR 176 at 180 per de Weerdt J. who discusses banishment and its modern day use in probation orders.

38. The foredeck of the "SS Distributor" (Appendix A, 1924) was rather unconventional. Even in the 1980's courts are held "in school rooms, gymnasia, [and] community halls replete with dance band equipment." Re Walton [1984] NWTR 65 at 78. To this list may be added church basements, settlement offices, and even outdoors. The writer has participated in trials on circuit in these court premises.

39. Zaslow, op. cit., p.281.

40. Zaslow, op. cit., p.xvii "Prior to 1945, the basic approach towards the native people was one of salutary neglect . . .".

41. Zaslow (ed.), A Century of Canada's Arctic Islands (Ottawa: The Royal Society of Canada, 1981) p.75.
42. Supra, fn.11.

43. See Chapter 7, fn.53.

44. See Chapter 7. In exceptional circumstances, until 1933, an appeal with leave could have been taken to the Privy Council, though this never occurred.

45. Ross v. Lieberman [1947] 1 W.W.R. 1070 at 1074.

    Until 1949 a civil appeal could be taken with leave to the Privy Council.

46. Chapter 7, fn.23.

47. Only one example has surfaced where a Stipendiary Magistrate was called "My Lord". That occurs in Appendix "B" in the submission of Mr. McBride.

48. In 1867 legislation authorized the appointment of the existing Stipendiary Magistrates as County Court Judges. Foster, "Law and Politics in BC" in Knafla (ed.), Law and Justice in a New Land (Calgary: Carswell, 1986) p.171.

49. "What's in a name?" Shakespeare, Romeo and Juliet, Act II, Scene II, Juliette.

50. News of the North, 15 July 1949.

51. R. v. A.B. 16 W.W.R. 425, 428 (S.C.A.A.D.). See also Ross v. Lieberman [1947] 2 W.W.R. 175 where Stipendiary Magistrate Cunningham is described as sitting in Police Court.

52. "During my time, we had no Judges at all" Syd Batty, RCMP officer at Yellowknife from 1949 to 1951, letter to the writer, 5 December 1977. Batty was equating a Judge with a Superior Court Justice.

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APPENDIX "A"

Criminal Circuits

NOTE: This is not an exhaustive list of cases heard by the Stipendiary Magistrates on their criminal circuits. It highlights some of the major cases. The sources are files at the Public Archives, contemporary newspaper accounts, and recollections of participants. No court registry books or docket lists, dealing uniquely with circuits, have been located.

Criminal Circuits of Stipendiary Magistrates

1905 - No circuit

1906 - No circuit

1907 - Perry, SM - Island Lake, NWT - Joseph Fiddler was convicted of murder and imprisoned in Stoney Mountain Penitentiary in Manitoba. Fiddler was released two years later.

1908 - No circuit

1909 - No circuit

1910 - It is of interest that Judge Noel in July 1910 accompanied the police on a circuit down the Mackenzie River. Noel was an Alberta District Court Judge for the Judicial District of Athabaska. He was not a Stipendiary Magistrate for the NWT. His circuit was presumably not in any official judicial capacity.

1911 - No circuit

1912 - x)
1913 - x)
1914 - x)
1915 - x) - no record of any circuits has yet surfaced.
1916 - x)
1917 - x)

1918 - x)
) - no record of any circuits has yet
1919 - x) surfaced.

1920 - No circuit

1921 - Dubuc, SM - Ft. Providence - 30 June 1921. Le Beaux was convicted of murder by an all white jury of six, sentenced to death and executed on 1 November 1921 at Ft. Smith. The Crown was I.B. Howatt KC of Edmonton and J.G. Cory of Winnipeg acted for the defence. All the trial arrangements were made by the RCMP. The court reporter was Constable Wild; the clerk was R.P. Wallace, the Supreme Court clerk at Edmonton.

The jury trial, the first in the District of Mackenzie, was held in a Roman Catholic mission chapel. The court party left Edmonton on 16 June, arriving at Ft. Providence on 27 June. The water journey from Ft. Smith to Ft. Providence was via the Hudson Bay Co. S.S. Distributor. The court party returned to Edmonton in July. The trial took place a few days after the Indians signed Treaty 11 at Ft. Providence. On the invitation of Dubuc, the Chief, two councillors, and approximately 100 Indians attended the opening day of the trial.

1923 - Dubuc, SM - Herschel Island, Yukon Territory, 16 July 1923 to 20 July 1923, although the court waited until 12 August 1923 for Ikalupiak to arrive by police escort. When he didn't arrive the court was forced to leave. Ikalupiak was tried at Aklavik the next year.

(1) Alikomiak was convicted of the murders of Corporal Doak (RCMP), Pungnana and Otto Binder (trader), and was sentenced to death. He was executed.

(2) Tatamigama was convicted of murder and sentenced to death. He was also executed.

(3) Ekootuk convicted of manslaughter was sentenced to one year in prison at Herschel Island.

(4) Amotuk and Utipsi were acquitted.

Counsel were I.B. Howatt of Edmonton, prosecutor, and T.L. Cory, of Ottawa, defence counsel. Cory was one of the in-house solicitors for the Department of the Interior. Constable Richard S. Wild acted as clerk and reporter.

This series of trials and that of Nookudlah at Pond Inlet, one month later, were the first held on Canada's arctic shores. The court party left Edmonton on 12 June 1923 and followed the same water route as the circuit in 1921 to get to the Mackenzie. The court travelled down the Mackenzie River on the "S.S. Distributor" to Aklavik and then to Herschel Island in two stages. The first was by motor scow along the coast west to Shingle Point; the remaining 50 miles was on the Hudson's Bay Company schooner Aklavik through the drift ice. The court party, except for T.L. Cory who returned via the Alaska route, came back on the "S.S. Distributor" arriving back in Edmonton on 21 September 1923.

The trials were held at the RCMP detachment. Five of the white jury of six were collected en route down river between Norman and Ft. Good Hope and consisted of traders and trappers. The sixth juror, Paul Poirier, a law student, had come with the court party from Edmonton. It was very odd to let a law student sit on the jury.

1923 - Alikomiak had been commited for trial on 23 April 1923 at Herschel Island before Inspector Wood acting as a Justice of the Peace with the powers of two. This was arguably an invalid committal. Only a Stipendiary Magistrate could exercise a criminal jurisdiction outside the Northwest Territories (NWT Amendment Act, SC 1923, c.21, s.1 adding section 59A to RSC 1906, c.62).

1923 - Rivet, SM - Pond Inlet - trial commencing 25 August 1923 for the next four days. Nookudlah, Ah tee-tah, and Oo-roo-re-ung-nak were all charged with the murder of Janes, a white trader. Nookudlah was convicted of manslaughter and sentenced to 10 years at Stoney Mountain Penitentiary in Manitoba; one accused was sentenced to two years in the custody of the police at Pond Inlet, the third accused was aquitted.

The court party was all from Quebec: A. Farlardeau of Quebec City was the prosecutor, Leopold Tellier of Montreal was the defence counsel and F. Biron of Montreal was the clerk. Fees and expenses in the sum of $2,779.30 were paid by the Department of Justice. This was a lot of money in those days.

The trial was held at the police detachment. The jury of six white men came from the crew of the S.S. Arctic. The court party left on 7 July on the S.S. Arctic, which visited a number of settlements in the Eastern Arctic on its annual Eastern Arctic Expedition. The court party returned on 4 October, almost three months later.

Janes had been murdered in 1920 near Adelaide Peninsula. Staff Sargeant Joy as a Justice of the Peace with the powers of two conducted a preliminary inquiry in July 1922 at Pond Inlet.

1924 - Dubuc, SM - Aklavik - 7-8 July 1924. Ikalupiak was convicted of manslaughter by a jury and sentenced to five years in prison at the Stoney Mountain Penitentiary, Manitoba. Counsel for the Crown was I.B. Howatt KC. J.B. McBride acted for the accused. Both were from Edmonton. McBride as a Stipendiary Magistrate heard R. v. Cardinal #2 in January 1954 at Yellowknife.

Ikalupiak was committed for trial at a preliminary hearing held 30 October 1923 at Herschel Island, YT before Inspector S.T. Wood acting as Justice of the Peace with the powers of two. Wood was later to become Commissioner of the RCMP. This was arguably another invalid committal.

Judge Dubuc's wife and three children accompanied the court party to Aklavik on the S.S. Distributor.

The trial was held on the foredeck of the docked Distributor; the judge sat on a raised chair backdropped by the Union Jack and surrounded by a crowd of interested observers including many Inuit. The court sat from the early morning of July 7th right through the evening with a break for supper receiving the jury verdict at 2 a.m. the next morning. (This was the time of constant daylight.)

The six man white jury was composed of a trader, two government officials, two others and the Captain of the S.S. Distributor.

1925 - No circuit.

1926 - Dubuc, SM - Aklavik - 24 June 1926. Toongnaak pleaded guilty to manslaughter and received a sentence of one year. Ikayeena charged with manslaughter was acquitted on the basis of self defence.

The court party consisted of I.B. Howatt, prosecutor and G.C. O'Connor, defence counsel, both from Edmonton. The court party stopped on its way down river at Ft. Providence, to deal with the case of Jack Stamp, charged with a serious offense, though not murder.

Ikayeena's case arose out of an incident with Uluksuk at Perry River in the summer of 1924. Arrested, he was committed for trial by a police inspector acting as a Justice of the Peace with the powers of two at a preliminary inquiry at Herschel Island, Yukon Territory in the summer of 1925. This was an invalid committal (supra Ikalupiak).

Toongnaak (a.k.a. Teckack or Toonalik) was arrested and committed for trial in the winter of 1925 for an alleged murder at Adelaide Peninsula in 1922.

1927 - No circuit.

1928 - No circuit.

1929 - Dubuc, SM journeyed down the Mackenzie River with a full court. At the principal posts he disposed of the cases on the docket.

Aklavik - 15-17 July 1929. Okchina, convicted of manslaughter, received a one year sentence. Lily Sarniyak, convicted of infanticide, received a suspended sentence.

Sarniyak was committed for trial at Herschel Island on 27 October 1928. This was an invalid committal (supra Ikalupiak).

The trials were held in the "saloon" of the S.S. Distributor. E. Clare Darling, prosecutor (later a Stipendiary Magistrate) and C.E. Gariepy, defence counsel, both came from Edmonton. The original defence counsel J. Clarke contacted pneumonia at Ft. Smith. Clarke was flown out and Gariepy flown in to Arctic Red River to join the court party on the Distributor. The court clerk was Corporal Belcher.

The jury were six white men. One of the deck hands on the Distributor, Wilbur Bowker later Dean of the Law School at the University of Alberta, remarks that it was hard to find six eligible jurors. He adds "there were of course interpreters for the Eskimo witnesses."

The court party travelled from Edmonton, leaving in late June. They proceeded by train to Waterways, by boat to Ft. Fitzgerald, then portaged the rapids to gain Ft. Smith from where they travelled across Great Slave Lake and down the Mackenzie River to the delta. The trip down the river took approximately one week.

1930 - No circuit.

1931 - Dubuc, SM - Ft. Smith - June 1931 - attended to docket matters. Dubuc probably went down the Mackenzie to Aklavik though no record exists to confirm this.

1932 - Douglas, SM - Aklavik - 17 June 1932. Norberg, charged with incest, was acquitted by a white jury composed in part of four trappers. The court party all came from Edmonton. The prosecutor was James Ogilvie, the defence counsel T.L. Cross (later His Honour Judge Cross of the District Court of Northern Alberta). W.R. Howson originally received the appointment as defence counsel but could not attend. The clerk was Alan Short, a Clerk of the Supreme Court of Alberta.

The trial started at 11 p.m. and ended at midnight. The 18 year old daughter's evidence was too suspect to support a conviction.

The court party left Edmonton in late June and travelled the same route as previous court parties. The trip down the Mackenzie took approximately two weeks in the Hudson Bay Co. wood-burning stern wheeler the S.S. Distributor. The court had to wait for several days at Aklavik for the police to arrive with the accused from Bernard Harbor. Tommy Cross summed up the case as a one month trip for a one hour trial.

The defence counsel's substantial fee was paid from the sale of a large quantity of white fox furs. This is odd since the defence counsel received an appointment to defend and could not be paid from two sources. Presumably the appointment was waived (Recollections of T.L. Cross).

1933 - No circuit

1934 - McKeand, JP[2] - Wakeham Bay, Quebec - 27 July 1934. McKeand conducted an inquiry respecting the sanity of Joshua under the Insane Persons Ordinance, CONWT 1898, c.90. It is doubtful if McKeand had jurisdiction to conduct this inquiry in Northern Quebec. The inquiry was held in the living room of the local trading post Manager's residence. A transcript of the inquiry is found in the Minutes of the Territorial Council PAC, M-811, p.572-586. Evidence was taken, though not under oath. Two interpreters assisted: M.L. Manning as interpreter for Dr. McKinnon and Tom Palliser for Joshua. The Board of Inquiry consisted of six white men, three police officers, a medical doctor (who also gave evidence) a trading post Manager and McKeand. Joshua was found to be suffering from deafness. He was not found to be insane. Medical assistance being unavailable in the Southern Baffin Island region, Joshua was transported by the "MacLean" to Quebec to hospital. An untrue press report indicated "a crazy eskimo was brought to Quebec City in a bear cage."

1934 - Douglas, SM - Coppermine - 20 August 1934. Ahigiah was found guilty of manslaughter and sentenced to five years with hard labor at the RCMP guardroom at Aklavik. The court party was all from Edmonton. The Crown witnesses were brought to Coppermine by air from Edmonton. The air cost was $1930.50, the counsel and clerk-reporter fees another $1950.00 ($80/day) prompting General MacBrien, Commissioner of the RCMP, to observe that the case could have been tried just as well by a Police Officer acting as a Stipendiary Magistrate (Minutes, CNWT, 17 October 1934, PAC, M-811, p.540).

Interestingly, it took approximately 10 days each way by plane. The plane hopscotched down the Mackenzie River then east along the arctic coast. Yet without the airplane the investigating police officer commented that this case would "still be under investigation" (RCMP Annual Report, Canada, Sessional Papers, 1935, #28, p.60).

Two further points about this circuit are noteworthy. First, the accused, disturbed by the poor job being done by the court interpreter, interjected to clarify that he had shot the victim in the back and killed him (discussion with Red Abraham, the investigating RCMP officer who attended the trial).

Secondly, the court party while going down the Mackenzie could have heard other cases but none were outstanding. The previous year the Hudson's Bay traders in the Mackenzie District were asked if they had any debt cases to bring before a Magistrate if he were to visit the District next season (Minutes, CNWT, 1933, PAC, M-811, p.303). None came forward.

1935 - Douglas, SM - Arctic Red River - 22 August 1935. Douglas travelled down the Mackenzie on the S.S. Distributor. He attended to a case involving three Indians. A prior indication to the RCMP that the accused would be pleading guilty meant that "it would be an unwarranted expense to provide counsel for the defence" (letter, Assistant Deputy Minister of Justice to Douglas, 18 July 1935, D of J, file #135033). The RCMP prosecuted. It may be assumed that the charges were

significant since only in serious cases would the Department of Justice consider appointing counsel. On this circuit Douglas also attended to the winding up of Murphy Services Limited. He posted the necessary court notices at Fort Smith (letter, Meikle to R.A. Gibson, 2 October 1945, PAC, RG 85, Vol.177, 54-3-1).

1936 - No circuit.

1937 - No circuit.

1938 - Meikle, SM - Ft. Smith. Ducharme charged with rape was acquitted of that charge and convicted of common assault. The sentence was one month imprisonment. According to Charles Perkins, Meikle, fearing the reaction an outright acquittal might provoke from the complainant's husband, convicted Ducharme of the lesser offence (Perkins Recollections).

J.E. Gibben, another Stipendiary Magistrate, resident at Fort Smith, acted as prosecutor, C.A. Perkins of Yellowknife acted as defence counsel under an appointment from the Department of Justice. Originally it was planned to have Gibben act as defence counsel but as he was not admitted to practise under the Legal Profession Ordinance, the Department of Justice feared a protest from Charles Perkins (letter, Gibson to Miall, D of J, file #135033). Presumably if Gibben had defended, the RCMP would have prosecuted.

1939 - McKeand, SM - Pangnirtung - 14 September 1939. Katcho charged with murder of three Inuit children, was found not guilty by reason of insanity at the time of commission of the offense (section 966 Criminal Code) by a six man white jury. Katcho was sent to the Dartmouth, N.S. mental facility to await the pleasure of the Commissioner of the NWT.

The court party travelled by train from Winnipeg, via The Pas, to the port of Churchill there to board the Nascopie on 7 August 1939. J.A. Maclean from Winnipeg was the prosecutor and F.G. Whitaker from The Pas was defence counsel. It is doubtful that these two were licensed to practise under the Legal Profession Ordinance, 1939 [amended 24 August 1939]. R.A. Gibson had opposed the

appointment of counsel, suggesting the RCMP prosecute and Mr. Daly, departmental solicitor or one of his staff, defend. The Department of Justice overruled Gibson (Minutes, CNWT 1939, PAC, M-811 to 815, p.1754).

The trial was held in the living room of the police barracks. Only two Inuit, the accused's aged father and his common law wife were present. Certainly this was not a 'public spectacle' viewed by the native populace. Perhaps this is explained by the appalling facts: the accused had tortured and forced the three children to eat a concoction of hair, human feces and urine.

F.G. Whitaker's bill was substantial: $15/day from 5 August to 28 September amounting to $825.00 plus $198.25 expenses. He apparently earned it giving "very effective service to the accused" (D of J, file #135033 - memo of D.L. McKeand). McLean's fee were his expenses only of $202.50. No reporter was present; McKeand therefore was to take his own notes. Apparently however he persuaded Mrs. Orford, wife of the resident medical doctor, to act as court reporter. Henry T. Ford acted as interpreter.

The court party returned to Halifax on 23 September 1939 without Katcho.

Three medical doctors, Dr. Thomas Welling, a departmental doctor from Chesterfield Inlet, Dr. Richard Sutton from Kansas City, and Dr. Donald Forward from Cleveland all gave evidence that the accused was insane. It is not clear why the two American doctors were on the patrol.

Decorum was preserved; it was decided that counsel would robe but McKeand would not (he didn't have a robe because "no one from the Department had spoken to me about one before I left Ottawa").

1939 - Gibben, SM - Aklavik - 29 May 1939. Selamio charged with incest of his grown daughter was convicted and sentenced to two years imprisonment. Charles Perkins for a fee of $125.00 was appointed by the Department of Justice to defend. The RCMP prosecuted. The trial was held at the RCMP barracks. Gibben

sat without a jury. Gibben and Perkins flew by Mackenzie Air Services Ltd. at a cost of $324.00 from Yellowknife to Aklavik and return.

1939 - Meikle, SM - Yellowknife - July 1939 - Several "Ladies of the night" were convicted of prostitution and fined $50.00. Sergeant Pearlson of the RCMP prosecuted. Helen Perkins, a lawyer, was granted permission by the Commissioner to defend although not licenced to practise under the Legal Profession Ordinance. Meikle at this time resided in Ottawa, returning to the Mackenzie District each summer. Helen Perkins charged no fee.

1940 - Gibben, SM - Ft. Rae - flew from Yellowknife to Ft. Rae on a Chartered CPA plane. There after a trial he found a treaty Indian guilty of breaking and entering.

1940 - Meikle, SM - Ft. Smith - 29 May 1940. Kennedy was convicted of incest and sentenced to 10 months imprisonment. Gibben, a Stipendiary Magistrate, prosecuted. Perkins for a flat fee of $300.00 defended. Urquhart, also a Stipendiary Magistrate at Ft. Smith, was a Crown witness.

1941 - Plaxton, SM - Belcher Islands - 19-22 August 1941. Seven Inuit were accused of murder. The murders were inspired by religious fanaticism. Nine Inuit died. Four accused were convicted of manslaughter. One accused was acquitted. One was found not guilty by reason of insanity. The last accused was found unfit to stand trial. The trials were attended with wide publicity. Several newspapers in Canada and the United States reported the trials.

The jury was composed of one Post manager, one Mining Executive, one prospector, the engineer of the "Fort Charles" and two newspaper reporters. The reporters were pressed into duty because of a scarcity of whites on these remote islands.

The prosecutor was R.A. Olmstead of the Department of Justice. The defence counsel, appointed by the Department of Justice, was John Madden from Ottawa. He charged a fee of $850.00 plus expenses. The fee was on a per

diem basis. The clerk was Sergeant Kearney of the RCMP and the court reporter was another RCMP officer.

The court party travelled by water on the "Fort Charles." After 13 days the ship was held up at Great Whale River by tides and sea - Plaxton's patience was at an end. He telegrammed on 18 August 1941: "if a police plane is available suggest it be sent to take us to the Belchers and let us get on with the job" (D of J, file #143871). The court arrived by water at the Belchers later that same day. Four trials took place. The court party left via police plane on 22 August 1941.

Court was held outdoors under a large marquee. The Judge's table was covered with a Union Jack and a small Union Jack was hoisted on a pole near the entrance to the open air tent.

Peter Sala, one of the accused, in a conversation with the writer in May 1986 related his impressions of the trials. The weather was very hot. The Inuit in attendance wore eiderdown duck parkas. The Judge spoke in a very calm voice. Mr. Sala's lawyer was "very helpful." He explained the trial procedure through an interpreter. During the trial an interpreter simultaneously translated the proceedings for Mr. Sala.

1940-41 Gibben, SM - went down the Mackenzie River to Aklavik. Because the Department of Justice appointed defence counsel for important cases only, no counsel accompanied Gibben in the ordinary course. The police prosecuted, occasionally the resident medical doctor might defend. The police acted as clerk and court reporter or else the Stipendiary Magistrate took his own notes.

1941-42 - Perkins, SM - made several trips down the Mackenzie River to Ft. Norman and Aklavik without counsel or a reporter. The RCMP local officers prosecuted. Occasionally, a medical doctor would act as agent for the accused. Perkins, after court, would write short stories in his bench book. The court travelled by chartered air craft: Norseman, Junker, or Fairchild.

1942 - Meikle, SM - Ft. Norman - 15 July 1942. Rivet was convicted of incest and sentenced to three years. Mr. Olmstead from the Department of Justice acted as prosecutor. Charles Perkins, even though a Stipendiary Magistrate, acted as defence counsel. The evidence was taken in longhand by Corporal Bolstad. Meikle sat without a jury. A jury could be waived under section 44 of the NWT Act (post 1951 - Paulette case).

Olmstead expressed his fears about the court's travel by air from Yellowknife: he did not approve of the custom "for officials to fly around with nothing more than a toothbrush. Personally I lack the implicit faith in air travel" (D of J, file #143764, memo, 6 June 1942).

The accused attempted to appeal but the Alberta Supreme Court Appellate Division, determined in May 1944, that no right of appeal lay in Canada from the decision of a Stipendiary Magistrate in a criminal case (R. v. Rivet [1944] 2 W.W.R. 132).

1943 - McKeand, SM -travelled on the Nascopie on the Eastern Arctic circuit this year. Because of cost restraints no private practising lawyers accompanied the court party on the Nascopie. The Police prosecuted and T.L. Cory of the Department of Mines and Resources defended.

Pond Inlet - and Clyde River - 29 September 1943 and early October 1943 - Simmonee. Sergeant McBeth presented the evidence at the Coroner's Inquest and T.L. Cory appeared for Simmonee. The charge was murder. The Coroner was Inspector Kirk. It was determined that Simmonee's wife died of natural causes. McKeand "advised" Inspector Kirk on matters of procedure. "I took no part in the proceedings but on several occasions Inspector Kirk consulted me in my capacity as Superintendent of the Eastern Arctic in such matters as jury panel and fees, place and time of holding court (sic) . . .". Memo of McKeand, 5 November 1943, PAC RG85, Vol.951, file 13170.

1944 - Gibson, SM - Ft. Resolution - 19-20 September 1944. Beaulieu acquitted of attempted murder

of RCMP Constable Clevette but convicted of wounding with intent received a sentence of seven years in prison. Counsel, both from Edmonton, were Charles A. Grant, KC, prosecutor and W. Rea, KC as defence counsel. Gibson sat without a jury. Mrs. Kennedy was the court reporter. Rea observed that "on the law Gibson is sound yet seven years is too severe" (letter, Rea to D/M of J, 3 October 1944, D of J, file #147433).

1945 - McKeand, SM - travelled on the Nascopie on the Eastern Arctic circuit this year.

Chesterfield Inlet - 17 August 1945. Karlooarse was convicted of incest by McKeand, sitting without a jury, who suspended the passing of sentence for one year and banished him from Baker Lake to Pangnirtung. Inspector Peacock prosecuted. Cpt. R.M. Macleod acted as defence counsel. It is not clear who sat on the jury, though from past practice the jury probably included whites from the Nascopie.

Ft. Ross - 4 September 1945. Miktaeyout was convicted of manslaughter before a jury and sentenced to one year in prison at the RCMP guardhouse at Pangnirtung to where she was banished. Inspector Peacock of the RCMP prosecuted and Captain R.M. Macleod of the Judge Advocate General's Branch of the Dept. of Defence acted as defence counsel. It is not clear who sat on the jury, though from past practice the jury probably included whites from the Nascopie.

The trial had been originally scheduled for the 1943 circuit but the Nascopie could not reach Ft. Ross because of ice conditions that year.

The trial begun at 8:15 and lasting until after midnight, was heard in the saloon of the Nascopie.

1946 - Fraser, SM - Port Radium, Great Bear Lake - 30 April 1946. Fraser flew via the Eldorado Mining Co.'s plane to attend to judicial business.

1946 - Gibson, SM - Coppermine - 20-21 August 1946. The court party flew by police aircraft (a Gruman Goose) from Yellowknife to Coppermine. During the trial the court party stayed on the RCMP patrol ship, the St. Roch. Counsel were F.J.G. Cunningham, a

Stipendiary Magistrate, who prosecuted and John Parker, who defended. The reporter was Ian Maclean.

Martha Mafa was acquitted by a jury of six RCAF crewman. The defence was a technical one. The Coroner omitted to properly endorse the Return from the Inquest so the accused's statement given at the Inquest was ruled inadmissible at the trial. With no statement from the accused the Crown did not have enough evidence to convict.

Anangiak was convicted of aiding in the commission of suicide of her husband and sentenced to 21 months imprisonment at Coppermine. Gibson proceeded without a jury.

1946 - Cunningham, SM - Port Radium, Great Bear Lake - 23 September 1946. Le Blanc was convicted of theft and sentenced to two months with hard labor and fined $200.00. Constable Routledge flew with the court party composed of Cunningham and reporter Ian Maclean.

1947 - Gibson, SM - Ft. Smith - July 1947. Lamont was acquitted by a jury of manslaughter. Defence counsel was Angelo Blanca, KC from Vancouver. He took the trial at the request of the Oblate Fathers at Ft. Smith. Cunningham could not prosecute as he was hearing a civil trial in Yellowknife so a lawyer from Edmonton was brought in to prosecute. The jury was mixed - composed of whites and Indians.

1948 - Fraser, SM in the summer 1948 proceeded by motor launch down the Mackenzie River to Tuktoyaktuk cleaning up minor cases at Ft. Resolution, Hay River, Ft. Simpson and Aklavik. No counsel accompanied him.

1948 - Gibson, SM - Yellowknife - 23-26 July 1948. Harold P. Killoran was acquitted of fraud by a jury. W.W. Cameron of the Securities Commission in Toronto prosecuted; no one appeared for the accused at trial, although Ray Mahaffey had appeared at the Preliminary Inquiry, also heard by Gibson.

1948 - Gibson, SM - Ft. Simpson - 6 August 1948. Charlie Charlo was convicted of failure to supply the necessaries of life, leading eventually to his wife's death, and sentenced to two years imprisonment at Prince Albert. John Parker prosecuted; Ken Conibear, a non-lawyer, appeared as agent for the accused.

1948 - Fraser, SM - Ft. Resolution - 29 August 1948. Emile Lambert was acquitted by a jury of manslaughter. John Parker prosecuted. Robert Bouchard, who was appointed a Stipendiary Magistrate on 31 August 1948, defended. At the same sittings, Modeste Manderville was acquitted of assault. Parker prosecuted and Dr. Mulvihill, Indian agent, acted as advisor to the accused.

1949 - Bouchard, SM - Aklavik - 17 January 1949. MacDonald was charged with theft. John Parker prosecuted and Ray Mahaffey defended. Ray Rimstad was the reporter.

1949 - Gibson, SM - Yellowknife and Edmonton - 1 April 1949. Jacobs was convicted of break and enter and theft and fined $300.00. John Parker prosecuted. This trial concluded at Edmonton under the court's special criminal jurisdiction (NWT Act, SC 1923, c.21, s.1).

1949 - Gibson, SM - Cambridge Bay - 2-3 September 1949. Eeriykoot (a.k.a. Erkyoot) was found guilty by a jury (of RCAF and Department of Transport personnel) of aiding his mother to commit suicide and sentenced to one year in prison to be served at the Cambridge Bay detachment. Ishakak was acquitted of the same charge. John Parker prosecuted; D.T. McDonald of the Department of Justice, Ottawa, defended. Ray Rimstad was the reporter.

1949 - Bouchard, SM - Aklavik - fall of 1949. Jones was acquitted of a charge under section 3(b) of the Reindeer Protection Ordinance. In the week long trial Ray Mahaffey appeared for Jones and John Parker for the Crown. Mahaffey's fee was his expenses and a modest remuneration. The trial was held in the Canadian Legion Hall. The jury and counsel lived in primitive conditions during the trial.

1950 - Brown, SM - Aklavik - September 1950. Theaccused was convicted of having carnal knowledge of a young girl and sentenced to six months to be served at the RCMP guardroom at Aklavik. Brown flew to Aklavik from Ft. Smith via Territorial Air Services.

1951 - Phinney, SM - Cambridge Bay - 12 April 1951. Alikomiak was acquitted by a jury of attempted murder. The court party flew to the Settlement from Yellowknife. Don Hagel defended, John Parker prosecuted. The jury was composed of five RCAF crewmen and one Inuit. The Inuit was the jury foreman. Inspector Fitzsimmons of the RCMP had conducted the preliminary inquiry the previous day, 11 April 1951 and committed the accused for trial.

1951 - Gibben, SM - Yellowknife - 12 April 1951. Strutinski was acquitted of rape by a jury. John Parker prosecuted; Don Hagel defended. Gibben came from Whitehorse for the trial. Phinney, SM had committed the accused for trial at a preliminary hearing on 21 March 1951.

1951 - Gibben, SM - Ft. Smith - 20 June 1951. Beaulieu was found guilty by a jury of murder, after a four day trial, and sentenced to death. John Parker acted for the Crown; Don Hagel for the defence. Phinney, SM had committed Beaulieu for trial at a preliminary hearing on 5 June 1951 at Ft. Resolution.

1951 - Bouchard, SM - Eskimo Point. Okalik was convicted of manslaughter by a jury composed of the crew of a Roman Catholic supply ship and sentenced to five years imprisonment to be served at Stoney Mountain Penitentiary. Macleod, of the Department of Justice, prosecuted; another lawyer from the Department of Justice acted as defence counsel. The court party flew from Ottawa.

1951 - Gibben, SM - Ft. Smith - 19 September 1951. Mary Paulette, a young Indian girl was convicted of murder of her new born child. She was not, as would be expected, charged with infanticide. John Parker prosecuted and Don Hagel appeared for the accused. Hagel waived a jury under section 44 of the NWT

Act, RSC 1927, c.142. Sentenced, as required, to be hanged, that sentence was commuted after the intervention of officials from the Department of Justice.

1953 - Gibben, SM - Aklavik - 9-11 July 1953. Cardinal was convicted by a jury of murder and sentenced to death. John Parker acted for the Crown. Don Thorson, of the Department of Justice, acted for the accused. The death of Cardinal's wife occurred on 8 May 1953 at Arctic Red River; and Phinney SM conducted the preliminary inquiry on 23 June 1953 at Aklavik. The verdict was overturned by a five man bench of the Supreme Court of Alberta, Appellate Division. A new trial was ordered ((1953) 10 W.W.R. 403). Neil McLean, KC acted for the appellant.

1953 - Gibben, SM - Yellowknife - October 1953. Adams was convicted by a jury of criminal negligence causing death and sentenced to six months with hard labor. John Parker appeared for the Crown; E.R. Lovekin of Edmonton appeared for the accused. Gibben attended from Whitehorse.

1953 - Gibben, SM - Ft. Smith, Yellowknife - October 1953. Alexis Fat and Fred Adams were charged with murder and manslaughter, Eric "Wimpy" Peterson was charged with arson and Jack Castle was charged with theft. Gibben came from Whitehorse to do these cases at Yellowknife and Ft. Smith.

1954 - McBride, SM - Yellowknife - 11 January 1954. Cardinal again (see 1953) was convicted by a jury and sentenced to death. The trial was held in the Caribou Room of the Ingraham Motel at Yellowknife. All appeals being exhausted, Cardinal was executed at Ft. Smith on 1 June 1954. Parker again acted for the Crown and Neil McLean, KC acted for the accused. Approximately 300 people attended the trial which lasted five days.

Eleven witnesses were brought by air from Arctic Red River and Aklavik to Yellowknife for the trial. John Parker recalls that a wurlitzer record player could not be removed so it was draped with the Union Jack.

1955 - Gibben, SM - Yellowknife. An employee at the Mining Recorder's office was convicted of indecent assault. Parker prosecuted. Anappeal taken by defence counsel Lewis Bernstein was successful, R. v. A.B. ((1955) 16 W.W.R. 425) and the conviction quashed. The evidence in the mind of the majority of the appeal court did not support a conviction.

1955 - Bouchard, SM - Eskimo Point - March 1955. MacLeod of the Department of Justice prosecuted and Mr. Affleck of Ottawa acted for the defence. The court travelled from Ottawa by air. The charge was murder. The indisposition was not determined.

END

APPENDIX "B"

Jurisdiction Issues in the Ikalupiak Case 1924

-8-

MR. MCBRIDE raises a preliminary objection:

MR. MCBRIDE: I have a preliminary objection to make on behalf of the accused. The instructions which the accused gives to me are that he claims that even if he hurt the deceased Havougach, the white men have no right to interfere with him. It is his tribe who must hurt or do harm to him. That is as near as I can gather, my Lord, from my talk with the accused. This, it becomes my duty to put in the more technical langauge of our jurisprudence.

Therefore, I am urging before the empanelling of the jury these preliminary objections: I. - That the accused does not recognize the jurisdiction of this Court.

THE COURT: Do you mean to say that you claim that they are not British subjects?

MR. MCBRIDE: I say that he, the accused, does not consider himself a British subject and that the law of the white man does not extend to the tribe of one that does not know of their laws.

II. - That the area included in your Lordship's commission and also these territories do not extend to that part of the territories in which he resides and where the offence occurred.

III. - That the accused claims a change of venue. That he should not be tried here, but that he should be tried where his tribe is located. If they are British subjects and your

Lordship has not called any of the Eskmos here as jurymen, he, the accused, claims that he is in hostile territory as far as all these Eskimos are concerned and, therefore, he claims a change of venue to where his tribe is located.

And, that, in empanelling the jury, it should include some of his own tribesmen.

This I bring before the notice of the Court and I ask that my objections be considered.

THE COURT: Your objections are noted but I overrule them.

MR. HOWATT: I note the objection of my learned friend where he asks for a change of venue. The venue is never changed except for some specific reason. Your Lordship's powers are as extensive as Legislature can possibly confer upon any Judge. It is entirely a matter of discretion with you as to what men you should and what men you should not summon. There may be other limitations but, in this case the selection of the jury if left entirely to the discretion of the presiding Judge. There is no law in our land which says that the Eskimos should be summoned to this jury. Also, the Statute places no limitations on the nationality of an accused, even when he states that he is not a British subject and therefore cannot be tried by any British Court. For that is a most startling announcement.

An American citizen comes to this country and commits a crime. Is he to escape justice because he has none of his countrymen on the jury? Any man who comes within British

territory owes a temporary allegiance to that Government and while he is there he must obey the laws of that country. You may bring a man from Mars or anywhere but the moment he puts his foot on British ground he owes temporary allegiance to British laws. His objection is a declaration of war against Canadian British rule in Canada and should be a further indictment of high treason.

British rule as represented by Canadian Government extends from the Atlantic to the Pacific and from the 49th to the North Pole. When there have been times that people have tested this jurisdiction they have received their answer, but it is a startling thing that a man who wears the gown my learned friend wears (one of the conditions of which is the oath of allegiance) should take such a view of the case. We are in this country under the sovereignty of the Canadian Government. The man must recognize that jurisdiction. We are here commissioned by the Canadian Government and we must stand by what the Canadian Government holds to be the law.

THE COURT: Mr. McBride, have you anything further to say?

MR. MCBRIDE: I trust that I have made it clear to Your Lordship that the objections which I have mentioned are the actual objections in the mind of the accused and I consider I would not be doing my duty if I did not convey these objections to this Court. With respect to some of my learned friend's remarks, I may say that as much as I was able to obtain from the accused, he the accused, does not recognize the

sovereignty of the Canadian Government and that the white man should not claim sovereignty over his land or his hunting ground. He knows no law but the law of his tribe.

Mr. HOWATT: I do not think my learned friend has the right to say this at this particular time.

THE COURT: Your objections are noted and overruled.

Sheriff calls names on Jury list consisting of: Captain Gardner, Charles T. Christie, John A. McDougal, Patrick S. Quinn, Alonzo W.P. Eckardt, Sam C. Tyrell, R. Walter Hale, P.B. Macleod, S. S. Marshall, Hugh St. Clair Cameron, Herbert J. Pardy, H.W.B. Hoare, Harry A. Warner, Joseph A. Durocher; - fourteen, all present.

Six jurymen were challenged. The six jurymen accepted and sworn were:

Patrick S. Quinn, John A. McDougall, Capt. Gardner, S. S. Tyrell, H. J. Pardy, Walter Hale.

The charge was read to accused and his counsel entered a plea of "Not Guilty".

(The Interpreter, an Eskimo known as Billy Coates, was then sworn in).

(Before calling in the first witness, the Judge asked the Interpreter to explain through him, the particulars of the trial to the Eskimos).

APPENDIX "C"

NOTE: To be read in conjunction with Chapter 6(3)(b). Sources are at the end of each.

Artificial Venue Trials

1788 - [Indian Territory] Nadeau and Le Compte were acquitted, at a trial at Quebec in 1788, of the murder of John Ross, a fur trader. The death occurred at a fort on the Athabaska river near present day Fort Chipewayan. One Peche had actually done the killing.

The two accused were tried pursuant to a Special Commission issued under the Criminal Law Act (Imper) 1541 33 Hen 8, c.23. The Commission was signed by the Governor General of Quebec. A subsequent joint opinion of the Law Officers of the Crown, that included the future Lord Eldon, expressed the view that the Governor of Quebec had no power to issue such a Commission without enabling legislation. Thus had Nadeau and Le Compte been convicted, they would then, on this opinion being known, have been discharged.

The trial could have been held in England pursuant to a Commission issued by the King-in-Council under the 1541 legislation.

Morton, The Canada Jurisdiction Act, (1938) 32 Trans Royal Society of Canada, 121 at 123ff; Report of the Archives, Canada, Sess. Papers, 1893, #7A, Note E, Courts of Justice Indian Country, 136 at 141.

1801-02 [Rupert's Land] Lamothe killed King, a rival fur trader, at a fort on the North Saskatchewan river.

Lamothe voluntarily came to lower Canda but because of the uncertainty over the jurisdiction to try him "he remains in a deplorable predicament, that neither his Innocence nor his Guilt [could] be legally ascertained." Report of the Archives, Canada Sess. Papers, 1893, #74, Note E, Courts of Justice for the Indian Country, 136 at 139, 145.

The uncertainty led to the enactment of the Courts of Justice, Canada Act (Imper) 1803 43 Geo 3, c.148.

Apparently Lamothe was never tried.
[Report of the Archives; Morton at p.125ff.]

1804 - [Rupert's Land]

Oiseaux du Plan, of the Northwest Co., accused of robbery of beaver furs near Stoney Lake (northwest of present day North Battleford, Sask.) from William Clark of the Hudson's Bay Co. The accused was apprehended by Hudson's Bay Co. men and brought to England for trial. But whether the accused could be tried at Bow Street for an offense committed in a part of His Majesty's dominions abroad within which there are no Courts of Justice is a question that "may possibly admit of doubt" (opinion of Mr. Gurney 29 November 1804). Mr.Gurney was of the view that a trial in England could only be under a special Commission of oyer and terminer issued pursuant to the Criminal Law Act (Imper) 1541, 33 Hen 8, c.23. Yet since this Commission could only be issued for murder, manslaughter or treason, Oiseaux du Plan was discharged for want of jurisdiction to try him.

HBCA, A/39/1 p.5ff.

1817 - [Rupert's Land]

Duncan Cameron was accused of shooting at certain persons, theft, amd being an accessory to arson at Red River. An employee of the Northwest Co. the accused, arrested by the Hudson's Bay Co., was indicted before a grand jury in Montreal and sent to England for trial. But, on the views of the Attorney General and Solicitor General of England the accused could not be tried in England because the charge was not murder, manslaughter or treason (as required by the 1541 and 1803 legislation). Could he then be sent to Canada for trial? No! - since under section 11 of the Habeas Corpus Act (Imper) 1679, 31 Chas 2, c.2, no subject can be set (i.e. apprehended and sent) across the sea. The exception in section 15 (capital offenses committed in a foreign plantation of the King) was not applicable to this case.

HBCA, A/39/3 folio 54ff.

1818 - [Rupert's Land] de Reinhard was convicted of the murder of Owen Keveny, before a Court of oyer and terminer held at Quebec. The offence occurred at the Dalles on the river Winnipic (near modern day Kenora). The deceased had been in the service of the Hudson Bay Company. Sentenced to death, the accused was pardoned when it was realized that the Dalles, being within Rupert's Land (the Hudson Bay drainage basin), and not as presumed in the Indian Territory, the Court had no jurisdiction under the Courts of Justice, Canada Act (Imper) 1803 43 Geo 3, c.148 to try the accused.

Simpson, Report at Large of the Trial of Charles de Reinhard for Murder (Montreal: James Lane, 1819).

1835-38 - [Indian Territory] Baptiste Cadien was the principal actor in a savage premeditated murder of 11 Hare Indians at a hunting camp near Great Bear Lake in the fall of 1835. Baptiste Jourdain and Creole La Graisse were also accessories, but for lack of evidence Jourdain "became King's evidence." All three were Hudson's Bay Co. servants. The matter revolved around a Hare woman who lived for a time with Cadien. Cadien retaliated when she was removed by a group of Hare hunters. The Hudson Bay Co., fearing reprisals that would subvert their fur trade activities, resolved to remove the perpetrators and punish them.

Taking legal advice from counsel in London, and law officers of the Crown in Canada, Cadien was sent to Norway House, and then to Montreal for trial, pursuant to the 1803 legislation. A hearing (akin to a Preliminary Inquiry) was held at Norway House in the summer of 1837 before the Governor and Council of the Northern Department of the Hudson Bay Co. Committed for trial, Cadien and Jourdain accompanied Governor Simpson to Montreal that summer. La Graisse went to Montreal via London sailing on the "Eagle" from Hudson Bay in the custody of John Tod, Constable of Rupert's Land. It was hoped to bring Cadien to trial in the fall of 1837 but the trial was delayed to secure additional witnesses. Yatso and an interpreter Baptist Contret were sent out from Ft. Norman in January 1938.

Under the exception (Section 15 of the Habeas Corpus Act) La Graisse in 1938 was detained in England and sent to Lower Canada for his trial. La Graisse had not yet sailed for Canada by March 1838.

Unfortunately no trial information is available in the Hudson Bay records. Presumably the trials took place in the summer or fall of 1838.

HBCA A/39/7 p.37, 38ff; B/200/b/8 folio 20, 27; B/200/b/10 pp.20, 24, 26, 29, 30; D/4/23 p.6, 84; D/5/4 p.194, 237; D/5/5 p.32.

1842 - [Indian Territory] The persons concerned in the death of Dr. McLouglin's son were sent from Fort Vancouver (on the Columbia River), to Canada for trial under the provisions of the British North America Act (Imper) 1821, 1 & 2 Geo 4, c.66. McLouglin was the Chief officer of the Hudson's Bay Co. in the Oregon Country. See Map M-1.

Herbert, A Brief History of the Introduction of English Law into British Columbia 2 UBC Legal Notes 93 at 94.

1849-52 - [Indian Territory] Manuel (a.k.a. Jean Baptiste Hebert) participated in the bloody massacre of four Inuit at Point Separation (north of. Ft. Good Hope on the Mackenzie River near the mouth of Peels River) by a group of Loucheux Indians. Manuel was a Hudson Bay Company steerman. (The Company as a matter of practice would not have become involved with an all native matter.) The Hudson's Bay Co. wished to make an example of Manuel to preserve good trading relations with the Inuit, so on legal advice, it initiated steps to bring Manuel and two Company servants, as witnesses, to the Canadas for trial. After further assessment of the evidence at Norway House, it was decided by Hudson Bay Co. officials that it would "a useless expense to send Manuel to the Canadas for trial." The matter was dropped.

HBCA B/200/b/25 p.9ff; B/200/b/26 p.11, 30, 43; B/200/b/28 p.93; B/200/b/29 p.75; D/4/43/p.41ff.

1866 - Rupert's Land] Wolverine at Portage la Prairie in the spring [Rupert's of 1866, murdered an American trader and an Indian. The opinion given 3 May 1867 by Montague Bere of the Middle Temple at London was tempered with caution "in response to the query what should be done with the perpetrator, Wolverine, a 'well know blackguard'.

"The safest way is to proceed under the 1803 and 1821 legislation and send Wolverine out for trial. This course will avoid all questions as to the jurisdiction of the Hudson Bay Company under their Charter as to whether the Wolverine is a person living under the Company; as to whether the provisions of the 1821 legislation overrule the general powers given to the Company under their Charter."

Wolverine could have been tried in England under section 9 of the Offences Against the Person Act (Imp.) 1861 c.100 under which any British subject charged with murder or manslaughter in any part of the world could be tried in England. This 1861 legislation replaced and extended the 1541 legislation.

HBCA A/39/7 p.340ff.

1917 - [formerly Indian Territory] Sinnisiak and Uluksuk murdered two Catholic priests Rouvier and Le Roux in November 1913 near the mouth of the Coppermine River on the Arctic Coast. Sinnisiak, only, was tried by a jury of prominent Edmonton citizens before Chief Justice Harvey at Edmonton of the murder of Father Rouvier on August 14-17, 1917. He was acquitted.

The second trial, after a successful change of venue to Calgary (R. v. Sinnisiak, unreported SCA, JDE #5748 Affidavit of McCaul and Cogswell Sworn 18 and 20 August 1917) was heard with a jury composed of "upper class" Calgarians before Chief Justice Harvey. Both Inuit this time were tried for the murder of Father Le Roux and convicted. The jury added the strongest possible recommendation for mercy.

The acquittal in Edmonton was justified, on a legal plane, on the basis of self defence. More probably sympathy of the "poor Eskimo" influenced the jury.

C.C. McCaul assisted by E.B. Cogswell prosecuted; Jim Wallbridge, in private practice in Edmonton on appointment by the Dept. of Indian Affairs, defended. His fee was $1576.40. This was very substantial.

H. Milton Martin, future public administrator of estates for the Territories, and J.A. McDougal, resident government agent at Ft. Smith after 1922, were on the Edmonton jury. The death sentences were commuted by Order in Council, 20 August 1917, to life imprisonment. The two Inuit served two years at the RNWMP guard house at Ft. Resolution. Under Order in Council dated 15 May 1919, they were granted conditional liberty for "reasons" [that] are not likely to be permitted to avail on another occasion either of them or any other [Inuit]" PAC, RG 13, c.1, Vol.1484.

Chief Justice Harvey received authorization, prior to passing the sentence of death, to state the sentence would be commuted. In his report to the Secretary of State the Chief Justice observed: "The case is clearly one for the utmost Executive clemency. The prisoners are pagans, with no knowledge of civilized methods of customs and with no religious belief. They are governed only by custom, and in the killing of Father Le Roux they did what they felt was justified (letter, Harvey to Secretary of State, 28 August 1921).

Chapter 8, fn.9.

END

APPENDIX "D"

OFFICE OF THE
DEPUTY COMMISSIONER

ADMINISTRATION
OF THE
NORTHWEST TERRITORIES
CANADA

OTTAWA

CIRCULAR LETTER.

TO - Stipendiary Magistrates and Justices of the Peace.

Reports of recent cases received here would seem to indicate that sufficient investigation has not been made before issuing warrants in cases where persons have been charged with committing indictable offences in the Northwest Territories, and for your information and guidance I wish to draw to your attention the following:

1. Section 655 of the Criminal Code, which reads as follows:

"Upon receiving any such complaint or information the justice shall hear and consider the allegations of the complainant and, if the justice considers it desirable or necessary, the evidence of any witness or witnesses; and if the justice is of opinion that a case for so doing is made out he shall issue a summons or warrant, as the case may be, in manner hereinafter provided.

2. Such justice shall not refuse to issue such summons or warrant only because the alleged offence is one for which an offender may be arrested without warrant.

3. The justice shall in connection with such hearing have the same power of procuring the attendance of witnesses and of compelling them to testify as under Part XIV.

4. The evidence of witnesses, if any, at such hearing shall be given upon oath, and the evidence of each witness shall be taken down in writing in the form of a deposition, and, subject to the provisions of section six hundred and eighty-three, which, so far as applicable, shall apply to such hearing, shall be read over to and signed by the witness and signed by the justice. R.S., c. 146, s. 655; 1909, c. 9, s. 2; 1913, c. 13, s. 24."

2.....

2. Seager's Criminal Proceedings before Magistrates, 3rd ed., p.152, IV - "Considering the Information";

"Upon receiving an information charging an indictable offence the next duty of a justice is 'to hear and consider the allegations of the complainant'; and to carefully question him, and if necessary any of the witnesses, touching the facts and reasons for suspecting and believing the defendant to have committed the offence complained of. If upon these facts the justice is of opinion that a case is made out for so doing, he may issue either a summons or a warrant of arrest, against the party charged: Code sec. 655. But the mere bald statement in an information, even under oath, by any person, that he believes a criminal offence to have been committed by the accused, without any facts or reasons being given to the justice to warrant such belief, and to satisfy him that such facts are sufficient, does not authorize him in issuing process: Ex p. Boyce, 24 N.B.R. 353; R. v. Johnston (N.S.), 17 C.C.C. 369, 44 N.S.R. 468; Re Broom (1911), 3 O.W.N. 51; R. v. Mercier, 18 C.C.C. 363."

"A justice who issues a warrant of arrest even upon a sworn information, without enquiring into the grounds which the complainant has for making the charge, and whether these are sufficient, so that he may be able to exercise a wise discretion in the matter, thereby sets at naught the requirements of Code sec. 655, which authorizes him to issue the process, only 'if on hearing allegations of the complainant he is of opinion that a case for so doing is made out,' and the justice who so recklessly issues process by which a man's liberty is taken away, may be liable to an action for damages for so doing, if it turns out that the proceedings were not based upon any reasonable or probable grounds whatever: Murfina v. Sauve, 6 C.C.C. 275; Ex p. Boyce, 24 N.B.R. 333; R. v. Lizotte, 10 C.C.C. 316; Ex p. Coffon, 11 C.C.C. 48 and cases there cited: R. v. Townsend, No. 2, 11 C.C.C. 115; R. v. Kay, Ex parte Dolan (1911), 26 C.C.C. 171, N.B. It was held in the latter cases that the information itself should shew the grounds for proceeding. But if the justice really enquires into the grounds, and hears the facts, and exercises his discretion, and then issues the process, his so doing is a judicial act: R. v. Ettinger, 3 C.C.C. 387; and no officer, exercising a judicial act, is responsible for any error of judgment, no matter how erroneous it may be."

"In the case of a summons the magistrate may issue it, upon information and belief that the accused committed the offence; but a warrant must not issue unless the information contains the grounds of the information and belief: Ex parte Coffon, 37 N.B.R. 122; R. v. Lizotte, 10 C.C.C. 316."

3.....

3. Crankshaw's Criminal Code of Canada, 6th ed., p. 722 et seq., - notes following section 655, and particularly the two quoted below:

"A sworn information merely stating that the complainant has just cause to suspect and believe and does suspect and believe that the defendant has committed the offence charged will not alone authorize a justice to issue a warrant to arrest, in the first instance. It is the duty of the justice to inquire into the facts on which the informant's belief is founded, and exercise his own judgment thereon. When the complaint is laid upon information and belief, and the causes of suspicion are not disclosed therein, the justice should examine the complainant and his witnesses ex parte, under oath, touching the grounds of suspicion; and the justice should grant a warrant of arrest only in case he himself entertains the like suspicion as a result of such investigation. (see Ex p. Coffon, 11 Can. Cr. Cas. 48, 37 N.B.R. 122; Ex p. Boyce, 24 N.B.R. 347. See - R. v. Lizotte, 10 Can. Cr. Cas. 316; and R. v. Lorrimer, 14 Can. Cr. Cas. 430) But it has been held, in the case of Ex parte Edmond Archambault, - 16 Can. Cr. Cas. 433 - that a warrant of arrest, issued by a justice on the sworn information of the complainant, is not invalid for failure of the justice to first examine the complainant's witnesses as permitted by section 655, ante."

and

"A magistrate should not place upon the complainant's words a legal construction which they do not bear. If, for instance, the complainant's statement shews only a civil trespass, it should not be construed by the magistrate as an indictable offence, nor should he so describe it in the information. (See - Rogers v. Hassard, 2 Ont. A.R. 507)."

From the foregoing, I think it may be properly adduced that the magistrate must use care in issuing a summons or warrant in the case of indictable Offences and should see that there will be evidence to make, at least, a prima facie case in support of the offence as charged. This is considered particularly important, not only to insure the proper administration of justice, but also to avoid unnecessary expense on the part of the Crown and the parties and witnesses involved.

Ottawa,
1st February, 1939.

R. A. Gibson,
Deputy Commissioner.
Northwest Territories .

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TABLE 1

TERM OF APPOINTMENT AS STIPENDIARY MAGISTRATE

	COMMENCEMENT			TERMINATION		
	DATE	PRIVY COUNCIL NUMBER	CANADA GAZETTE PART 1 Volume and Page	DATE	PRIVY COUNCIL NUMBER	CANADA GAZETTE PART 1 Volume and Page
A. Bowan Perry	1907	-	-	1922 (1)	-	-
Edwin C. Senkler	17 May 1910	986	V.43,3681	24 Oct. 1912	2962	-
Lucien Dubuc	27 May 1921 28 June 1922	1706 1370	V.54,5223 V.56,151	21 Dec. 1921 1 Feb. 1932	4407 222	V.55,2832 V.65,2328
Louis Adheniar Rivet	19 June 1923	1097	V.56,296	1928 (2)	-	-
James McCrie Douglas	17 June 1932	1407	V.65,3456	30 Mar. 1936	735	V.69,2449
Albert E.G.O. Reames	29 Apr. 1933	793	-	8 Dec. 1941 (surrendered) (3)	-	-
Alex Norquay	30 Mar. 1936	735	V.69,2449	23 Apr. 1937 effective 31 Mar. 1937	912	-
Mackay Meikle	1 Dec. 1936	3042	V.70,1509	23 Dec. 1951	6978	-
Dr. James Moore Morrow	26 Nov. 1957	2918	V.71,1483	5 Apr. 1939 (surrendered)	-	-
Omer St. Germain	4 Aug. 1938	1940	V.72,531	2 Aug. 1945 (surrendered)	5372	-
John Edward Gibben	4 Aug. 1938	?	V.72,531	11 Mar. 1942 (surrendered) (4)		
	5 July 1950	3054	V.84,2488	1 Apr. 1955 (5)	-	-
Dr. James Alfred Urquhart	18 Oct. 1938	2593	V.72,1084	5 Dec. 1944 (surrendered)	-	-
David Livingstone McKeand	30 May 1939	1259	V.72,2892	28 Dec. 1951	6978	-
Charles Percy Plaxton	8 July 1941	4930	V.75,184	12 Jan. 1942 (surrendered)	-	-
Charles Augustus Perkins	14 Aug. 1941	6280	V.75,616	29 Aug. 1951	4468	-

TABLE 1

TERM OF APPOINTMENT AS STIPENDIARY MAGISTRATE

	COMMENCEMENT			TERMINATION		
	DATE	PRIVY COUNCIL NUMBER	CANADA GAZETTE PART 1 Volume and Page	DATE	PRIVY COUNCIL NUMBER	CANADA GAZETTE PART 1 Volume and Page
E. Clare Darling	3 May 1944	41/3275	-	18 June 1944 (deceased)		
Andrew Harold Gibson	1 Aug. 1944	31/6000	V.78,2780	28 Dec. 1951	6978	-
Frederick Fraser	30 Oct. 1944	8437	V.78,4772	28 Dec. 1951	6978	-
Frank J.G. Cunningham	26 Apr. 1946	1659	V.80,3056	28 Dec. 1951	6978	-
Joseph R.E. Bouchard	31 Aug. 1948	3836	V.83,939	14 Dec. 1955 (7)	1836	-
Douglas James Martin	9 Dec. 1948	40/5666	V.83,170	28 Dec. 1951	6978	-
Wilfred George Brown	29 Nov. 1949	6068	V.83,4706	7 Jan. 1953	8	-
Laurence Hudson Phinney	26 Oct. 1950 effective Sept. 1950 (6)	B/5088	V.84,411	23 Mar. 1955 effective 1 Apr. 1955	2-443	-
James Boyd McBride	29 Dec. 1953	2005	V.88,187	1 Apr. 1955 (5)	-	-

Notes

(1) No precise date of appointment or termination is known. Perry held the appointment by virtue of his office as Commissioner of the Police. He retired from the Police in 1922. No other Police Commissioners after 1905 were Stipendiary Magistrates.

(2) No precise date of termination is known. Rivet was appointed a Judge of the Circuit Court of Montreal on 1 December 1928. (P.C. 2187, Can. Gaz. I, V.62, 1854).

(3) Reames' Commission, bearing his written surrender, was forwarded to the Department of Justice in February 1941. The patent was sent to the Department of the Secretary of State where it was recorded as cancelled on 8 December 1941. (D of J, file #136636.)

(4) Gibben surrendered up his Commission in 1941 to take the appointment as Stipendiary Magistrate at Dawson, Yukon on 14 August 1941 (P.C. 6281, V.75, 616). The surrender was not recorded in the Secretary of State files until 11 March 1942. (D of J, file #136636.)

(5) The Stipendiary Magistrate's Court was abolished effective 1 April 1955 and accordingly Gibben's appointment as Stipendiary Magistrate lapsed. (Post, fn.7.)

(6) There is an intriguing note in the 1946 Privy Council Register at the PAC at Ottawa that suggests on 11 November 1946 (P.C. 4774) Phinney was appointed a Stipendiary Magistrate for the Northwest Territories. At this time Phinney was at Dawson, acting as Stipendiary Magistrate for the Yukon.

(7) The effect of abolishing the Stipendiary Magistrate's Court was to revoke automatically Bouchard's patent. Yet the effect of section 19(2)(a) of the Interpretation Act, RSC 1952, c.1 "may [have] meant that Bouchard was now a Police Magistrate" memorandum, D.H. Christie, 24 November 1955, D of J, file #136636. To clear up any uncertainty, the Order-in-Council revoking the appointment was passed.

(8) Phinney became a Police Magistrate in the Northwest Territories when the Stipendiary Magistrate's Court was abolished.

General Note

Termination of Appointments

The earliest appointments were either revoked by a writ of supersedeas or cancelled after the Stipendiary Magistrate had executed an agreement surrendering his Commission. If a writ were used, notification of that was published in the Canada Gazette, Part 1. If the Commission were surrendered up to the Department of the Secretary of State there was no publication of this fact.

When surrendered up, the original Commission was retained by the Department of Secretary of State. Exceptionally, Plaxton received back his Commission after it was cancelled. The Commissions of Reames, Morrow, Plaxton, Urquhart, St. Germain and Gibben's first were cancelled.

The writ of supersedeas signified a command to put an end to the Commission. The Commissions of Dubuc, Douglas and Norquay were revoked.

In 1951, the practice changed and an Order-in-Council was passed accepting a resignation or terminating the Commission. The procedure of surrendering up the Commission was no longer followed. Letter, Varcoe, Deputy Minister of Justice, to Commissioner of the Northwest Territories, 5 November 1951, PAC, RG 32, Vol.187, Meikle.

TABLE 2

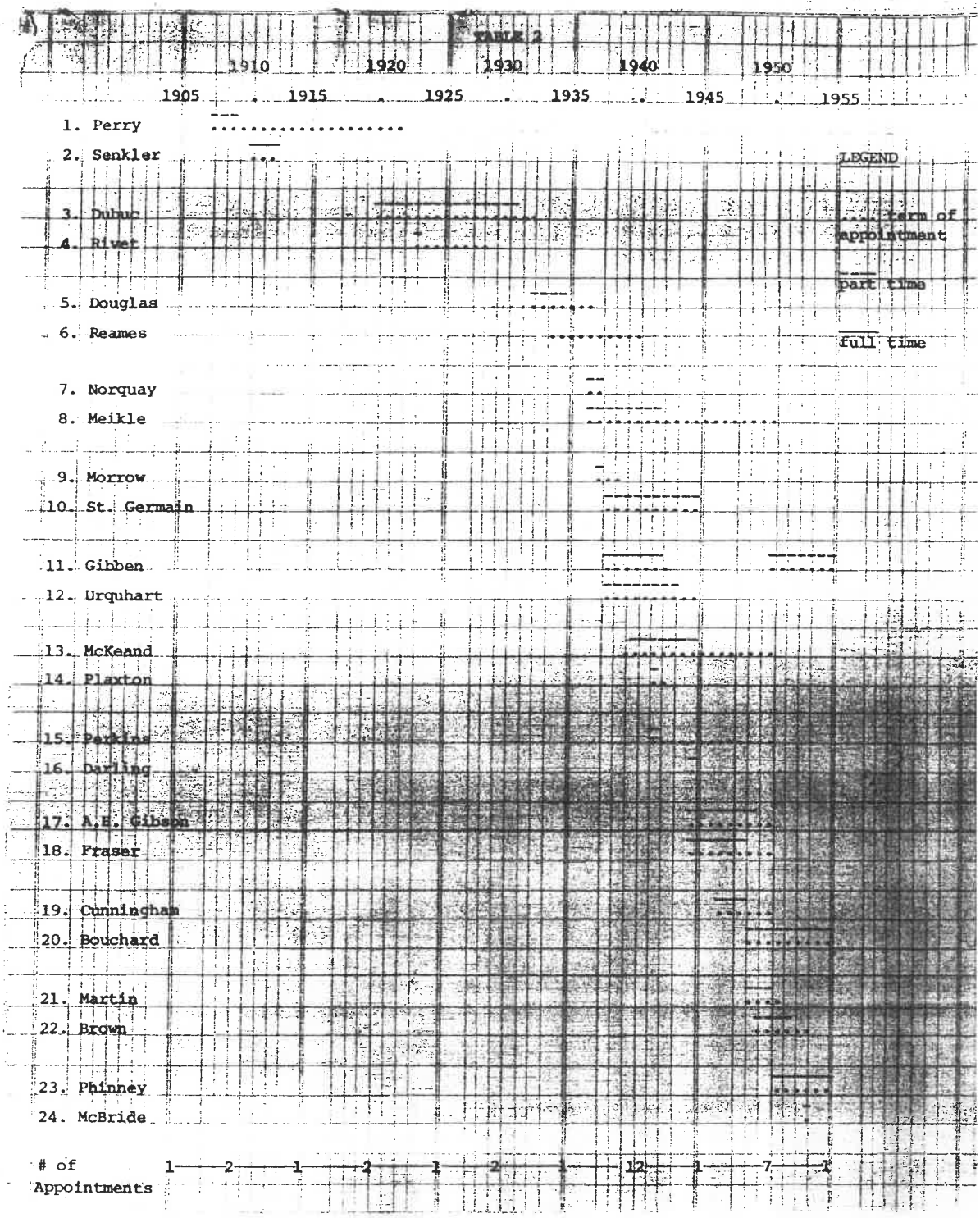
1905
1910
1915
1920
1925
1930
1935
1940
1945
1950
1955
1. Perry
2. Senkler
3. Dubuc
4. Rivet
5. Douglas
6. Reames
7. Norquay
8. Meikle
9. Morrow
10. St. Germain
11. Gibben
12. Urquhart
13. McKeand
14. Plaxton
15. Perkins
16. Darling
17. A.E. Gibson
18. Fraser
19. Cunningham
20. Bouchard
21. Martin
22. Brown
23. Phinney
24. McBride
# of Appointments
1 2 1 2 1 2 1 12 1 7 1
LEGEND
term of appointment
part time
full time

Table 3

Brief Information on Each Stipendiary Magistrate

	Years of Active Service as a Stipendiary Magistrate	Age When Appointed	Education and Occupation on Appointment	Politics
Perry	2 years inter-mittently	47	law-police	Liberal
Senkler	2 years	44	law-civil servant	not known
Dubuc	6 summers		law-Judge	Liberal
Rivet	1 summer	50	law-lawyer	Liberal
Douglas	3 summers	65	mining executive	Conservative
Reames	none	43	police-Inspector	not known
Norquay	1 year	early 60's	civil servant	Liberal
Meikle	10 years of part time	47	engineer-civil servant	not known
Morrow	6 months		medicine-doctor	not known
St. Germain	7 years	61	law-lawyer	Liberal
Gibben	3 years, 5 years	44	law-lawyer	Liberal
Urquhart	6 years, part time	60	medicine-doctor	not known
McKeand	6 summers	59	banking-civil servant	not known
Plaxton	1 summer		law-judge	not known
Perkins	1 year	29	law-lawyer	Liberal
Darling	2 weeks	51	law-lawyer	Liberal
A.H. Gibson	6 years	61	law-lawyer	Liberal
Fraser	5 years	49	law-Air Force	not known
Cunningham	2 years	43	law-Army	Liberal
Bouchard	1 year plus 5 years, part time	36	law-civil servant	Liberal

Table 3

Brief Information on Each Stipendiary Magistrate

	Years of Active Service as a Stipendiary Magistrate	Age When Appointed	Education and Occupation on Appointment	Politics
Martin	3 years	58	police-retired Superintendent	not known
Brown	3 years part time	43	law-lawyer	Liberal
Phinney	5 years	58	law-Stipendiary Magistrate	Liberal
McBride	1 trial		law-Judge	Liberal

Table 4

Ex-judicial Duties of Some of the Later Stipendiary Magistrates

(1) Mackay Meikle

- Stipendiary Magistrate
  1 December 1936
- Chief mining inspector for the Department of the Interior, Ft. Smith
- District Agent, at Ft. Smith
- Superintendent of Wood Buffalo Park
- Sheriff of the Northwest Territories
  20 July 1938
- Mining Recorder, Agent of Dominion Lands, and Crown Timber Agent for District of Mackenzie

(2) John Edward Gibben

- Stipendiary Magistrate (first appointment)
  4 August 1938 to 1941
- Mining Recorder, Agent of Dominion Lands, and Crown Timber Agent for Yellowknife Mining District
  1 July 1940
- Chairman, Yellowknife Administration District Trustee Board
  18 October 1939
- inspector and auditor of Yellowknife liquor store
- local enumerator for Dominion census of Yellowknife Administrative District

- sometime legal advisor to Territorial Council concerning Workman's Compensation and Employer's Liability Ordinance prepared in 1938 by Mr. Daly

- prepared draft Stipendiary Magistrate Court Ordinance in 1938

(3) **James Alfred Urquhart**

- Stipendiary Magistrate
  18 October 1938

- Medical officer

- Deputy Sheriff
  11 January 1940

(4) **David Livingston McKeand**

- Stipendiary Magistrate
  30 May 1939

- secretary - Northwest Territories Council
  29 November 1936

- Officer-in-Charge of the Government expedition to the Arctic Archipelago
  (1932-1945)

- game officer

- Sub-Mining Recorder

- Small debt official

- Commissioner for the taking of census

- Deputy Registrar of Vital Statistics

(5) **Charles Augustus Perkins**

- Stipendiary Magistrate
  14 August 1941

- Mining Recorder, Agent of Dominion Lands, and Crown Timber Agent for Yukon Mining District
  26 August 1941

- inspector and auditor for the Yellowknife liquor store (paid a salary of $50.00/month)

- Chairman, Yellowknife Trustee Board

(6) **Fred Fraser** (Yellowknife and Fort Smith)

- Stipendiary Magistrate
  30 October 1944

- Mining Recorder, Mackenzie Mining District

- Crown Timber and Land Agent

- Receiver of wrecks

- District Agent (Chief Administrator at Ft. Smith)

- Registrar of Titles under the Navigable Waters Protection Act

- Superintendent of Child Welfare at Fort Smith

- Chairman of Local Trustee Board at Yellowknife

- Chief Game Officer

- Superintendent of Wood Buffalo National Park

- Chairman of Committee to Construct a Curling Rink

- Regional Superintendent of Indian Agents

(7) D.J. Martin

- Stipendiary Magistrate
- Chairman of Local Board at Hay River

(8) Wilfred George Brown

- Stipendiary Magistrate
  29 November 1949
- Mining Recorder, Crown Timber Agent
- District Administrator for the Mackenzie District
- Commissioner of the Yukon Territory
  November 1952

Table 5

Eastern Arctic Patrol Ships

1903-1905 - The Neptune

1906-1911 - C.G.S. Arctic

- No patrols between 1912 and 1921

1922-1925 - C.G.S. Arctic

1926-1931 - S.S. Beothic

1932- S.S. Ungava

1932-1947 - S.S. Nascopie

1948- - MV Terra Nova and MV Regina Polaris

1949- - The McLean and the Newfoundlander

1950-1955 - C.D. Howe

List of Sources

A. Unpublished

Ottawa, RCMP Archives

Ottawa, Public Archives of Canada
- RG 13, RG 18, RG 85

Winnipeg, Hudson Bay Company Archives

Calgary, Glenbow Alberta Archives

Regina and Saskatoon, Saskatchewan Archives
- Series AG, "G"

Yellowknife, Prince of Wales Heritage Centre, Court House, Government Record Centre
- Minutes, Council of the NWT, issues of The Blade and The Prospector and the News of the North

Ottawa, Department of Justice
- files concerning the administration of justice in the NWT, including Stipendiary Magistrate file

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