

Hunger, Horses, and Government Men

Criminal Law on the Aboriginal
Plains, 1870-1905

SHELLEY A.M. GAVIGAN

PUBLISHED BY UBC PRESS FOR
THE OSGOODE SOCIETY
FOR CANADIAN LEGAL HISTORY

PATRONS OF THE OSGOODE SOCIETY

Blake, Cassels & Graydon LLP
Gowlings
Lax O'Sullivan Scott Lisus LLP
McCarthy Tétrault LLP
Osler, Hoskin & Harcourt LLP
Paliare Roland Rosenberg Rothstein LLP
Torkin Manes LLP
Torys LLP
WeirFoulds LLP

The Osgoode Society is supported by a grant from
The Law Foundation of Ontario.



The Society also thanks the Law Society of Upper Canada
for its continuing support.

LAW AND SOCIETY SERIES W. Wesley Pue, General Editor



The Law and Society Series explores law as a socially embedded phenomenon. It is premised on the understanding that the conventional division of law from society creates false dichotomies in thinking, scholarship, educational practice, and social life. Books in the series treat law and society as mutually constitutive and highlight scholarship emerging from the interdisciplinary engagement of law with fields such as politics, social theory, history, political economy, and gender studies.

A list of titles in the series appears at the end of the book.

Sample Material © 2012 UBC Press

Contents

- List of Illustrations / ix
- Foreword / xi
- Acknowledgments / xiii
- Introduction: One Warrior's Legal History / 3
- 1 Legally Framing the Plains and the First Nations / 24
- 2 "Of Course No One Saw Them": Aboriginal Accused in the Criminal Court / 50
- 3 "Prisoner Never Gave Me Anything for What He Done": Aboriginal Voices in the Criminal Court / 88
- 4 "Make a Better Indian of Him": Indian Policy and the Criminal Court / 121
- 5 Six Women, Six Stories / 156
- Conclusion / 183
- Afterword: A Methodological Note on Sources and Data / 189
- Notes / 195
- Bibliography / 253
- Index / 268

Illustrations

MAPS

- 1 Treaty 4, Treaty 6, and Indian reserves / 2
- 2 The North-West Territories before the inauguration of Saskatchewan and Alberta / 30

FIGURES

- 0.1 Big Bear as a prisoner in June 1885 / 10
- 0.2 Poundmaker and Big Bear at their trial, 1885 / 10
- 0.3 Poundmaker, 1885 / 11
 - 1.1 The North-West Territories Supreme Court / 41
 - 1.2 Hugh Richardson / 41
 - 1.3 Clipping from *Saskatchewan Herald*, 27 January 1882 / 43
 - 1.4 Clipping from *Saskatchewan Herald*, 12 January 1884 / 43
 - 1.5 Battleford, 1884 / 47
 - 1.6 Regina, 1887 / 48
 - 1.7 Richardson House, Victoria Avenue, Regina / 48
- 2.1 Clipping from *Saskatchewan Herald*, 27 January 1879 / 68
- 2.2 Sandfly, 1915 / 70

- 2.3 Clipping from *Saskatchewan Herald*, 9 May 1881 / 74
- 2.4 Regina Industrial School, 1894 / 76
- 2.5 Clipping from *Saskatchewan Herald*, 31 October 1881 / 84
- 3.1 Dominion Day horse races, 1882 / 89
- 3.2 Information of Apistatim, 1878 / 95
- 3.3 Letter from Hugh Richardson to J.B. Mahoney, 1 October 1878 / 101
- 3.4 Letter of reply from J.B. Mahoney to Hugh Richardson,
3 October 1878 / 101
- 3.5 Peter Hourie and Judge Richardson, undated photo / 114
- 4.1 Mequanis, likely 1915 / 136
- 4.2 Mequanis and Buffalo Bow among the File Hills Elders, 1914 / 137
- 4.3 Clipping from Regina *Leader*, 1 October 1885 / 141
- 4.4 Piapot at the Regina Industrial School / 152
- 4.5 Piapot and other First Nations leaders in front of Canadian
military, 1885 / 153
- 5.1 Unidentified Indian woman / 161
- 5.2 Bachelor shack, North-West Territories / 163
- A.1 Mequanis and Shave Tail with young First Nations soldiers, 1915 / 194

TABLES

- 1.1 Population of the Canadian Plains, 1870-1901 / 31
- 1.2 Census data: North-West Territories, 1884-1901 / 31
- 1.3 Lean Man's Band Treaty 6 annuity payments, 1882-85; 1891 / 31

Foreword

The Osgoode Society for Canadian Legal History

Shortly after Confederation Canada acquired the territories formerly owned and administered by the Hudson's Bay Company. Among the formidable challenges brought by this massive land acquisition, the most notable was the task of reconciling the Aboriginal peoples of the Plains to Dominion sovereignty. Much has been written about the treaty making process of the 1870s, and about the Métis resistance of the late 1860s and 1880s, but we know relatively little about the introduction of Canadian legal regimes. Professor Gavigan fills that historiographic gap, examining in considerable detail the introduction of Canadian criminal law and criminal justice institutions in the prairie west after 1870. Using newspapers, penitentiary records, Indian Department files, and, principally, the records of stipendiary magistrates, she shows the law's impact on the Aboriginal peoples of the West, as well as their use of it in coming to terms with the new political reality.

The purpose of the Osgoode Society for Canadian Legal History is to encourage research and writing in the history of Canadian law. The Society, which was incorporated in 1979 and is registered as a charity, was founded at the initiative of the Honourable R. Roy McMurtry, formerly attorney general for Ontario and chief justice of the province, and officials of the Law Society of Upper Canada. The Society seeks to stimulate the study of legal history in Canada by supporting researchers, collecting oral histories, and publishing volumes that contribute to legal-historical scholarship in Canada. It has published 84 books on the courts, the judiciary, and the legal profession, as well as on the history of crime and punishment, women

and law, law and economy, the legal treatment of ethnic minorities, and famous cases and significant trials in all areas of the law.

Current directors of the Osgoode Society for Canadian Legal History are Robert Armstrong, Kenneth Binks, Susan Binnie, David Chernos, Thomas G. Conway, J. Douglas Ewart, Violet French, Martin Friedland, John Gerretsen, Philip Girard, William Kaplan, Horace Krever, C. Ian Kyer, Virginia MacLean, Patricia McMahon, R. Roy McMurtry, Dana Peebles, Paul Perell, Jim Phillips, Paul Reinhardt, Joel Richler, William Ross, Paul Schabas, Robert Sharpe, Mary Stokes, and Michael Tulloch.

The annual report and information about membership may be obtained by writing to the Osgoode Society for Canadian Legal History, Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N6. Telephone: 416-947-3321. E-mail: mmacfarl@lsuc.on.ca. Website: Osgoodesociety.ca.

R. Roy McMurtry
President

Jim Phillips
Editor-in-Chief

Acknowledgments

This book, which is devoted to the relationship between Aboriginal people and criminal law on the nineteenth-century Plains, has returned me to the people and the issues I encountered in the lower criminal courts in Saskatchewan as a law student and young lawyer in the 1970s. The research is grounded in the records of a nineteenth-century criminal court in the same region where one hundred years later my colleagues and I appeared as legal aid counsel. Most of our clients were members of First Nations and Métis communities, reflecting even then the over-policing and over-representation of Aboriginal youth and adults in the Canadian criminal justice system. In the course of research and writing, I have thought often of my clients and their struggles in the face of incredible odds, of my colleagues and friends in the Saskatchewan legal aid bar, and of myriad lessons it took me long to learn and longer to absorb. This work studies an earlier watershed period, but I am mindful that but for the experience a hundred years on I would not have found my way to this study.

The book began as a doctoral dissertation supervised by Jim Phillips at the Faculty of Law, University of Toronto. I thank him for his generous support of my research and writing and for his exemplary commitment to supervision, which I experienced as excellent in every respect. I acknowledge with thanks Carolyn Strange, who deepened my appreciation of research methodology, and Julia Hall in the Graduate Program at the Faculty of Law. I am indebted as well to members of the supervisory and examining committees, Martha Shaffer, Allan Greer, and Darlene Johnston

for their support and advice, and especially Hamar Foster for his insightful interrogation as external examiner.

I am honoured that this book bears the imprimatur of the Law & Society Series of UBC Press and of the Osgoode Society for Canadian Legal History. I thank Randy Schmidt at UBC Press for his stewardship in this process, and I am indebted to Wes Pue and Jim Phillips, editors of each, for their support. The metamorphosis and production of this book has been supported by an author's dream team at UBC Press, led by Randy Schmidt and Ann Macklem. Every stage of the process was marked by the perfect combination of encouragement, support, and commitment to excellence. I am most grateful for the extremely helpful comments and advice offered by the three anonymous reviewers for UBC Press. I am deeply indebted to Ann Macklem for her expertise and her unwaveringly calm management of the production of the book and to her talented team at UBC Press: Francis Chow, copy editor; Lara Kordic, proofreader; Eric Leinberger, who drew the map of the Treaty 4 and Treaty 6 region; and Mauve Pagé, whose cover design beautifully captures the spirit and concern of the book.

Since 1986, Osgoode Hall Law School of York University has been my intellectual and professional home. Osgoode has given me the gift of time through sabbatical, research, and other forms of teaching release and leaves. Two Osgoode Hall Law School Research Fellowships awarded at different times over the last decade first made possible many research trips to the Saskatchewan Archives and then facilitated the revision from dissertation to book. I have had the opportunity to present portions of this research at Osgoode Faculty seminars and at Feminist Fridays sponsored by the Institute for Feminist Legal Studies. I am indebted to my Osgoode colleagues for their critical engagement with and generous support of my work as it progressed. Osgoode also provided excellent technical support when I needed it (which was often) and for this I acknowledge with thanks the work and support of Hazel Pollack, Miriam Spevack, Laurie Cormack, Gautam Janardhanan, Shahnoor Tilak, and the other members of the energetic IT team at Osgoode. I also acknowledge with great thanks the excellent research assistance of two different generations of Osgoode students, Karen Pearlston (LLB 1996), Sheetal Rawal (JD 2011), and Alexandra Matushenko (JD 2013).

Research for this book would not have been possible without access to court files and other public records housed and protected by publicly supported archives. I am enormously indebted to the Saskatchewan

Archives Board, especially to the archivists and staff of the Regina office. Catherine Holmes, Janet Harvey, Paula Rein, Tim Novak, Amanda Don, Becky Hahn, Susan Millen, and Bill Wagner were incredibly knowledgeable and unfailingly helpful; their support made the research process a pleasure. The Reading Room at the Saskatchewan Archives in Regina with its walls of windows is a wonderful place to do research and read court files. I acknowledge with gratitude the permission granted to reproduce the photographs and documents held by the Saskatchewan Archives Board that appear in the book. I also thank the now-beleaguered archivists and staff of Library and Archives Canada in Ottawa, especially Ritchie Allen and Patrick St-Jean Croft.

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

I have come to appreciate that writing is not always the solitary experience it is cracked up to be, a good thing as I have never been drawn to a scholar's monastic life. Many friends and colleagues have been generous in extending different forms of much appreciated support, advice, and encouragement. In particular, I would like to acknowledge and thank Dorothy Chunn, Mary Condon, Michael Gavigan, Renée Gavigan, Joan Gilmour, Janice Gingell, R.J. Gray, Balfour Halévy, Peter Hogg, Judith McCormack, Janet Mosher, Sidney Peck, Wes Pue, Gabriele Scardellato, Kathy Scardellato, Norma Sim, the late Otto Weininger, and the Deverell/Woroner clan. An intrepid few read earlier versions of parts of the manuscript and the most heroic, E. Ann McRae, Amy Deverell, and Balfour Halévy, read and offered detailed comments on full drafts, which were incredibly helpful and for which I am most grateful. Amy not only read with a sharp, critical eye, and very red pen, she also tackled the index, for which I am mindful no amount of thanks can fully be expressed.

I had the privilege of presenting portions of this work to colleagues and students in many academic settings, including the Canadian Law and Society Association, the Law and Society Association, the Toronto Legal History Group, University of British Columbia Faculty of Law's Institute of Feminist Legal Studies, Simon Fraser University's Department of Sociology and Anthropology, Monash University Law School, the National Law School of India University in Bangalore, the American Society of

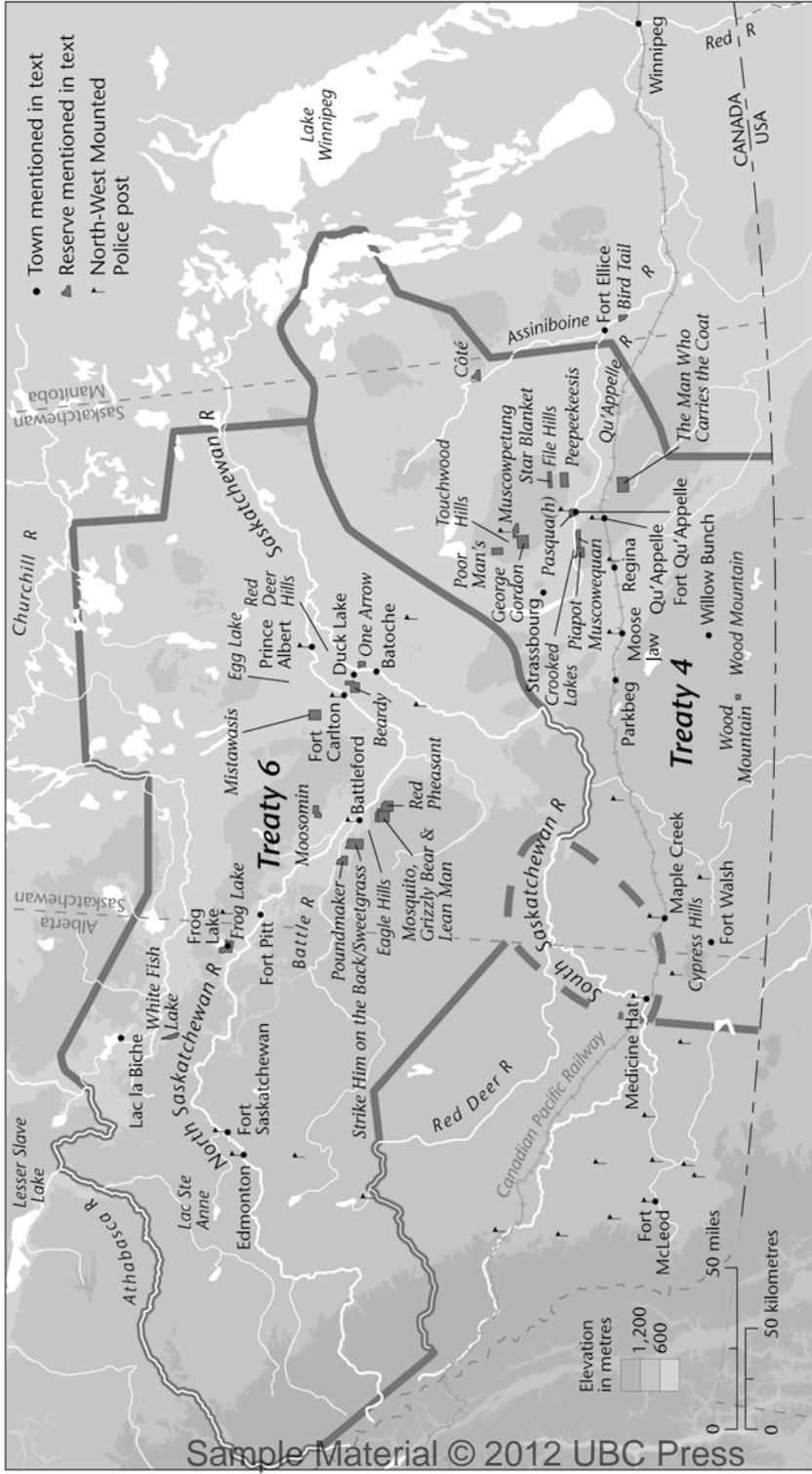
Legal History, and at the inaugural Legal Histories of the British Empire Conference in Singapore in July 2012. I thank my national and international colleagues for their interest, comments, and advice. Earlier versions of Chapter 4 appeared in: “More Than Just *Mens Rea*: Indian Policy in Two Aboriginal Capital Cases from Regina, NWT” in Margaret E. Beare, ed., *Honouring Social Justice, Honouring Dianne Martin* (Toronto: University of Toronto Press, 2008) 108 and “‘Prisoner Never Gave Me Anything for What He Done’: Aboriginal Voices in the Criminal Court” (2007) 3 *Socio-Legal Review* 71, and I am grateful to these publishers for allowing me to reprint material.

As I embarked upon the writing, I received a precious gift, one of space and peace, from friends who made their beautiful cottage available to me during an equally beautiful autumn. From deep in the heart of Muskoka, I was able to write about criminal law on the nineteenth-century Aboriginal Plains, and I thank Beverley, Thomas, and Lorraine Burns for this generosity and hospitality. And in Umbria, where much of the thinking and some of the writing of the book has been done, *ci sono dei buoni vicini di casa, i nostri amici* – Brunella, Luciano, Federica, Letizia, e Andrea – grazie mille.

Historical research is inevitably about the past, and my own has been with me in this project. My life has been graced by people who think I can do anything, even when I have had reasonably held doubts. I thank my mother and late father, Edith Gavigan and Keith Gavigan, for their lifelong encouragement and support of my aspirations and endeavours. Judy Deverell can no longer be thanked in person, but her love, confidence, and trust remain with me. Thanks beyond measure go to Karen Andrews, my smart, irreverent partner and most precious critic, who for many years has lived and breathed this project with me – here, there, and everywhere. No one was called upon to make more sacrifices or to extend herself than was Karen, listening to and reading everything, never in silence, mostly without complaint, and never without insightful advice.

But, from beginning to end, this has been for Amy, my/our cherished daughter, with love and hope, as she continues along the path she has chosen, committed to the importance of ideas, the arts, and social justice.

Hunger, Horses, and Government Men



MAP 1 Treaty 4, Treaty 6, and Indian reserves. | Cartographer: Eric Leinberger.

Introduction

One Warrior's Legal History

This book tells a little-known story, relying on voices seldom heard. It is the story of the relationship between the Plains First Nations and Canadian criminal law as it took root in their land. This is the first in-depth analysis of the relationship between the First Nations and the criminal law in the territory that is now Saskatchewan in the last quarter of the nineteenth century – a period of profound social, economic, and legal transformation for the First Nations of the region, of which the criminal law and criminal courts were a part.

The story begins in the Eagle Hills near Battleford, the first capital of the North-West Territories, where Pee-yan-kah-nik-oo-sit (Red Pheasant) was the long-time chief of the Eagle Hills Cree. In 1877, the year following the signing of Treaty 6, Red Pheasant's band consisted of twenty-seven men, forty-six women, and ninety-two children. This included the chief (and four women and three children for whom he received a treaty payment), four headmen (and their families), twenty-two other men and their families, and five families headed by women where no man was listed.¹ Peaychew, a signatory to Treaty 6 in 1876 and long-time headman to Red Pheasant, was listed and appeared as Number 4, "Pee-yah-Chew," on the Treaty Annuity Paylist. It is with his story that this book begins.

ONE WARRIOR'S WATERSHED: PEAYCHEW'S LEGAL HISTORY

On 5 October 1885, Peaychew appeared as a prisoner before Stipendiary Magistrate Charles Borromée Rouleau, charged with the offence of

treason-felony for his involvement in what for many years was known as the Riel Rebellion, and later as the North-West Rebellion and, still more recently, as the North-West Resistance.² Unrepresented by legal counsel, Peaychew pleaded guilty and was sentenced to two years in the Manitoba Penitentiary. On his admission to the penitentiary on 7 November 1885, the prison register recorded simply that he was an Indian, forty years of age, 5 feet, 8 inches tall, with dark hair, eyes, and complexion, whose occupation was indicated as “none.”³ This was not Peaychew’s first encounter with Canadian criminal justice.

In early June 1880, his twelve-year-old daughter, M-c-s, had gone missing in the Eagle Hills. The girl had been living with her paternal aunt and her aunt’s husband, Robert Saunders, since their marriage approximately three years earlier. Peaychew told the court that he had given his daughter to his sister and her husband because they asked to have her with them, and he had agreed so long as they remained in the area. He explained that he was always satisfied with their treatment of the child.⁴ She had gone missing, however, during an egg-hunting trip with Saunders and two other men, and, perhaps surprisingly, Saunders had not informed her father of this on his return.⁵ Instead, Peaychew learned that the child was missing only when another man, Tobacco Juice, indirectly alerted him by asking him whether she had returned. Tobacco Juice then informed him directly that she had been lost on the hunting trip. Peaychew later told the court that he went through the camp asking after the girl, and when he could not find her, he set out for Saunders’s place. When he arrived, he found his sister, her husband, and two other men, Joseph Gouin and Louis LeToup. The men were working on a house. Peaychew asked Saunders what had become of the child; Saunders deflected this query with his own question: “Didn’t she get to your place?” Peaychew told Saunders what he probably already knew – that the little girl had not turned up at his camp – and he warned that “if my child is lost there’ll be some trouble.”⁶ Peaychew enlisted Saunders and Gouin in a search of the area where the child was last seen, but she was not found.

Peaychew may have feared the worst, but he did not take matters into his own hands. The trouble that he promised his brother-in-law came in the form of North-West Mounted Police (NWMP) constables Chassi and Prongua, dispatched by their sergeant to see after the missing child. It is clear from the court file that both Peaychew and Chief Red Pheasant spoke to Constable Chassi about the circumstances of the child’s disappearance from Saunders’s camp, and one of them may have alerted Chassi’s commanding officer initially. Chassi dispatched some Indians to request

Saunders, Gouin, and LeToup to come and see him at the Eagle Hills Mission the next day, and then he went out to search for the child himself. Saunders presented himself at the mission the next morning and gave Chassi a statement explaining how the child had become separated from the hunting party. Saunders also gave Chassi a stocking that he said he had found, and which the child had been wearing the previous Sunday while out on the trip.

Saunders, LeToup, and Gouin were arrested on suspicion, brought directly before Magistrate Hugh Richardson in Battleford on 12 June 1880, and charged with an elaborate offence,⁷ surely difficult to prove and dubious with respect to these facts: that they “unlawfully by fraud detained an Indian child under the age of fourteen years with intent to deprive her father of the possession of such child.”⁸ The court proceedings were interpreted into Cree by Peter Ballendine for the three prisoners (“all of whom understand that language”⁹), and into French by Constable Chassi for LeToup and Gouin.

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

The case of this missing child attracted the attention of the local paper, the *Saskatchewan Herald*, and was reported upon in considerable detail on the front pages of the 21 June and 5 July issues. The *Herald* reported that Gouin had been detained in custody as it appeared that he had been the last of the three men to see the girl.¹⁰ The *Herald* also reported the warning given by Richardson to the three accused men before he ordered the adjournment:

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

the graver charge of murder. He also pointed out to them that it was their duty to conduct a vigorous search, and to aid by every means in their power the police and those engaged in the endeavor to clear up the mystery surrounding the case.¹¹

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

On 5 July, the *Herald* reported that on 20 June the missing girl had “walked into her father’s house as unexpectedly as she had mysteriously disappeared, much to the surprise and joy of her family.”¹² According to the *Herald’s* informant, the girl said that while she had been unhitching the horse from the cart, she saw two men on a hill whom she did not recognize, and so she ran and hid. She later saw the Indians who were searching for her and others on the Plain, but she was afraid and continued to hide, eating only roots, buds, grass, and the occasional egg for the fourteen-day period, before finally making her way to her father’s house. The *Herald* reported that a great feeling of relief was experienced throughout Battleford when word of the child’s safe return was received. Most especially, the paper added, the three men who had been under suspicion were relieved to learn of her safe return.

By 1882, Red Pheasant’s band had declined in number to one hundred thirty-nine persons (twenty-three men, thirty-four women, seventy children, and twelve others).¹³ That year, Peaychew received a treaty payment of \$40 for himself, two women, and four children. In October, shortly after treaty payment time, Peaychew was again before Magistrate Richardson in Battleford, involuntarily and as a prisoner in custody, as a result of an Information sworn by Indian Agent Hayter Reed that he had engaged in conduct that in today’s context would be regarded as akin to welfare fraud.

At the preliminary hearing before the justice of the peace, Reed alleged that Peaychew, by false pretences and with intent to defraud, had obtained

\$15 in treaty annuities to which he was not entitled.¹⁴ Reed deposed that when asked at treaty payment time for the numbers he had claimed as belonging to his family, the prisoner had named, among others, “a certain woman and two children,” for whom Reed had paid him \$15. Reed claimed that he had subsequently learned that “for the last two or three years he had discarded the woman and had refused to support her or the children, and that he claimed their pay last year.” Reed also claimed that Peaychew had refused to return the money, and so he had him arrested.

A short deposition from Chief Red Pheasant was received by the NWMP officer sitting as justice of the peace; no interpreter is indicated. Red Pheasant's words were recorded, and he is said to have indicated that he had been present when the Indian Agent paid the treaty annuities: “I heard Mr. Reed say through [Thomas] Quinn the interpreter that Pee-ah-chew had drawn pay for a woman and two children that he had no right to. I know that Pee-ah-chew had drawn money for a woman and two children and that he had no right to the money. I promised Mr. Reed that I would try and get the money back.”¹⁵ In his Statement of the Accused, taken before the justice of the peace at the end of the hearing and before being committed for trial, Peaychew denied the statements made against him and indicated that he had intended to pay the money to the woman.¹⁶

His committal for trial was reported in the *Saskatchewan Herald* in almost precisely the same language as Reed's deposition: that Peaychew had discarded one of his wives, drawn the annuities for her and her two children, refused to deliver up the money when ordered to do so, and was arrested.¹⁷ He was held in custody until 9 November 1882, when the court record indicates simply: “deft discharged.”¹⁸ In its account of the case, the *Herald* took the opportunity to edify its readers on the subject of Indian customary practices:

One of the customs of the Indians is to take as many wives as they please, and to discard them when it suits their humour. Prisoner had, in pursuance of this custom, “thrown away” a wife and two of her children, and when payment was made he drew their annuities as of old ... The Judge laid great stress on the enormity of the offence of trying to rob the Government and explained to the Prisoner the danger he ran. Not being anxious to proceed to extremities for the first offence, and the agent being willing to withdraw the complaint if the money were returned, the court gave the prisoner the option of doing that or having sentence passed on him. The money was paid over and the case dropped.¹⁹

It may be trite, but nonetheless undeniable, to observe that the *Herald* would have had no access to reliable information on the marriage, separation, divorce, and other cultural practices of the Cree.²⁰ For the *Saskatchewan Herald*, “Indians” were men who “discarded” women at will. Hayter Reed and the *Herald* might well have characterized Peaychew as having “discarded” his daughter M-c-s, but the facts of the earlier case involving Saunders, Gouin, and LeToup do not indicate a disengaged, uninterested father. Red Pheasant’s deposition provided a less than ringing endorsement, and likely not evidence beyond a reasonable doubt, of the charge against his headman, with whom he had stood in 1876 at Treaty 6 and again in 1880 when the child was missing. The perspective of the allegedly discarded woman is nowhere to be found in the court records or the press reports.

In the spring of 1885, “Pee-Yay-Chew” was one of five signatories to a letter to Louis Riel asking for ammunition and his support, evidence of which facilitated Poundmaker’s conviction for treason-felony.²¹ Described by one of Blair Stonechild and Bill Waiser’s informants as a “hardliner” in Red Pheasant’s band (Red Pheasant himself having rebuffed Riel’s emissaries),²² Peaychew is reported to have goaded some of neighbouring Cree chief Little Pine’s men into joining the Métis in the fight: “You are cowards if you do not fight ... Anyone of you who refuses can don and wear his wife’s dress.”²³ For Peaychew’s role in the events of 1885, Stipendiary Magistrate Rouleau accepted his guilty plea to treason-felony and sentenced him to two years in the Manitoba Penitentiary – a man who nine years earlier had been one of the Cree leaders whose “X” had graced Treaty 6.²⁴ Over the course of those nine years, Peaychew had made trouble for a man who had treated him with discourtesy by not informing him directly, or at all, that his young daughter was lost; had been prosecuted by the Indian Agent; had been publicly ridiculed by the *Saskatchewan Herald*; had been lectured but not convicted by Richardson; and finally – and for the first time – had been convicted as a result of his participation in the events of 1885. He was pardoned in March 1886 and released from the Manitoba Penitentiary,²⁵ as were others,²⁶ and he lived past the age of seventy.²⁷ Despite his pardon, the Treaty Annuity Paylists in the years that followed continued to list him as a rebel²⁸ – a Treaty 6 signatory and a father who had once invoked the assistance of the police and the court.

Peaychew’s complex and uneven relationship with Canadian criminal justice between 1876 and 1886 lays the groundwork for the story and interpretation found in this book of the more general relationship between the First Nations and the criminal law in the region in the last three decades

of the nineteenth century. Peaychew's experience with the criminal law exemplifies the transformation of the period: as a signatory to Treaty 6 in 1876, he had a personal experience and understanding of what the representatives of the Crown had promised and expected of the First Nations that entered into the treaty. As headman to Chief Red Pheasant, along with Poundmaker, he would have had occasion to consider matters of concern to the Eagle Hills Cree, and he stayed with Red Pheasant when Poundmaker established his own band (and reserve not far from Red Pheasant's reserve).²⁹ The legal records suggest that he might have been a man who knew his rights, who made good on a promise or threat, who was not easily intimidated, who stood his ground. He was prepared to make use of the law, and when first taken as a prisoner to court in 1880 he did not simply nod his head.³⁰ He did not share the misgivings of his chief about Louis Riel, and he joined the historic struggle in 1885.

The press report of his conviction and sentence for treason-felony, together with the skeletal entry in the prison register, provide at best the barest sketch of the Cree hunter and warrior. A more fully developed and complex portrait of Peaychew, and of his experiences with Canadian criminal law, clearly emerges from the court records of Hugh Richardson in the years before Peaychew's appearance before Charles Borromée Rouleau, who succeeded Richardson in 1883 as stipendiary magistrate in Battleford.

Peaychew's little-known guilty plea and conviction for treason-felony invites a reflection upon our knowledge of the trials and convictions of better-known First Nations leaders for the same offence in the aftermath of the events of the 1885 North-West Resistance. As other historians have demonstrated, the First Nations people of Treaty 4 and Treaty 6 paid a heavy price for modest to nonexistent forms of involvement and support in the events of the spring of 1885.³¹

The images of the 1885 Resistance trials loom large in the historical literature. Significant among them are photographs of Cree leaders in custody following the events of the spring and early summer. Among the most vivid of these are those of Mistahimusqua (Big Bear) in shackles at Fort Carlton,³² of Big Bear and Pihtokahanâpiwiin (Poundmaker) at the time of their trials in Regina,³³ and of Big Bear in Stony Mountain Penitentiary, "shorn of his shoulder-length hair to humiliate him."³⁴ Images of the shackled, incarcerated Cree leaders have come to exemplify, for some historians, the nature of the relationship between Aboriginal peoples and Canadian criminal law (see Figures 0.1 to 0.3).

Historian Sidney Haring describes their prosecutions for treason-felony as "the most famous Indian criminal trials in Canadian history."³⁵ This not



FIGURE 0.1 Big Bear as a prisoner in June 1885. | Saskatchewan Archives Board, R-B3780.



FIGURE 0.2 Big Bear and Poundmaker at their trial in Regina, 1885, photographed with (*at the far left in front*) Big Bear's young son Horse Child (not Little Bear). Poundmaker is misidentified as a Blackfoot chief. | Saskatchewan Archives Board, R-A2146.



FIGURE 0.3 Poundmaker, 1885. | Saskatchewan Archives Board, R-B8775.

unreasonable claim warrants consideration as well as a brief analysis of the implications of those trials and how they have been interpreted by legal historians. The names and histories of other Cree, Assiniboine, and Dakota leaders also prosecuted (and some of them imprisoned) for treason-felony in the aftermath of the violent spring of 1885 are less well known: White Cap, One Arrow, Lean Man, Yellow Mud Blanket, Peaychew, to name but a few. Poundmaker's charisma (and his striking good looks, which made him the darling of some of the press, even if not the law³⁶) and Big Bear's stature as a political and spiritual leader no doubt contribute to the attention. The Resistance trials have come to symbolize the defeat and subordination of the Plains Aboriginal peoples by the Canadian state and to define the role and contribution of the criminal law.³⁷

It would be an error to dismiss, or even to minimize, the significance of the 1885 Resistance trials, and I do not intend this.³⁸ A hierarchy of knowledge and names does exist, however: we know more about the 1885 trial of Louis Riel³⁹ than about the companion trials of Poundmaker and Big Bear. Due to the press coverage at the time, as well as popular and scholarly accounts written since,⁴⁰ we also know more about the trials of Poundmaker and Big Bear than we do about those of the Willow Chief One Arrow⁴¹ and the Dakota Chief White Cap.⁴² We know less about the eighty-one First Nations and forty-six Métis prisoners also tried in 1885⁴³ or about Papamahchatwayo (Wandering Spirit), Apischiskoos (Little Bear), Manichoos (Bad Arrow), Papamakesick (Round the Sky), Wahwahwitch (Man Without Blood), Kittimakeguh (Miserable Man), Napaise (Ironbody), and Itka, the six Cree and two Assiniboine warriors hanged for murder at Battleford following summary trials or guilty pleas in Fort Battleford on 27 November 1885.⁴⁴ We also know more about the handful of prosecutions concerning the potlatch in British Columbia⁴⁵ and of religious dances on the Plains⁴⁶ than we do about the routine engagement of criminal law on the ground and the Plains Aboriginal people who for one reason or another found themselves before justices of the peace, magistrates, and – later – judges, before or after the events of 1885. This book renders visible some of these people and some of their stories. And from these stories images emerge of relationships rather more complex than are commonly understood at present.

“The Grist of the Law”

There is now more interest in the records of proceedings of lower criminal courts, characterized by some as “low law,” and this book forms part of

this reclamation.⁴⁷ The definition of and distinctions between high law and low law are important, if contested by some postmodern socio-legal scholars critical of the apparent primacy given to state law.⁴⁸ By “high law” Douglas Hay means “the law of appellate courts, most law professors, and most opinion makers.”⁴⁹ Low law, in contrast, comprises the “most common daily manifestation” of law: summary proceedings, before a magistrate without a jury and without counsel.⁵⁰ The socio-legal, political (and arguably scholarly) implications of high law are important: rare and expensive high law – the “most loudly articulated account of law” – becomes the only form of law.⁵¹ High justice is celebrated “as if low justice did not exist,”⁵² and thus scarcely meriting a scholar’s gaze or analysis or a law teacher’s mention in the classroom.

It is low law, however, that affects most people, and certainly most directly affects the poor, the marginalized, the vulnerable, and the oppressed – those whose voices are muted in and by law, who cannot afford to retain lawyers even if lawyers are available and/or willing to represent them. In today’s context, their ranks include social benefits recipients, tenants, the displaced and undocumented, the working poor, and the homeless, who find themselves vulnerable to prosecution for a plethora of small offences and municipal bylaw infractions for which legal aid is seldom available. The accused persons of low law appear before the lowest level of the judiciary, most of whom historically, and many of whom still, are not schooled in the law. The justice they experience is lean, unadorned, and summary at best. And when on occasion they find themselves in high-law contexts or reported on in the press, caricature and insult often compound the injury of poverty and oppression.

I have found that on the nineteenth-century Canadian Plains, “law” for most people, including most First Nations people, meant low law. When accused of crime, they appeared in court invariably as a prisoner, without legal counsel, without legal arguments, without grand juries, in proceedings conducted in a foreign language, where they had limited access, if any, to basic linguistic interpretation. This law meant confinement in a police barracks before the hearing and taking of depositions; and if the evidence was sufficient to warrant a committal for trial but was otherwise weak, release on bail or a recognizance until trial was possible – if indeed there was a trial (and often there was not where this form of interim release was granted). For most accused persons, it meant remaining in custody at the police barracks until trial, appearing before the magistrate in his office at the barracks, and serving a custodial sentence in the same police barracks. For most, it involved a preliminary hearing or possibly summary trial

before one or two justices of the peace, who probably held that office because they were a Hudson's Bay Company factor, a North-West Mounted Police officer, an Indian Agent, or a medical man or other eminent member of the settler community. For many, then as now,⁵³ it involved a guilty plea and no trial, and, for almost all, no appeals to a higher court. For the most unfortunate, it meant a prison sentence to be served in the Manitoba Penitentiary, a form of death by incarceration for many.

Hugh Richardson was the first magistrate before whom the First Nations peoples of the Saskatchewan region, including Peaychew, had appeared. The research for this book derives from his court – a lower territorial trial court – in its everyday application of ordinary criminal law. My primary focus is on the Aboriginal people who appeared as deponents, witnesses, informants, and accused persons, and on the kinds of cases that were prosecuted, whether or not there was a trial or conviction – cases that Canadian legal historian Louis Knafla once characterized as the “grist of the law.”⁵⁴

“A DISTINCT SENSE OF PLACE”

In many ways, the space, terrain, and territory are easier to discern in the court records than are the people whose cases and experiences are set out therein.⁵⁵ The context whence these cases derived and found their way to the court defies capture through contemporary concepts of rural or urban, for it was neither. A way of life based on a different relationship to land, family, and work is described in many of the court records, together with the intersection of newer relationships and influences.

The Plain is omnipresent in these records – as space, place, and location. It offered some people sanctuary from a summons that would never be delivered or a sentence that would not be served, just as it readily delivered up others. People met each other on the Plain; assaults took place on the Plain; people sent word to the judge telling him of their inability to come to court because they were on the Plain; and those who were thought to be evading justice took refuge on the Plain. On the Plain, hungry indigenous people approached freighters' wagons filled with flour, sugar, and pemmican.⁵⁶

The land, and people's relationship to it, animates and shapes the unfolding of the cases. We learn of the chilling discovery of the bones and charred remains of a mother and her children buried in the snow in the bush following their murder by her husband, their father.⁵⁷ The pond in the spring that promised ducks but brought death to an elderly hunter at

the hands of his son-in-law;⁵⁸ another pond in another season that gave rise to the murder of another family by two brothers who claimed that their hunting territory was being encroached upon;⁵⁹ the lost child left behind on a hunting trip;⁶⁰ the bank of the lake where the body of a newborn infant was buried by a young mother;⁶¹ the swampy place where a young girl was found crying while trying to wash herself, having been sexually interfered with by her mother's husband;⁶² the place on the river where a hapless Mountie moored his canoe, perhaps not appreciating the invitation it represented;⁶³ the river again, where a Cree man was told he should fetch his water, rather than from the "water hole";⁶⁴ the distance of a mile – measured by telegraph poles – for a horse race outside Battleford.⁶⁵

The court records also reveal the newcomers' different but no less significant relationship to land, disputes over it giving rise to criminal prosecutions: houses that were "taken down" by an aggrieved husband demonstrating his complaint about the homeowner's inappropriate intimacy with his wife⁶⁶ or thrown into the river by those who argued a prior claim;⁶⁷ empty homes and schoolhouses left unoccupied for a season or year,⁶⁸ one of which was used as a refuge by a fifteen-year-old British orphan immigrant who had been brought to Canada, who said, when found in the house, that he had wanted a home of his own;⁶⁹ piles of firewood intended only for the private use of owners.⁷⁰ The land, the distance, the space, the weather, the terrain, the seasons, the location – a "distinct sense of place"⁷¹ – significantly form and inform the stories and the cases found in the early court files.

These are cases that did not, could not, wend their way to the higher courts, even if appeals had been permitted.⁷² The spoken words, frequently through an interpreter (who was sometimes sworn in), were recorded by a justice of the peace, and depositions were marked with an "X." These cases of low law are those of the Plains Aboriginal people. To do them justice requires us to be attentive to complexity and contradiction and to avoid the trap of self-evidence, thereby adding to our understanding of the people and their relationship to and engagement with the criminal law in the land that became the North-West Territories.

HOW THE STORY IS TOLD

Historical scholarship reflects the writer's approach to research, method and techniques, ideas, and the writer's aspiration to understand and

interpret the documents and data she has found. I accept completely the perspective that legal historical research into court records work with broader contexts, and take a broad view of the evidence in court records.⁷³ It is important, however, to be clear how one defines one's broader contexts. My study is of the relationship between Aboriginal people and the criminal law in the North-West Territories in the last three decades of the nineteenth century. On one level, the broader context of this study has encompassed two collections of one judge's criminal court records, and not simply the ones in which Aboriginal persons are named as accused persons. By reading all the criminal files of the two courts over which Hugh Richardson presided between 1877 and 1903, I was able to identify non-Aboriginal as well as Aboriginal accused persons and to develop a fuller understanding of the operation of criminal justice in the region during the period. Thus, I was also able to locate more cases involving Aboriginal peoples that enabled an analysis of a fuller range of Aboriginal experience of and engagement with criminal law in the North-West Territories.

Although my focus is on criminal law, I broadened the legal context of this study as well: I looked beyond the formal black letter of criminal law to identify and incorporate other forms of law that emerged as relevant: Treaty 4 and Treaty 6, the Dominion government's Indian legislation and policy, and Aboriginal "criminal law" prior to 1870. This broader legal context has enabled me to consider the relationship between the treaties, government policy, and the criminal law.

Stephen Robertson also has reminded interdisciplinary socio-legal historical researchers of the importance of engaging with the law.⁷⁴ For me, this involves paying close attention to the distinction and relationship between legal forms, legal institutions, and legal actors. Informed by the work of social historians that identified forms of agency and activism within the First Nations and forms of conflict within the state,⁷⁵ I eschewed an assumed relationship between the criminal court and government policy, and I looked for expressions of Indian policy in criminal prosecutions. I have proceeded from the premise that the coercive aspects of the *Indian Act* and government policy were a different form of legal coercion, and not simply another point along a supposed continuum of criminal law. This has led me to a critical engagement with criminalization and the exemplars offered in other social and legal historical literature, about which more will be said below.

I have drawn extensively on socio-legal, non-legal, and Aboriginal sources, as well as the nineteenth-century territorial press and Annual

Reports of the Commissioner of the North-West Mounted Police to enable me to develop a more fully social account of both the data and the dimensions of the court records.

Finally, I have made extensive use of direct quotations of the words attributed to First Nations participants in the criminal proceedings. The words they spoke were likely spoken in their own language, interpreted by a man charged with that responsibility, on occasion sworn in by the court, and then transcribed by a justice of the peace or a court clerk. Where possible, I have attempted to reproduce their words by quoting directly from their depositions, statements, and testimony in the court documents rather than summarizing or paraphrasing. I am mindful that lengthy quotations should be used sparingly, but on balance I think it is important in this writing to stay as close to their recorded words as possible (bearing in mind that the text is at least twice removed from the speaker). Although court proceedings do not give much space for the voices of the marginalized, what the marginalized have to say for themselves in these settings is worth repeating.

In identifying the themes around which the book is structured, I have departed from conventional legal methods to identify and analyze this complex relationship. Rather than take the analytic and substantive categories of criminal law as its organizing principle, forms of Aboriginal participation in the criminal law and its processes are used to organize the themes and chapters of the book. I looked beyond the dyadic relationship between the state and the accused to capture a wider spectrum of Aboriginal involvement and participation in the criminal law. This includes Aboriginal informants, complainants, interpreters, and witnesses, in addition to accused persons. In choosing this approach, a debt must be acknowledged to socio-legal historical work on law and colonialism that bears the influence of history, anthropology, legal pluralism, and international law – to scholars who have begun to re-examine the relationships between colonized and indigenous peoples and colonial law and the ways in which indigenous and other subordinated peoples actively participated as actors in colonial legal processes and in criminal justice systems.⁷⁶

In the Western Canadian context, historians R.C. Macleod and Heather Rollason argue that considerable evidence can be found that in the period 1874-85 Aboriginal people in the North-West Territories experimented, negotiated with, and used the law when it appeared to them to be useful.⁷⁷ Tina Loo also emphasizes that First Nations peoples were active agents in the development of legal institutions and processes in the Canadian West – who, as guides, trackers, constables, court interpreters, and Crown

witnesses, “brokered the extension of European state power in the form of law.”⁷⁸ Loo offers this assessment of First Nations peoples who used the law, cooperated with the police, erected gallows, worked as constables, and so on: “[T]hey helped reproduce the system that contributed so much to their domination. However, their engagement with the law and their victimization by it was more complex than simple, straightforward oppression ... [N]ative peoples’ engagement with the law speaks to and for the ambiguities and contradictions of power, complicating our understanding of agency and oppression and hegemony and resistance.”⁷⁹ In explaining the role of Aboriginal men as special constables, or that of chiefs and communities in turning over alleged murderers, she argues that they were deploying the law to serve their private interests.⁸⁰ Emphasizing the importance of Aboriginal agency, she nonetheless appears to suggest that the participation by Aboriginal people in the legal system was tantamount to collaboration with legal authority against their community.

Context is important, and the situation and experience of the Plains First Nations, signatories to Treaties 4 and 6, suggest something different from that suggested by Loo above. In the North-West Territories, many chiefs who were prosecuted or who as informants turned to law were protecting their people or pursuing their community’s interests. Cree chiefs Beardy and Lucky Man, Assiniboine chief Lean Man, and Cree-Assiniboine chief Piapot were prosecuted criminally at different times for attempting to assist or protect their people; Cree chiefs Beardy, Red Pheasant, and Strike Him on the Back (through his headman) invoked the law to seek assistance or redress for their band members; and Assiniboine chief Bear’s Head was permitted to post bail in 1884 for his fellow chief Lean Man. chief Mosquito testified as a character witness in another case, on behalf of one the members of his band charged with horse theft. Blackfoot chief Stamiscotocar (Bull Head) was thrown in police cells for refusing to hand over one of his men to the NWMP,⁸¹ and in another case he was the informant in the prosecution of an apparently private matter – that is, he accused a Métis man of stealing one of his horses.⁸²

Indigenous and colonized peoples around the world have participated within the legal systems and have used and resisted laws,⁸³ and the Plains First Nations were no exception. Although the fact of participation of colonized peoples in colonial legal processes is not unique, as others writing of other colonial contexts have shown,⁸⁴ understanding its forms and significance remains a more difficult challenge, which we take up in this book.

AND WHAT OF CRIMINALIZATION?

Criminal law is generally understood to be the perfect expression of a coercive legal form, expressing as it does the power of the state to criminalize, to enforce, to detain, and to punish. Even so, this coercive legal form is replete with contradictions. While it is undeniable that criminal law legitimates, enforces, and reinforces relationships of inequality, it also mediates these relationships.⁸⁵

A central argument of this book is that the discourse of criminalization fails to capture the complexity of the relationship between the First Nations and the criminal law, because it directs our gaze only to the criminalized and away from others. As with Peaychew, many forms of engagement with the criminal law are described in this book. I have found cases in which First Nations individuals laid Informations against white men as well as men from their own communities, alleging different types of offences, such as theft and assault;⁸⁶ cases in which Aboriginal women and girls appeared as informants and witnesses and charged white and Métis men, as well as men from their own communities, with forms of sexual interference with, or “carnal knowledge” of, them or their daughters;⁸⁷ cases in which only a handful of First Nations women and girls appeared as accused persons, charged with or implicated in the theft of small items, such as a tea kettle from an empty house,⁸⁸ a silver spoon from an empty school-house,⁸⁹ the clothes that First Nations children were wearing when they ran away from the industrial school,⁹⁰ or, in the case of Betsy Horsefall and Benjamin Gordon, in the theft of a horse that Betsy said was hers.⁹¹

Perhaps the strongest argument of this book concerns the form and content of law and reflects my long-standing commitment to the importance of attending to the specificity of different legal forms and the relationship between them.⁹² The book represents a sustained call for a more precise definition and use of the concept of criminalization, one in which distinctions between criminal law as a legal form and other forms of law are recognized, and that seeks to apprehend the contexts, circumstances, and sites in which actions and practices of Aboriginal peoples were prosecuted – as crimes or as regulatory or other statutory offences.

Some of the historical literature reveals a certain imprecision with respect to the definition and scope of criminal law. Many scholars adopt a wide approach to criminal law, in which all legal forms that have an air of compulsion, coercion, or sanction are coloured with a criminal law brush. Recent work examining the efforts of the Canadian state to restrict and

curtail traditional forms of Aboriginal expression and activity, including dances and ceremonies, hunting, and fishing, uses the language of criminalization to characterize them.⁹³ For instance, a now iconic exemplar of criminalization is said to be found in amendments to *Indian Act* in 1884 that prohibited particular kinds of dances and celebrations (such as the potlatch in British Columbia).⁹⁴ For the Plains First Nations, the most expansive and relevant *Indian Act* restrictions were introduced in an 1895 amendment to s. 114 that prohibited dances involving giveaways and wounding or mutilation.⁹⁵ Although historical evidence implicates the police as well as Indian Department officials in efforts to enforce the prohibitions and prosecute these offences, the historical evidence also indicates that these prohibitions were resented, resisted, and ignored as well as only occasionally and unevenly enforced (indeed, they were almost unenforceable) on the ground.⁹⁶ In any event, these provisions fell outside the ambit of criminal law.

Admittedly, caution is in order here. Interdisciplinary scholarship in socio-legal studies argues for a broader notion of crime – one that challenges the historical preoccupation with crimes of individual wrongdoers and the historical neglect of crimes of the powerful, including the state and corporate actors and institutions,⁹⁷ as well as the historical neglect of the experience of the environment, culture, and entire communities as victims of forms of seldom criminalized violence.⁹⁸ If one proceeds with criminal law narrowly construed (excluding some of the coercive provisions of the *Indian Act*, for instance), one may risk proceeding with too narrow an understanding of crime. The importance of critical engagement with a self-referential notion of true “criminal law” cannot be denied.⁹⁹ The content of criminal law is neither universal nor transhistorical; and, importantly, criminalization is not self-evident.

The process of criminalization occurs when people are criminally prosecuted and convicted for forms of conduct that have become defined by the state as crimes. It may encompass the extension of criminal law over formerly non-criminal behaviour, or it may involve the systemic targeting, overpolicing, and criminal prosecution of particular groups and communities for particular kinds of offences. Inevitably, it is intended to express and enforce social denunciation for socially injurious conduct. In legal scholarship, it is important to be attentive to the analytic distinction between legal and extra-legal forms of compulsion and legal coercion, between prohibition and regulation, and between committal and conviction, in order to precisely identify the nature of the law under discussion.

To insist upon specificity in the scope and definition of criminal law need not lead one to an uncritical acceptance of the legitimacy of its norms. It is important, however, to be attentive to questions of form, content, and diversity of legal instruments deployed by the state, many of which contain offences but which do not involve the denunciation and sanction normally associated with criminal law.

An important and related line of inquiry concerns the way in which legal historians have or have not addressed the specificity of the two legal regimes of the *Indian Act* and the criminal law, and the sites of intersection between the Canadian government's "Indian policy" and the criminal law component of its national policy. The Indian policy of the Canadian government intensified over the last two decades of the nineteenth century with the introduction of increasingly oppressive amendments to the *Indian Act*.¹⁰⁰

In recent work examining the efforts of the Canadian state to restrict and curtail traditional forms of Aboriginal expression and activity, the language of criminalization has been invoked.¹⁰¹ For some scholars, the prohibition of some forms of religious ceremonies and dances, together with special practices and policies, such as the pass system,¹⁰² offer evidence of the nature of the Canadian state's treatment of Aboriginal peoples.¹⁰³ For the most part, these initiatives occurred under the legislative auspices of the *Indian Act* or the administrative initiatives of the Commissioner of Indian Affairs and his Indian Agents in the field. It has become commonplace in some of the literature to refer to the criminalization of Indians and Indian religious celebrations.¹⁰⁴

There are other voices in the historical literature that offer different emphases. It is significant, in my view, that one recent study expressly devoted to law, colonialism, and First Nations addresses the struggle over the right to fish and the regulatory framework, including offences, of the *Fisheries Act*.¹⁰⁵ Nowhere in Douglas Harris's careful study of the restriction and regulation of the Aboriginal fishers of British Columbia does he characterize the process as one of criminalization. Similarly, Katherine Pettipas's equally rigorous study of the interference with and prosecution of First Nations ceremonies on the Prairies characterizes government policy as one of regulation.¹⁰⁶

We can also, however, find instances and forms of NWMP resistance to federal Indian policy. Pettipas's carefully researched study of the regulation and repression of indigenous religious ceremonies on the Prairies provides irrefutable evidence of the legalized campaign of repression of forms of religious celebrations. Nevertheless, although her work demonstrates the

lengths to which the government went to circumscribe and curtail these forms of religious expression, including the prosecution and imprisonment of a number of Aboriginal celebrants, she also notes that some members of the NWMP actually ignored orders to prevent dances and instead facilitated the events.¹⁰⁷ Both Pettipas and John Jennings cite Stipendiary Magistrate Macleod's refusal to convict Indians who had been arrested for performing a sun dance. Macleod, a former commissioner of the NWMP, is said to have delivered "a scathing rebuff" to the police who had made the arrests, likening their conduct to having made an arrest in a church.¹⁰⁸

In sum, Pettipas's study of the regulation of Plains Indian religious ceremonies evinces a nuanced analysis, showing the uneven and contradictory tensions that accompanied this damaging legislative initiative. She reminds her readers that only some forms of dances and celebrations (those involving "giveaways" and "piercings") were prohibited by the *Indian Act*; that because of its vagueness, the police often declined to enforce the infamous s. 114 of the *Indian Act*;¹⁰⁹ and that even Indian officials were of the view that a prosecution should be undertaken only as a last resort.¹¹⁰ It is also clear that some First Nations people were prepared to "test" the strength and limits of the law.

In conclusion, the "self-evidence" of criminalization is a trap for the unwary. Criminal law becomes all law; criminalization becomes an umbrella that covers all manner of legal forms (from liquor violations, to hunting and fishing offences, to the *Indian Act*, and sometimes even criminal law). In critical legal historical work on criminal law, criminal law is depicted "in one dimensional terms"¹¹¹ – criminal law "acts against" subordinate people (women, indigenous peoples, workers, and so on). This is the dominant account in the critical literature – inequalities of class, race, and gender are reinforced as the criminal law bears down on those brought before it. And yet some of the literature may also be read to offer a more relational notion of criminal law,¹¹² even in a colonial context.

This book takes a different view and makes a different argument: the offences and prosecutions under the early *Indian Acts* did not criminalize the First Nations; rather, they "Indianized" the First Nations.¹¹³ They were prosecuted as "Indians" – not as criminals – for violating the *Indian Act*, for not conforming to the behaviour required of Indians by this legislation.

The question of how to identify and interpret forms of participation and treatment of subordinated peoples, such as Aboriginal peoples of the Canadian Plains, in criminal processes is important. Against the "coercive domination" story of criminal law is set and celebrated instances and forms

of “resistance” to it. It is clear from the literature, and appears to be confirmed by the court records I have examined, that the experiences transcend one-dimensional notions of oppression coupled with victimization. Few historians today would suggest that the Aboriginal peoples were the passive victims of the new dominant order that was being established in the Territories. At the other extreme, it is also an error to regard every act of defiance or criminal activity as a form of resistance. The challenge is to identify forms and expressions of resistance while resisting an impulse to portray every act in heroic terms. In the middle is the vexing matter of participation, and here again the challenge is to avoid the worst excesses of misunderstanding.

This book reinserts criminal law into criminalization and, through the stories yielded by the court records, offers new evidence – and a new interpretation – of its role and relationship with the First Nations on the Aboriginal Plains.

© UBC Press 2012

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without prior written permission of the publisher.

Library and Archives Canada Cataloguing in Publication

Gavigan, Shelley A. M.

Hunger, horses, and government men [electronic resource] : criminal law on the aboriginal plains, 1870-1905 / Shelley A.M. Gavigan.

(Law & society, ISSN 1925-0215)

Co-published by Osgoode Society for Canadian Legal History.

Includes bibliographical references and index.

Electronic monograph in multiple formats.

Issued also in print format.

ISBN 978-0-7748-2254-1 (PDF). – ISBN 978-0-7748-2255-8 (HTML)

1. Criminal law – Saskatchewan – History. 2. Criminal courts – Saskatchewan – History. 3. Indians of North America – Criminal justice system – Saskatchewan – History. 4. Native peoples – Legal status, laws, etc. – Saskatchewan. 5. Criminal justice, Administration of – Saskatchewan – History. 6. Native peoples – Saskatchewan – Government relations. I. Osgoode Society for Canadian Legal History II. Title. III. Series: Law and society series (Vancouver, B.C. : Online)

KE7722.C75G39 2012

345.71'00897

C2012-903972-1

KF8210.C7G39 2012

Canada

UBC Press gratefully acknowledges the financial support for our publishing program of the Government of Canada (through the Canada Book Fund), the Canada Council for the Arts, and the British Columbia Arts Council.

This book has been published with the help of a grant from the Canadian Federation for the Humanities and Social Sciences, through the Awards to Scholarly Publications Program, using funds provided by the Social Sciences and Humanities Research Council of Canada.

UBC Press

The University of British Columbia

2029 West Mall

Vancouver, BC V6T 1Z2

www.ubcpress.ca