

Law Enforcement in Nineteenth-Century British Columbia: A Brief and Comparative Overview

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Almost the first point to which your attention will be directed will be the establishment of a Court or Courts of Justice, with the necessary machinery for the maintenance of law and order.

— Sir Edward Bulwer Lytton to James Douglas,
Governor of Vancouver Island, 2 September 1858

The conservatism of the colonial officials of pre-Confederation Canada has been described as “an inchoate desire to build, in these cold and forbidding regions, a society with a greater sense of order and restraint than freedom-loving republicanism would allow . . . [A] kind of suspicion that we in Canada could be less lawless and have a greater sense of propriety than the United States.”¹ That this is a comparatively stodgy creed for nation-building cannot be denied: the peace, order and good government that are the stated goals of most of our early constitutional legislation hardly conjure up the stirring images of their American counterparts. Yet this desire to provide a superior alternative to Jacksonian democracy has been a recurring theme in Canadian history and in Canadian law. Its strongly reactionary flavour did not escape criticism, but this criticism did not prevail; both east and west of the Rockies, those charged with the responsibilities of government, and in particular with the administration of justice, continued to view the American experiment with a sceptical eye.² Of course, not all men of influence were anti-

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¹ George Grant, *Lament for a Nation: The Defeat of Canadian Nationalism* (Toronto, 1965), 70.

² This was especially so in colonial British Columbia, where elements of the press were severely critical of Governor Douglas. Many journalists in the United States also took this view of British North American institutions: see James G. Snell,

American, and Confederation in British Columbia, for example, was not a foregone conclusion. In most respects it flew in the face of geographic and economic reality.³ Yet Confederation did occur, and it is not unreasonable to suggest that one of the factors that may have contributed to this result was a "deep conviction of the superiority of British constitutional practices to the republican institutions" across the border.⁴ For legal historians, especially those writing in a period in which many thoughtful Canadians no longer feel a meaningful attachment to this tradition, its strength and its effect upon law enforcement in the nineteenth century are questions worthy of investigation.

British Columbia's early historians rarely failed to stress "the striking contrast they saw between peaceful and law abiding British Columbia and the settlements to be found on the American frontier."⁵ No doubt there is a large element of myth in these accounts, but that does not diminish their importance. For better or worse, what people believe to be the case can influence their behaviour as much as what is in fact the case, and, even if the lawlessness and vigilantism of the United States were exaggerated by the authorities in British Columbia, the picture they saw nonetheless shaped the actions they took.⁶ Moreover, it is difficult to dispute the proposition that the opening of the West was generally a much more peaceful process in Canada than it was in the United States. In the Canadian West the law arrived before "the rush of settlement"

"The Frontier Sweeps Northwest: American Perceptions of the British American Prairie West at the Point of Canadian Expansion (circa 1870)," XI *Western Historical Quarterly* (1980), 381-400 at 390.

- ³ Walter N. Sage, "The Annexationist Movement in British Columbia," in *Proceedings and Transactions of the Royal Society of Canada* (1927), ser. 3, Vol. 21, sec. II at 97-110. See also Willard E. Ireland, "The Annexation Petition of 1869," IV *British Columbia Historical Quarterly* (1940), 267-87 and "A Further Note on the Annexation Petition of 1869," V *British Columbia Historical Quarterly* (1941), 67-72.
- ⁴ Paul F. Sharp, "Three Frontiers: Some Comparative Studies of Canadian, American and Australian Settlement," XXIV *Pacific Historical Review* (1955), 369-77 at 376.
- ⁵ Allan Smith, "The Writing of British Columbia History," in W. Peter Ward and Robert A. J. McDonald, eds., *British Columbia: Historical Readings* (Vancouver, 1981), 7. See also J. Friesen's introduction to J. Friesen and H. K. Ralston, *Historical Essays on British Columbia* (Toronto, 1980), xviii.
- ⁶ See Robin W. Winks, *The Myth of the American Frontier: Its Relevance to America, Canada and Australia* (Sir George Watson Lectures, 1971), 7 and Richard Maxwell Brown, "The American Vigilante Tradition," in Hugh David Graham and Ted Robert Gurr, eds., *The History of Violence in America* (New York, 1969), 225 and "Legal and Behavioural Perspectives on American Vigilantism," in Donald Fleming and Bernard Bailyn, eds., *Law in American History* (Boston, 1971), 95-144.

and the prospects for orderly development were correspondingly enhanced.⁷ To speak of the Canadian or British Columbian frontier may therefore be somewhat misleading: when the first settlers arrived in the West they found that governmental authority, i.e., the Hudson's Bay Company, had preceded them. Indeed, the existence of the Canadian Shield and the Rocky Mountains meant that Canada, like Australia, never really had "a steadily or progressively expanding frontier in the American sense."⁸ In the United States greater population meant greater security against the Indian, but in Canada the reverse may have been true: the disastrous Indian wars waged south of the border did not occur, and the emigration of settlers from America was often seen as decreasing security because "the Indian posed no threat while the potentially subversive American did."⁹

In the early nineteenth century, British Columbia, like the rest of the Canadian West, was the preserve of the Hudson's Bay Company, and the culture of the Indians who hunted fur-bearing animals was essential to the success of that trade.¹⁰ The Company therefore adapted to that culture instead of destroying it and had no interest in promoting white settlement. Many of its officers and employees, in particular James Douglas, later Governor of both Vancouver Island and British Columbia, not only adopted this attitude toward the Indian but also became opposed to American expansion. Douglas was the "man on the spot" during the mid-century gold rushes which could have led so easily to the annexation of the entire Pacific slope by the United States virtually by default. He realized that, in the struggle to keep British Columbia British, a breakdown of law and order would be as potent an argument for American annexation as the lack of British settlement had been years earlier in the Columbia.¹¹ In this period, therefore, legal history and general history

⁷ Sharp, above note 4 at 373.

⁸ The reference is, of course, to the "frontier thesis" of Frederick Jackson Turner, first proposed in 1893 in "The Significance of the Frontier in American History," and excerpted in Michael S. Cross, ed., *The Frontier Thesis and the Canadas: The Debate on the Impact of the Canadian Environment* (Toronto, 1970), 12-22. The quoted words are from Sharp, above note 4 at 371.

⁹ Winks, above note 6 at 22. There were, of course, the Riel "Rebellions" of 1869-70 and 1885.

¹⁰ This idea, first put forward by Harold Innis in *The Fur Trade in Canada: An Introduction to Canadian Economic History* (Toronto, 1956), is the basis of an excellent recent book: Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890* (Vancouver, 1977), xi.

¹¹ The phrase "man on the spot" is used in the despatches between Douglas and the imperial authorities. For this theme generally see Walter N. Sage, *Sir James Douglas and British Columbia* (Toronto, 1930), and Barry M. Gough "Keeping British

are difficult to distinguish: law and order become a central theme of both.

The history of law enforcement in nineteenth-century British Columbia may be conveniently separated into three distinct periods. In the first, which runs from the early 1800s to 1849, most of what is now British Columbia was a vast fur-trading domain called "New Caledonia" north of about 51 degrees of latitude and "Columbia" south of it. This area was bounded by the Rocky Mountains in the east, Russian Alaska in the north, and Mexico — which included California at that time — in the south. The lower Columbia, that is, all the land south of 49 degrees latitude, was ceded to the United States by the Oregon Treaty in 1846. The only inhabitants of this remote territory were Indians and fur traders, and to speak of "law enforcement" during this period is to stretch the meaning of words.¹²

The second period, which begins with the founding of the colony of Vancouver Island in 1849, ends with the entry of the united colony of British Columbia into Confederation with Canada in 1871. These were years of gold rushes, settlement, and then economic decline, and they have received the lion's share of scholarly attention. Many of the conclusions reached by historians concerning this period, however, have yet to be examined in light of the surviving legal records; to date historical investigation has largely ignored administrative evidence, coroners' inquests, court records and police books in favour of newspapers and diaries. We have only the stories, but not the structures, of the past.

The third period covers British Columbia's first thirty years as a Canadian province. Here the emphasis may shift somewhat from law enforcement *per se* to the working out of the precise relationship between provincial and federal authority in this field, a task that is not finished today.¹³ The statutes for these years are, of course, more accessible than the colonial ones, and printed law reports supplement surviving court

Columbia British: The Law-and-Order Question on a Gold Mining Frontier," XXXVIII *Huntingdon Library Quarterly*, 269-80.

¹² The Indian population of what is now British Columbia has been estimated as approximately 70,000 in 1835, but by then they had been exposed to European diseases, firearms, and alcohol for sixty years: see Wilson Duff, *The Indian History of British Columbia. Vol. I: The Impact of the White Man* (B.C. Provincial Museum, 1980), 38-39.

¹³ See *Regina v. Wetmore and Attorney General of Ontario et al.* (1983) 7 C.C.C. (3d) 507 (Supreme Court of Canada), in particular the dissenting judgment of Dickson, J. (as he then was).

records. In this period much remains to be done by legal historian and general historian alike.

Here Before Christ: The HBC

We have seen the forms of justice, or rather justice without form, as administered by the factors and traders of the fur company... And we must confess it, that although far-reaching and strong enough, justice hitherto has been barely respectable, appearing oftener in elk-skin than in ermine, and quite frequently with gaunt belly and tattered habiliments.

— *The Works of Hubert Howe Bancroft, Vol. XXXII: History of British Columbia 1792-1887* (San Francisco, 1887), p. 419

At a minimum, “law enforcement” should mean the maintenance of order through the arrest, trial and punishment of those who transgress against specific legal standards of conduct. On a fur-trading frontier such as New Caledonia and the Columbia, long under joint British and American occupation, law enforcement in this sense was confined to dealing with those who committed offences against persons and property or who violated trade regulations. But if the area’s small and widely scattered population presented few problems of this sort, its extreme isolation was equally certain to complicate matters when serious incidents did occur. Presumably the choice, if not the solution, was simple: justice could be administered locally, by Bancroft’s gaunt and elk-skinned traders or, from a distance, by the ermined judges of the courts of Upper and Lower Canada. In theory and on paper, Parliament reached a compromise with the enactment of two statutes, the Canada Jurisdiction Act of 1803 and the more extensive Criminal and Civil Jurisdiction Act of 1821. In practice, the situation was somewhat different.

A “period of violence” in the fur trade in the years 1800-1821 and a state of confusion in the law, both during and after this period, led to the enactment of these two statutes, which governed law enforcement in the so-called Indian Territories until the mid-nineteenth century.¹⁴ Their impact on the development of legal institutions is therefore an important topic for the legal historian, but their details are beyond the scope of this paper. It suffices to say that they authorized the appointment of local justices of the peace but required capital cases to be tried in Upper Canada.¹⁵ Although they clearly had some practical effect upon the administration of justice east of the Rockies, it has been assumed that

¹⁴ This phrase is from the title of chapter VII of Arthur S. Morton’s *A History of the Canadian West* (Toronto, 1973, 2nd ed.).

¹⁵ 43 Geo. III (1803), c. 138 (U.K.); 1 Geo. IV (1821), c. 66 (U.K.). The preamble to the latter cites both the violence of the competition between the

in New Caledonia and the Columbia they were a "dead letter."¹⁶ No justices were ever appointed, and at least one historian has concluded that the provision for sending serious offenders to Upper Canada meant they "would not, and could not, be tried at all."¹⁷ Yet it appears that persons may have been sent east for trial under both statutes, and the confusion surrounding the outcome of the most well-known incident, the murder of Chief Factor McLaughlin's son at Fort Stikine in 1842, suggests that the Hudson's Bay Company did not ignore them entirely.¹⁸ In any event, no account of law enforcement in what is now British Columbia before the colonial period would be complete without a detailed analysis of both enactments and a thorough investigation of any examples of their application.

If the role of legislation in New Caledonia seems somewhat theoretical, that of the Hudson's Bay Company, the only authority in the area, is not. Indeed, it was so successful both in the fur trade and in its relations with the Indians that, understandably, it provoked a great deal of hostility from would-be competitors. The Hudson's Bay Company stood for "almost everything that Americans had been taught to dislike." It was British, monopolistic, undemocratic, authoritarian and owned by absentees.¹⁹ By the 1860s even the British had lost whatever fondness they once may have felt for it. An anachronism by contemporary philosophical and economical standards, the Company had not really en-

HBC and the North West Company and the doubts as to whether the 1803 statute applied to the chartered HBC lands as the reasons for the law. For a recent discussion see Desmond H. Brown, "Unpredictable and Uncertain: Criminal Law in the Canadian North West before 1886," 17 *Alberta Law Review* (1979), 497-512 at 500-04.

- ¹⁶ The phrase is R. G. Herbert's in "A Brief History of the Introduction of English Law into British Columbia," 2 *U.B.C. Legal Notes* (1954), 93-94. This topic is dealt with incidentally by Morton, above, note 14 and E. E. Rich, *The History of the Hudson's Bay Company 1670-1870, Vol. II 1763-1870* (London, 1959). For a discussion of how justice was administered in the chartered lands, see Kathryn M. Bindon, "Hudson's Bay Company Law: Adam Thom and the Institution of Order in Rupert's Land 1839-54," in David H. Flaherty, ed., *Essays in the History of Canadian Law Vol. I* (Toronto, 1981), 43-87.
- ¹⁷ F. W. Howay, ed., *The Early History of the Fraser River Mines* (Archives of British Columbia Memoir No. 6, 1926), viii. That no justices were appointed is confirmed by the preamble to 22 & 23 Vict. (1859), c. 26 (U.K.), "further" providing for the administration of justice in the North West.
- ¹⁸ In 1817 a man accused of murder and cannibalism was sent to Canada for trial and acquitted: G. P. V. Akrigg and Helen B. Akrigg, *British Columbia Chronicle 1778-1846* (Victoria, 1975), 166-67. There is an account of the McLaughlin affair at 343-48 and in Rich, above note 16 at 713-16.
- ¹⁹ F. W. Howay, W. N. Sage and H. F. Angus, *British Columbia and the United States: The North Pacific Slope from Fur Trade to Aviation* (Toronto, 1942), 89.

couraged the settlement of Vancouver Island in the 1850s and was out of place in the new world of settlers and democrats. For example, the despatches of Sir Edward Bulwer Lytton, Secretary of State for the Colonies, betray a suspicion that Douglas could not be trusted to introduce representative government to British Columbia as quickly as Lytton would have liked; and the tone of his instructions requiring Douglas to sever all connection with the Company before becoming Governor suggests that the obvious prudence of this move was not untainted with antipathy. To those in the amorous grip of Manchester economics, the fur traders of the North West Coast were antediluvian, autocratic and indispensable.²⁰ The part played by the Hudson's Bay Company in training men who would later enjoy positions of authority in the colonial governments is therefore a second important question for the legal historian of the period.

A third question is the extent to which the Company's good relations with the Indians facilitated the maintenance of law and order once the mid-century gold rushes began. The American press may have vilified the Company as the most "arbitrary, oppressive and tyrannical government in any part of the civilized world," but its policies and methods towards the Indian must have been a factor in the pacification of the West.²¹ Indeed, in the days of the fur trade, Indian-European relations were much more important to the maintenance of law and order than anything else. Although the conduct of the Indians in this period was treated as a matter of diplomacy rather than law enforcement, the lessons learned by such men as Douglas appear to have proved valuable to them subsequently, and the ease with which the Indian of British Columbia was transformed from a potential and formidable enemy to a familiar statistic on the police blotter is disheartening evidence of this success.

The Colonies and the Gold Rushes

[I]t appeared that there was on all sides a submission to authority, a recognition of the right, which, looking to the mixed nature of the population, and the very large predominance of the Californian element, I confess I had not expected to meet.

— Judge Matthew Baillie Begbie, reporting to Douglas on his first visit to the Fraser River gold fields, 25 April 1859

²⁰ Lytton held this office in 1858-59. The relevant despatches are in *British Parliamentary Papers* Vol. 22 (1859). See also the item on Douglas in the *Dictionary of Canadian Biography* Vol. X (Toronto, 1942), 238, particularly at 244.

²¹ The San Francisco *Daily Alta California*, 3 March 1868, quoted in Snell, above note 2 at 387.

The Colonial period of 1849-71 is a microcosm of the process of nation-building for general and legal historian alike. In the space of twenty-two years, a fur-trading preserve became a Canadian province, and in the process two separate legal systems were constructed and then merged. Two figures stand out.

James Douglas and Matthew Baillie Begbie, the first Governor and the first Judge of British Columbia respectively, personified the conservative determination to establish British constitutional practices which was so important a factor in this evolution to nationhood. They are the stuff of which legends are made. Their statues grace the entrance to the legislative buildings in Victoria, and they take pride of place in scholarly as well as popular accounts of their times. One early historian has described Douglas as "the most significant figure in the history of the mining advance" on both sides of the border; another calls Judge Begbie "the incarnation of justice."²² Scholars of a later generation are perhaps not so florid, but the central importance of these men is undeniable. That they were two very different men is clear: Douglas had spent his adult life as a fur trader in one of the remotest corners of the empire, Begbie was a Chancery barrister and Cambridge graduate. But they shared an authoritarian cast of mind and were both dedicated to the task of keeping British Columbia British through law and order. This singleness of purpose, coupled with a number of other factors of equal interest to the historian and of equal importance to the result, contrasts sharply with the record of the California gold rush. The contrast has even led one student of the mining industry to conclude, not without reluctance, that "the democratic Americans of the nineteenth century still had much to learn about frontier government from the empire that once had ruled their country."²³

However, even if one were to accept such a conclusion, many questions remain regarding the efficacy and the integrity of law enforcement during the gold rush period and the years immediately preceding it. In 1849, when the colony of Vancouver Island had been founded, the imperial authorities lacked the stimulation of 25,000 foreign miners and adventurers flooding into the country within a space of a few months, and left the new Colony much to its own devices. There is reason to

²² William J. Trimble, *The Mining Advance Into the Inland Empire* (Madison, 1914), 323; Hubert Howe Bancroft, *History of British Columbia 1792-1887* (San Francisco, 1887), 423 (The Works of Hubert Howe Bancroft, Vol. XXXII).

²³ Rodman W. Paul, "'Old Californians' in British Gold Fields," XVII, *Huntingdon Library Quarterly* (1954), 161 at 172.

suppose that, at least at first, the administration of justice there drew as much blame as praise. When Lytton insisted in 1858 that all legal authorities for the new mainland colony be sent from England to avoid every suspicion "of local partialities, prejudices and interests," he was no doubt reacting in part to difficulties on the Island, where Douglas' appointment of his brother-in-law as Chief Justice was only one of a number of sore points.²⁴ But Lytton was also anticipating the temptations that could face law enforcement officials in an environment in which lesser men could make fortunes in a few weeks. By early 1859, no less than three of Douglas' revenue officers and justices of the peace on the Fraser had to be dismissed for incompetence.²⁵

Not only is it helpful to compare law enforcement on the mainland to that on the Island prior to 1858, but the whole experience must be examined in the context of the earlier Australian and Californian gold rushes.²⁶ British Columbia likely benefited from being the last in the series, and Lytton, in his despatches, displayed a keen awareness of the difficulties encountered on other gold mining frontiers and of the need to avoid them on the Fraser. It is arguable that this awareness prompted a middle course between the authoritarianism which led to the Eureka Stockade episode in Victoria (Australia) in 1854 and the abdication of governmental authority which characterized the California gold rush. By ensuring that the miners' boards set up by the Californians when they arrived were subject to official control, Douglas devised a workable compromise that permitted a degree of autonomy to the miners but did not

²⁴ Lytton to Douglas, 14 August 1858 (*British Parliamentary Papers* Vol. 22 at 65). Douglas also set up a Supreme Court in 1853 without lawful authority, and when the imperial authorities disallowed the enacting legislation they urged him to cease legislating and restrict himself to exercising his "general powers of preserving the peace." See James E. Hendrickson, "The Constitutional Development of Colonial Vancouver Island and British Columbia," in Ward and McDonald, above note 5 at 250. On the role of the navy in 1858-59, see Barry M. Gough, "Turbulent Frontiers' and British Expansion: Governor James Douglas, the Royal Navy, and the British Columbia Gold Rushes," *XLI Pacific Historical Review* (1972), 15-32.

²⁵ Yet in October Douglas had expressed his great satisfaction with the way these men had been carrying out their duties: Douglas to Lytton, 26 October 1858 (*British Parliamentary Papers* Vol. 22 at 284). Some of the correspondence relating to these dismissals is collected in Howay, above note 17.

²⁶ On Vancouver Island the authorities were concerned primarily with civil justice prior to 1858. David Cameron, the Chief Justice, was given no criminal jurisdiction because Douglas had advised London that he had not "felt any difficulty as yet on this score." Despatch quoted in Farr, below note 34 at 7. Begbie's court, however, was given jurisdiction "in all cases, civil as well as criminal" (Proclamation No. 28, 8 June 1859) — a fact which later caused much confusion in a trial that took place in 1880 (see Foster, below note 33).

threaten British sovereignty. Perhaps most important of all, he insisted that the enforcement of the criminal law was exclusively a matter for government, and miners' codes that provided for the election of judges and constables and left the penalties for most serious crimes up to miners' juries did not appear (or at least survive) in British Columbia.²⁷ Nor were there any lynchings that can be verified, although an illegal execution just inside the Washington Territory in 1867 was initially reported by the *Cariboo Sentinel* as a lynching at Kootenay.²⁸ In short, many of the miners, and at least some of the government officials, had first- and second-hand knowledge of what had happened in Australia and California, and this may well have been a significant factor in the maintenance of law and order. All this suggests that, given a choice, most people preferred legal courts to vigilance committees.

The role and abilities of the rank and file of the law enforcement system are, therefore, a primary question for legal historians of the period. Certainly Douglas' and Begbie's task would have been much more difficult if incompetence and corruption had been the rule rather than the exception among officials, but a clear picture has yet to emerge. One pioneer who struck it rich in the Cariboo gold rush recorded his opinion of Begbie as "the judge all we old-timers considered as the best of the old-time judges." However, his reviews of a number of magistrates and gold commissioners ranged from "excellent" to "poor." The activities of the courts of these magistrates and gold commissioners must be scrutinized before it will be possible to assess their contribution and the opinions of their critics. In the United States, this work has already begun.²⁹

²⁷ An example of such a Code is the one devised for the Gold Hill District in Nevada, reproduced in Jim Dan Hill, "The Early Mining Camp in American Life," I *Pacific Historical Review* (1932), 295-311 at 297-98. The author states (at 310) that "... all the American traditions for ignoring the law, their own, as well as the Statutes of the United States, were ably upheld in the mining camp." Yet this should not be over-emphasized: if government is ineffective, it is not surprising that the vacuum thus created will be filled.

²⁸ *Cariboo Sentinel*, 8 July 1867; report corrected 25 July 1867. Some Americans did lynch an Indian in B.C. in 1884, but they were never caught. This was, of course, well after the colonial period was over: see David R. Williams, "... *The Man for a New Country*" (Sidney, 1977), 89.

²⁹ From "A Pioneer of '59" (the reminiscences of Robert Stevenson), in W. Wymond Walkem, *Stories of Early British Columbia* (Vancouver, 1914), 243-87 at 275-76. The most relevant American study is John R. Wunder, *Inferior Courts, Superior Justice: A History of the Justices of the Peace on the Northwest Frontier, 1853-1889* (Westport, 1979). However, see also Kermit L. Hall, "Hacks and Derelicts Revisited: American Territorial Judiciary, 1789-1959," XII *Western Historical Quarterly* (1981), 273-89 and Clark C. Spence, "The Territorial Officers of Montana, 1864-1889," XXX *Pacific Historical Review* (1961), 123-36.

Related to the character and competence of the judges are the prior questions of the structure of the law enforcement system itself and the demographics of its personnel. Both on Vancouver Island and on the mainland a judicial system had to be erected that both complied with the fundamentals of English constitutional practice yet was reflective of local conditions. On the Island a wholly amateur system was put in place before the Fraser gold rush, primarily because, with the sole exception of the first Governor, Richard Blanshard, no one had legal training. Blanshard resigned soon after his arrival in the new colony in 1850 when he realized that without colonists, lawyers, judges or legislators, he had little hope of opposing Douglas who, as Chief Factor of the HBC, was the real authority on the Island. The following excerpt from testimony given by Blanshard to an inquiry into the Company's management of the colony is instructive:

Q. How was justice administered; was there a recorder or anybody to administer justice?

A. I did it all myself; I had no means of paying a recorder a salary; there were no colonial funds — I had been called to the bar.

Q. And in that capacity you administered justice there?

A. Yes.

Q. So that you were governor and justice. Had you any constables?

A. Yes, when I wanted a constable I swore one in.³⁰

On the mainland, however, both the Colonial Office in London and Governor Douglas saw the importance of establishing an effective structure before problems developed, rather than afterwards. Whereas Blanshard had no salary, Douglas bargained for a good one; and the main architects of the mainland system were experienced, salaried professionals sent from England. Even before the proclamation of the colony on 19 November 1858, Douglas had taken steps to ensure social order which were of dubious legality. Some of these were countermanded by Lytton. But on the whole, his actions were approved and, drawing lessons from the Australian and Californian gold rushes, both Lytton and Douglas laboured to ensure that a workable court system was set up and that the rights of the miners were "established and defined . . . by law, instead of

³⁰ Minutes of evidence taken before the select committee on the Hudson's Bay Company, 15 June 1857. Quoted in Alfred Watts, Q.C., *History of the Law Society of British Columbia, 1869-1973* (Vancouver, 1973). The reference to the recorder indicates the difference between Vancouver Island in this period and Rupert's Land. See Bindon, above note 16.

being left to grow up by mere custom or accident."³¹ Some early proposals had to be modified because of the lack of funds,³² others were disallowed by the imperial authorities because they departed too far from English custom and practice.³³ Generally, however, London could not criticize the system too harshly since it was clearly working better than most had expected.³⁴

In addition to the personnel and the structure of the law enforcement system, the nature of the mining population itself ranks high on the list of factors that contributed to the relative peace of the British Columbia gold fields. If it is true that the authorities wanted to build a society "with a greater sense of order and restraint" than the Americans', it seems equally true that the miners themselves saw this to be to their advantage, at least insofar as law enforcement was concerned. Douglas' early fears that, unless he took firm measures, the country would soon be "filled with lawless crowds, the public lands unlawfully occupied by squatters of every description, and the authority of the Government . . . ultimately set at naught," were soon followed by reports that all was quiet and that "notwithstanding the weakness of the Colonial Executive, [the new-comers had been] submissive to the laws of the country."³⁵ No doubt the single-mindedness of the local government had much to do

³¹ Lytton to Douglas, 2 September 1858 (*British Parliamentary Papers* Vol. 22 at 80).

³² In October of 1858, Douglas sent Lytton a proposal for a Fraser River judiciary drawn up by George Pearkes, the newly appointed Crown Solicitor for Vancouver Island. Lytton praised the plan as "simple and practical" but warned Douglas that he should not expect too much financial assistance from England: see despatch cited in Note 25 above and Lytton to Douglas, 30 December 1858 (*British Parliamentary Papers* Vol. 22 at 350). Pearkes closed his proposal with a plea for "proper legal books and statutes." "It matters not," he said, "however brilliant a presiding judge may be, he will find a constant recurrence to legal books and the statutes absolutely necessary to the just administration of law." This was a common theme at the time, and it is notable that the Yale Supreme Court Book for 1861-63 begins with a detailed list of books purchased for the use of the court. See Provincial Archives of British Columbia (hereafter PABC) GR 714.

³³ For example, Begbie's Gaol Delivery Act, 1860, which was disallowed on this ground, much to his distress: see Hamar Foster, "The Kamloops Outlaws and Commissions of Assize in Nineteenth Century British Columbia," in David H. Flaherty, ed., *Essays in the History of Canadian Law Vol. II* (Toronto, 1983), 308-64 at 318-19.

³⁴ The only study of the colonial judicial system that has been done to date is David M. L. Farr, *The Organization of the Judicial System of the Colonies of Vancouver Island and British Columbia 1849-1871* (BA thesis, 1944). A shorter and more accessible version of this essay may be found in 3 *University of British Columbia Law Review* (1967), 1-35.

³⁵ Douglas to Lord Stanley, 10 June 1858; 26 July 1858; 1 July 1858 (*British Parliamentary Papers* Vol. 22 at 32, 41 and 37).

with averting the anticipated disorder, but the degree of the success suggests other causes.

First, it seems likely that most of the "bad actors" probably left British Columbia soon after they arrived: the life was hard, the climate harder, and the gold exaggerated. Throughout the summer of 1858 the Fraser was too high to work the bars, and most of those who left in disgust did not return, leaving the real miners to harvest the river. Secondly, those who remained probably welcomed a regime which promised the rule of law rather than that of force, and found in British Columbia what they would have been quick to support had it existed in California. One of the paradoxes of the era is that the "old Californians" who dominated the gold fields both technologically and economically nonetheless submitted legally and politically, which is strong evidence that British law and order had its attractions.³⁶ Indeed, when a group of miners unsuccessfully attempted to help one of their number resist arrest in December of 1858, Douglas described this as the first and only example of open resistance to the law that had come to his attention.³⁷ Yet this was months after most of the miners had arrived in the colony and, with the exception of "Ned McGowan's War" in 1859, the "Rock Creek War" a year later, and the "Grouse Creek War" in 1867, none of which involved loss of life, it did not happen again. All this stands in marked contrast to the gold rushes south of the 49th parallel, where the weakness of the authorities repeatedly led to a vigilantism that even many judges and lawyers felt obliged to support.³⁸

The structure and personnel of the law enforcement system, the nature of the mining population, comparisons with other gold rushes and the contrast between Vancouver Island and the mainland are not the only important themes for the study of the colonial period. A number of others deserve mention. The treatment of the native Indians, the role of minorities such as the Chinese, and the policing of British Columbia, for ex-

³⁶ See Gough, above note 11 at 269; Howay, Sage and Angus, above note 19 at 174-76; and Paul, above note 23 at 170-71. Howay, Sage and Angus also suggest that *autres temps autres moeurs* might account for the co-operation of even the notorious Californians, e.g., Ned McGowan of "Ned McGowan's War" fame at Hill's Bar in 1859.

³⁷ Douglas to Lytton, 24 December 1858 (*British Parliamentary Papers* Vol. 22 at 322).

³⁸ See authorities cited in note 6 above and W. Eugene Hollon, *Frontier Violence: Another Look* (New York, 1974). The willingness of Douglas, Begbie and others to confront angry crowds with firm assurances of justice according to law is striking when compared to some well-known incidents in the U.S. See, for example, Trimble, above note 22 at 222-23.

ample, are equally important, and not just for the years 1849-71. A few remarks about them are therefore appropriate.

It seems reasonable to suppose that the relative lack of Indian warfare in the colonial period made law enforcement easier than it would have been otherwise. By way of contrast, in the United States the government by the 1870s was spending the equivalent of Canada's annual budget on fighting the Indians, and during the Fraser River gold rush reports of massacres and pitched battles provoked by grievances in the Washington Territory were not uncommon.³⁹ London's policy, however, was that the law protected the rights of the Indian "no less than those of the white man," and both Douglas and Begbie shared this concern for the "children of the forest," as Douglas called them.⁴⁰ Douglas appointed Indian magistrates and made several journeys to the interior to reassure the native inhabitants that they would not suffer the same treatment as their counterparts south of the border. The result, from the immediate political standpoint, was a good one. Relations between the Indians and the British that had been characteristic of the fur-trading era seem to have lasted, and the authorities could therefore perform their law enforcement functions against a backdrop of order rather than bloody conflict. Unfortunately, however, a new problem had already emerged: the plight of the Indian as a primary victim of the justice system. This is as apparent in the jail books of the gold rush as it is in the prison rosters of the 1980s. Of approximately 125 charges recorded at Fort Hope in 1861, for example, half were against Indians.⁴¹ A familiar and distressing pattern had begun.

³⁹ R. C. McLeod, *The NWMP and Law Enforcement 1873-1905* (Toronto, 1976), 3. The author concludes that because of Ottawa's limited finances it is "not an exaggeration to say that the only possible Canadian West was a peaceful one."

⁴⁰ Douglas to Lytton, 15 June 1858 (*British Parliamentary Papers* Vol. 22 at 34-35). See also Fisher, above note 10 at 61-62 and "Indian Warfare and Two Frontiers: A Comparison of British Columbia and Washington Territory during the early years of Settlement," *L Pacific Historical Review* (1981), 31. For Begbie's attitude see Williams, above note 28, chap. VII. Lytton repeatedly urged Douglas to deal humanely with the Indians, emphasizing that "the feelings of this country would be strongly opposed to the adoption of any arbitrary or oppressive measures towards them." He also sent him a copy of a long letter from the Secretary of the Aborigines Protection Society condemning the "reckless inhumanity" of the gold diggers in California and quoting a *New York Times* story that contained a harrowing description of the cruelty the Fraser River Indians could expect at the hands of such men: Lytton to Douglas, 31 July 1858 and 2 September 1858 (*British Parliamentary Papers* Vol. 22 at 63-64 and 76-78).

⁴¹ Jail Book, Fort Hope, 25 December 1860-14 December 1861, PABC, GR 574 at 24-31. This does not seem to be the case, however, at Barkerville. Police Court records there (see following note) disclose far fewer Indian accused. The significance of this, of course, depends largely upon the relative populations.

The part played by other racial groups in the law enforcement system is another topic concerning which much is surmised but little is known.⁴² The Chinese, for example, appear to have been initially accepted in both British Columbia and the United States. Although prejudice existed, relations between Europeans and Chinese during the Fraser and Cariboo gold rushes were not unfriendly.⁴³ In a colony enjoying a boom in which all could hope to share, the industrious "Celestials" promised to be an asset; but when the gold began to run out and the economy declined, this same industry was viewed rather differently, as a threat, perhaps, or at least as an affront. Moreover, it seems that even those sympathetic to oriental immigration in the early years saw it as a temporary phenomenon only. Douglas, for example, thought the Chinese useful in the short term both as workers and consumers but added that they were "certainly not a desirable class of people, as a permanent population."⁴⁴ Nonetheless, they were often praised as "well behaved and easily governed," a common description that, likely as not, meant willing to take abuse with a smile, and do not seem to have posed a particular problem for the law enforcement system.⁴⁵ As time went by and the centre of the

⁴² Space does not permit a discussion of the small Negro population, most of whom were seeking a better home than they could find even in the free states south of the border. Few seem to have become miners, although a man named Dixon appears to have been the immediate cause of "Ned McGowan's War" in 1859 and probably is the same Dixon who figures prominently in the Police Court Casebook for Richfield/Barkerville (1862-74): PABC, GR 598, Vol. I. An account of the original immigrants may be found in F. W. Howay, "The Negro Immigration into Vancouver Island in 1858," III *British Columbia Historical Quarterly* (1939), 113. For the situation in Australia see E. Daniel Potts and Annette Potts, "The Negro and the Australian Gold Rushes, 1852-57," XXXVII *Pacific Historical Review* 381.

⁴³ Harry Con et al., *From China to Canada: A History of the Chinese Community in Canada* (Toronto, 1982), 42.

⁴⁴ Douglas to Newcastle, 23 April 1860 (*British Parliamentary Papers* Vol. 24) at 147. Approximately 2,000 Chinese entered the Fraser district between January and April of 1860, and by July there were about 4,000 in the Colony as a whole (*ibid.*, 6 July 1860). For Begbie's rather sympathetic views, see Williams, above note 28, chap. VIII. Contrast those of Gray, J., writing to the Minister of Justice on 12 July 1877, and describing the females of the mining districts as "principally Chinese and Indians of the vilest description." PABC, Add MSS 54, Vol. 12, Folder 66 at 8444.

⁴⁵ The quoted words are from the address of the grand jury at Cayoosh in October of 1860 to Douglas and Begbie. This address contains pleas for tolerance and protection for the Indians and the Chinese; it is interesting as well that at this same assize one Indian was acquitted and another convicted only of manslaughter for killing two Chinese miners who appear to have provoked the attack by indecently assaulting the wife of one of the Indians. Douglas to Newcastle, 9 October 1860 (*British Parliamentary Papers* Vol. 24 at 169). In the Fort Hope Jail Book (1861) referred to at note 41 above, only eight of the charges are against Chinese.

mining activity moved northwards, a pattern began to emerge that would be repeated later in the Cariboo. The white miners would move on in search of better diggings, leaving the worked-over ground to the Indians and Chinese. By October of 1860, for example, the mining bars at Lytton were either deserted or occupied by native and Chinese miners, and a quarter of a century later the assize book for the once bustling towns of Richfield and Barkerville may tell a similar story. Between 1881 and 1888 ten men were tried at the Richfield assizes: one white, one Indian, and eight Chinese. It seems unlikely that this represented a sudden explosion of oriental criminality. A simpler explanation is that the Chinese remained once the gold played out, and the others left.⁴⁶ Whether or not they received the same justice in the courts as their white neighbours is clearly a subject for further research.⁴⁷

The policing of British Columbia in the nineteenth century is another important topic for the legal historian. In the colonial period constables were appointed locally until 1858, when London sent Chartres Brew, an experienced member of the Royal Irish Constabulary, to British Columbia to organize a regular force. Lytton emphasized to Douglas that the Royal Engineers, who had been sent earlier, should be displayed as little as possible in the interim because their presence might anger rather than reassure the mixed population of the gold fields. "Nothing," he warned, "can be more likely to sap the manhood and virtue of any young community than the error of confounding the duties of soldiers with the ordinary functions of a police."⁴⁸ Although it was difficult to find good men to serve for the available pay, and although there was much colonial correspondence regarding the size and financing of the contingent of policemen to be sent out from England, the record overall was successful. During the Fraser River rush seven justices of the peace and fifteen constables maintained law and order in the gold fields. Later, in the Cariboo, the experience was similar.⁴⁹ And when the Northwest Mounted

⁴⁶ Richfield Assize Book (1881-1904), PABC, GR 713 Vol. 1. Between 1888 and 1904 there were only nine assizes, and no more Chinese accused. At two of them there were no criminal cases and at a third, no cases at all. On the other hand, when Crease, J. opened the Richfield Assizes in 1871 he noted that "the parties in every case but one were Chinese—a race which had not yet apparently acquired a proper respect for our laws." *Victoria Weekly Standard*, PABC, Add MSS 55, Vol. 25, File 15 at 17.

⁴⁷ See John R. Wunder, "The Chinese and the Courts in the Pacific Northwest: Justice Denied?" LII *Pacific Historical Review* (1983), 191-211. The author considers the American experience only, using only reported cases.

⁴⁸ Lytton to Douglas, 31 July 1858; Lytton's instructions to Col. Moody, R.E., 29 October 1858 (*British Parliamentary Papers* Vol. 22 at 63 and 73).

⁴⁹ The Fraser River figure is from Howay, Sage and Angus, above note 19 at 174.

Police was established in 1873, British Columbia was not part of its jurisdiction. Only in the railway belt in 1883-88 and during the Klondike gold rush at the end of the century did the federal force have any role to play in the regular policing of the province.⁵⁰ For the legal historian all this is fertile territory indeed because extensive police records have been preserved.⁵¹

The three major constitutional events of the Colonial period were therefore the founding of the colony of Vancouver Island in 1849, the founding of the colony of mainland British Columbia in 1858, and the unification of the two in 1866. (For a brief time on the mainland there was something of a legal vacuum. Although settlers were deemed to bring English law with them, Douglas had no authority to make laws there until 19 November 1858, when the new colony was officially proclaimed. He did so anyway, and London reciprocated with a proclamation which retroactively validated these acts and indemnified him and his officials from liability.)⁵² The laws that governed the colonies were those of England, subject to modification (within limits) by the local legislative authority. Although new offences were certainly created, local officials made few attempts to alter the basic structure of the English criminal

The correspondence regarding the English contingent is in despatches dated 27 December 1858, 11 April 1859, and 2 July 1859 primarily (*British Parliamentary Papers*, Vol. 22 at 324-25 and 358-59, and Vol. 23, Part III at 26-4. On October 1865 the *Cariboo Sentinel* reported that a Chief Constable and two regular constables were the police force for the whole of the Cariboo; earlier it had remarked that "not a single case of criminal misconduct [had] come before the worthy magistrate at Williams Creek for nearly twelve months past" (6 June 1865).

⁵⁰ See W. N. Sage, "The North West Mounted Police and British Columbia," XVIII *Pacific Historical Review* (1949), 345-61. For the Alaska gold rush, see L. H. Carlson, "The First Mining Season at Nome, Alaska — 1899," XVI *Pacific Historical Review* (1947), 163-75. The latter author states at 165 that "riff raff" who were fed up with the "strictness" of Canadian law eagerly left the Yukon for Alaska. A somewhat different perspective is provided in Thomas Stone, "The Mounties as Vigilantes: Perceptions of Community and the Transformation of Law in the Yukon 1885-1897," 14 *Law and Society Review* (1979-80), 83-114. The NWMP were also in B.C. in 1898-99 for the Crow'snest Pass railway construction.

⁵¹ The Provincial Archives at Victoria have what appears to be a nearly complete set of records for the provincial police force, and municipal records also survive. For example, the Police Sergeant's Daily Report Book for Victoria (2 vols., 1863-66) is at PABC, GR 426.

⁵² Lytton to Douglas, 2 September 1858 (*British Parliamentary Papers* Vol. 22 at 79-81). Morton, above note 14 at 769, wryly remarks that "the Anglo-Saxon, upholder of law though he be, has never been its victim. When law fails him, and the public interest requires it, he feels free to act as the situation demands. At any rate, it was so with Douglas."

justice system.⁵³ When the united colony entered Confederation in 1871, it did so with a judiciary steeped in English criminal jurisprudence, convinced of its superiority, and pointing to its exemplary record during the gold rush. This refrain would be repeated often in the years to come.

Confederation and After

The administration of criminal justice devolves upon the provincial authorities. . . .

— James McDonald, federal Minister of Justice, 11 May 1880

As indicated above, the first great constitutional reforms in British Columbia occurred in 1849 and 1858 when Vancouver Island and the mainland became colonies, and then merged in 1866. Although the substantive civil and criminal law of England continued to apply, the relevant portions of the Canada Jurisdiction Act of 1803 and the Civil and Criminal Jurisdiction Act of 1821 were repealed west of the Rockies.⁵⁴ Instead, the English Law Proclamation of 1858 (later confirmed for the united colony by the English Law Ordinance of 1867) acknowledged that full legislative responsibility for law enforcement was now colonial, subject only to disallowance by London in certain cases.⁵⁵ Pursuant to this grant of authority, Douglas and his successors had set up gold commissioners' courts and made other less fundamental changes to their model English judicial system. Some of these passed muster; others did not.⁵⁶ However, by 1871, under the watchful eye of the Crown's Law Officers, law enforcement had been a matter for the Governor and his advisors for two decades.

In that year the second major constitutional restructuring occurred. Confederation with Canada involved transferring jurisdiction over criminal law and procedure, and the authority to appoint county and superior court judges, to the Dominion.⁵⁷ This meant that legislation had to be

⁵³ An example of a new offence is the prohibition against selling liquor to Indians, which had a long history in New Caledonia but, of course, was not a part of the English criminal law. An example of a rare modification of English criminal procedure is "An Act for rendering the Administration of Justice in Minor Criminal Cases more speedy and certain" (19 December 1860).

⁵⁴ 12 & 13 Vict. (1849), c. 48 (U.K.); 21 & 22 Vict. (1858), c. 99 (U.K.). For a brief discussion of the 1803 and 1821 legislation, see Part 2 above.

⁵⁵ A table of disallowed Acts and ordinances may be found in Vol. 7 of the Revised Statutes of British Columbia (1979), Part D. After 1865, disallowance was governed by the Colonial Laws Validity Act, 28 & 29 Vict. (1865), c. 63.

⁵⁶ E.g., see above note 33.

⁵⁷ British North America Act, 30 & 31 Vict. (1867), c. 3 (U.K.), ss. 91(27) and 96; the administration of justice, however, remained a local responsibility: s. 92(14), and see note 13 above.

enacted to bring the new province of British Columbia into the uniform system of criminal law and procedure mandated by Confederation.⁵⁸ It also meant that it would be some time before even the broad details of the shared jurisdiction over criminal justice would be worked out. Indeed, within ten years of Confederation, confusion over the criminal assize system and even the precise constitutional position of the Supreme Court of British Columbia led to bitter disputes between the provincial government and the judges.⁵⁹

In addition to these formal changes, the new province had to undergo an equally fundamental social transition. The gold rushes were over, the economy was deeply in recession, and both the population and the legal system underwent a painful period of adjustment. These years are in most respects *terra incognita* for the legal historian.⁶⁰

Because very little research has been done to date, it is difficult to predict what themes will emerge. There are, however, a few obvious candidates. The first is the gradual maturing of the judicial system itself. The Supreme Court of British Columbia in 1869 had one judge, Matthew Baillie Begbie. By 1872 there were three, and by 1881, five. In the decade or so following Confederation, the government reorganized the county courts, regulated the assizes and introduced its own version of the reforms set forth in the English Judicature Acts of 1873-75, all of which generated heated political debate and a bitter contest with the Supreme Court judges.⁶¹ It also phased out the gold commissioners, some of whose functions had passed in the 1860s to the county courts, and substituted government agents. Although justice was no longer administered in the tents that were commonplace during the gold rush, in the outlying areas log cabins often served as courthouses and assize judges still travelled long distances on horseback.⁶² They resented, however, attempts made by the provincial government to decentralize this

⁵⁸ E.g., 37 Vict. (1875), c. 42, which made a series of statutes passed by the Canadian Parliament between 1867 and 1870 applicable in British Columbia.

⁵⁹ See Foster, above note 33 and "The Struggle for the Supreme Court: The Politics of Law in British Columbia 1871-1885" (forthcoming).

⁶⁰ For an example of the sort of empirical work that could be done, see Ralph Mann, "The Decade After the Gold Rush: Social Structure in Grass Valley and Nevada City, California 1850-1860," *XLI Pacific Historical Review* (1972), 484-504 and Richard H. Peterson, "The Frontier Thesis and Social Mobility on the Mining Frontier," *XLIV Pacific Historical Review* (1975), 52-67.

⁶¹ The most important of these statutes was probably the Judicature Act of 1879 (SBC 1879, c. 12), as to which see Foster, above note 33 at 321-22 and note 59.

⁶² See letter from Mr. Justice John Hamilton Gray to Edward Blake, 12 July 1877. PABC Add MSS 54, Folder 12/66.

system by dividing the province into separate judicial districts. The judges naturally preferred the amenities of city life to the boredom and remoteness of the hinterland and bitterly opposed the Judicial District Act of 1879, which required them to reside in their assigned regions. Mr. Justice John Foster McCreight, for example, languished in the declining community of Richfield with little judicial work to do. He complained in letters to one of his brother judges that he felt useless stationed where he was and that, unless the provincial government was opposed on this issue, the administration of justice in British Columbia would soon "be no better than in the worst part of the U.S."⁶³ Some of the other judges refused to go to their districts, and the problem ultimately led to a Supreme Court of Canada decision, a new County Courts Act and informal intervention by the federal Minister of Justice.⁶⁴

Another problem of the post-colonial era was a product of social rather than political change. By the late 1870s the province's population was still predominantly Indian, and there were also many persons of mixed blood who were being squeezed by the "resistless agency" of encroaching civilization.⁶⁵ Those whose life styles had been tied to the fur trade and the gold rushes posed a potential threat to law enforcement, although, once again, the sorts of problems that developed south of the border appear not to have achieved like proportions in British Columbia. Does the notion of the "social bandit" have any relevance to the history of the Canadian West, or should it be confined to the Ned Kellys of Australia and Jesse Jameses of the United States?⁶⁶ Certainly the members of one notorious gang in nineteenth-century British Columbia, the McLeans, attempted to stir up popular support for their grievances. They failed

⁶³ McCreight to Mr. Justice H. P. P. Crease, 26 November 1881 and 10 February 1882. PABC (Crease Collection) MS AIE C86 M133. His real fear was that the provincial government would reward or punish judges by assigning them to coveted or to dismal locales.

⁶⁴ *The "Thrasher" Case* (1882) 1 BCR 153 (Pt. I) at 243-44; the County Courts Act, SBC 1883, c. 5; and see Williams, above note 28 at 179. This episode does much to justify Margaret Ormsby's description of B.C. in the 1870's and 1880's as the "spoilt child" of Confederation: see *British Columbia: A History* (Vancouver, 1964) at 258.

⁶⁵ The quoted words are those of Crease, J., addressing the grand jury at a special assize held in New Westminster in March of 1880. *Victoria Colonist*, 16 March 1880.

⁶⁶ For the notion itself see E. J. Hobsbawm, *Primitive Rebels: Studies in Archaic Forms of Social Movement in the 19th and 20th Centuries* (New York, 1965). There is a thoughtful discussion in an American context in Richard White, "Out-law Gangs of the Middle Border: American Social Bandits," *XII Western Historical Quarterly* (1981), 387-408.

utterly, however, and even the Indians who ought to have been their natural allies viewed them not as heroes but as outlaws.⁶⁷

In the last two decades of the century the economy improved, especially once the rail link with the eastern provinces was completed. The forest and fishing industries began to develop their present roles in the economic life of British Columbia, and mining again became important, although the Klondike rush at the end of the century was really an Alaskan and Yukon phenomenon. It seems likely, then, that law enforcement in this period would settle into patterns much more familiar to the modern British Columbian, but this too remains to be seen. The court and police records await.

Some Additional Questions

This brief and selective overview of the background of law enforcement in nineteenth-century British Columbia reveals how little, really, we know about the administration of justice prior to 1900. The rhetoric of law and order has figured prominently in the general histories of the period, particularly in those dealing with the threat of American annexation. However, research into the extent to which rhetoric and reality correspond has been meagre. Conclusions drawn by some historians have been thoughtful and persuasive, but they remain to be tested against the newspapers and legal records of the day. Impressionistic and anecdotal sources may be as problematic a guide to the incidence and control of disorder then as letters to the editor and "hot line" radio shows are today. In short, what people believe to be the case is important to understanding why they spoke or behaved as they did, but it is also important to know whether they were right.⁶⁸

The comparative approach to such research is important for two reasons. First, and most obviously, it is valuable in itself. If, as Maitland said, all history is the art of comparison, we will not mistake the commonplace for the singular if we regularly look at how other jurisdictions approached our problems. The second reason is more specific: both during the gold rushes and afterwards those responsible for the administration of justice in British Columbia, and even many ordinary citizens who saw fit to publicize their opinions, repeatedly pointed to law enforcement in the

⁶⁷ See Foster, above note 33.

⁶⁸ See text accompanying note 6 above. As an example of research directed at this sort of question, see David J. Bodenhamer, "Law and Disorder on the Early Frontier: Marion County, Indiana, 1823-1850," *X Western Historical Quarterly* (1979), 323-36.

United States as an example to avoid. Whether it is an "old Californian" congratulating Judge Begbie on the contrast between California and the Cariboo, or the repeated concerns of the judges that this or that change would reduce the effectiveness of the law to that of the United States, the refrain is clear: the conservative values of order and restraint are superior to those of "freedom loving republicanism."⁶⁹ The importance of this assumption in the ideology of nineteenth-century law enforcement seems, therefore, a suitable starting point and organizing theme for the researcher.⁷⁰

It seems appropriate to conclude, therefore, by suggesting a few things which ought to be done to facilitate further research and by mentioning some other issues which are raised by the secondary sources presently available. With respect to the former, at least two research tools are needed: a general survey of the legislation relating to law enforcement and a detailed map of the court structure both before and after Confederation.⁷¹ The first is necessary because the court records tend not to reveal the statutory authority for charges laid, and prior to 1871 it is not always clear whether a particular act is prohibited by a bylaw, a colonial statute, an English statute, or the common law. In short, the distinctions so familiar today are harder to find in colonial British Columbia. More-

⁶⁹ For a typical judicial complaint see text accompanying note 63 above; the reference to "freedom loving republicanism" is of course to the theme announced at the outset of this paper: see note 1 above. The first example is taken from Begbie's report to the Colonial Secretary of 25 September 1861. In it, he quotes an old miner named Downie as saying: "They told me it was like California in '49; why, you would have seen all these fellows roaring drunk, and pistols and bare knives in every hand. I never saw a mining town anything like this." The town was Antler, in the Cariboo, and Begbie concludes that although there were hundreds of people there on that Sunday afternoon, "it was . . . as quiet as Victoria." Quoted by Douglas, in Douglas to Newcastle, 24 October 1861 (*British Parliamentary Papers* Vol. 24 at 202-03).

⁷⁰ For some other general themes, see R. C. B. Risk, "A Prospectus for Canadian Legal History," 1 *Dalhousie Law Journal* (1973), 228 and David H. Flaherty, "Writing Canadian Legal History: An Introduction," in Flaherty, ed., above note 16 at 3-33. Risk's suggestion that the Canadian experience is distinctive in that we have tended to rely less on the law to establish and preserve fundamental values may be true of nineteenth-century Ontario, but does not quite fit the gold rush period in British Columbia.

⁷¹ With respect to legislation a beginning has been made: see RSBC 1979, Vol. 7 (Appendices). Joan N. Fraser, Public Services Librarian at the Faculty of Law, University of Victoria, is working on a collation of all the known sets of statutes from 1849 to 1871 for the Colony of Vancouver Island, the Mainland Colony of British Columbia and the united colony of British Columbia. For Ontario, see Margaret A. Banks, "An Annotated Bibliography of Statutes and Related Publications: Upper Canada, the Province of Canada and Ontario 1792-1980," and "The Evolution of the Ontario Courts 1788-1981," in Flaherty, ed., above notes 16 and 33, Vol. I at 358-404 and Vol. II at 492-572.

over, portions of the judicial work in the records are so poorly described as to raise questions whether they are really "criminal" matters at all.⁷² The second is important because in the colonial period the distinct responsibilities of officials such as gold commissioners, revenue officers, county court judges, etc., seem rather vaguely defined, and an intensive analysis of the relevant legislation may well clarify this. In addition, whereas some work has been done on the judicial system prior to 1871, virtually none has been done on the thirty years following Confederation.⁷³

Some of the substantive questions that seem worth investigating include the following:

(a) The extent to which English legal practice was applied in British Columbia. Did judges apply a form of "rough justice" to the cases before them, or did they tend to abide by the strict letter of the law and let the chips fall where they may? It seems reasonable to suppose that standards applied by the lower courts would be less rigorous than those observed in the Supreme Court, but how great a gap was there? Recent work in the United States suggests that "frontier justice" was not quite so unlettered as many have assumed.⁷⁴ And in British Columbia there are many indications in the records which suggest that, in theory at least, the technicalities of procedure were generally respected.⁷⁵ Certainly there was an emphasis upon the need for English statutes and law books, and, on one occasion at least, Judge Begbie felt it necessary to defend himself and the other judges of his court against the charge that they were quashing too many convictions by magistrates on purely technical grounds.⁷⁶

⁷² E.g., in the Richfield Police Court Casebook, PABC, GR 598, Vol. 1 (1862-74), the litany of wrongdoing includes complaints of "insulting language" and "refusal to give change" as well as more familiar transgressions. The civil/criminal distinction is somewhat blurred.

⁷³ Howay, Sage and Angus, above note 19 at 156-57 state that the titles of many of these offices were "no index to their jurisdiction." However, Douglas did set out their duties in instructions to them, and after 1858-59 clearer lines appear to have been drawn. For the period prior to 1871 see Farr, above note 34; there is no equivalent study for the later period.

⁷⁴ See Wunder and Hall, above note 29 and Elizabeth Gaspar Brown, "Frontier Justice: Wayne County 1796-1836," in Wythe Holt, ed., *Essays in Nineteenth Century American Legal History* (Westport, 1976), 675-703.

⁷⁵ See note 32 above.

⁷⁶ Begbie to Sir Alex Campbell, Minister of Justice, 26 March 1882, Public Archives of Canada (hereafter PAC), RG 13, A5, Vol. 2038, File 308. For an intriguing look at another jurisdiction see Paul Craven, "Law and Ideology: The Toronto Police Court 1850-80," in Flaherty, above note 33 at 248-307.

(b) The quality of both Bench and Bar. In the last few years, both in the United States and England, a number of studies have dealt with this question.⁷⁷ The judges and lawyers of nineteenth-century British Columbia have suffered criticism at the hands of each other and of both contemporary and scholarly commentators, so their competence and integrity is a fit subject for discussion. So too is the role of the lawyer in the law enforcement system. Begbie, for example, insisted on the need for lawyers in cases before him, and was even willing to let Americans practise in his court if necessary.⁷⁸ As it turned out, it was not necessary, but his views are aptly illustrated by the following excerpt from one of his early notebooks, referring to the trial of an Indian charged with murdering one John Reilly: "verdict, guilty — owing to absence of counsel."⁷⁹

(c) The role of the law in the social history of the gold fields. One suggested, critical difference between the British Columbian and American approaches to law enforcement during their gold rushes was that the colonial authorities tolerated "social" offences such as prostitution and gambling in order to concentrate on ruthless prosecution of serious crime. In the western United States, the argument goes, the reverse was true.⁸⁰ A brief and preliminary examination of some of the available police court records suggests that this may have been so in British Columbia, but other factors are clearly involved and a much more careful look must be taken before such conclusions can be confirmed.⁸¹

⁷⁷ E.g., the ones cited in note 29, above and Daniel Duman, *The English and Colonial Bars in the Nineteenth Century* (London, 1983), especially Chapter 4, "The Colonial Bar and Bench"; *The Judicial Bench in England 1727-1875. The Reshaping of a Professional Elite* (London, 1982). See also J. R. Lewis, *The Victorian Bar* (London, 1982), and for a much earlier period, E. W. Ives, *The Common Lawyers of Pre-Reformation England* (Cambridge, 1983).

⁷⁸ Enclosure in Douglas to Lytton, 6 January 1859; see also 1 July 1859 (*British Parliamentary Papers*, Vol. 22 at 328-31 and Vol. 23, Part III at 25).

⁷⁹ Begbie, Notes of Supreme Court Proceedings (10 March 1859-8 May 1861). PABC, C. AB. 30 3N1, *Regina v. Ouahook*, 4 April 1860.

⁸⁰ See Howay, Sage and Angus, above note 19 at 177 and Trimble, above note 22 at 357-58. Recent studies include George M. Blackburn and Sherman L. Richards, "The Prostitutes and Gamblers of Virginia City, Nevada, 1870," *XLVIII Pacific Historical Review* (1979), 239-58; see also William Hanchett, "The Blue Law Gospel in Gold Rush California," *XXIV Pacific Historical Review* (1955), 361-68.

⁸¹ In the approximately 300 charges recorded in the Richfield Police Court Book for 1862-68 (above note 72) there are only two charges of keeping a gambling house and only one of keeping a disorderly house. Of course, some of the many drunk and disorderly charges may, where a woman is the accused, have been related to prostitution; see Constance B. Backhouse, *Nineteenth Century Canadian Prostitution Law: Reflection of a Discriminatory Society* (unpublished 1982). Perhaps

(d) The extent to which vigilantism existed in British Columbia. The traditional view is that it did not exist at all, but there was a lynching in 1884 and an Anti-Chinese Vigilance Committee formed in Vancouver in 1887.⁸² Although this sort of thing never achieved the proportions it did even in the Washington Territory, given the distances involved and the state of communications and transportation in the remoter areas, it may be that there were more problems than research to date has uncovered.⁸³

(e) Attention might be directed as well to the financial and physical aspects of law enforcement in British Columbia, including the hardships endured by the circuit judges, the history of courthouse facilities, and the perennial problem of building secure gaols. (For some reason, from the Fraser Rush of 1858 to at least the 1880s one reads constant complaints of escaped prisoners and dilapidated lock-ups.) In one trial this problem even threatened to become an issue.⁸⁴

More generally, however, the history of law enforcement in nineteenth-century British Columbia appears to be the history of the shifting guardianship of the British ideal. In the colonial period this ideal became an ideological weapon, wielded by both the executive and the judiciary, in the struggle against American annexation and American "lawlessness." Its political effectiveness is well established; whether it made much difference to effective law enforcement is less clear. After Confederation the Judges of the Supreme Court accused the government in Victoria of losing sight of this ideal and of instituting changes that threatened judicial independence. As always, the example of the United States was a handy illustration of what could happen if too radical a departure were made. The judges sought to enlist the aid of the Dominion government in this new struggle, but Ottawa, like London and Montreal before it,

cross-referencing with local newspapers may shed some light on this. For British Columbia, the views expressed in the text accompanying note 80 above must also be squared with observations such as those of John Damon, a former lieutenant in the Vigilance Committee of 1856 (San Francisco) who came to the Fraser in 1858-59. He found Fort Hope not unlike a California mining town, except that the law prohibited gambling and drunkenness, "an indulgence of which I have yet to observe for the first time": Raymond E. Lindgren, "John Damon and the Fraser River Rush," XIV *Pacific Historical Review* (1945), 184-95 at 192-93.

⁸² See Williams, above note 28 at 29 and Con et al., above note 43 at 62.

⁸³ Five separate vigilante movements in the Washington Territory have been identified: see Brown in Graham and Gurr, eds., above note 6 at 225.

⁸⁴ *The Queen v. The McLeans* (1880). See Foster, above note 33 at 328-29 and 335.

was thousands of miles distant. San Francisco, on the other hand, was just down the coast. If it is true that the legal history of nineteenth-century British Columbia cannot be adequately understood otherwise than in the context of these two influences, it is also true that the relative merits of freedom and stodginess cannot be assessed until the daily records of each are marshalled in the attempt. In doing this, we are certain to gain a better picture of a shape of life now grown old and of the roots of a legal system that continues to affect us all.