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Discipline, Discretion and Control: The Private Justice System  
of the Hudson's Bay Company in Rupert's Land, 1670-1770

by

Paul C. Nigol

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## **ABSTRACT**

This thesis examines the private justice system of the Hudson's Bay Company during the first century of its enterprise in Rupert's Land. It explores themes in the development and interaction of legal systems prior to the establishment of state sovereignty. The study of law without a state is the primary focus of this work, which is developed thematically and chronologically. A narrative is employed in five thematic areas in order to develop a comparative sketch of legal systems without a state.

The introduction develops the larger context of the Company's business and provides an overview of the methodology employed and the sources used. This chapter also examines the intellectual history of colonialism during the Company's first century and current developments in the fields of colonial theory and comparative legal studies. Chapter two examines the Company's central management structure in the context of imperial rivalries, constitutional crises and its methods of managing a colonial business enterprise in the seventeenth and eighteenth centuries. In addition, and in an effort to develop the legal culture of the Company, biographies of its legal counsel are placed within the framework of the major developments in the profession.

Chapters three to six are organized thematically and explore the internal dispute resolution system of the Company at Hudson Bay, the interaction between Aboriginal dispute resolution systems and Company law, the role of the Hudson's Bay Company's navy and naval law in Rupert's Land and the legal status of women and the family. These themes are examined because they were of great concern to the Company's managers during this period and are developed in a narrative format with an eye to certain poignant incidents that took

place in Rupert's Land and Europe.

The final chapter deals with how these various influences combined to create a dispute resolution system that was unique to Rupert's Land. The time period chosen ends in 1770, which marks a departure in Company policy with its move inland and its attempt to exercise sovereignty over a larger geographic area. Throughout this thesis, the common law is contrasted with the legal system that emerged in Rupert's Land.

## PREFACE

In this thesis, an effort has been made to make the primary source material more readable. Most of these records were written in short-hand script and were difficult to decipher. Thus, the clear meaning of the words used in post journals, correspondence and other documentation has been facilitated by expanding abbreviation and modernizing the English used in quotes. The letter case and punctuation has been left intact and indecipherable words were substituted with words that seem plausible in the context of the text.

A number of terms are used synonymously throughout this thesis. In order to develop a sense of conformity throughout this work, the terms First Nations People and Aboriginal people are used synonymously. With respect to the Company's establishments on the Bay, the terms fort and factory refer to the Company's larger trading posts while the term house refers to smaller outposts. Post is used as a general term used to describe all of its establishments in North America. In addition, the term governor is used to designate the Bayside governor, while Governor is the designation of the Company's Governor in London. The terms governor, chief factor, factor, commander and leader are also synonymous terms for the purposes of this thesis, while the term officer is a catch all term for all employees in upper and middle management positions.

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## LIST OF ABBREVIATIONS

HBC.....	Hudson's Bay Company
HBCA.....	Hudson's Bay Company Archives (Winnipeg, Manitoba)
PRO.....	Public Record Office (London, U.K.)
CO.....	Colonial Office



## CHAPTER ONE

### Introduction: Colonialism and the Charter

On 25 March 1670 at Greenwich Palace, King Charles II affixed the great seal of England to a Charter for a group of courtiers and merchants who wished to trade for North American furs in a colony that was to be called Rupert's Land. The royal Charter granted to the Governor and Company of Adventurers Trading into Hudson Bay (Hudson's Bay Company or HBC) was an element of a seventeenth-century royal policy that promoted the formation of joint stock companies to forward imperial aims. This Charter was one of a number signed by English monarchs, beginning in the ninth century, to transfer land and rights from the grantor to grantee under the authority of the King.<sup>1</sup> The grant provided the Company with the right to create laws for the good governance of the men on the Bay so long as they were not anathema to the laws of England. It also entitled the HBC to enter into treaties with the Aboriginal inhabitants to foster trading relations. While the Charter was broadly permissive, the Company did very little to impose English law on its employees or First Nations People. What developed instead was an ad hoc approach to dispute resolution that had very little in common with formal English law.

Legal disputes arising out of the Company's business in England were ultimately played out in the courts at Westminster. This was a formal aspect of the HBC's legal regime. At its headquarters in London, the Company was subject to the laws of England, just as any other trading business was governed by the laws of the *lex situs*. On the Bay, however, a very different justice system emerged that can best be classified as plural and private. Internal discipline and colonial practice were combined and hybridized on the shores of the Bay. The

disputes that occurred involved both criminal and civil matters. Unfortunately, the documentary record of civil disputes tends to be scant. In situations where conflicts arose between employees and the HBC involving civil causes of action, resolution ultimately took place in London. These types of discord are not addressed in this dissertation.

The focus of this dissertation is on civil and criminal actions that took place on the shores of the Bay that were reflected in the writings of Company's officers in their post journals, correspondence and logs. The majority of disputes which led to record keeping usually involved a level of coercion as a method of resolution. This was true of the type of entries related to the disciplining of employees as well as First Nations People. Where coercion was not used, very little was written. What is problematic about the record is the infinite number of disputes that remained unreported because they did not involve coercion. Whether this was a conscious choice of those who governed cannot be discerned from the records. What can be discerned, however, is a correlation between incidents involving coercion and detailed reporting.

The extant journals are of varying lengths. Some of the more detailed accounts comprise several hundred pages of handwritten script per year, while others were only a few dozen pages annually. By the 1770s, there were four major and six minor HBC posts in Rupert's Land, and between 1670 and 1770 the total number of annual post journals, correspondence books, and ships records for all HBC operations is in excess of five hundred. What to report, and not to report, was ultimately left to the discretion of post leaders. For this reason it is tempting to call these sources anecdotal. This observation is misguided since what was written was tempered by the distinct impression a leader wanted to make on the

Company's London management. Post leaders controlled and filtered information sent to London, and through this power they could manipulate the facts to complement their particular leadership style. These records were written for the eyes of English financiers and were read on an annual basis. Along with the post accounts, they were the primary conduit of information from the Bay, and the information they afforded shaped the HBC's overseas policy. For this reason, these records should be viewed as official documents which have unusual characteristics and are reflective of when they were written, the nature of the place in which they were written, and the anecdotal expression that imbues the writing. Some journal authors, such as governors James Isham and Joseph Isbister, tended to be extremely detailed. Their entries were often one or two pages long per day. Isbister, for example, tended to take great pains in explaining why a stern cuffing is the only useful method of correcting the men, while Isham tended to assert that First Nations People must be treated with care. Clearly, some leaders were more outspoken than others, such as George Howy, who wrote less than a page per week.

The posts and leaders that received the most attention in this dissertation were chosen on the basis of their discursive approach to journal writing. At Albany, York Fort and Fort Prince of Wales, James Knight served as governor from 1698 to 1700, 1714 to 1717, and 1717-1718 respectively. His veteran experience, candour and the number of posts he governed contributed to the historical value of his reports. Knight served the Company during wartime and peace which added meaning to his observations and comparisons. Henry Kelsey, who was chief factor of York Fort from 1701 to 1722, was also the first Company man to travel inland to the prairie region of Rupert's Land. His understanding of Aboriginal

languages and cultures, and his high rank made his reports particularly useful in the study of European/First Nations contact. William Bevan who served at Eastmain from 1727 to 1732, and Moose Factory from 1732 to 1737 also received a great deal of attention due to the extemporaneous reports of the harsh discipline he personally meted out. The reports of James Isham, governor at York Fort and Fort Prince of Wales from 1737 to 1754, received a great deal attention because of his lifetime of service to the Company. Similarly, Joseph Isbister who served as governor at Eastmain and Albany from 1735 to 1756, was chosen due to the length of his service and the fact that he served during the same years as Isham. Ferdinand Jacobs and Moses Norton of Fort Prince of Wales each governed for over ten years. Their reports proved to be useful for comparative purposes but did not receive the attention afforded to the aforementioned leaders. Similarly, Anthony Beale, Richard Staunton and Thomas McCliesh, who served the Company for fourteen years, seven years and nineteen years respectively wrote relatively short journals and were rarely expressive about disciplinary matters. Finally, leaders such as Henry Potter, John Favell, Christopher Goston, Henry Pollason and John Garbut, who governed Moose between 1756 and 1771 were largely ignored due to their short tenure and the sparsity of their writing.

The records of the other smaller posts, including Fort Severn, Eastmain, Cumberland, Richmond, Henley and Whale River House, reveal a leadership structure that was transitional due to the limited size and fleeting existence of these posts. Posts such as Henley and Whale River House were established in the mid-eighteenth century, attacked, and abandoned for varying lengths of time. Severn, Eastmain, Richmond and Cumberland, on the other hand, were established with a limited stock of goods to compete with French traders. These were

outposts created to showcase Company goods, and entice Aboriginal fur traders to trade their furs at the main posts. They were in a precarious position which can be credited to the harsh conditions associated with managing a trading post without goods. Generally, these posts were under the authority of the closest fort or factory and their records were occasionally incorporated into those of the main posts. In addition, at the smaller posts, a clerk or even a literate master was often lacking resulting in scanty reporting. Nevertheless, two cases of homicide were reported at outposts during the Company's first century. For this reason they have received some attention in this dissertation.

This research focusses on notable events. Why some leaders were effusive, and others were not, can be attributed to a number of variables which will be explored in this dissertation. There were over 40 factors, masters and governors during the Company's first century. Of these, 24 revealed some tendency to discuss disputes and discipline. Fortunately, most of them had long tenures, were verbose, and wrote more than fifty percent of all journals and correspondence during the century. This prolixity can be attributed to a number of factors including the length of the leader's tenure, their employment background and individual characteristics such as religion and personality. The most significant characteristic of all these leaders was their permanence. Many of these men spent the majority of their adolescence and adult lives in fur trade society, and to some, England became more foreign than Rupert's Land.

The years 1670 to 1770 comprise the early history of the Company. It had moved into the northwest of North America more than one hundred years before the American Revolution and eighteen years before England's Glorious Revolution. Imperial wars continued

almost unabated throughout this hundred year period, yet the HBC carried on and grew in the same fashion as other chartered companies and colonies. It possessed a monopoly backed by a royal Charter and had the ability to create any laws it deemed necessary. While this power seemed absolute, it was rarely invoked in Rupert's Land. Occasionally, employees were summarily punished for their transgressions. But according to the post journals, the more formal instrument of a post council was rarely invoked. With respect to their interaction with First Nations People, Company men were far from being the "storm-troopers" of colonialism. Their relationship was, for the most part, based upon dependency and distrust. They relied on Aboriginal people for furs and provisions, and for this reason deliberately tried to do nothing to disrupt their lifestyle other than discouraging war. Less than deliberately, HBC men also brought European beliefs related to their property claim to Rupert's Land. While the monopoly continued after this period, the Company's pluralistic legal regime did not last much longer than the first hundred years of the Charter. By the nineteenth century, Rupert's Land had a draft code based on the laws of England and had received common law based on the authority of the Charter. While its law was still slightly pluralistic, it had become much more formal with the introduction of the code. This move to formalism was also reflected in its relations with First Nations People.

Colonial practice in the age of chartered companies turned on the premise that the charters themselves were valid. The extent of the Company's possession of Rupert's Land and its ability to exercise law giving-powers was not questioned in the first two decades of its Charter. Colonial policy, was assumed to be based on the international law of conquest. In terms of contemporary European opinion, the imposition of a foreign legal system on newly

claimed colonies fell into three classes:

Class (I) - Those who regard colonized people as possessing a title to the sovereignty over the territory they inhabit which is good as against more civilized peoples.

Class (II) - Those who admit such a title in Aboriginal peoples, but only with restrictions or under conditions.

Class (III) - Those who do not consider that the Aboriginal people possess rights of such a nature as to be a bar to the assumption of sovereignty over them by more highly civilized peoples.<sup>2</sup>

Generally, England's colonial policy during this period, according to M.F. Lindley, fit into the third class. In this respect, the distinction of being non-Christian was fundamentally important. European nations, among themselves, "regarded as appropriable any land not occupied by Christians, and while they considered that the right to appropriate such lands was in the discoverer, they recognized that lands in the possession of the natives were not vacant, and that, as between the natives and the European Power, they were to be acquired by Conquest or Cession."<sup>3</sup> In this context, the claims of European colonial powers to overseas territories which they acquired either by force or occupation were based on the theory that territories not in the possession of a Christian prince were *territorium nullius*, and subject to acquisition by Papal grant, or by discovery and occupation without regard to the wishes of the native inhabitants.<sup>4</sup> This perspective was apparent in the writing of the courtier Richard Hakluyt during the sixteenth century. Hakluyt felt that "... Christian monarchs had the duty and obligation to colonize, settle, and profit from these lands, exercising control over their peoples."<sup>5</sup>

Colonial policy in the seventeenth and eighteenth centuries was derived from the writing of Hugo Grotius. Calling it his "just war" theory, Grotius believed that through conquest a state could replace a former political order, rendering its rights extinct.<sup>6</sup> In 1688,

a revisionist theory based on the writing of Franciscus Vitoria was advanced by Samuel Pufendorf which held that states are not bound by “unjust wars.” According to Vitoria and later Pufendorf, First Nations People had princes, rights and duties that could not be indifferently abrogated. Jean-Jacques Rousseau expanded Pufendorf’s argument through his concept of the “Social Contract,” holding that unjust treaties did not settle questions of possession. Because wars were waged between states, they did not bind the rights of people they affected.<sup>7</sup> According to Louis Knafla, Grotius’ ideas were based on the concept that “... property rights were a gift of civil society and the state, derived from the law of nature.”<sup>8</sup> Thus, because First Nations People did not possess a formally developed civil life, legal system and political organization, they did not possess property rights. Conversely, Pufendorf acknowledged the fact that First Nations People had political and legal systems, but held that title was dependent on land use.

The legal pluralism paradigm best suits the study of colonial legal systems for a number of reasons. First of all, because colonial legal systems were essentially private, they fell outside the scope of European positive law as well as English common law. This was the case because the officials of both the French and English colonial enterprises were not trained in law. Their interest was primarily commercial, and the system functioned without state-appointed justices. It has to be recognized that the colonial process was not simply the brazen conquest of a numerically superior nation by a technologically advanced minority. Although European powers made claim to vast stretches of land under the principle of *territorium nullius*, acquisition took centuries rather than decades. As Knafla notes, “... since this jurisdiction was not based on conquest, common law admitted the practice of local customs



where they were well established in communities as part of the municipal law of the territory.”<sup>9</sup> For this reason, the legal pluralism perspective is useful. In legal pluralism, law consists not only of institutional structures and imported rules, but also local codes which define normative standards of behaviour that are unique to a place like Rupert’s Land.<sup>10</sup> The HBC adopted indigenous law in some cases, while in other circumstances attempted to replicate common and naval law.

European colonial policy in the late seventeenth century followed a rather ambiguous direction. While colonizing states believed they had a right to conquer the lands of non-Christians, and particularly those non-Christians who did not possess the material culture of European nations, they attempted to make treaties and agreements with indigenous peoples based on nation-to-nation diplomacy. Perhaps this was an indication of a power relationship that placed Europeans at a disadvantage. This relationship was particularly evident in the British Colonial Office Correspondence of 1682. In a letter of reply to Governor Frontenac of New France, who claimed Rupert’s Land in the name of France, the HBC’s Governor replied with a memorial stating:

One Zachary Gillam in the Non-Such Ketch they discovered a river in the bottom of the Bay upon East Main where he met with the Native Indians & having made a league of friendship with the Captain of the said River & formally purchased both the River and it self and the Lands thereabouts... [and] Since that time we have erected other Forts upon the Coasts of the said Bay in places more remote from Canada then Charles Fort is still making Solemn compacts and agreements with the Natives for their Rivers and Territories where we have with great expence discovered and maintained a Trade and Commerce...<sup>11</sup>

Curiously, the Company’s claim through this diplomatic correspondence was based on history, discovery, treaties and occupation rather than the Charter. For their part, the French

used the pretence of Christianization to forward their claim to the territory and their stewardship over Aboriginal people. In 1675, the HBC committee wrote about the arrival of the Jesuit Father Charles Albanet's mission to the detriment of the Company's trade.<sup>12</sup> The Jesuit relationship to fur trading and missionary work ran deep in French colonial policy in New France. The Jesuits were in fact granted the management of the fur trade there.

After repeated attacks on British interests in North America, the Colonial Office adopted a nation-to-nation rationale for their dealings with First Nations People. The subtext of the following passage fully develops this opinion:

[the] Commander shall not attempt any thing against any the Subjects of any Prince or State in wayward amity with us, but only against the French King and his Subjects, and Inhabitants within any of their territories whatsoever & against any that Shall Go in Alliance or Confederacy with the said French King.<sup>13</sup>

With respect to First Nations People, the Company was granted proprietary rights in Rupert's Land under English Law as it existed in 1670, but nation-to-nation interaction was more common than the formal reception of English law.<sup>14</sup> This meant, essentially, that First Nations People were not subject to common law. Instead, the Company's Bayside governors promoted the prestige of local Aboriginal leaders to curry favour with their people. Thus, it is not surprising that attempts to impose an English form of dispute resolution on Aboriginal people was not discussed in the Company's orders to the Bayside posts. The discretion of Company officers was largely influenced by the dependent position they were in with regard to the "Home Guard" Natives for provisioning the posts as well as for their trading alliances with other nations.

On his arrival in 1671, Charles Bayly sought to foster diplomatic relations with the

First Nations People he met at Charles Fort. Attash, known as “The Prince” to the English, was the leader in the region who visited the fort along with “The Chancellor” and “Peter,” and helped Bayly procure a supply of provisions since fresh meat was needed to ward off scurvy.<sup>15</sup> Attash, “The Chancellor” and “Peter” arrived at the fort in the winter with their families in an almost starved condition. Bayly responded by sending them off to seek game for themselves and the fort while he himself went hunting.<sup>16</sup> Attash was invited to England in 1674, where he was maintained generously by the Company and returned the following year. By fostering friendly relations, the Company attempted to secure the possessory right to the Rupert River region.<sup>17</sup> Thus, from an early date it appears that the Company was dependent on Aboriginal people for the use of the area as well as provisions and furs.

John Nixon was hired to replace Bayly after his recall in 1679. Nixon followed his mandate by setting up posts at Port Nelson, New Severn and Hayes Island to defend Rupert’s Land from French incursions. In addition to this, Nixon was ordered to make treaties with First Nations People in order to take absolute propriety of the land or at least the freedom to trade.<sup>18</sup> While he was serving as Bayside governor, the Committee’s orders in 1680 showed the concern they felt toward establishing settlements on the Severn River and Port Nelson, and emphasized the need to make treaties with the local inhabitants for the surrender of the proprietorship of the area. The fundamental purpose of establishing diplomatic relations with First Nations People appears to have been in an effort to establish a superior claim to the area over the French.<sup>19</sup> By this period, Pierre-Esprit Radisson and Medard Chouart Groselliers had defected from the HBC and rejoined the French interests in New France.

Another example of the dependency that Company employees had on First Nations

People was expressed early in the orders to John Bridgar, who was sent independently to Port Nelson with two ships in 1682 to establish physical control over Rupert's Land. The Governor and Committee instructed him to "...make such Contracts with the Natives for the River in & above Port Nelson as may in future times ascertain to us a right & property therein and the Sole Liberty to trade & peaceable Cohabitation..."<sup>20</sup> He was to do this following the custom of the country or as the Committee stated, "... with such Ceremonies as you shall find to be most Sacred and Obligatory amongst them."<sup>21</sup> This directive was made when the Company was just beginning to establish York Fort, and when French aggression against the HBC was at its height. According to E.E. Rich, this attempt to make covenants and obtain title to the territory from First Nations People is indicative of the anxiety the Committee felt over the threat of French incursions.<sup>22</sup> From a legal standpoint, the HBC felt compelled to assert title according to any form of occupation that existed in colonial theory. While the Charter was a direct grant, the management promoted treaty making and title extinguishment with non-Christian people in an effort to supercede any French claim. Ironically, Bridgar was captured by the French in 1683. After his release, he returned to the Bay where he was captured again in 1686, and the Company's post at Port Nelson remained in the intermittent control of the French until the Treaty of Utrecht in 1713.

By developing colonial history with an eye to the larger British colonial regime, a number of peculiarities and distinctions of Rupert's Land can be explained. Of the panoply of British colonial lands, Australia fits neatly into the category of the conquered or ceded colonies rather than settled, and bears a close resemblance to North America's northwest. When the practice of granting chartered companies monopoly rights ended in 1689, a new

definition of being conquered or ceded was applied to Australia. However, according to Alex Castles, "...the powers of the Crown remained much as they were in the royal colonies of the 17th century."<sup>23</sup> Indeed, once Australia was annexed, without conquest or cession, the common law began to operate to determine the colony's legal system, making the Aboriginal population subject to a foreign and culturally hostile legal regime. As noted in a 1722 British colonial memorandum, "the conqueror, by saving the lives of the people conquered, gains the right and property in such people; in consequence of which he may impose upon them what law he pleases."<sup>24</sup> The Australian colonial legacy was wrought with inconsistencies. The Aboriginal inhabitants of New South Wales, for example, were in an ambiguous position. According to David Neal, colonization was based on a legal myth that the colony of New South Wales was *territorium nullius* because the inhabitants were "uncivilized."<sup>25</sup> The work of a number of Australian legal historians including Susanne Davies, David Neal, Paula Byrne and Alex Castles is based on the recognition that whether or not the Colonial Office advanced a policy of equality for Aboriginal people before the law, the fiction of a transplanted legal system provided cold comfort to Australian Aborigines caught up in the formalistic British legal system. They were entitled to its protection. But because they were not Christian, they could not take an oath or give evidence in court, rendering marginal protection even less effective.<sup>26</sup> During the HBC's first half century in Rupert's Land, the situation was entirely different. In Australia, Aboriginal people occupied a dual role as workers and as offenders in their interactions with white society. In Rupert's Land, First Nations People played the European powers off against one another to exact diplomatic and trading advantages.<sup>27</sup>

Rupert's Land was unique in the venture of colonialism because the HBC did little to

effect settlement, and was content to develop a reliant relationship to the Aboriginal inhabitants of the area. It took another hundred and fifty years before the Company made any moves toward the reception of common law, and even then it was modified for the purposes of a proprietary colony whose foremost purpose was to defend its monopoly. During the first hundred years of the Charter, the British newcomers behaved more as visitors than colonizers. Their settlements were geographically isolated and limited to the vicinity of the Bay, and a policy of non-interference and nation-to-nation interaction governed the Company's relations with First Nations People.

While the HBC attempted to hold on to its possession of Rupert's Land in the name of the Crown, it faced a number of challenges that made its position tenuous. Many of these were due to reports from the Bay that the Company mismanaged the fur trade and abused its servants and First Nations People. Nevertheless, legal opinion at the time supported the HBC's position. While its position was strengthened in England over the course of its first century, the Company's external relations with First Nations People continued to be a matter of debate.

Although there is a great deal of literature written on the institutional aspects of colonialism, very little has been written on the early contact period. The work of John Phillip Reid is particularly poignant in this regard as he has attempted to develop a picture of indigenous legal systems at the moment of contact. Despite his disclaimer to the effect that it is difficult to construct a picture of indigenous legal systems based on British records, a picture can be developed by moving outside of the historical perspective and using the tools provided by anthropologists. It also seems that a comparative approach can be useful in order

to fill some of the gaps that appear when attempting to develop the discourse of colonialism in a single geographic area. However, one caution is necessary. According to M.B. Hooker, in the United States, Canada, Australia, New Zealand and South Africa, where an Indigenous culture of some complexity existed prior to contact, a common heritage in English law developed with a markedly individual treatment of indigenous justice systems.<sup>28</sup>

History has traditionally reflected the imperial view of mainstream academia. As a result of this, indigenous views have been excluded as anathema to colonial ideology.<sup>29</sup> Recently, indigenous peoples, as the “Other,” have approached the discipline in an effort to rewrite their position in history. According to Linda Tuhiwai Smith, the decolonization of indigenous history can only be achieved by examining the intersection between indigenous approaches to the past, the modernist history project and the resistance strategies that have been employed. As Smith states, “[there] can be no ‘postmodern’ for us until we have settled some business of the modern.”<sup>30</sup> Colonization continues to exist in the modern period, and for this reason a critical approach to the field of study is necessary. While this work does not address the larger implications of colonialism, it attempts to account for resistance, albeit from the perspective of dispute resolution systems functioning during the contact era. The form that colonial law took in ceded or conquered territories was influenced by the legal culture that had existed prior to contact. By examining the social relations that developed within the ranks of the Company’s employees, and their relations to First Nations People as well as the larger world of commercialism and colonialism, a more thorough picture of the legal culture of Rupert’s Land can be attained.

In the following chapters, various themes related to private justice in Rupert’s Land

will be developed with respect to the HBC, its Charter and First Nations People. While the divisions may seem contrived and artificial, a thematic approach has been employed in order to develop the narrative of interaction between the various people who influenced the creation of a private justice system. The themes explored are the business foundation of the Company, its method of disciplining its employees within the various posts, its external relations with First Nations People, the HBC navy and the naval model of discipline, and the role of women and gender relations in the legal system of Rupert's Land.

Chapter two is a narrative of the business background of the Company and the role of professional lawyers in its operation. From the perspective of London, the HBC was a joint stock company that survived most other chartered trading companies, yet failed to provide sizeable dividends during its first century of existence. Associated with it were men who became King, an executed Lord Mayor of London, the noted scientist Sir Robert Boyle, and a host of courtiers and M.P.'s. It also hired lawyers who defended its rights in court and Parliament. This chapter provides the European context of the Company's business and provides a foundation to the rest of this work.

Chapter three examines internal discipline in the governance of the Company's Bayside posts. Discretion was a primary feature of social ordering within the walls of the forts. This was mandated by the Royal Charter, where post leaders were given unlimited discretion in the everyday functioning of the post. This was manifested in the leaders' benevolent despotism accompanied by the regular striping of recalcitrant employees in some posts, and simply ignoring, or at least not reporting, insubordination in others. Infractions, when they were reported, included theft, mutiny, riot, bestiality and sodomy. These two



countervailing methods of social ordering were directly affected by the background and experience of the men in charge. Autonomous decision-making made this justice system resemble an arrangement based on local custom and personal discretion rather than a structured array of common law remedies. Dispute resolution and social ordering in the posts is the main focus of this chapter.

Chapter four focusses on the interaction between First Nations People and HBC men. The chapter is arranged around an incident when HBC men, using the legal jurisdiction derived from the Charter, executed three Aboriginal men after a trial by post council. While post councils attempted to follow common law procedure in some respects, they were largely an artifact of Rupert's Land. The trial of these men was unique to Rupert's Land. It resembled English customary law in some respects, and Aboriginal custom in others. Chapter four is also about the fur trade, which required extended contact between HBC men and the First Nations People who became active in the trade. In the end, a relationship of co-dependency developed between the Company and First Nations People. The legal pluralism paradigm influences the analysis in this chapter, which concludes with the proposition that justice in Rupert's Land was not based on the reception of common law, but was rather a form of pre-contact usage.

Chapter five examines the HBC navy and the reception of naval law in Rupert's Land. The North American fur trade was a maritime trade. In addition to this, the posts were for the most part total institutions, which was analogous to shipboard life. Rank, function, experience and ethnicity combined to create yet another source of private justice. The HBC operated two navies. The trans-Atlantic navy was responsible for bringing goods to and furs from the Bay during the rather short sailing season. At the same time, a year-round or Bayside navy

employed sailors who wintered at the posts. The employment contract with the latter of these sailors proved to be a source of contention between Company officers and the sailors, who were required to perform manual tasks on land during the winter months. Company employees, with the exception of officers, were not free to leave their employment. Much like sailors, all employees were constrained by the fact that they lived and worked in a far-off land where contact with England was limited to a yearly visit. What distinguished employment in the posts from that on the ships was the heterogeneity that existed on land. Labour collectivity was an important aspect of making a living on the sea, while on the shore workers were divided. This chapter revolves around the development of the total institution and how it affected the men who worked within it.

Finally, chapter six examines the role of women in the fur trade and how the HBC's private justice system was adapted to the needs of the country. In this, the "custom of the country" influenced Company law in immediate and meaningful ways. The central management in London was overly optimistic when they attempted to prohibit employees from interacting with Aboriginal People. Aboriginal women and Company men became united in a customary marriage and raised families in Rupert's Land. Through this interaction, the colonial implications of the HBC's Charter first materialized. The men of the HBC became dependent on Aboriginal women for their survival and success, and consequently began to alter the society of First Nations People. What is particularly striking in the early period is the multifaceted legal system that operated to justify country marriages, and more generally, the HBC's presence in Rupert's Land. The children of these unions usually stayed in Rupert's Land, where female children would usually return to their extended families, and male children

joined the HBC as servants. This chapter outlines the Company's policy, practice and effect on Aboriginal women. It is not a definitive narrative of the role of women in the fur trade. Rather, it is an examination of how the HBC attempted to impose colonial law on Aboriginal women, and what these men perceived as resistance.

#### Notes:

1 Louis A. Knafla, "The Imperial and Colonial Roots of Customary Law in North American Frontiers," unpublished paper presented at the Annual Canadian Law and Society Association held at Lake Louise, 2 June 2000, 1.

2 M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (New York, 1926), 11.

3 Ibid, 31.

4 Sharon Korman, *The Right of Conquest* (Oxford, 1996). 42.

5 Knafla, 7.

6 Ibid, 5.

7 Ibid, 6. See also Hugo Grotius, *De Jure Belli ac Pacis* [1625], translated by Francis W. Kelsey (Oxford, 1925), Book 3, Chapter 6; Samuel Pufendorf, *De Jure Naturae et Gentium* [1688], translated by C.H. and W.A. Oldfather (Oxford, 1934), Book 3, Chapter 8, Section 1; Franciscus Vitoria, *De Indis et de Jure Belli Relectiones* [1540], translated by J.P. Bate (Washington D.C., 1917), Book 1, Chapter 9 (Knafla notes that Vitoria acknowledged the right of conquest, but only if Natives resisted "benign influences."); Jean-Jacques Rousseau, *The Social Contract and Discourses* [1762], translated by G.D.H. Cole (London, 1973 reprint), Book 1, Chapter 3.

8 Ibid.

9 Ibid, 7.

10 H.W. Arthurs, *'Without the Law' Administrative Justice and Legal Pluralism in Nineteenth Century England* (Toronto, 1985), 2.

11 PRO, CO 134/1, fo. 5, Letter in reply to Governor of Canada from HBC 11 Nov. 1682 - Extracts.

12 PRO, CO 134/1, fo. 16, The Petition of y:e Govern:r and Company of Adventurers of Hudsons Bay 26:th January 1675/6 - Excerpts.

13 PRO, CO 134/1, fo. 143, A Commission for Capt Leonard Edgecombe 1689.

14 Martin and Huggard, 75.

15 Morton, 67.

16 Ibid..

17 Ibid, 79.

18 Rich, *The Fur Trade and the Northwest to 1857*, 42.

19 Morton, 83

20 "Instructions for Mr. John Bridgar Governor of Port Nelson the 15th of May 1682," in E.E. Rich, ed., *Copy-Book of Letters Outward &c Begins 29th May, 1680 Ends 5 July, 1687* (London, 1948), 36.

21 Ibid.

22 Rich, *Copy-Book of Letters Outward &c Begins 29th May, 1680 Ends 5 July, 1687*, xiii.

23 Alex Castles, *An Introduction to Australian Legal History* (Sydney, 1971). 4.

24 Ibid, 8.

25 David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge, 1991), 17.

26 Ibid.

27 Mark Finnane, *Police and Government. Histories of Policing in Australia* (Melbourne, 1991), 115.

28 M.B. Hooker, *Legal Pluralism. An Introduction to Colonial and Neo-Colonial Law* (Oxford, 1975), 301.

29 Linda Tuhiwai Smith, *Decolonizing Methodologies* (London, 1999). Smith provides a thorough discussion of colonial theory and indigenous peoples.

30 Ibid, 34.

## CHAPTER TWO

### Exploration, the Charter and the Company's Legal Counsel

#### The Company's Charter and Commerce in London

During the medieval and early modern periods, the importance of the staple trade in the English economy steadily became a crucial component of its commercial relations. Merchant guilds, which were the direct precursor of joint stock companies, controlled the trade in towns and villages by associating all merchants for the sale of certain staple products. Guilds were able to create cartels in certain areas of the economy where, for example, meat, fish, cloth, wool and leather were the exclusive province of guild members who regulated prices, claimed an option on all goods, and created a virtual monopoly in certain products. Customary law played a vital role in this arrangement, where codes of ethics and a general prohibition on price gouging was an aspect of guild self-governance.<sup>1</sup>

Autonomy and self-regulation had long been the standard of business in the domestic economy. By the seventeenth century the sanction of the Crown was required for people to combine and share risks in business ventures because only the Crown had authority to create them.<sup>2</sup> English law during the rise of the commercial age did not guarantee the right of assembly, much less allow the election of company officers and the framing of regulations. Thus, in order to avoid running the risk of being prosecuted for unlawful assembly, associations applied for royal charters which permitted the administration of oaths, framing of regulations, election of officers and the right of individuals to leave England.<sup>3</sup> The *Statute of Monopolies* of 1624, prohibited domestic monopolies with the exception of companies and overseas monopolies.<sup>4</sup> The right of the Crown to make such grants remained unchallenged until the

## Glorious Revolution of 1689.

Royal charters were also necessary to carry on foreign trade since the Crown had authority over all subjects no matter where they were in the world.<sup>5</sup> Charters enabled merchant adventurers to enter into trading relationships with foreign peoples as well as treaties and wars under the aegis of the Crown. Above all, the most important quality that chartered companies possessed was a monopoly over a particular trade item or geographical area. By conferring exclusive rights against all other Englishmen, monopolies served to guarantee that English interlopers could not enjoy the fruits of someone else's labour.<sup>6</sup>

Royal grants developed in two forms that were distinguished only by technical and political differences. Letters patent were issued by the King alone, while charters were issued by the King and Privy Council. Charters like the one granted to the HBC were designed to provide detailed rules for the governance and constitution of a company, a definition of its function, and its territorial jurisdiction.<sup>7</sup> Each form of organization had advantages and disadvantages, and companies were allowed to switch from one form of organization to the other at will. In the case of the HBC, the joint stock model was followed throughout the seventeenth and eighteenth centuries.<sup>8</sup>

Chartered companies during this period were organized for two different purposes. Some had the mandate of settlement, while others were formed strictly for the purpose of trade. The HBC fit somewhere in between these two models. Permanent settlement was part of its mandate, but little was done to increase the number of Englishmen on the Bay over the first hundred years of its existence.<sup>9</sup> Its Charter dealt with exploration, colonization and trading, and provided it with a vast proprietorial interest in Rupert's Land including a broad jurisdictional

authority.

Market forces provided the inspiration for the formation of the HBC. Demand for luxury fashion items began to grow throughout Europe in the early modern era. With this came a demand for furs, which by the late sixteenth century could be felted. Felting involved removing the hair from the skin, mashing it together, soaking it, and adding an adhesive to create a type of felt that was used for hat making.<sup>10</sup> Beaver skins were well suited to this process. North American settlers soon realized that they were available in large quantities from Aboriginal traders, who through the indigenous trading network brought them to their settlements from the north. Hudson Bay was much closer to the prime trapping country, and a fur trading venture in the Bay was proposed in the seventeenth century.<sup>11</sup>

The northeastern reaches of the North American continent were explored by English mariners in the sixteenth century in hope of finding a northwest passage to the Asian continent. As early as 1576, Captain Martin Frobisher had charted Newfoundland, Hudson Strait and Baffin Island. The Bay was first charted by the English explorer Henry Hudson, who was sent to find a northwest passage to the east in 1607 for the Muscovy Company. Although he was unsuccessful, he was commissioned by the Dutch East India Company in 1609 to sail to the Americas in search of new territory. On this journey he reached New York and sailed up the river named after him.<sup>12</sup> In the following year he left London in the *Discovery* and travelled past the northern Cape of Labrador into the enormous Bay that was given his name. During the winter of 1610/11, the intense cold, lack of food, and scurvy culminated in a mutiny the following spring which resulted in Hudson being set adrift in an open boat. His body was never recovered.<sup>13</sup> Nevertheless, his trade with the Cree Nation marked a point of contact and became

part of the oral history of the James Bay area into the 1740s.<sup>14</sup> In 1612, another expedition commanded by Sir Thomas Button claimed possession of the area around Nelson River.<sup>15</sup> Subsequent voyages by Robert Bylot and William Baffin in 1616, Jens Munck in 1619-20, and Thomas James and Luke Fox in 1631 were commissioned to search for a northwest passage, which proved to be fruitless. Nevertheless, English mariners had managed to chart a good portion of the west side of the Bay.<sup>16</sup>

The European fur industry had developed with the extension of commerce.<sup>17</sup> Russian expertise in combing beaver skins and Huguenot refugees skilled and experienced in felt making affiliated in the formation of the Feltmakers' Company in London in 1629.<sup>18</sup> When the French fur traders Medared Chouart, Sieur de Groselliers and Pierre Esprit Radisson returned from an inland journey to the Bay they became convinced that the most expeditious means of increasing the fur trade was by moving European trade goods in, and furs out of the region via the seaborne route to the bottom of the Bay. Failing to obtain support from the authorities of France and New France, they approached the New Englanders of Boston and managed to secure the services of a ship in 1663.<sup>19</sup> Although the expedition was abortive due to the season, they managed to attract the attention of the English boundary commissioners, who were open to the plan. Their venture was supported by English courtiers, financiers, administrators and scientists who were interested in making their fortunes and exploring the Arctic for larger imperial purposes. For example, the scientist Robert Boyle, and the recently formed Royal Society, had arranged for a meeting with Radisson and Groselliers. Boyle joined the enterprise in order to obtain scientific information about the Arctic.<sup>20</sup> Charles II, his cousin Prince Rupert, James Hayes, Rupert's Secretary, and the statesman Sir George Carteret were the first courtiers



persuaded by these French explorers to equip an expedition to pursue the fur trade at the bottom of the Bay in 1667.<sup>21</sup> Prince Rupert, after whom the territory was named, was a dominant force in English politics and imperial ambition. Born in Prague and educated in Bohemia, England and the Netherlands, Rupert was well placed to further his cousin's empire. He was fluent in English, French, German and Dutch, and served Charles I and Charles II as commander of the horse and Lord Admiral, respectively. Politician, financier, cavalier, and privateer, he was an archetypal adventurer.<sup>22</sup>

The formation of a joint stock company was a method of incorporation chosen for the enterprise that combined commercial, colonial and imperial purposes. Fourteen English businessmen and courtiers raised funds and secured two ships; the *Eaglet* (on loan from the Royal Navy), a ketch of fifty-four tons, and the *Nonsuch*, a ketch of forty-three tons. A royal commission promised exclusive trade in any countries they discovered. Among the original members of the Company, including Anthony Ashley Cooper, the first Earl of Shaftesbury, a number had experience in other chartered English colonial enterprises in the West Indies, Carolina, Virginia and New England.<sup>23</sup> The two ships left Gravesend in June 1668, and reached the Hudson Straits when they ran into a storm, forcing the damaged *Eaglet* to turn around and return to England. By September 1668, the *Nonsuch* sailed into James Bay where Charles Fort was established to provide winter shelter for the crew and captain John Gillam, while Groseillers traded weapons, tools and trinkets for beaver skins with the First Nations People.<sup>24</sup> In June, a royal grant for the sole trade of the northern parts of America was given to the London group of the original speculators. According to E.E. Rich, they were "distinct from the courtiers and scientists, within the loose body which was taking shape to support the project."<sup>25</sup>

The group included Sir John Robinson, baronet, M.P., Lieutenant of the Tower of London and former Lord Mayor of London; Sir Robert Vyner, a baronet and subsequent Lord Mayor of London; Sir Peter Colleton, baronet, Lord Commissioner for Trade and Plantations of the Colonial Office and a planter in Barbados; and John Portman, who was a goldsmith and moneylender in the city of London. The *Nonsuch* returned to England on 9 October 1669 with a rich cache of furs.<sup>26</sup>

Although the expedition did not discover a northwest passage, the commercial success of the voyage resulted in Charles II granting a royal charter in 1670 under the great seal of England to the “Governor and Company of Adventurers of England Trading to Hudson's Bay.” The Charter, granted under the royal prerogative and the King’s seal on 2 May 1670, gave eighteen “Adventurers,” including Prince Rupert, the right to the

... sole trade and commerce of all those seas, straits, bays, rivers, lakes, creeks, and sounds, in whatsoever latitude they shall be, that lie within the entrance of the straits commonly called Hudson's Straits, together with all the lands and territories upon the countries, coasts and confines of the seas, bays, lakes, rivers, creeks and sounds aforesaid, that are not already actually possessed by or granted to any of our subjects, or possessed by the subjects of any other Christian Prince or State...<sup>27</sup>

The Charter conferred on Prince Rupert, the HBC’s first Governor, and his seventeen associates an absolute lordship in free and common socage tenure including all mineral and fishery rights, paying the King and his heirs two elk and two black beaver whenever they entered the country.<sup>28</sup> The Charter envisaged a colony named Rupert’s Land that would fall under the authority of the newly incorporated Company.<sup>29</sup>

The Company was also empowered to create any reasonable laws, constitutions, orders and ordinances for the good government of the HBC and its employees, provided that they

were agreeable and not repugnant to English common law.<sup>30</sup> The Charter incorporated the original shareholders under one corporate and political body to provide government for the corporation in England and the colony abroad. The stockholders assembled in a General Court for the transaction of the Company's business and to elect officers. Prince Rupert, the HBC's original Governor, administered the Company with the aid of a Deputy Governor and a Committee of seven. Meetings were held in the Tower of London, Whitehall and various committee members' homes. By 1679, Prince Rupert presided over the annual general courts, which took place at the end of November and where the only business was the election of the Committee.<sup>31</sup> The daily work of the Company, which included hiring captains and selecting Bayside officers, was handled by the Deputy-Governor.

The Charter gave the HBC proprietary rights derived from the Crown according to the accepted forms of English law. It had the right to build fortifications and military establishments, and to make peace and war with any non-Christian Prince or people. As well, the ultimate sovereignty of the Crown was recognized in the Charter where the "... land was to be held of the King 'as of our Manor of East Greenwich, on our County of Kent, in free and common Socage'..."<sup>32</sup> Finally, the Charter gave the Governor and Committee the right to assemble and make laws and ordinances for the good government of its colonies and forts, and for the advancement of trade. Through this the Company had the right to try civil and criminal cases, to impose penalties and punishments that were reasonable to the laws of England, and to appoint officers and governors.<sup>33</sup>

The HBC was capitalized at £10,500, which was used to equip further expeditions. During the early years, these expeditions proved to be unprofitable. In fact, the first dividend

was declared in 1684, two years after the death of Prince Rupert and fourteen years after the granting of the Charter. The Company's monopoly was challenged in 1681 on an expedition to the Bay by the *Expectation*, sponsored by John Phipps and commanded by Richard Lucas, a former employee of the Company.<sup>34</sup> The Company immediately petitioned the Crown and two Lord Chief Justices were consulted. In the following year, the *Expectation* was captured by the Company's ship the *Dilligence*, commanded by Captain Nehemiah Walker. On his return, Walker was unexpectedly suspended by the Committee for capturing the rogue ship and its solicitors began to untangle the legal action against the Company and Walker involving £1,600 for the *Expectation* and its cargo.<sup>35</sup> The case was heard in Admiralty Court, where Phipps represented his enterprise as innocent trading and denied the HBC's Charter made their activity illegal. As a result, Walker and three members of the Committee were arrested. In the end, Captain Lucas and another former employee recanted and came over to the Company's side, swearing affidavits that attested to the mischievous designs of their employers. After spending hundreds of pounds in legal expenses, the HBC managed to protect its monopoly in the first of many challenges launched against it.<sup>36</sup>

While the Governor and Committee in London managed the overall strategy of the HBC in London, resident governors were hired to manage its Bayside operations. The first local governor chosen by the Company was the devout Quaker Charles Bayly, who was released from his six year imprisonment in the Tower of London in 1669 on the surety of the Lieutenant of the Tower, John Robinson.<sup>37</sup> Bayly was in prison under the 1662 *Quaker Act* for "seditious practices" and kept there as a nuisance and an expense to the Crown.<sup>38</sup> Petitioning for his release, the Privy Council set him free on the provision that he take up employment with the

HBC as the first governor of Rupert's Land.<sup>39</sup> Bayly agreed, was given a £300 share in the enterprise, and ordered to claim Rupert's Land formally for the English Crown. According to Rich, Bayly's appointment was partially attributable to Sir John Robinson's role as the Governor of the Tower and shareholder in the HBC. Bayly was also a childhood playmate of Charles II. It can be assumed that the Crown felt it expedient to release and exile the controversial Bayly to avoid arousing the hostility of English Puritans and religious dissenters.<sup>40</sup>

The HBC's first expedition into Rupert's Land was to re-establish Charles Fort in James Bay, with Captain Gillam in command, and to establish a new fort at the Nelson River (later York Fort) with Bayly and his assistant, Captain Nehemiah Walker, in charge. Friendly relations with the First Nations People had to be renewed in order to secure their surrender of the region and take possession for the Crown. In order to adhere to the provisions of the Charter, the Company's colonial policy required that they discover, obtain a surrender, formally annex, and occupy the land in order to effect a transfer of title.<sup>41</sup> Although he expected to remain for the following year, Bayly could not find enough men who were willing to volunteer for another winter on the Bay. He returned the following summer, established posts at the Moose and Rupert Rivers by 1673, and brought in a moderate trade.<sup>42</sup> On his return these furs were then sold "by the candle" at Gallaways Coffee House in London.<sup>43</sup> After establishing a trade at Albany and East Main Island, Bayly was recalled in 1679 and charged with trading privately. Before the charges were formally laid, Bayly died in January 1680 and was buried at St. Paul's Cathedral.<sup>44</sup> John Nixon, his replacement, was an unsuccessful governor due to his ill use of the First Nations people as well as Company's employees.<sup>45</sup> Nixon was a Scot who had a background in the East Indies trade and was a protege of Shaftesbury. Despite his connections,

the Committee demanded a surety of £5,000 for him to act as the Bayside governor.<sup>46</sup> Nixon's appointment, according to Rich, was influenced by a rift that occurred among the courtiers who supported the Company. Ultimately, control was left in the hands of a group of financiers whose primary concern was limited to generating profit rather than loftier colonial ambitions.<sup>47</sup>

By the late 1670s and early 1680s, a fundamental change was taking place in the composition of the Company's shareholders. After a decade of showing no profits in the face of record fur sales and the increasing cost of financing the enterprise, a considerable number of the original courtier investors sold their shares to a number of London financiers and merchants.<sup>48</sup> Most important in this group was Sir Robert Clayton, whose extensive curriculum vitae included Sheriff and Mayor of the City of London, director of the Bank of England, and later Whig and William of Orange supporter.<sup>49</sup> As a scrivener and banker, he had specialized knowledge in title deeds and mortgages. This addition to the Committee brought a new sense of business efficacy to the management of the Company. It established its permanent headquarters at Scriveners Hall, began taking proper minutes at all meetings, and drafted rules for attendance and conduct at management Committee meetings.

In addition to the change in management, the political climate of England began to affect Company shareholders. Shaftesbury, who was a leading figure in the English commercial movement, sold off his shares in 1679 and became leader of the Whig opposition, which aimed to exclude the King's brother, the Duke of York, from succession to the throne.<sup>50</sup> One of Shaftesbury's supporters, Henry Cornish, was elected Sheriff of London in 1680 and began investing in the HBC, increasing his holding to £550 by 1682. In May 1681, the King refused to receive an honour of the City because Cornish was a member of its government, and in July

Shaftesbury was arrested and charged with high treason. Not finding a true bill, the London Grand Jury released Shaftesbury and Cornish was defeated in the Mayoral elections of the same year. Despite Cornish's and Shaftesbury's objections, upon the death of Prince Rupert in 1682, the Company's management approached the Duke of York to assume the position of Governor, which he accepted. Cornish was a stockholder until 1683, when he was convicted of riot and severely fined. Cornish was eventually executed as a traitor when the Duke became King in 1685.<sup>51</sup> When James II assumed the throne, the General Court elected Lord John Churchill as its third Governor.<sup>52</sup>

During the 1680s, the HBC met several challenges to its Charter rights in Rupert's Land from French as well as English interlopers. Throughout the period, French interests asserted a superior claim to the territory. In pursuit of this, a group of Canadians under the command of Pierre, Chevalier de Troyes, crossed the continent overland in 1686 and captured all the Company's posts except for the new one at the Nelson River, taking Bayside governor Henry Sergeant and governor Bridgar prisoner and leaving the French in control of the trade at the bottom of the Bay.<sup>53</sup> The Company returned to the Bay to re-establish a post at Albany in 1688, and began to formulate a commercial policy for Rupert's Land. With the Glorious Revolution in 1689, James II abdicated, William was "elected," and King William's War with France became the first European war for empire.<sup>54</sup> The protection of the HBC's monopoly in the fur trade was of utmost importance, and with the new government's support the Company developed an intricate set of sanctions against all private trading and interloping. Priority was also placed on the colonization potential of the territory, since the English fully supported the dictum that "prescription without possession availeth nothing."<sup>55</sup> However, the HBC did little

to effect settlement since colonization was anathema to a staple trade based on the procurement of animal skins which relied totally on Aboriginal trappers and middlemen.<sup>56</sup>

After 1689, the Company faced the difficulty of defending the Charter as a national interest at a time when the royal prerogative was under attack. Finding considerable support in Parliament, additional legislation was passed in 1690 in the form of an *Act for Confirming to the Governor and Company trading into Hudson Bay their privileges and trade*. The Act acknowledged that the HBC required the power to manage the fur trade and authorized its management to create by-laws, orders, rules and constitutions to manage and regulate the trade. It also included a penal provision "... for the punishment of offenders and recovering forfeitures and penalties which cannot be so effectively done as by authority of Parliament."<sup>57</sup> The Act was to remain in effect for seven years, and at its expiration the HBC was once again forced to rely on the Charter for its status and monopoly in Rupert's Land.<sup>58</sup> The opponents of its rights during the debate were the London Feltmakers, who alleged that the Company was inflating the cost of furs by exporting to the Continent and to the merchant communities of New York and New England.<sup>59</sup> The Feltmakers Company was fearful that the HBC would be able to prevent imports from Russia, or that larger fur dealers, who were the its principal purchasers, would ship a higher proportion of their commodity to Russia.<sup>60</sup>

By 1694, the Company regained control of the posts at the bottom of the Bay, but lost York Fort in 1696. As King William's War was drawing to a close, the Company's grant was up for renewal and Governor Marlborough, who was by then out of favour in the royal court, was replaced by Sir William Turnbull.<sup>61</sup> Turnbull was Secretary of State for the Northern Department and the former ambassador to France. In this role he was influential in the peace



negotiations with France, which culminated in the signing of the Treaty of Ryswick on 20 September 1697.<sup>62</sup> As part of its terms, the HBC had to relinquish its post on the Nelson River (York Fort) but retained the posts at the bottom of the Bay.<sup>63</sup> In 1713, the Treaty of Utrecht, following the defeat of France, acknowledged the Company's right to Rupert's Land as defined in the Charter, and the HBC regained all of the posts on the Bay.

From the Company's perspective, the Treaty of Utrecht established their Charter right in Rupert's Land according to the precepts of common law, diplomacy, and international law. From 1670 until the Treaty of Utrecht, the Company's claim had been challenged by traders from New France who had penetrated the interior of the continent in addition to launching seaborne attacks on the Company's posts on Hudson and James Bay. In the age before the South Sea Bubble, when the revolution in finance capital reached its zenith, the Company's revenues remained relatively stable. Of all the chartered companies, however, the HBC appeared to be a poor cousin. The Company's claim was insecure, the commodity that could be obtained was of little importance in the English economy, and the Company's performance for the first forty years of its existence only afforded moderate dividends on a few occasions.

During the political changes that were taking place in the second decade of the eighteenth century, the Company's claim to Rupert's Land continued to be asserted in the face of war and interlopers.<sup>64</sup> Although its claim was not seriously challenged in Parliament, it emerged from the War of the Spanish Succession (1701-1713) in a less favourable position.<sup>65</sup> Parliament during this period viewed the War of the Spanish Succession as a war for overseas possession and trade, and England was poised to become Europe's greatest colonial power. All the chartered companies during the Revolution period were under pressure to show that they

had promoted English navigation, and were subsequently challenged by interlopers, sued in Admiralty Court and investigated by Parliament.<sup>66</sup>

Commerce in this period began to take on a more modern appearance. The issue of stamped debentures had a profound significance on the HBC and all other joint stock companies by the early eighteenth century. Evidence of this can be partially discerned from a lawsuit for the repayment of debt launched by Thomas Pitts against the Company in 1701. Pitts introduced a number of creditors to the Committee and personally lent it more than £1,500. When Pitts called in £1,000 of the HBC's debt it was refused. Upon his death his estate claimed the entire debt. This debt was secured by the stamped bond system and the action was brought to the Court of Exchequer. The HBC refused to allow Pitts' estate to sell his stock until they paid "all the unnecessary cost occasioned by the Law Suit."<sup>67</sup> In the end, the Company settled the action by agreeing to pay £500 immediately, and another £1,000 six months later. The settlement required the Pitts estate to pay five pounds of the costs and discontinue the action. The result of this did little to clarify the corporate responsibility of the Company to its bond holders other than showing that the Company, as a corporate individual, was liable for its debts rather than the individual who negotiated the loan.

In another action the HBC brought against its banker and former Governor, Sir Stephen Evans, the Company established that it had a right to assets that resulted in trade carried on in its name by its individual shareholders. As part of his personal business, Evans invested in insurance companies that underwrote high risk policies. By 1712, Evans was no longer taking an active role in the HBC, preferring the insurance business, and the Committee successfully proved before the Commissioners at Guildhall that they had a claim against its Governor for

£844 3s. 3d.<sup>68</sup> Subsequently, Evans committed suicide and his trustees, on behalf of his creditors, wished to include his HBC stock among his assets. The Committee provided his trustees with information on his stock holdings but refused to allow them to sell his stock based on the Company by-law, "Relating to the Stopping of Such Persons Stock where it shall Appear any person is Indebted to the Company."<sup>69</sup> The trustees of Evans' estate challenged the by-law in 1716, when it was held that the Company's regulatory powers were guaranteed in the Charter, which gave it the right to withhold the transfer of stock until his debt to the Company was paid.

The Company continued to withhold Evans' stock until 1719, when his trustees discovered that his share in the Company was not limited to the £500 of stock which stood in his own name. Evans also had a claim to £574 which was held for him in trust by Sir Thomas Lake (the father of HBC Governor, Bibye Lake). As a result, the trustees sued the Company in Chancery in 1720.<sup>70</sup> The Company's position prevailed when the Court of Chancery held that Evans' debts did not revert to the HBC. From this holding it was evident that the HBC gained protection from shareholders who conducted its business.<sup>71</sup> While on the surface this seemed to be the Company's method of dealing with financing operations through the war years, it is also evident that it was drawing closer to the principle of shared liability associated with joint-stock corporations. According to Rich, "the verdict which it obtained in 1720 ranks as an important step in the evolution of the legal concept of the joint-stock company."<sup>72</sup>

Stability came to the Company out of this conflict for two reasons. First, the dispute over the estate of Sir Stephen Evans brought one of his trustees, Samuel Jones into the Company, who subsequently brought wealth and a solid background in management to the

Committee and later to the office of Deputy Governor from 1729 to 1735. In fact, it was Jones who loaned the Company £2,000 for its customs duty in 1712.<sup>73</sup> Second, Bibye Lake succeeded Evans as Governor of the HBC; a position he held until 1743. Lake's interest in the Governorship was as a full-time manager, a departure from a Company formerly governed by courtiers, princes, politicians, diplomats, generals and bankers.<sup>74</sup>

Sir Bibye Lake acquired his first £1,000 of HBC stock in 1709 at the age of twenty-five. Lake's father, Sir Thomas Lake, also had a background in the HBC as Deputy Governor from 1710 to 1711. He subsequently sold his shares to his son. Bibye Lake's first association with the HBC occurred when he was sent to France as an envoy of the Crown along with Captain John Merry, M.P., to negotiate for the restoration of the Bay. In 1710, he and James Knight reported to the Committee that "they were Assured by Mr. Cardonell and Mr. Walpole that all Hudson's Bay and Streights have been Demanded of the french."<sup>75</sup> On his return, Lake claimed a baronetcy vacated by the death of his uncle, and devoted the bulk of his time to the Company despite his position as Sub-Governor of the Royal Africa Company. Just prior to his Governorship, the Committee began investing money borrowed from Samuel Jones in Exchequer Bills and Bank of England notes. Lake continued this policy by investing in government securities, East India stock, South Sea stock, and real estate.<sup>76</sup> The Company then spent its excess capital on the building of posts, which were its chief fixed asset and provided the Company with equity on which to borrow working capital through debenture bonds and loans that lacked the obligations of bonds.<sup>77</sup>

In addition to this, Lake trebled the Company's stock in 1720 in an effort to strengthen its position as a national interest. Up to 1720, the stock issue of the Company was too small to

enlarge the trade, and after several meetings of the Committee they passed a resolution to find a valuation for the Company's "Quick and dead Stock and Lands" which amounted to a conservative estimate of £94,500.<sup>78</sup> The Company then enlarged its stock from £31,500 to £94,000, and resolved that each proprietor should receive three shares of £100 for each share of old stock.<sup>79</sup> Prior to this, Company stock was last trebled in 1690, when the Committee realized its vulnerable position with only thirty shareholders.<sup>80</sup> Once again, the Company needed to elevate its mandate and status to that of a colonial scheme and a national concern. In the meantime, however, the Company was losing the fur trade to the French in the interior of North America. According to A.S. Morton, "[to] patriotic Englishmen and to men interested in British manufactures and overseas trade this was nothing short of disaster."<sup>81</sup> Generally, the system of monopoly that deprived Company outsiders of the opportunity to risk their fortunes was considered the primary cause.

Arthur Dobbs agreed with this sentiment when he began his attack on the Company. Born an Irish gentleman, Dobbs had inherited his father's wealth and contacts with the governing class. In order to further increase his wealth, he married an heiress. Among the many offices he held was Sherriff of Antrim from 1720, and M.P. in the Irish House of Commons from 1721 to 1730. In 1730, Dobbs was introduced to Sir Robert Walpole "... as one of the members of our House of Commons, where he on all occasions endeavours to promote his Majesty's service."<sup>82</sup> During the years just prior to and just after this meeting, Dobbs published an *Essay on the Trade and Imports of Ireland*, and as a result was appointed engineer-in-chief and surveyor-general of Ireland.<sup>83</sup>

In 1731, Dobbs prepared an abstract of all explorers notes in the search for the north-

west passage. Two years later, on a visit to London, he gave a copy of his abstract to Sir Charles Wager, the First Lord of the Admiralty. Through Wager, Dobbs met Samuel Jones, the Deputy Governor of the HBC from whom he learned of the Company's Charter.<sup>84</sup> According to Rich, "Dobbs concluded that the Hudson's Bay men were by treaty and charter, in control of the avenue to the passage...[and he] was not such a man as to allow them to remain in unquestioned control, established in view of what he considered their firmly inactive policy."<sup>85</sup> Dobbs inferred that according to the terms of the Charter, the Company alone could derive the benefit of the discovery of a northwest passage.<sup>86</sup> To make matters worse, after reviewing all the information available he realized that the HBC had done little in pursuit of this goal. In fact, the HBC officially informed him that it did not plan to make any attempts in the future.<sup>87</sup> Such was the nature of its business. It derived its prosperity from keeping other Europeans out of Rupert's Land and collecting as many furs as could be traded. For this reason, Dobbs approached Captain Christopher Middleton and suggested they approach the Admiralty to fit out an expedition for a northwest passage.<sup>88</sup>

Middleton was in the employ of the HBC when Dobbs approached him. He gained much of his maritime experience serving on privateers in the Atlantic during Queen Anne's War (1701-1713). He joined the Company in 1721 to sail as second mate on the voyage to York Fort until 1724, when he was appointed commander of the *Hannah*. By coincidence, both Dobbs and Middleton presented papers to the Royal Society in 1726; Dobbs on the aurora borealis and Middleton on compass anomalies in the Arctic. Whether they met at this time is unknown. But when Dobbs approached the Company's captains in 1735 for information about the northwest passage, he approached Middleton supposedly because of his scientific interest

in the North.<sup>89</sup> By this time, Middleton was a senior HBC captain commanding the *Seahorse*, its new 170- ton ship.

In 1737, after learning of Knight's and Scroggs' expeditions to the north, Dobbs pressured Lake to send two sloops north from Churchill.<sup>90</sup> Middleton, who was at Churchill when the ships returned, reported to Dobbs that the crews had not been qualified to take on such an expedition and as a result only sailed as far North as 62 degrees 15 minutes. With this, Dobbs became convinced that the Company had no interest in pursuing this search, and told the Company that he would look for support from those "... who I believe will undertake it cheerfully, as they are convinced it will be a national Benefit."<sup>91</sup> To this end, Dobbs appealed to the Admiralty in 1737 and 1738 to sponsor an expedition. Middleton seemed to be the ideal captain due to his lengthy experience in Arctic navigation, and his election as a Fellow of the Royal Society in 1737 for his efforts in the theory and practice of navigation.

While at the Bay in 1738, Middleton learned from Richard Norton that Scroggs' expedition noticed the sea rising and the land falling off to the west of the Bay. Coupled with this, he learned from local First Nations People that they had heard of Europeans trading with Aboriginal people on the Pacific Coast. From 1739 to 1740, Middleton spent the winter at the royal court in an effort to convince Sir Robert Walpole, the First Minister, and Sir Charles Wager, the First Lord of the Admiralty, to sponsor an expedition in search of a passage. According to Glyndwr Williams, Middleton then wrote to Dobbs stating, that "George II had been approached by Wager and had given his blessing to the venture."<sup>92</sup> On 5 March 1741, Middleton received his commission from the navy and was formally appointed commander of the Arctic expedition. He then resigned from the HBC.

In preparation for the journey, Middleton faced a number of difficulties including converting his vessels, the *Furnace* and the *Discovery*, for the voyage. In addition, during the war years there was a shortage of sailors, which forced Middleton to rely on the press gang to supplement a small contingent of HBC defectors including his cousin, William Moor, who commanded the *Discovery*. Delayed in England, Dobbs' expedition set sail on 8 June 1741, six weeks after the Company's ships had set sail. It was a foregone conclusion that the expedition would have to winter at one of the Company's posts and explore the north in the spring before returning to England. The HBC reluctantly gave the expedition the abandoned fort at Churchill and watched them lose ten crew members to scurvy over the course of the winter. Sailing north in the spring, the ship became trapped in ice, which prompted Middleton to send boats out to explore the area. He became convinced that they were in nothing more than a river or inlet after the ice had gone. Like his predecessors, Middleton mistook Chesterfield Inlet for a bay.<sup>93</sup>

Middleton's return in 1742 brought considerable discussion and publicity to the search for the northwest passage and the HBC. Awarded with the Royal Society's Copley prize medal, Middleton also faced a charge from Dobbs that he, in league with the Company, deliberately concealed the passage.<sup>94</sup> To back up this claim, crew members Edward Thompson, John Wigate and John Rankin all swore that Middleton had concealed the passage.<sup>95</sup> This began a pamphlet war that continued for three years. In Middleton's account of the journey, he stated that a conspiracy was afoot against his command, which was engineered by Dobbs. He stated that James Smith, who was recommended to him by Dobbs, told him that "... a close Design was carrying on against me, between Mr. D-, my Lieutenant, my Clerk, and my Surgeon, and ... Mr. *Wilson*."<sup>96</sup> Among the other allegations levelled against Middleton by Dobbs was that



he had been bribed by the Company for the sum of £5000 in order not to prejudice or obstruct their trade.

By this period, Dobbs was disappointed that the passage had not been found, and devised a plan to pursue the venture by attacking the Company's Charter. Because Middleton supported the HBC's claim to Rupert's Land, Dobbs accused him of being secretly on the payroll of the Company, and the Admiralty called upon him to answer the charge, keeping him on shore as a sign of disapproval.<sup>97</sup> The dispute was resolved by an inquiry where, according to Middleton,

The Lords of the Admiralty, who are my proper Judges, deemed the Reasons brought against me to prove my Corruption insufficient, did not convince Mr. Dobbs, anxious for the Discovery of Truth, made the strictest Enquiry into my Conduct during the Voyage, among my Officers and Men, and having found Four, whose Testimony he relied upon, doubtless not believing them capable of deliberate Falsehood, published the Book already mentioned...<sup>98</sup>

As it turned out, an affidavit presented to the Lords of the Admiralty against Middleton by George Axx turned out to be a forgery. He stated that the letter Dobbs presented to the Lords was forged, which was corroborated by John Dewilde of St. Martin's, Ludgate, prior to Axx's mysterious disappearance. In Dewilde's deposition, sworn at the public office in November 1744, he stated that "[the] said Captain admonished the said Axx several Times to be cautious in what he signed or swore. After which, the Said Axx cheerfully signed a Paper, in which he denies that the ever wrote or Sent the said Letter of Draught, to which his signing, he this Deponent, was a subscribing witness."<sup>99</sup>

In 1745, Dobbs approached Parliament for help in the further search for a northwest passage. His petition used the old arguments of opening up new countries to provide a market

for English manufactured goods, and it was referred to a Parliamentary Committee comprised of all the merchants and M.P.s for sea ports.<sup>100</sup> In March, a Committee of the Whole House resolved that the discovery of a passage would be of great benefit to the Kingdom, and a reward of £20,000 was offered for the discovery. According to Rich, “[the] expedient of offering a reward was one which allowed the government to show support without incurring any expense or responsibility unless and until the project could prove successful.”<sup>101</sup> As a result, a public subscription was opened in order to raise £10,000 which was needed for such a voyage. Dobbs and the shareholders put together an organization called the North West Committee which subsequently purchased two ships, the *Dobbs Galley* and the *California*, and hired William Moor, who commanded the *Discovery* on the previous journey with Middleton, to command the *Dobbs Galley*, and Francis Smith, who had formerly commanded the Company’s *Churchill Sloop*, to command the *California*.<sup>102</sup> This expedition left England in 1746 after Dobbs received assurance from Parliament that the bill offering the reward should not contain a clause safeguarding the Company’s Charter. The HBC was expected to give the expedition the assistance it needed if they were in distress. Nevertheless, the 1746-1747 expedition lacked the official support of the Admiralty and had to rely on the Company’s compassion if in distress.<sup>103</sup>

Among the members of the North West Committee were a number of London merchants who petitioned the Crown for a charter of their own. The petition, forwarded to the Crown’s law officers and prepared by Dobbs and his associates, declared that the HBC’s Charter was invalid on legal grounds as well as on the basis of non-compliance with the grant, and requested a perpetual grant and exclusive trade in areas the Company had not occupied.<sup>104</sup>

The law officers rejected Dobb's proposal, since it would have resulted in two companies holding charters to trade in the same territory. Dobbs and his supporters then took the issue to Parliament in 1748, where they presented a petition to the Committee of the Privy Council which was forwarded to the Attorney and Solicitor Generals. Based on affidavits filed prior to this, Dobbs was informed by his legal advisors that he and his Committee were in a position similar to that of the HBC prior to the granting of their Charter because of the time, money and labour that they had utilized in the search of a passage.<sup>105</sup> A Committee of the House of Commons was appointed to investigate the Company's Charter in 1749. According to Williams, this was the most serious challenge the Company faced since the granting of the Charter. It faced countrywide opposition as petitions flowed into London from the leading industrial towns and ports, demanding an end to its monopoly.<sup>106</sup> This was part of a larger attack on monopolies which included an attack on the Royal Africa Company, and was organized by merchants of the great port towns of Bristol and Liverpool.<sup>107</sup>

For two months, the Parliamentary Committee heard evidence from twenty-two witnesses including Dobbs, merchants and former HBC employees. The questions centred around the conditions of the Bay, the prospect of settlement, the Company's reluctance to move inland and its treatment of First Nations People. The result was that the HBC was portrayed in an unfavourable light, which was further exasperated by a spate of bad press and a second pamphlet war.<sup>108</sup> The Company found few defenders in the media, which made its secretive business dealings part of the public record. To defend itself, the Company published a short pamphlet written by its solicitor, Joshua Sharpe, entitled *The Case of the Hudson's Bay Company*. It was circulated among M.P.s and illustrated the main issue of the debate: whether

the Company's pursuit of a conservative business plan that was first and foremost responsible to shareholders was inferior to Dobbs' plan for the export of timber and sled transport to the Pacific.<sup>109</sup>

The Parliamentary Committee concluded its investigation and presented a printed report to the Commons in April 1749. In the debate that ensued, the Company found an important defender in Sir John Barnard, an authority on trade and commerce. He attributed the attack on the Company to a group of antagonists with the basest motives. In the end, the Commons sat as a Committee of the Whole House and called witnesses. To defend itself, the Company called in all those officers and ships captains who were in England. The issue boiled down to how effectively the Company was upholding the Crown's interest in North America in the face of French interloping and conflicts with First Nations People on the western frontier of the Thirteen Colonies. To exonerate its decision not to move inland, Company servants informed the Committee of the expense and transportation problems, and pointed out that a move inland would result in the loss of trade at the posts already established on the Bay.<sup>110</sup> As a result, the motion to challenge the Company's Charter in the law courts was defeated by a majority of two to one in the Commons.

Although the Company had reason to fear for the security of its Charter, it emerged from the challenge in a stronger position than its fellow chartered companies. The Royal Africa Company was dissolved in 1750, and the Levant Company had its Charter modified in 1753. The HBC succeeded, according to Williams, because it had provided its shareholders with sporadic dividends, did not rely on the government for its finances, and was steadily becoming profitable.<sup>111</sup> The HBC did not require military or financial support from the state, held a vast

stretch of land (albeit in name only), and its posts had not been attacked by the French since the late 1600s. In fact, in 1779, Adam Smith regarded the HBC as the only chartered company that was justified due to the conditions of Rupert's Land.<sup>112</sup> Nevertheless, the Company's frontier was dominated by posts established by Sieur de la Verandrye, who had moved as far west as the forks of the North and South Saskatchewan Rivers by 1753.<sup>113</sup>

Following the challenges to the Charter in the 1740s, James Isham, the governor at York Fort, became sensitive to the situation in the interior. He suggested to the Committee as early as 1743 that the Company needed to follow a more pro-active policy. Although initially ignored, his idea received a more receptive ear in 1752 when he found a volunteer in Anthony Henday, a company labourer who was hired in 1750. Although Henday did not have any real experience travelling inland, his expedition was to exceed in distance the only other full scale journey inland undertaken by Henry Kelsey in 1690. Henday's mission was to travel inland with a group of Cree allies to the country of the "Archithinue Indians," and convince them to travel to the Bay to trade.<sup>114</sup> In his journey, Henday travelled as far as the Red Deer River, and met the now mounted Archithinue group before he returned to York Fort with a convoy of canoes.<sup>115</sup> According to Williams,

In a single journey Henday had revealed not only the complex pattern of Indian trade in the interior; he had also confirmed the way in which the French posts on the Saskatchewan were intercepting the Cree and Assiniboine traders on their way to the Bay. His unexpurgated journals provided powerful arguments for serious inland penetration, preferably accompanied by the establishment of interior posts.<sup>116</sup>

Nevertheless, in the years following Henday's journey, the need to move inland lost importance for the Company as the Seven Years War of 1756-63 resulted in the French abandoning the posts on the Prairies by 1759 with the Conquest of Canada. By the mid 1760s, however,

competition in the interior reemerged when French and English-speaking “pedlars” from the colony of Quebec began to visit Rupert’s Land. With this, the next phase of the HBC’s history began as they moved inland themselves, first to Cumberland and then beyond in order to compete head to head with what became the North-West Company, which culminated in the merger of the two Companies in 1821.

### The Barristers and Solicitors of the HBC

Throughout the first century of its operation, the HBC was a litigious enterprise. It faced challenges and launched actions dealing with diverse areas of the law. These included attacks on its monopoly, shareholder’s liability, banking notes and debentures, land transactions and Admiralty matters. A major by-product of the commercial economy of the late sixteenth and seventeenth centuries was litigation. Through this, the common law was adapted to the new business context. New and novel methods of capitalization were beginning to emerge which required common law remedies and statutory rules. In this milieu, barristers, solicitors and attorneys were hired by the HBC to conduct its legal business. It was, therefore, professional lawyers who participated in the defence of the Company’s Charter, in the interpretation of its rights, and more generally in the development of the HBC’s corporate and commercial strategy.<sup>117</sup>

As already mentioned, Joshua Sharpe represented the Company in the political and legal action taken against the Charter. Sharpe worked for the HBC from 1748 to 1759 in various matters including Dobb’s attack on the Charter, and some protracted litigation that began in 1755 and continued until 1759.<sup>118</sup> Sharpe’s position was not unlike a number of solicitors hired

or retained in this period. While he was not mentioned in the pension books of the various Inns of Court, he most likely attended one of the Inns of Chancery. The Inns of Chancery, like the Inns of Court, were associated with the accommodation and education of lawyers in London. What distinguished the Inns of Chancery was the association they had with the lower tier of the two-tiered legal profession in England. These Inns trained solicitors and attorneys while the Inns of Court trained barristers. Unfortunately, the records of the Inns of Chancery have not survived in great quantities; of the eight Inns that were in existence in 1600, documentary evidence exists for only five, all of which are incomplete.<sup>119</sup> For the HBC, about half of its legal advisors came from the lower tier of the profession from 1674 to 1759.

A problem with the extant HBC records is that a number of legal counsellors have been listed without given names, making it impossible to locate permanent records. Included in this list are Mr. Hawkins, Mr. Ince, solicitor, Mr. Kinvin, solicitor, Mr. Shaller, attorney, Mr. Clayton, solicitor and Mr. Osbourne, attorney. While it is tempting to place all of these men under the category of solicitor, caution must be exercised due to the imprecision of language used by the Company's management in their description of legal counsel.

This was a period when the Inns of Court were solidifying an ever-narrowing upper-tier position while the lower tier's numbers were swelling, possibly leading to confusion among outside observers. For example, Charles Turner was listed as the Company's attorney. However, throughout his career he was a member of Staples Inn of Chancery, and as a student held chambers in Middle Temple in 1671. Turner was fined and expelled in 1671 "... for scandalous and shameless behaviour late at night in several courts..." He had apparently organized a gambling session on Christmas Day, 1670.<sup>120</sup> Clearly a solicitor, Turner went on

to work for the HBC from 1717 to 1734, handling the Company's defence against the action launched by the estate of Sir Stephen Evans in 1718.<sup>121</sup> During his eighteen-year association with the HBC as its solicitor, Turner also litigated a real property matter concerning an investment in drained marshland against the Craddock estate for the Company's Governor, Bibye Lake.

**Table 1.**

**Training of HBC legal counsel:**

<b>Solicitors</b>	<b>Barristers</b>	<b>Advocates and Proctors</b>
Edward Randolph	William Walker	Thomas Penfold
George Gorst	John Travers	Sandforth Neville
William Deane	Charles Turner	Mr. Searle
Thomas Dowse	Edward Stanley	
Joshua Sharpe		

The work of the Company's legal counsel can be set in the larger context of the growth of industry and commerce in England. *Lake v. Craddock* is indicative of one type of investment the HBC's management was engaged in. After the debacle of the South Sea Bubble, real estate was looked to as one of the most secure investments, and legal counsel was required for any manner of land transfer. In addition to this, industry and commerce gave rise to a considerable amount of chambers work as well as the drafting of specialist opinions at the behest of businessmen. Large organizations such as the HBC actually "retained" counsel for a number of decades. For example, Charles Turner acted as the Company's counsel from 1717 to 1734, Edward Stanley from 1738 to 1744, and Joshua Sharpe from 1748 to 1759. As David Lemming



contends, every metropolitan practitioner must have taken on some commercial business dealing with problems associated with bills of exchange, charter parties, share dealings and company organization as well as the law of real property.<sup>122</sup>

There was a considerable level of crossover available to solicitors and barristers in the seventeenth century. Turner, it appears, was a litigator in Chancery, which undoubtedly proved lucrative. Expelled from an Inn of Court, he went on to become a successful solicitor. While Turner's situation is similar to many solicitors of the period, some also became barristers after spending time in the lower tier of the profession. While the Inns of Court enjoyed a unique privilege in being alone able to confer the right to an audience at Westminster Hall, the benchers of each Inn were allowed a tremendous amount of discretion in admissions including the waiving of formal requirements. By the end of the seventeenth century, the Inns had achieved complete independence in the selection of barristers.<sup>123</sup> Prior to this, orders were issued by the Crown, the Privy Council and judges for qualification standards. The last of these were passed after the Restoration, and by the 1690s seniority, residence and the performance of legal exercises were the only requirements imposed by the Inns.<sup>124</sup> While some of the Company's legal counsel attended Inns of Court, not all finished there. Students educated at an Inn were still able to pursue legal careers even if they failed, or chose not to to cross the bar. Turner was one example of this. Another was Edward Randolph, who acted as the attorney for the Company in New England and died in Virginia in 1703 "in poverty."<sup>125</sup>

Business had come to influence the legal profession pervasively during this period. Speculative ventures led to a number of references to law officers for their recommendations, or for petitions to the Crown for the amendment of monopoly charters. Such was the case when

Dobbs challenged the Company's Charter in the 1740s. This type of matter created work for barristers since interested parties were at liberty to challenge charters before letters patent passed the great seal. While some Company barristers confined their practices to Westminster, others did not practice at all. According to Lemmings, "... the Inns of Court became the fashionable resort of large numbers of well-born gentlemen who regarded them simply as finishing schools."<sup>126</sup> Such was the case of Sir Thomas Lake, father of Bibye Lake and former Deputy-Governor of the HBC. Sir Thomas Lake received his bar call from Lincoln's Inn on 10 May 1664 as Thomas Lake, Esquire, and proceeded to become involved in the world of business and a major shareholder in the HBC.<sup>127</sup> Lawyers of Sir Thomas Lake's cast followed the tradition of starting as esquire before becoming gentlemen. These men were lawyers who invested in government stocks and chartered companies.<sup>128</sup>

Active barristers employed by the Company included William Walker, who was called to the Inner Temple bar on 25 November 1678 and placed on a list of potential readers in 1697.<sup>129</sup> Walker, the son of a stockholder, was employed by the Company in 1679. John Travers also attended the Inner Temple and was called to the bar on 16 February 1688.<sup>130</sup> Edward Stanley was admitted to the Inn in 1720, bought a stair in 1721 and was admitted as a member to a chamber for life in 1724.<sup>131</sup> Stanley acted for the HBC from 1738 to 1744 in *Goodyer & Gibson v. Lake* and *George Love v. The Hudson's Bay Company*.<sup>132</sup>

The Company also hired counsel from Doctors' Commons, the house of civilian lawyers, presumably to manage its maritime law matters. The first mention of hiring an advocate was in 1698, when Sir Thomas Penfold and Dr. Walker were retained as council for the Company at one guinea each.<sup>133</sup> After receiving his Doctor of Laws from Cambridge,

Penfold had an illustrious career in the Court of the Arches, as King's Advocate, when he was knighted, and as Treasurer of Doctors' Commons.<sup>134</sup> Members of the Commons who specialized in legal matters fell into two categories: advocates who held doctorate degrees and conducted cases in court, and proctors who usually held little more than baccalaureate degrees and prepared briefs for the advocates as well as performing client based work. Nevertheless, the Commons lacked the same types of classifications that existed at the Inns of Court. Until the society was incorporated by royal charter in 1768, there was no formal requirement for membership.<sup>135</sup> Membership in the Commons was held by clergymen and laymen. A layman could qualify for admission by studying civil and canon law for five or six years in a university and attending Canterbury for a year.<sup>136</sup> Proctors rather than advocates were hired by the HBC during the 1730s and 1740s to deal with matters that pertained to Admiralty Court. Two civilians hired during this period were Sandforth Neville, proctor, who was appointed the Company's "Syndick or Proctor," and Mr. Searle, who was hired in 1741 and retained until 1743 to defend Captain William Coates during the Dobbs affair.<sup>137</sup>

The HBC was situated geographically and temporally at the centre of English trade and commerce in the eighteenth century. Because of this, they could hire legal counsel that best suited the situation at hand. The catalogue of the Company's legal counsel reflects its wider cognizance of business and the law. With respect to common lawyers, it has been asserted that the separation of the two branches of the legal profession was not yet fully established in the period of study although it may have reached a crucial stage. Barristers were becoming specialists and retained a coveted position in the legal profession. However, working as a barrister was becoming an almost boutique field in legal practice. The number of men that

worked as barristers was substantially outnumbered by solicitors and attorneys. These were the men who sought their fortune in particular areas of law that were being created in Chancery or carved out of the medieval common law profession. Proctors, on the other hand, began developing different skills that affirmed their position in other areas of the English legal profession in matters concerning such things as wills, estates and maritime law. The nexus of various legal professions was reflected in the counsel hired by the Company in its first century as the legal profession began to keep pace with the corporate and commercial needs of overseas enterprise.

#### Notes:

1 Rudolph Robert, *Chartered Companies and their Role in the Development of Overseas Trade* (London, 1969), 11-12.

2 Sir Percival Griffiths, *A Licence to Trade. The History of English Chartered Companies* (London, 1974), ix-x.

3 Ibid, x.

4 Ibid, xii.

5 Ibid, xi.

6 Ibid.

7 Ibid, xii.

8 George Cawston and A.H. Keane, *The Early Chartered Companies* (London, 1896), 10.

9 Griffiths, xiv.

10 Ibid, 110.

11 See generally E.E. Rich, *The Fur Trade and the Northwest to 1857* (Toronto, 1967); E.E. Rich, *Hudson's Bay Company 1670-1870, Vol. 1* (London, 1958); A.S. Morton, *History of the Canadian West* (Toronto, 1939). For a complete bibliography of the general history of the Canadian West see bibliography. For the purposes of this chapter, the general history of the incorporation of chartered companies and their legal meaning is the focus.

12 Robert, 103.

13 Ibid, 103-104.

- 14 Knafla, 12.
- 15 Griffiths, 110.
- 16 Rich, *The Fur Trade and the Northwest to 1857*, 22.
- 17 Rich, *Hudson's Bay Company 1670-1870, Vol. 1*, 30.
- 18 Rich, *The Fur Trade and the Northwest to 1857*, 22.
- 19 Ibid.
- 20 Ibid, 22-25.
- 21 Ibid, 23.
- 22 Knafla, 2.
- 23 Rich, *Hudson's Bay Company 1670-1870, Vol. 1*, 30.
- 24 Robert, 105.
- 25 Morton, *A History of the Canadian West*, 65; see also Rich, *Hudson's Bay Company 1670-1870, Vol.1*, 41.
- 26 Griffiths, 112; see also Archer Martin and J.T. Huggard eds., "The Rise of Law in Rupert's Land " in *Western Law Times* (Winnipeg, 1890): 54.
- 27 "The Royal Charter Incorporating the Hudson's Bay Company, 1670," in E.H. Oliver, ed., *The Canadian Northwest Its Early Development and Legislative Records, Vol. 1*(2 Vols., Ottawa, 1914),135-154.
- 28 Robert, 106; see also Martin and Huggard, 58.
- 29 Morton, 54.
- 30 "The Royal Charter Incorporating the Hudson's Bay Company, 1670."
- 31 E.E. Rich ed., *Minutes of the Hudson's Bay Company 1679-1684, First Series 1679-1682* (London, 1945), xxiii.
- 32 "The Royal Charter Incorporating the Hudson's Bay Company, 1670."
- 33 Ibid
- 34 E.E. Rich ed., *Minutes of the Hudson's Bay Company 1679-1684, Second Series* (London, 1946), xviii.
- 35 Ibid, xx.
- 36 Ibid, xxi.
- 37 Rich, *Hudson's Bay Company 1670-1870, Vol. 1*, 65.

38 Morton, 65.

39 Ibid, 66.

40 Rich, *The Fur Trade and the Northwest to 1857*, 32.

41 Morton, 67.

42 Rich, *Hudson's Bay Company 1670-1870, Vol. 1*, 68.

43 Ibid. Sale by the candle refers to the method of auction where an upset price was called as the candle was lit and bids were made as the candle burned. Whoever had made the highest bid when the candle guttered out was the purchaser.

44 Morton, 80.

45 Ibid, 82.

46 Rich, *Hudson's Bay Company 1670-1870, Vol. 1*, 82.

47 Rich, *The Fur Trade and the Northwest to 1857*, 42.

48 Griffiths, 118.

49 Rich, *Hudson's Bay Company 1670-1870, Vol. 1*, 88-89.

50 Rich, *Minutes of the Hudson's Bay Company 1679-1684, Second Series*, xxii.

51 Ibid, xxiv.

52 Morton, 95

53 Rich, *The Fur Trade and the Northwest to 1857*, 55.

54 Ibid, 60.

55 Ibid, 31.

56 See generally Daniel Francis and Toby Morantz, *Partners in furs: a history of the fur trade in eastern James Bay, 1600-1870* (Toronto, 1983); Arthur J. Ray, *Indians in the Fur Trade: Their Role as Trappers, Hunters, and Middlemen in the Lands Southwest of Hudson Bay, 1660-1870* (Buffalo, 1974); Arthur J. Ray and Donald Freeman, "Give Us Good Measure": *An Economic Analysis of Relations between the Indians and the Hudson's Bay Company before 1763* (Toronto, 1978).

57 *Act for confirming to the Governor and Company Trading to Hudson's Bay their Privileges and Trade*, 1690 (U.K.), 2W. & M., c. 23.

58 Griffiths, xii.

59 Rich, *The Fur Trade and the Northwest to 1857*, 60.

60 Griffiths, 119.

61 Rich, *The Fur Trade and the Northwest to 1857*, 64.

62 Ibid, 64.

63 Ibid, 68.

64 Rich, *Hudson's Bay Company, 1670-1870, Vol. I*, 422.

65 Ibid, 461.

66 Ibid, 273.

67 Ibid, 463-464.

68 Ibid, 468.

69 Ibid; see also "The Royal Charter Incorporating the Hudson's Bay Company, 1670," 145.

70 Rich, *Hudson's Bay Company, 1670-1870, Vol. I*, 468.

71 Ibid.

72 Ibid.

73 Ibid, 469.

74 Ibid.

75 Ibid, 419.

76 Ibid, 473.

77 Ibid, 475

78 Ibid, 477.

79 Ibid.

80 Ibid, 272.

81 Morton, 207.

82 Ibid.

83 Ibid.

84 Ibid, 208.

85 Rich, *Hudson's Bay Company, 1670-1870, Vol. I*, 557.

86 Ibid.

87 The Company sent the Whalebone Sloop under the command of John Scroggs north from Churchill in 1722 to search for traces of the lost expedition of Governor James Knight. See Glyndwr Williams, "Christopher Middleton," in *Dictionary of Canadian Biography*, v. 3 (Toronto, 1974), 447.

88 Rich, *Hudson's Bay Company, 1670-1870, Vol. I*, 563.

89 Williams, "Christopher Middleton," 446.

90 Ibid, 447.

91 Ibid.

92 Ibid.

93 Ibid, 448.

94 Ibid, 449; see also Rich, *Hudson's Bay Company, 1670-1870, Vol. I*, 571.

95 Williams, 449.

96 Christopher Middleton, *A Vindication of the Conduct of Captain Christopher Middleton, In A Late Voyage on Board His Majesty's Ship the Furnace* (London, 1743), 13.

97 Rich, *Hudson's Bay Company, 1670-1870, Vol. I*, 572.

98 Christopher Middleton, *Forgery Detected By which is evinced how groundless all the Calumnies cast upon the Editor in a Pamphlet published under the Name of Arthur Dobbs, Esq.* (London, 174), 3.

99 Ibid, 23.

100 Rich, *Hudson's Bay Company, 1670-1870, Vol. I*, 576.

101 Ibid.

102 Ibid..

103 Ibid.

104 Glyndwr Williams, "Highlights of the First 200 Years of the Hudson's Bay Company," in *The Beaver* (Winnipeg, Autumn 1970): 18.

105 Rich, *Hudson's Bay Company, 1670-1870, Vol. I*, 581.

106 Williams, "Highlights of the First 200 Years of the Hudson's Bay Company," 18.

107 Ibid.

108 Ibid.



109 Ibid, 19.

110 Ibid, 20.

111 Ibid.

112 Rich, *Hudson's Bay Company, 1670-1870, Vol. I*, 590.

113 Williams, "Highlights of the First 200 Years of the Hudson's Bay Company," 24.

114 Ibid.

115 Ibid, 25. In Kelsey's journal, he made no mention of horses when he met the Archithinue people which lends weight, according to Williams "to the hypothesis of those anthropologists who date the acquisition of horses by the Blackfoot of the northern plains to the period after 1740.

116 Ibid, 26.

117 Special thanks must be extended to Ms. Judith Beattie, Archivist, Hudson's Bay Company Archives, for her help in developing a complete catalogue of the Company's solicitors, attorney's and legal advisors from 1674 to 1920.

118 HBCA, Minutes A.1, RG20/6a/8-10. Joshua Sharpe was the Company's solicitor re: Dobbs, 1748, 23, 24, 25 February, 1, 2, 4, 10 March, 6, 29 April, 3, 4, May, 9 June, 14 December; 1749, 5 January, 10, 13 March, 28 June; 1750, 31 July, 7, 10, 15 August 3 October; re Corsellis 1755, 18 June, 30 October, 6 November; 1759, 15 November.

119 Christopher W. Brooks, *The Admissions Registers of Barnard's Inn 1620-1869* (London, 1995), 1.

120 Charles H. Hopwood ed., *Middle Temple Records. Minutes of Parliament, 3 Vols.* (London, 1904), vol. III, 1263, 1278, 1281.

121 HBCA, Minutes A.1, RG20/6a/4-6. Charles Turner was the Company's attorney or solicitor from 1711-1734 dealing with litigation involving, re. Sir Stephen Evans, re. Valentine, re. Sir Cesar Child and re. Bibye Lake Property. While little of the litigation of this period can be found in published reports, the reference to the Bibye Lake property appears in the *All England Law Reports* [1558-1774]. Argued before Sir Joseph Jekyll, Master of the Rolls in 1729, the issue involved equity's preference for tenancy in common rather than joint tenancy. Lake was in a partnership relationship with four other investors when they purchased land in West Thorock, Essex, from the Commissioners of Sewers intending to drain the lands formerly flooded by the Thames. All of the investors contributed rateably. Later one of the investors left the partnership and the other four purchased more land for the project. After several of the original investors died, Lake brought an action for an account and division of the partnership estate. The court held that the partners were to be treated as tenants in common where the partner who deserted the arrangement was to be let in on the condition that he pay a sum, with interest, making his contribution the same as the other investors.

On appeal at Lord Chancellor's Court at the Michaelmas Term before Lord King in 1732, Lord King affirmed Sir Joseph Jekyll's decrees. He decreed that the five partners were tenants in common of all the lands that were purchased to that date but that the defendant Craddock's claim to his share required him to "... pay so much money as would make what had been already advanced by his father equal to what had been contributed by each of the other partners, together with interest from the respective times that his father ought to have made those payments." In this Turner argued that Craddock and his father had abandoned the partnership and that the terms offered to him to revive the partnership were reasonable with respect to payment

and interest. According to Lord King, Craddock's design delayed matters and that he deferred bringing in his money and interest until an account of the profits was taken. Thus, as a result of Turner's advocacy the court found in favour of Lake.

122 David Lemming, *Gentlemen and Barristers. The Inns of Court and the English Bar 1680-1730* (Oxford, 1990), 166.

123 Ibid, 64.

124 Ibid, 63.

125 Toppan, 715.

126 Lemming, 8.

127 W.P. Baildon, J.D. Walker and Sir Ronald Roxburgh eds., *The Records of the Honourable Society of Lincoln's Inn. The Black Books, Vol. 3* (London, 1897-1868), 38.

128 Lemming, 156.

129 F.A. Inderwick and Richard Roberts eds., *A Calendar of the Inner Temple Records, Vol. 3* (London, 1896-1900), 131, 337.

130 Ibid, 247.

131 Ibid, 108.

132 HBCA, A.1, Minutes, RG20/6a/6.

133 HBCA, A.1, Minutes, RG20/6a.

134 G.D. Squibb, *Doctors' Commons A History of the College of Advocates and Doctors of Law* (Oxford, 1977), 181.

135 Ibid, 37.

136 Ibid, 25.

137 HBCA, A.1, Minutes, RG20/6a/5, 7.

### CHAPTER THREE

#### **“39 Lashes upon his bare back”: Internal Discipline and Social Ordering in the Fort**

Internal discipline in the early phases of the HBC's foray into Rupert's Land rested upon the assumption that its employees were members of a society that was structured and stratified along class lines. English society, and therefore factory society in the seventeenth and eighteenth centuries, was based on deference and paternalism while at the same time providing a wide range of liberties and methods of resistance.<sup>1</sup> This assumption was undercut by the growth of social mobility leading to ruling class anxiety that was assisted by the constant threat of invasion by the French, who shared the same colonial ambitions as the Chartered Company and British Crown. The paranoia of the Company's London management was matched by the Company's Bayside officers, who tended to rule the Company's posts in a similar fashion to ship's captains. The various posts on the Bay were visited by ships from England on an annual basis and for the most part Company's officers, and more particularly post factors and governors, as well as masters and post officers, were left to their own devices in order to maintain order among the employees. Indeed, the discourse used to describe disciplinary infractions resembled naval law to a greater extent than civilian law. Words such as “mutiny” and “piracy” abound in the post journals during the Company's first hundred years in Rupert's Land. In addition, a Company directive required officers to read and post the *Piracy Act* on a monthly basis for a few years.

Discretion, on the part of the Company's Bayside leaders, was the foundation of this disciplinary system and the social ordering of post life was largely based on the use of discretion. Nevertheless, the Company's discretionary mechanisms were not based on naval

law.<sup>2</sup> Naval law did not fit into the business of a highly secretive civilian enterprise. Company officers did not require the highly structured mechanism of courts martial to achieve their ends. Besides, courts martial, which were in the control of officers, were not effective instruments of discipline in the navy itself unless the interests of an entire group of officers was affected by a crime.<sup>3</sup> Instead, the HBC was granted a much hazier set of directives for social ordering which were incorporated into its Charter.

Internally, the Company's management structure was based on the model used for other chartered companies that originated in the seventeenth century. It represented a model of efficiency and flexibility that was necessary to carry on a transatlantic mercantile business in the age of the sail. For the sake of this endeavour, the private justice system of the HBC failed to receive common law until well into the nineteenth century. In London, a Governor, Deputy Governor, and Committee of seven which was elected from the shareholders, made all of the central business decisions. These men were its commercial elite. In turn, they hired resident managers, who were known as officers to manage the Company's business at the various posts on the Bay. The upper tier of this local managerial class included governors and factors, chief factors and masters. Below them was a class including professional surgeons (which was apparently interchangeable with doctors according to the post journals), followed by clerks and writers, who fit intermediately below them and were given the rank of lower officers. The managerial class were responsible for the everyday operation of a post and were members of the commanding officer's council. A class system also existed in the general rank of servants. In the higher echelon of the Company's labourers were tradesmen, people who were apprenticed to a trade according to the master-servant relationship in English law, and had

completed or were completing their apprenticeship. In this rank were the Company's bricklayers, coopers, armourers, tailors, cooks and all other skilled labourers. Below them were the common labourers, the men who were hired to carry out whatever task they were ordered to perform by the officers. In contrast to the officers, the Company's labouring workforce was often hired by the HBC's transatlantic captains either in London or the Orkney Islands en route to Rupert's Land.<sup>4</sup> Because the posts themselves were visited only once a year by the Company's ships, communication between the Bay and London took place annually, and the resident managers were left primarily to their own devices to maintain order and discipline as well as foster the fur trade.

To understand how such a chaotic and informal legal system could govern relations in a closed and isolated institution, legal pluralism can provide theoretical answers. Law in this paradigm consists of both statute and unwritten law, as well as various codes which define normative standards of behaviour. It was this set of codes and the customs that governed relations between Company employees which will form the body of this chapter.<sup>5</sup> The private justice system of the HBC was exactly that: private. It fell outside of the scope of England's courts, the officials of the Company were, for the most part, not trained in the law, and the system functioned without state-appointed justices. The legal system of the HBC was unique to the geography of Rupert's Land as well as to the architecture of the Company's establishments. It resembled naval law in some instances and English petty sessions in others. It was the product of a Charter that permitted the Company's discretionary creation of law.

The Hudson's Bay Company governed Rupert's Land under the authority of a royal Charter which stated:

...the Governor and Council of the several and respective places where the said Company shall have plantations, forts, factories, colonies or places of trade... in case any crime or misdemeanour shall be committed in any of the said Company's plantations, forts, factories or places of trade within the limits aforesaid, where judicature cannot be executed for what of a Governor and Council there...[it] may be lawful for the chief Factor of that place and his Council to transmit the party, together with the offence, to such other plantation, factory or fort where there shall be a Governor and Council, where justice may be executed, or into this kingdom of England, as shall be thought most convenient, there to receive such punishment as the nature of his offence shall deserve.<sup>6</sup>

As a result of this wide application of procedural justice in the hands of the Company's senior officers, a great deal of latitude existed in how they managed the everyday functioning of the posts. Company officers brought with them backgrounds that were as diverse as their governing styles. The authority outlined in the Charter was permissive on sending accused persons either to a quasi-judicial council presided over by the senior officers and made up of all the officers at the post, or to England at the annual sailing, presumably to face trial there. However, it seems that most disciplinary issues were dealt with summarily. In fact, according to Joseph Robson, who was employed by the HBC as a stone mason and a surveyor during the 1730s and 1740s,

If a servant is guilty of theft, or any act that would be deemed gross felony by the laws of England, and subject him to capital punishment, the governor only whips him, and afterwards sends him home to be prosecuted by the company: but from a mistaken lenity, or for some secret reasons, they proceed no farther than a quiet dismissal from their service.<sup>7</sup>

Robson's comments, which were part of a larger attack on the Company's Charter launched in the late 1740s under the guiding hand of Arthur Dobbs, reveal that the Company's methods of discipline within the forts closely resembled the disciplinary system at work in the navy. In his diatribe against the Company's disciplinary system, Robson described the Company officers as

men who "... have generally sea-officers principles and exert the same arbitrary command, and except the same slavish obedience here, as is done on board a ship."<sup>8</sup> Because the Company posts were essentially closed systems with only occasional communication to the outside world, the social environment of a post was broadly similar to the shipboard environment.

It comes as no surprise that the Company's disciplinary regime resembled that of the navy. Many of the Company's officers themselves were in fact drawn from the HBC's private navy, which in 1740 consisted of the *Hudson's Bay V*, the *Mary IV* and the *Sea Horse*. In addition to these transatlantic ships were several sloops, shallops, cutters and longboats which were used for communication between the posts as well as trading, exploration and whaling. These were attached directly to the major posts and had sloop masters assigned to them.<sup>9</sup> The Company in fact made a conscious effort to hire officers who had had a taste of naval life. Included in this list are James Knight, Henry Bayly, John Fullartine and Joseph Isbister. Isbister, was appointed to serve as the chief factor of the HBC's fort at Eastmain Island from 1735 until 1740, when he was asked to take charge of Albany Fort after the death of Rowland Waggoner, "... in Order to Check those Irregularities that have grown up the particulars of which we refer you to Captain Middleton who hath been an Eye witness to the height of Insolence that threatens to Demolish all forms of Government..."<sup>10</sup> Isbister, an Orcadian by birth, was first employed by the Company in 1726 as a servant on board the *Hannah Frigate*, which operated on the yearly Europe to the Bay voyage. By 1728 he had transferred to the *Hudson's Bay Frigate* where he served as a "Boy," an "Able" and "Sailor" until 1734, when he was discharged. Isbister took his naval experience with him to the Bay. He had learned naval methods of discipline first hand and in 1735, Isbister returned to Hudson Bay as a permanent

Bayside sailor. On his arrival at Albany, he was named master of the Eastmain Sloop and sailed to Eastmain Island, where he passed the five succeeding winters as master there.<sup>11</sup> Isbister later served as chief factor of Fort Prince of Wales at the Churchill River from 1748 to 1752 after Joseph Robson resigned his position there and had returned to England to testify against the Company.

The reason Isbister was hired by the Company becomes obvious when reading the post journals from any of the establishments he served at. The nomenclature of his discourse is infused with references to a legal system based on paternalism and naval law. In one case, Isbister went as far as to relieve a captain of his command. This situation arose on 25 May 1750, when James Walker, the master of the *Churchill Sloop*, refused to move goods from the warehouse of Fort Prince of Wales, treated Isbister with “ill language,” and refused to give up the command of the sloop.<sup>12</sup> In his journal, Isbister wrote:

James Walker being down on the beach where our Carpenter is at work on our boats I told him my intentions that I have Made a resolution, Never to let him Set his foot onboard the Sloop till he came to a better Sense of his duty & asked pardon for the affronts he had put on the Company's Authority & [?] me, I received for Answer as You please, Sir in the afternoon: the Said James Walker Killed two geese, the then thought it proper to Acquaint me of them & that if I pleased he would deliver them to the Stewart & began to humble himself - acknowledge his faults, I again told him that Crimes of Such are not to be forgave without a faire Confession & a future good Conduct but for present I insisted that - he asked pardon for the affronts put upon the Companys Authority gives me by the Committee, and also for those affronts to my self to which he hesitated, I told him again I would stand to what I said & determined to do...<sup>13</sup>

Resolution was finally achieved when Walker made a formal apology to Isbister and promised to conduct himself with more respect in the future. For this, Walker was restored to his command and once again allowed to eat at the factor's table. The disciplinary system at work



here was personal and structured along a chain of command, where in this case, a higher ranking officer relieved a sloop master of his command.

In the analysis of the HBC's private justice system, the legal pluralism paradigm is particularly useful because of the wide discretionary powers of the Bayside governors. The fact that they only communicated with the Company's headquarters once a year meant that the private justice system developed, for the most part, independent of management directives originating in London. This enabled the governors to slide into a form of benevolent despotism which was closer to the type of society that existed in the navy rather than the master-servant relationship, based on the household of rural and urban Britain.<sup>14</sup> At the same time, the criminal and civil jurisdiction of the Charter applied to the internal relations between all the employees of the Company as well as the relations between employees and the Company's management.

Company law was a mixture of naval law, master-servant custom and English common law. The internal ordering of a Company post was a hybrid legal system that varied with the personalities in charge. Overtures to the command structure of the navy and the type of informal dispute resolution that would have existed on board a ship was infused with master-servant law in Company posts. An aspect of this hybridization was the practice, adopted by recalcitrant employees, of voicing their grievances through petitions to the post factors. Such was the case in September, 1751 when James Walker the sloop master, Arthur Felter, mate, and the sailors of *Churchill Sloop* wrote a protest to Joseph Isbister, the chief factor of Fort Prince of Wales:

We the Under Written persons being Master, Mate and Sailors belonging to the Churchill Sloop in the Service of the Hudson's Bay Company do hereby Declare that Whereas the Above Mentioned Sloop has by the Companys particular Order been Kept at Anchor in the Above Mentioned River through many dangers to this time Wee do Solemnly protest and declare that Neither the said sloop Nor our Lives are Any longer

in Safety on board in the said River the said sloop Being in the Utmost danger of Being Cut from her Mooring or Sinking from the Great Quantity's of ice floating in the said River And that it is Also so by Necessary as Well for the Company's Interest as for the Safety of our Lives that She be Immediately Laid up-

In Witness Whereof We have here Unto Signed our Names the day and Year Above Mentioned -

James Walker Master

Arthur Felater Mate

Richard Johnson for Mast Men

Tho:s Turnbull -

Tho:s Moon

Tho:s Kellet

James Jock

Andrew Graham Servant -<sup>15</sup>

The conflict between Isbister and Walker apparently continued over the ensuing years. However, what is remarkable about this is that the protest had protocol. The command structure of the Company allowed masters to petition their senior officers primarily because the services of the sloop masters, who were skilled employees, were essential to the safe administration of the fort. For this reason, skilled workers as well as officers had leverage against a governor's autocratic tendencies. This incident was in the end resolved when Isbister refused to acknowledge the protest, and the sloop was not damaged. His tenacity in the face of protest was predicated on the dominant position he was in. Isbister was the absolute lord over his charge.

In October of the same year, one of the Company's labourers was severely reprimanded because of his disregard of station. According to Isbister:

Last Night at ½ past 12 o:Clock, James Moad had the watch Came to My room & Acquainted me that James Pink, is so disorderly & drunk that he will not go to bed nor let other people rest and had Struck the Said James Moad as he attempted to put him to bed, expressing such horrid emprecations And oaths, that he would mind no Governor in this Country (upon which I got up & ordered henry Moor to bring me the Irons, dressed my Self & went into the Mens house where I See & heard the Said James

Pink quarrelling & abusing the watch & would not go to his bed (I then went forward & ordered Pink to go to his Cabin, he Answered me Very rudely & Said by And by, do you think I will be kept under like and Orkney Man, with a great deal of other Sauce language upon which I Called M:r Robert Bass, who had heard a great deal More of the Said James Pinks discourse & declared that the fellow deserved hanging & that the Said James Pink had expressed Several Mutinous words; I then put him in Irons, & left him in Charge of the watch...<sup>16</sup>

Perhaps it was the aspersion that Pink meted out toward Orkney men that convinced Isbister, who was apparently a proud Orcadian, to leave Pink in irons for the next two days. After spending two days in irons, Pink was reminded of his misdeed by Isbister and he subsequently begged for forgiveness, upon which he was released. In cases such as this, Pink was fortunate to receive a punishment of confinement rather than a cat of nine tails which could have been administered at Isbister's discretion. Indeed, with regard to summary punishment, the disciplinary model of the navy invariably applied to life within the factory walls. Discretionary punishment in this example was based on the level of disorder the factor was willing to tolerate and what he perceived as a correlation between punishment and deterrence.

In contrast, the master-servant relationship that existed in seventeenth and eighteenth Britain was based upon the pre-industrial custom of deference and a rigid class structure. The basis of this relationship was the household, which was not only the basic unit of production but also the nucleus of the social order.<sup>17</sup> This relationship, which was defined by statute and contractual in origin, was a relationship where, according to Marc Linder, "... the rights and duties involved in the relationship were fixed to a large extent by law and not by the agreement of the parties..."<sup>18</sup> Much of the relationship was customary in tradition, such as a set hiring day in addition to the obligations of both parties. British husbandry service contracts were usually verbal and lasted one year. Servants were implicitly bound to obey the reasonable orders of

their masters, and the master was bound to pay the servant even if there was no work to perform or the servant was unable to work. Physical punishment was a traditional method of dealing with insubordinate servants. However, in the case of Britain, servants could easily leave an abusive master through stealth or settle a dispute at the local petty or quarter sessions. Because service was generally a transitional phase of life, fitting between childhood and marriage, it was primarily a method to save money prior to marriage since room and board were provided, and wages were paid annually with periodic advances.<sup>19</sup> True to form with British society across the Atlantic, servants who stepped outside of the traditional forms of behaviour faced social censure on the Bay. Crimes involving sex, as well as excessive drunkenness and insubordination, were often dealt with swiftly and severely.

In the HBC, there was a degree of similarity between the household and life at a post. However, because the Company fort represented a closed society and a total institution, complete with a surgeon and a command structure, the model of the navy holds more credence because of its distant locale, the perceived importance of discipline, and the military emphasis on war with non-British nationals.<sup>20</sup> Thus, while both models were present in the Company's personal relationships, for the most part the Company's disciplinary regime resembled the navy of the 1740s and 1750s. According to N.A.M Rogers,

The Navy in the middle years of the eighteenth century retained a large degree of informality, even of intimacy... All of them were united by the shared experience of a dangerous profession, in which teamwork was essential to survival. In their working lives, officers and men lived close together, sharing similar discomforts and lack of privacy. Moreover it was easy for them to transcend the wide social disparities which existed as much in the Navy as in society ashore, for they accepted these divisions without thought.<sup>21</sup>

Indeed, in the case of naval discipline as well as in factory life, it was often more humane to

give a quick blow and forget the transgression than to invoke the apparatus of a formal flogging or court-martial as in the navy, or flogging and the summoning of a post council in a Company fort. Authority in this context was not lax because the officers were unable to act more firmly. Instead, it was a conscious choice of people who believed it was right and natural for both employers and employees to behave in that manner.<sup>22</sup> As well, in cases where brutality did occur, it tended to destroy discipline, which could only be maintained successfully in this environment when it rested on unstated consent and not force. Thus, power was not exercised deliberately and domination was based more on consent and deference than on authoritarianism.

In cases where class lines were transgressed among the Company's officers and servants, social chaos was considered the result in the eyes of Bayside commanders. As Ferdinand Jacobs, the governor of Fort Prince of Wales from 1751-1762, noted in his journal entry on 13 February 1755,

...I mentioned on Sunday Last M:r Squire's keeping Company & Setting with W:m Mathews when he had the Watch; Here is Now Gentlemen another Example, M:r Wills the Surgeon was Drinking most if not all Last Night with Guilford Long who had then the Middle Watch, and with the afore said William Mathews, this Gentlemen is Some out of many Such Examples of Behaviour of these two Officers in Particular, it is also a Common thing with them to be Frequently Drinking with the Tradesmen and at the times of their Watch which Tradesman's behaviour Gives me great Room to think that there is a Combination to Disturb the peace of the Factory, Retard the work & make me Uneasy; for why Should those officers Choose to Drink with these Tradesmen on those Particular Nights that they have Watches, Unless it is that I Should always have Cause to Find Fault & be Continually Chiding them; these Gentlemen are your Second & Surgeon, Officers that are appointed to assist me in the Management of your Honours affairs in the Room of which they are of no Manner of Service to Me, and I find they do all they Can to Disturb the Peace of the Factory.<sup>23</sup>

By ignoring the class implications of their actions, Mr. Wills, the surgeon, and Mr. Squire the second, had broken the power relationship between master and servant as well as the normative

relationship between officers and men by fraternizing with people below their station in life. Jacobs alluded to the fact that by doing this they were acting in an almost mutinous fashion. What becomes apparent from this discourse is that when lower ranking servants neglected their duty or resisted the orders of the governor, their insolence was most often accepted and summarily punished with little more mention. However, when Company officers socialized with the servants, it was tantamount to conspiracy, which represented a strong similarity to the naval model of social ordering.

Discretion was an important aspect of the relationship that existed between servants and the Company's officers during the first century of the HBC's operation. It was the tacit acceptance that the men would be disorderly that governed the discretionary attitude among the officers. It was a personal relationship between an employee and their supervisor based on the personality and prejudices of each actor. The post journals of the various factories, forts and posts around the Bay have proven to be an invaluable source in the examination of the Company's disciplinary apparatus. They were generally written or dictated by the superior officer of the post and therefore contained a singular impression of the events that had taken place. They are also full of the kind of prejudices a benevolent autocrat would hold over his charge. As already discussed, one assumption that can be made with respect to the Company's disciplinary system is that punishment was probably meted out in some cases but not documented in the post journals. It should also be noted that the survival and governance of a post, much like a ship, depended on mutual reliance and brutality tempered with kindness.<sup>24</sup> As a result, disciplinary problems could be overlooked if there was social value in not documenting them. Thus, the laws of England applied to some crimes but not to others. It was

a place where custom was modified and converged with the legal systems of England and the navy.

The individual officers on the Bay played a major role in how internal discipline functioned in Rupert's Land. They were bound to the laws of England through the Charter. They also had a great deal of discretionary power and in most cases did little that resembled the common law of the 18<sup>th</sup> century. For the most part, disciplinary problems were dealt with on a case to case basis. In all this, the background and motivations of the Company officers during the 18<sup>th</sup> century played a major role in how they exercised their personal discretion. The factors and governors were responsible for producing post journals. It was a record of every event that took place at the post, including weather and work, that was produced for the eyes of the Governor and Committee in London. The post journals are where the majority of this research is drawn from.

To contextualize the general themes, in the early period, from 1670 to the 1730s, war and the French takeover of many of the Company's posts reinforced a disciplinary regime that emphasized firm control and quasi-military conduct which was premised on resisting an external threat. During this period James Knight and William Bevan wrote some of the most candid journals involving internal discipline at their respective posts. In the later period from the 1730s to 1770, the Company's disciplinary emphasis changed to the internal threat of sloth and drunkenness which was punctuated with the threat of mutiny. During the later period, the officers of the Company were not as concerned with a French attack as they were with their men rising up or simply not fulfilling their contractual agreements. Of particular interest in the later period of the Company's first hundred years were the careers of Joseph Isbister, James

Isham, Ferdinand Jacobs, and Humphrey Marten, who respectively governed Albany Fort, York Fort, Fort Prince of Wales and Eastmain from the 1730s to the 1770s. For the most part, these officers were chosen because they conveyed enthusiastic attitudes about discipline in addition to the power to correct. The reason for this, it would seem, was to show the Company's London management that they were actually dealing with the issue of discipline since the journals themselves were written for the information of the Governor and Committee.

The governing styles of these Bayside leaders were varied and for the most part dissimilar. One generalization that can be made, based on the post records, is that Joseph Isbister was the most vigorous disciplinarian of the group. Whether this is grounded in reality is another question since recording the events of the post for the scrutiny of the Company's management may have resulted in aggrandizement. Because Isbister was undoubtedly the most vocal of all these governors, he will serve as the point of reference to compare the whole group. As already mentioned, Isbister made a reputation for himself as a harsh disciplinarian who was handy with his fists. He tended to mete out the most summary punishment when compared to all the other governors. He was verbose about his correction and generally beat anyone who stood in his way. An example of this took place in 1738 at Eastmain Fort, when William Fosset and William Maclean refused to follow orders and Isbister reacted with violence. According to Isbister's account,

I Called for the Water but Nobody had obeyed My orders Nor Gone for Water; then I [went] Down To Know the Meaning of it & Whose Turn, & found it to be William Fossets Turn & William Mackcleans: I Gave Each of Them two or three Cuffs with My hand as for a Small fault Not according to their Deserving...<sup>25</sup>

After these men shoved Isbister and continued their "Sasey" language, he managed to convince



them to do what he ordered. Cuffing, for Isbister, was an acceptable form of summary punishment. However, in his own words he stated that,

... there ought to be Gentle Correction allowed When Men Wont Do their Duty: as for My part I shall Not punish No Man Without a fault & if there be No Straightness of Command you honours interest Most be Neglected or Else a Master must Do the Work him Self.<sup>26</sup>

A similar example of this took place in the same year, when Isbister, through his own initiative and with the aid of some “Home Indians,” apprehended a Company servant who apparently deserted the Eastmain post. According to Isbister's journal,

No sooner Had I Got Down but Saw the Canoe a Coming I Laid wait in order to take him when he Landed But the Indians Had tied him hand & foot & Landed So I Went to Him Cast the Lashing of his feet & Made Him Walk to the Boat, he also began to berate Me & told Me that all this Should Not hinder his Design, as yet also the Indians told Me that he had been Enquiring how far it was to the french & that He wold Go to them No Sooner had we Come to the House but I put him in Irons & turned him on board the Sloop...<sup>27</sup>

Desertion as well as labour discipline was seen by Isbister as warranting summary punishment at the end of his fists or in irons. He seemed to believe that constant correction was necessary for the proper functioning of a fort. Comparatively, the other governors shied in their use of irons and beatings. Clearly, Isbister's naval background affected the frequency of his use of punishment. However, the question of whether this was anathema to the laws of England deserves some scrutiny. It would seem that in the master-servant relationship this was acceptable. However, in contrast to labourers in Britain, a servant could not leave the post or take his employer to court until the next sailing out of the Bay.

At Eastmain, Isbister managed to make a name for himself as a man capable of bringing order to disorderly posts. On one occasion in 1737 Ralph White, a Company carpenter,

returned to the post half-drunk and threatened not to obey Isbister's orders. This was undoubtedly a common disciplinary problem in all the posts. Isbister dealt with White by first threatening to make sure his wages would not be paid but in the end simply threatening to beat him and place him in irons. Again, according to Isbister, White,

... began to Give Me abundance of Sauce Language & Saying that he Would Not be Under My Command No More... Then He told Me he would Not Strike or Spoke More about it Very Well I Says your Wages shall Suffer No Work No pay he Still Continued his ill Language & had the Assurance to Damn My blood & Very Sause Language So I took him by the Neck & Turned him out of My Room then he Said he Would fight Me & Lick Me to, but I Threatened to beat him & put him in Irons...<sup>28</sup>

While Isbister was allowed to correct Company employees, it would seem that he could not unilaterally deny a servant's wages, which is why he resorted to a threat of irons in the end.

When Roland Waggoner, the factor of Albany died in 1740, Isbister was appointed by the council to replace him.<sup>29</sup> Upon becoming factor, Isbister continued his firm disciplinary regime to end private trading, drunkenness and liaisons with Aboriginal women, which had become a concern to the Governor and Committee in London.<sup>30</sup> In 1743, he established Henley House, 120 miles upriver from Albany and the first Company post to be opened away from the shores of the Bay. It was hoped that this outpost would circumvent the French who had established themselves in the region and had been intercepting Aboriginal traders on their way to Albany. Unfortunately, Henley was attacked and destroyed by First Nations traders in 1754. In 1744, Isbister returned to England, but was re-engaged by the Company for five years as chief factor of Albany. However, his health had not improved and the Company granted him the sum of £10 10s 10d to convalesce in Bath prior to his return to the Bay. He was again allowed to breach his contract in 1747 for health reasons but was once again engaged by the

Company in 1748 at Fort Prince of Wales at the Churchill River where he remained until 1752, when he once again returned to England for a year and was subsequently reappointed to Albany until 1756.<sup>31</sup>

Another governor, who had served in the middle of the eighteenth century was James Isham. Isham was born in London in 1716, and became a writer and book-keeper for the Hudson's Bay Company's York Fort in 1732. Described as a "... very Sober, honest and Diligent, young man" by Thomas White, chief factor at York Fort, Isham was appointed to the leadership of York Fort in 1737 with the assistance of two other officers.<sup>32</sup> By 1741, Isham had proven his abilities to the Governor and Committee in London, who named him chief factor of Fort Prince of Wales on the Churchill River. He remained at Prince of Wales for four years, where he suffered from ill health and petitioned the Governor and Committee for leave, which was granted in 1745. In the following year, Isham was appointed chief factor at York Fort, but was recalled to London in 1748 to help the Company fend off an attack on their Charter by Arthur Dobbs.<sup>33</sup>

During the winter of 1741, two ships under the subscription of Dobbs and his associates unsuccessfully attempted to find the North-West Passage and wintered, against Isham's wishes, in the vicinity of Fort Prince of Wales. Under the command of Captain Christopher Middleton, who had been employed by the HBC as the captain of the *Hudson's Bay*, His Majesty's bomb-vessel the *Furnace* and the *Discovery* sloop under the command of William Moor set out to find the Northern passage to the Orient. The expedition was in fact led by former HBC employees, including Moor, who was Middleton's mate on the *Hudson's Bay*, and Edward Thompson, who was the surgeon of Moose Factory and a member of that post's council.<sup>34</sup>

Middleton, who was a member of the Royal Society and interested in finding the route, was convinced by Dobbs to approach the Admiralty to undertake an expedition.<sup>35</sup> Unfortunately, the expedition failed to find the passage and instead was forced to winter on the Bay. The Company's Committee previously learned of the plan and sent Thomas White to assume the command of York Fort so that Isham could assume the command of Fort Prince of Wales. When the ships arrived, Isham tried to make the explorers as comfortable as possible, giving them James Knight's old fort, about six miles upstream from the new fort where they drew the ships out of the water and settled in for the winter.<sup>36</sup> According to Rich, this expedition created a particularly difficult disciplinary problem on the Bay. As he stated:

Even the Company's own ships' captains and crews provoked comparisons as to terms of service and wages, standards of food and drink and conduct. They often provoked crises of discipline, challenged and defied the Governor and his authority, introduced excessive alcohol to the posts, and facilitated private trade. If the Company's own ships could produce such problems, how much more were Middleton and his independent command to be dreaded!<sup>37</sup>

It was Middleton's use of alcohol that was at the root of most of the problems at the fort and was the cause of his differences with Isham. According to Rich, "[it] prostrated his men, it provoked difficult comparisons with the Company's rules and practices, and it provided Middleton with a means of making good his losses at the Company's expense."<sup>38</sup> Over the course of the winter, the problems mounted as Isham endeavoured to keep the fort under control by resorting to the use of irons and lashes when his men got drunk and tried to desert. In the end, the fort lost five men who forfeited their Company wages and signed on as sailors.<sup>39</sup>

When Middleton returned to England he was instrumental in Dobbs' attack on the Charter. Dobbs initially challenged the Company's exclusive access to the North-West passage

and later the Charter itself after perusing its vagaries, the journals of Henry Kelsey's expedition inland and other information. In 1749, Parliament ruled in the Company's favour and the matter was put to rest. It was during this period that Joseph Robson testified against the Company at a Parliamentary enquiry. While Isham was in England to testify for the Company, he married and returned to York Fort as governor in 1750.

In contrast to Isbister, Isham tended to be paternalistic and generous with First Nations People and was the father of a country-born son.<sup>40</sup> Curiously, one of his specific orders was not to entertain Aboriginal women in the post in order to set an example of sobriety for the other men. He was also responsible for sending expeditions inland.<sup>41</sup> While both of these men served as governors and chief factors for the HBC during the same period, there was no uniformity in their governing styles from what can be discerned from their respective post journals. While Isbister, with a background in the navy, seemed to have administered a harsh form of discipline, Isham, who was a Company veteran by the 1740s, did not. In addition, their respective opinions of the "Home Indians" also suggests a certain lack of uniformity in their governing styles as well as the high level of discretion in their daily decision making. It seems that many of the servants preferred Isham over Isbister. An example of this preference, according to Isbister, occurred when James Walker, after calling Ferdinand Jacobs, who was Isbister's second at Fort Prince of Wales, "...Pimp & Tale bearer with many other unbecoming expressions...", said that he wished it could have been his "...fortune to have been under M:r Isham & that he would rather Serve at York Fort for £30 per year then here for £40."<sup>42</sup> Apparently, Walker wanted to entertain Aboriginal women in his cabin but found that Isbister was not receptive to his aspiration.

Within the ranks of the Company servants, the most common breach of discipline was invariably drunkenness, which was documented with great detail during the tenure of Isbister at Albany Fort. This offence was almost always met with the punishment of being confined to the servants cabin or else being placed in irons until sober. As well, Isbister was not the least bit apprehensive about administering a certain amount of physical punishment in the form of a cuffing or beating. In the post journals, alcohol and the disciplinary problems attached to excessive drinking were a far more prevalent concern at Albany than they were at York Fort. The irony of this generally, was that the Company supplied the alcohol that created its most common disciplinary problem.

In his characteristic detail, Isbister recorded an incident that took place in 1748 which was related to drunkenness, mutiny and his rule. On 2 October, Isbister was informed of a conspiracy against his life by the Fort Prince of Wales armourer, John Watson. He stated:

John Watson having formed a design to Stab me had prepared a weapon for that purpose (any first intelligence of this was brought me by our Surgeon & M:r Jacobs declaring... that it was not Save for to let him go Unconfined for that he disturbed the Whole People on Friday Night, Seemingly mad Saying that the Governor was there with guns & Pistols to Shot him..and more openly began to declare his designs, on Me (which the people in this Factory Vouches for Truth and this without any & all cause for so doing

M:r Morton our Surgeon informed that he had Seen this John Watson sharpen the point of a Tile and asked the Said John Watson what he intended that for but was Answered with these words to defend my Self ( and swore he would have the hearts Blood of Somebody this Night, also Several of our Men told me they had heard him Say so & had seen the weapon with which he intended to so the deed... I thought this Sufficient to Convince me of the danger I was in so Consulted with M:r Jacobs & M:r Morton & Concluded that the best way to prevent Maters of [?] Consequence would be to [?] into Irons...<sup>43</sup>

After placing Watson in irons, Isbister interrogated him and asked why he planned to murder his governor, for which he replied that he was only defending himself. At this point Isbister

began to assert his dominance as this was not simply attempted assault, it resembled mutiny. Upon searching him, Ferdinand Jacobs discovered that he was indeed preparing to assault his governor whereupon Isbister wrote,

... at this Mr Jacobs discovered Something in his bosom Concealed upon which [he] Seized hold of him & take it from him and found it to be a long half round Tile pointed being 7 inches long from the half. I must observe that his acting the mad man is only to Cloak his Evil design to take away my life for he Spoke reasonable till I began to say that I must put him into irons to protect his doing any Mischief, so hand cuffed him and sent him to his Cabin, there in his Mad fits would Swore I was there at his Cabin with Pistols to Shut him, this Morning I had his head Shaved, bled him and Laid a plaster on his back but he continued Very obstinate...<sup>44</sup>

In his account, Isbister noted that Watson was “most-intolerably addicted to liquor,” and that he was constantly given to drunkenness and neglect of his duty. Following his punishment, Isbister stated,

John Watson our Armourer being brought to a True Some of his Errors acknowledged that he had Committed a Great Crime against me in his [criminal] intentions on my life, he Seemed earnestly to beg pardon for the offences given upon which and to let him See that I am not of so [criminal] a disposition as he I let him out of Irons for which Gentleness & lenety toward him he promised good behaviour for the future, and that if he are got drunk whilst in this factory he would [?] to the greatest punishment I Should think proper to inflict, and fell down to his Knees and thanks me for this Gentle treatment.<sup>45</sup>

Isbister’s entry in his journal was written to create an impression on the people who would read it. For this reason, he was fulfilling his mandate to bring his men under control using a harsh form of naval discipline, and simultaneously ignoring the criminal jurisdiction of the Company’s Charter. Instead, his discipline was usually a summary beating at his own hands, followed by an apology and forgiveness. There was no similarity to this at common law; this was naval discipline meted out within the context of master-servant law.

With respect to Isham, the connection between alcohol and disciplinary problems was

surprisingly absent in the post journals of York Fort while he served as chief factor and governor. The only mention of alcohol involved giving it to the “Home Indians,” and of servants defrauding the Company of a couple of quarts of brandy on a few occasions. In the case of the Company servants, it involved the sale of stolen brandy from Richard Satchfeild to John Wood for [£10 6s]. As a punishment, Isham ordered that both men were to be deprived of liquor for the remainder of the year.

the Said Richard Satchfeild some time Last Summer or fall, Sold to Thomas Lushington a Bell for two shilling Knowing the same to be the properties of Humphry Martins, which he Clandestinely Stole by his frivolous Excuses also in Searching Last fall Several Knives were found upon the said Richard Satchfeild not being his own property. ...for which Misdemeanours I do order for an Example that the said Richard Satchfeild be Lashed to the press and receive 39 Lashes upon his bare back Accordingly had him brought too but Excused him with 32 Lashes, he promising to be honest in future.<sup>46</sup>

It would seem that the tranquillity of York Fort, at least regarding alcohol and discipline, was maintained with excessive punishments that were meted out infrequently. This observation is based on the post journals, and therefore wrought with the inaccuracies that they may contain. However, it must be remembered that it was in the best interest of a chief factor to include an account of all the disciplinary problems that did occur, since it was a record of what happened that would back up an officer’s actions if a servant decided to sue the Company in England. As well, it seems that the London management were content to see a commander perform some act of admonishment as evidence that he was actually governing. It is clear that Isbister’s ability to physically punish resulted in promotion.

Inevitably insubordination, which was often exacerbated by excessive drinking, occupied the second most common category of disciplinary breakdown. The autonomous



nature of governing a fort becomes clear when examining the evidence concerning insubordination. Isham, for his part, was paternalistic in his treatment of servants, in that he would refrain from harsh punishments unless it served as an example to all the servants, while Isbister was more than happy to correct an uncooperative worker by regularly cuffing him and placing him in irons. Such was the case at Albany Fort in 1741, when Thomas Nelthorpe, who according to Isbister,

... had the boldness absolutely to Deny his Duty the first Step to a Mutiny an Example & Precedent to all others in the factory to Go by: & for this... given him a few Cuffs with my hand.<sup>47</sup>

Nelthorpe's insubordination continued until the next ship's sailing, when Isbister sent him back to England. On another occasion, Isbister issued a similar punishment to Peter Isbister for not following his orders and giving him some ill language, which was corrected with a reprimand and "Green willow."<sup>48</sup> Isbister's method of correction in many ways reflected his experience as a sailor and master in the sense that a quick blow, rather than a proper flogging, was often more useful in cases of simple and drunken insubordination.

When new posts and forts were established around the Bay, social tensions were often exacerbated by an esprit de corps of individualism that was underscored by the threat of an attack from the French. As with any new command, social tensions developed early. Such was the situation at Moose Factory in James Bay during the 1730s. Add to this the fact that the workforce of the post was inflamed by the constant agitation of a tradesman named James Norton. Moose Factory was first established at the Moose River at Hayes Island in 1672, by governor Charles Bayly, and it soon became the Company's headquarters on the Bay.<sup>49</sup> The fort was captured by the French under the leadership of Pierre de Troyes, and recaptured a few

years later in 1686, but was re-established in 1730 by Joseph Myatt, the master of Albany. Myatt had served on the sloop sent by the Company to establish a post at Eastmain in 1723-24 and considered the establishment of another post at the Moose River, as an auxiliary to the Albany trade, of great advantage to the Company. According to Rich, "... the post at Eastmain was built in order to secure a trade which was additional to that of Albany itself, [while] that at Moose was designed merely to secure a trade which, it was argued, would otherwise come to the main post."<sup>50</sup> It was felt that by establishing a fort so close to the French, trade would be diverted to the English because of the Company's advantage in heavy goods. William Bevan, the sloop master of the *Beaver*, was chosen to travel to the area and survey the area for a new fort in 1727, and Moose Factory was officially established in 1730.

Initially, 20 men were sent to Moose in order to rebuild it and establish a trade, but no chief factor was assigned to the place until 1732 when the sloop-master Thomas Render was replaced by William Bevan, who was appointed master.<sup>51</sup> Aside from taking on the task of disciplining a rancorous set of workers, Bevan was expected to protect the Company's interest against French attacks and supervise the rebuilding of the post. A Company post, such as Moose Factory, possessed the same qualities as any other carceral institution of the period. It was a total institution that was designed, using Foucault's terms to, "... derive the maximum advantages and to neutralize the inconveniences (thefts, interruptions of work, disturbances and 'cabals')."<sup>52</sup> Unfortunately, this was a new post and the linkage between Bevan's leadership and deference to him was not established. The fort was a closed institution, where the work of all individuals was calculated for the survival of the post. They were military establishments as much as they were trading posts and for this reason every individual had an indispensable role

to play, both socially and functionally. In this situation, a single employee could cause the breakdown of the deferential relationship between rulers and the ruled, as well as an officer's ability to dominate the Company's servants.

In his first year of service, a servant named James Norton tended to be the subject of most of Bevan's complaints about insubordinate servants. In fact, there was a page appended to the yearly journal entitled, "Articles in the Journal at Moose River, relating to M:r Norton Bricklayer Viz:d," and catalogued 44 occasions when Norton was mentioned in the post journal. It seems that Norton began to display his aversion to work in mid-January 1733 when Bevan stated:

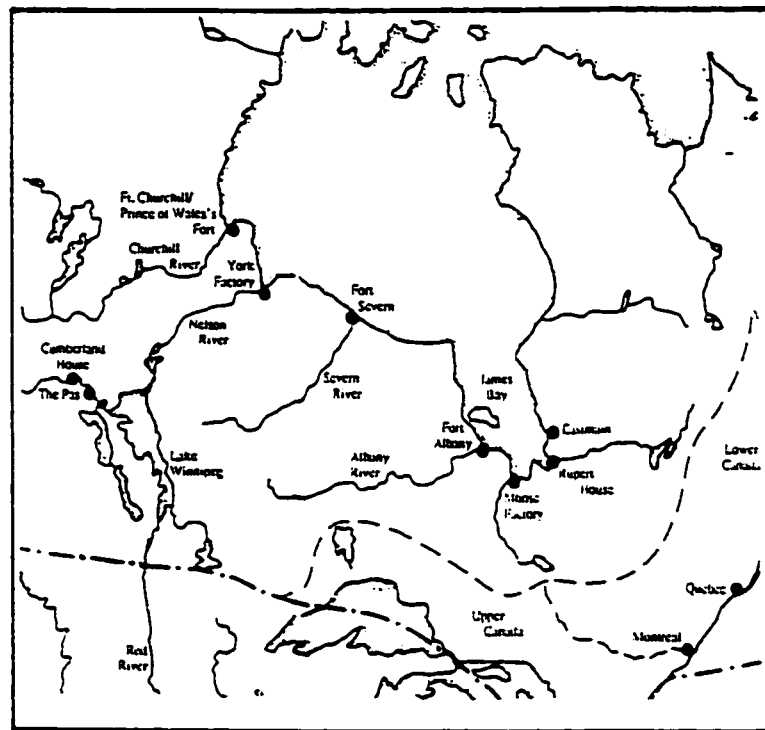
I desired M:r Norton to split up some wood he told me he would not he said he did not come here to split wood his Father did not bind him to it so he would not do it nothing else: I told him he could work but a small time at his Business in this Country not above ten days in year & not that having no bricks & he to be the only man to walk with his hands in his pockets all the Year I told him, consider of it He likewise abused the Surgeon at the Table and said there was none but fools came into this Country they should do any thing but his Business and they are fools that did any thing else as for them that are of no trade should do any thing that was imposed on them for it was there business and not Tradesmans's... Further he wants me to put him in Irons and should be Glad that I would strike him he would Caught at it he being all the time very Sober when he came from hunting which was the [?] of this Instant and many times since he swore bitterly Damn his Soul & body, & many other such like oaths that If ever he went from the Factory that King George should come with his guards and force him out or my Lord Mayor: with his great Horses to draw him out.<sup>53</sup>

Profanity and cursing aside, Norton kept up his resolve not to work at anything but bricklaying over the course of the ensuing months, to the dismay of Bevan, who began to note that his behaviour had "corrupted" the work ethic of all the other workers at the post. Rank was a vital aspect of discipline in the fort. However, rank in this facet of social ordering pertained more to contract law than discipline. Here, Norton attempted to assert the customary law of

apprenticeship, while Bevan attempted to assert his authority according to his rank and the contract between Norton and the Company. Because Norton controlled the means of production, he asserted his customary right to perform only his trade.

### Map 1.

#### Locations of posts in Rupert's Land, 1770:<sup>54</sup>



For the first fifty years of the Company's enterprise in Rupert's Land, summary discipline was the normal way of dealing with disobedient employees because the forts were on a general military alert and preparing to fight off French invaders. However, by the 1730s, the private justice system of the Company was changing and rank began to play a vital role in the type of disciplinary apparatus that could be used. Because tradesmen were skilled, they fit

between company labourers and officers according to class lines. It was for this reason, they were not punished as harshly as labourers for their transgressions because their labour could not be replaced until the arrival of the Company ship from England. The day after this incident took place, Bevan noted in his journal that he had taken a contract to Norton to read, to which Bevan wrote, "... he told me he could not read & write as well as I could so shoved it from him with scorn & would not look at it..."<sup>55</sup>

By the spring of 1735, Norton had in fact become mutinous in his actions and in what he inspired in the other workers. On 23 April Bevan wrote,

Anthony Ward being drinking in Nortons Cabin and Norton in his bed I ordered Ward to bed it being after eight a clock and he was going but Norton got out of bed in his shirt and said damn You fool don't go And damnation seize your Soul if you do go you fool till you have dranked the Beer out for what Signifies minding such a black guard Governor at that a black guard fellow so Ward returns him answer damn him if he would go So I hit Ward a knock & bid him go look after the Sloop when he was afterwards conformable If he had not I told him I would put him in Irons but Norton came to the door and abused me to such a degree that never pickpocket was ever abused so he damned & Cursed me & called me all the Ill names that could be thought of I told him he was a pretty fellow to carry on Sir Biby Lakes building as he thought he should So he Damned Sir Biby Lake & me to and all the Honourable Company And told me that A Bricklayers Labourer in England was a better Man then I And turned up his shirt Tail & clapped his hand on his backside & bid me kiss that Then he wanted me to put Irons on him which I did on his legs and he wanted handcuffs he Said he liked them they were pure and light & shook his legs and said it should cost me all the money I had due in the Companys hands for he would shew me the inside of Westminster Hall if he fetched me from the further part of Wales.<sup>56</sup>

The reference to Sir Bibye Lake, which appears in this text refers to the London Governor of the HBC. What is particularly striking in this entry was Norton's confidence in the English justice system. He probably knew that the Company did not cherish the idea of having a case involving a servant heard in Westminster Hall since its enterprise tended to be secretive. Indeed, the Company was reluctant to litigate in the Courts of England, for the fear of negative public

relations and a challenge to its Charter. What is also striking about this entry is the fact that Norton's insubordination did not involve liquor, which was the common feature of most other disciplinary problems. Whether or not Norton believed he could find a remedy for his mistreatment in England is not particularly relevant. What is relevant is the particular kind of resistance that Norton offered up. He obviously realized that he was not bound to naval law and the *Articles of War*, but instead to the common law and the customary law governing relations between masters and servants.

By the time the ship was about to arrive to carry the servants home in the summer of 1735, Norton had succeeded in rousing resistance against Bevan's orders among many of the Company's workers. Bevan was in fact facing a mutiny in the fort at a time of military alert. Bevan had learned that the post was vulnerable to an attack, after a group of First Nations People told him that the French were on their way to attack them. As a result, Bevan divided the men into three watches and put two sentries on duty at night to guard the post.<sup>57</sup> Regarding Norton, Bevan wrote:

(This Norton has corrupted most men in the Factory to such a degree that was he to stay one year longer we should not have one man to do the Companys Business & would not nor did not turn out) Then Jacob Anderson came & told me and I got up & with a small Cane in my hand I gave Levingstone some whips and went to bed again when he was swearing and Cursing that he would not Watch and likewise went away out of the Guard Room all which I heard my self as I Lay in bed Then I got up again and put him in Irons which he got of afterwards & went to his cabin In the morning we Seized him and gave him twelve Lashes with a Cat of nine Tails when afterwards we asked him whether he would go to work or go into Irons he told me he would go into Irons which we likewise put him in...<sup>58</sup>

Norton's influence on the behaviour of the Company's workforce at Moose Factory continued until the sailing of the Company's ship in August. In one of the last entries related to Norton,

Bevan remarked on how Norton threatened to shoot him if the ship did not arrive in front of all the other servants and later remarked that he would welcome the appearance of the French.<sup>59</sup>

Using Foucault's category, the factory was a functional site which individualized and compartmentalized people according to rank in order to fulfil "... the need to supervise, to break dangerous communications, but also to create useful space."<sup>60</sup> Individuals were distributed in space according to rank and hierarchy and intricately linked together with the aim of survival. Hence, an attempt was made to isolate individuals while at the same time weaving them into the fabric of the social relationships through work. At Moose Factory, Bevan had in fact failed to hold the social fabric of the post together and to impress upon his men that their survival depended on the cooperative labour of the entire workforce. Norton was subsequently sent back to England, having done little work during his year at Moose Factory, but undoubtedly received his wage.

Mutiny, as most insubordination was called, was dealt with by James Isham at York Fort through confinement rather than physical punishment. In addition to threatening to send servants home, Isham used irons to bring unruly servants under control. Just prior to the yearly sailing in August 1753, Isham wrote:

...at noon James Jarvis Behaved in a most Sad manner Refused working put him in Irons broke the Lock no Irons would hold him, Thomas Smith has been these two Days Cursing Swearing and abusing in a most Sad manner, Benjamin Picard who is a wicked man Combined together Before for to Cause Disturbance in a mutinous manner Dangerous to Keep Such men in a fort, Sent a 6 oared boat for the Captain to Come and take them on board.<sup>61</sup>

In another case where the York Fort doctor began acting irrationally, Isham again resorted to the use of irons on one of his officers in order to protect him from himself. In his journal entry

of 6 April 1753, Isham wrote,

... at 12 Last night was Disturbed by a gun fired of, upon Examining found it to be the mad Doctor, who over night threatened to Shoot himself, - he fired the gun out of his window but first took the Lock of his Door that persons the Sooner might Come to his Relief, he Did this to make us Imagine he had Shot himself, but afterwards Said he Did it to Alarm us. I Called old ferd up, put the Doctor in Irons till 5 morning, then Released him upon his promising better Behaviour.<sup>62</sup>

Indeed, rather than holding a formal trial in the form of a post council, Isham preferred to have unruly servants and officers placed in irons, and forgive them when they came to their senses. In essence, Isham exhibited a great deal of leniency, acting as a father rather than a captain. He preferred to be moderate and paternal rather than tyrannic and austere.

In other cases of more serious crime involving sexual impropriety, Isham exhibited his usual restraint while at the same time evoking ritualistic punishment to create an example for the men under his charge. Cases of sexual impropriety in the first century of the Company's history in Rupert's Land has traditionally focussed on sexual liaisons between Company employees and Aboriginal women.<sup>63</sup> Sexual relations between the employees themselves have not received any attention. This is undoubtedly because there is very little evidence to suggest it was a common aspect of living in a Company post. Nevertheless, a few incidents have surfaced which suggest that it was something that at least warranted a couple of references in the post journals. Isham, in one year, reported several incidents involving sodomy at York Fort. However, as a generalization, it can be gleaned from the sources that post governors and factors exercised a great deal of discretion in reporting such incidents. There was no need for a factor to report incidents of sexual impropriety unless they were intent on infamously marking the perpetrators, since the journals were records that were read and kept in England. It was left



to the initiative of the Company to prosecute these crimes in England. However, if they did they subjected themselves to questions of venue as well as potentially bad press. As well, it can also be assumed that many of these incidents may have been dealt with informally, which would have made reporting unnecessary.

Employing the tools of discourse analysis in order to construct a picture of the Company's disciplinary regime can be useful when trying to reconstruct the crimes related to sexual impropriety and the punishment assigned to it. As already discussed, the role each employee played in the post was vital to the survival of all the others. Therefore, it was not just an employment relationship based on contract. In many ways it was more akin to naval life, even though the *Articles of War* were not part of the HBC's private justice system. Most of the men that worked for the Company came from England or Scotland, more particularly the Orkney Islands, and were for the most part unaccustomed to the harsh climate of Hudson Bay. As well as being a trading post, a workshop, a farm and a barrack, the Company's forts were military establishments complete with palisades and cannons. Men slept in communal barracks according to rank. There were cabins for labourers and tradesmen, separate cabins for the officers such as the surgeon or second in command, and a private cabin for the governor, chief factor or master of a fort. Company employees lived, worked and often died within the confines of the post's walls because absences from the posts without permission were subject to summary punishment in the form of a reprimand and usually being struck. As well, an employee faced the risks of the generally hostile climate and the isolation of the north if he decided to jump the wall. Survival, for a Company employee on his own and without provisions was unlikely if he was bold enough to go absent without leave.

York Fort was the foreign headquarters of the Company in the middle of the eighteenth century. It was also the Company's largest and most lucrative post and the home of the Company's Bayside governor. As alluded to earlier, the social relationships that existed in the factory could be seen as a microcosm of British labouring society with the difference being that they were forced to function as a military unit if the situation required it. Discipline, in this society was an aspect of power where individuals functioned as objects, in what Foucault called a "calculated but permanent economy."<sup>64</sup> The fort had much in common with the penitentiary in practice if not in philosophy. They were total institutions that restricted freedom by employing enclosure, rank, functional sites and surveillance.<sup>65</sup> At York Fort, enclosure was by far the most ominous category of distribution. The only Europeans for thousands of miles were either at other HBC posts, that were generally weeks of sailing or walking away, or French "pedlars," who were considered enemies of the Company as well as the British in general. Desertion was a mortally dangerous option. Therefore, resistance was invariably met with an exercise of power whether at the end of a cat-of-nine-tails, the fist of an officer or a more ritualized form of punishment.

At York Fort, the only incidents of sexual impropriety between servants was reported in the post journals took place in 1754 and 1755. These incidents consisted of sodomy: a capital offence at common law as well as naval law. They involved Peter Isbister, who it would seem came from Albany and had been punished by Joseph Isbister while assigned there. Isham's journal entry reads,

at noon Brought Peter Vincent too had him Rammed, that is Every man a Slap on his back side with a Barrel stave, for making a disturbance Last night, and attempting that abominable sin of Sodomy on George Dorell.<sup>66</sup>

Three days later, on 30 December 1754, Isham wrote:

...at noon Brought Peter Isbister too, Every Man too Lashes, this old Rogue upon enquiry found to be the person who seduced the above Peter Vincent to that wicked and sinful act of Sodomy, by his own Confession was twice in the young mans bed. and offered several sent him home to your Honour to being in my power to bring him to any further punishment than what I have done which is much too favourable for such notorious crimes...<sup>67</sup>

Isham was shocked and offended by what he discovered. However, instead of dealing with this incident through the use of a formal post council, Isham chose summarily to mete out a less severe punishment. What is unclear is whether he was influenced by his personal tolerance or whether the punishment he meted out was customarily typical. What is clear is that he ordered the men to be "... Rammed, that is Every man a Slap on his back side with a Barrel stave."<sup>68</sup> This form of ritualized punishment was not the type of penalty that would have been meted out by a court martial of the same period.

At a court martial, sodomy required the death penalty if the charge was proved in full. According to N.A.M. Rodger, during the Seven Years War, there were eleven courts martial for sodomy which led to 4 acquittals and seven convictions on indecency and uncleanness.<sup>69</sup> In most cases, courts were reluctant to impose the death penalty in even fully proven cases and instead preferred accepting a partial proof and imposing a sentence of several hundred lashes.<sup>70</sup> This was a crime that was officially detested and difficult to conceal. As well, according to Rodger, during the Seven Years War at least, "... it is difficult to believe that there can have been any serious problems with a crime so much detested, but so seldom mentioned."<sup>71</sup> In the navy, the crime was simply was not prosecuted in most cases because the officers had no collective interest in pursuing a charge.

Table 2.

Capital convictions for sodomy in England, 1755-1818.<sup>72</sup>

Criminal Courts	Convictions	Executions	Executions as a percentage of Convictions
<b>London and Middlesex</b>			
1756-1804	9	5	55.5%
1812-1818	4	4	100%
<b>Home Circuit</b>			
1755-1814	14	12	85.7%
<b>Norfolk Circuit</b>			
1768-1818	4	3	75%
<b>Western Circuit</b>			
1770-1818	7	4	57%

At common law, the crime of sodomy was also relatively rare according to extant records. In England, there were not very many prosecutions as Table 2 indicates. On the Bay, these men were not subject to forms of punishment that resembled those prescribed in common law or the *Articles of War*. In the case of Isbister and Vincent, one more occurrence took place just prior to the ship's arrival, when Isham wrote:

... when I was Going to Bed at 8 Martin Came up with Peter Vincent who Complained of Peter Isbisters offering again that sin of Sodomy, I directly had him Lashed up and Every man 3 strokes with a good Young Willow and Separated them from being in the same Cabin...<sup>73</sup>

For what Isham called "such notorious crimes," the men were sent back to England the

following summer where they both disappeared from the documentary record. Notwithstanding this, it can be safely assumed that the Company did not prosecute these men since they were already experiencing a public relations disaster with the Parliamentary Inquiry of 1749, which threatened the Company's Charter.<sup>74</sup>

Considered a moral crime to Isham, sodomy created the spectacle of punishment in the context of the social relationship between the servants at York Fort. As Isham described it in the post journal, sodomy was “wicked and sinful,” “[an] abominable sin,” and a “Heinous Sin.”<sup>75</sup> Vincent, who was younger than Isbister, it would seem was a willing participant in the act because they were detected through the mechanism of surveillance as well as Isbister’s confession. Isham’s judgement on the incidents was based on Christian morality and he viewed these men as perverted for performing acts that were considered deadly sins.<sup>76</sup> Punishment, in this context was a spectacle. The servants were called together to administer beatings on Vincent and Isbister as a group to signify their collective disgust over their behaviour. In common with England during the same period, punishment was not a hidden aspect of penal practice, but was corporal; it had a direct effect on the bodies of Vincent and Isbister. Ritualized torture was Isham’s chosen form of punishment. Vincent and Isbister were both on the lower rank of the post’s hierarchy, guilty of a capital crime, and therefore subject to public torture. According to Foucault, the three criteria of torture are that:

First: it must produce a certain degree of pain... [and] this production of pain is regulated. There is a legal code of pain; when it involves torture, punishment does not fall on the body indiscriminantly or equally; it is calculated according to detailed rules: the number of lashes of the whip... [and] forms part of the ritual. It must mark the victim: it is intended, either by the scar it leaves on the body, or by the spectacle the accompanies it, to brand the victim with infamy;... And, from the point of view of the law that imposes it, public torture and execution must be spectacular...<sup>77</sup>

The bodies of Isbister and Vincent were fertile ground for the spectacle, ritual and regulation of pain. Both were branded with infamy, and in these cases of torture, pain was used to produce the truth as well as punish them for the sin of sodomy. As the Company's Bayside governor, Isham was granted law-making powers for the regulation of the trade and the good governance of the men on the Bay. With this came right to punish people according to the laws of England. The public ritual employed in the text reinforced the primacy of law, whether moral, codified or regulative. The spectacle had to be limited so as not to demoralize the recipients who were vital to the functioning of the post. The punishment also had to look forward in order to prevent repeating the act of sodomy but not be too excessive, which would eventually diminish Isham's exercise of power. By cognitively linking the punishment to the crime in an unarbitrary way, the ritual of paddling the rear ends of the culprits was maintained in successive punishments.<sup>78</sup>

Eighteenth century concepts of the social contract serves to explain Isham's use of torture as punishment in the context of the fort. By accepting the very laws that punish, which runs part and parcel with belonging to a society, in this case that of York Fort as well as England, Isbister and Vincent were viewed as enemies of their societies and participated in their own punishments in a generalized sense.<sup>79</sup> The bodies of the accused men were linked to their crime and were punished accordingly. Thus, the invisibility of disciplinary power was exercised in a visible manner on Isbister and Vincent through the spectacle of the public paddling. After returning to Britain, Vincent and Isbister were not mentioned again in the York Fort post journal. However, on 24 June 1764 Ferdinand Jacobs was informed by a group of First Nations People that had come to the fort to trade that "... Mr. Isbister is with a body of

men Nigh 100, in 15 Large Cannoes coming up to the back of your Honours settlements to trade where the French had their Houses...”<sup>80</sup> Whether or not this was the egregious Peter Isbister is not addressed in the entry. However, if it was, this example serves to show the extent of resistance the men could show toward the Company and their governors. Ironically, free trading was in many ways considered a greater crime than sodomy. It was equated to piracy by the Company as it violated the Charter as well as British hegemony over law and trade in the Bay.

The only other known case of sexual impropriety at York Fort took place in 1761, under the governorship of Humphrey Marten. Marten began his service to the HBC in 1750 as a writer, clerk and steward. In 1758 he was named to replace James Isham when he returned to England, and was later named second at York Fort and master at Severn House when Isham returned to York Fort the following year. Under the guidance of Isham, Marten developed a similar style of governing and on the occasion of Isham’s death on 13 April 1761, he was named chief factor at York until he was recalled to England the following year. In a similar fashion to Bevan’s appointment at Moose Factory, Marten inherited a fort that was ripe for a series of disciplinary infractions. It would seem that on the timeline, the first year of a command at an HBC post was invariably a period of adjustment for the Company employees and a new commander’s only opportunity to assert and exercise his power on employees who constantly tested their patience and discretion. During Marten’s first six months as chief of York Fort, he encountered a serious case of sexual impropriety involving one of his officers. The incident involved Jason Bloxham, the surgeon of York Fort, and took place on 21 October 1761. The journal entry read as follows:

... this day at 11 O'clock, I missed William Brown from his Works, I asked where he was gone, and was informed he was sent for by the Surgeon, on which I went to the Surgeons Cabin, the Doors of which was shut, I called for William Brown, no answer being made I pushed hard against the Door, the Lock being none of the Rest it flew open, when I discovered not W:m Brown but the Surgeon in the Following posture his Breeches were down, a part of his waistcoat open, and the great Bitch that was sent from Churchill some time since almost in his embraces, I cant say I actually saw him Copulating, for he Stood in the utmost Flavour of Countenance that I ever saw: for some time we were both Silent, I was ready to Sink into the Earth, at last he spoke the Words following, (A, Sir, you cant find her I have hid her) by this time I was a little recovered from the Shock I had read: I went in to the Cabin I looked into all the Places I thought a Woman could probably hide herself in his Cabin but Alas I found none, all the same time he had not the Power to but up his Breeches, or to turn the Bitch out of his Cabin, but [?] crying out, you cant find her Sir, I have hid her, at last I replied, I wish you had Doctor, I went down to the Bank, I went to the Tent, I hardly knew where to go or what to do, at the Tent where all the Women belonging to it presently after the Doctor followed me out, I endeavoured to show him, I could not speak to him, he slight followed me, he called after me, Sir I want to speak to You, Doctor I have nothing to say to You, pray Leave me, he did so, I went to my Room, I sent for a Man to Clean my upper Trading Room out, which was more to divert my self then any real Necessity for so doing, in a few minutes the Doctor came up Stairs, Pray let me Speak to You Sir, more the Words he said, Doctor go down, I neither can, or will speak to you at present, he went down, when I sat down to write as Follows,  
 Sir You have Offended God/ not ( it certainly an offence against all men, but I was for much Conceived to write better) me / make your peace with the Almighty, Implore God humbly and sincerely for Pardon, if you are sincerely sorry for / O' Heavens! / your crime, you will think me for this advice, I cant go on I tremble so, I am your Afflicted Country Man.

H. Marten,

PS I you should think fit to sent an Answer, do it in writing, as I am not in a Condition fit to see you at Present!

October the 21, 1761

To M:r Jas: Bloxham Doctor

In reply to this, Bloxham responded in writing by saying:

Sir

By the Behaviour of you to me it seems that I was guilty of a most Monstrous indecent Action, The way that you found me was certainly Indecent, but the reason was / in Truth / to made Water, to be thought of being guilty of any Familiarity with a Brute Beast would be enough to Vex a Saint Far was it from me I had just before been reading of Turner of the Veinercate Diseases concerning the fallopian Tubes, in the Womb, he recommends it in his Works to be tried on a Bitch and as I was willing to



try it, I did put my fingers into the Pudenda of the Animal, but if it was any intention in the Mind of [?], At him never Know happiness in this life, or in any other

As I am thought to be so great a Monster (as you believe me to be and certainly deserved had I been guilty) I will if you please refrain from your Table till you think I am not so great a Villain.

I am Sir your most humble Servant J:s Bloxham

P:S: I read your letter and am sorry that you think so.

Marten continued his entry by saying:

Your Honours will observe that the great part of the Surgeons Letter to me was wrote before he had read mine, I wrote Him for answer that in regard to coming to my Table he might use his Pleasure, and in regard to the Surgical excuse in his Letter, it must be left to some of the Faculty, to either acquit or Condemn him, but that as to my Opinion of his Letter, I thought there was too much room left in it for me to remain fixed in my first thought on that subject, nay that it had rather confirmed me, by the too glaring Contradictions in it he then begged I would keep it a profound Secret, this I said must depend on his behaviour in future, he came up to Dinner as Usual but eat Nothing.<sup>81</sup>

Despite the fact that Marten believed he detected one of his officers engaged in a sexual act with a dog, Bloxham's services to the post were indispensable and he was left with no recourse but to keep his secret as a bond for future good behaviour. Marten, using the informal apparatus of his position manipulated this incident to compel the doctor to behave himself. As it turned out, Bloxham continued to cause disciplinary problems all year, leading Marten to confront him with loaded pistols in December of 1761. After Bloxham had sobered up, Marten again used the issue of his liaison with a dog to try to compel him to behave himself. He wrote, "I sent word down, I could keep my Own Secrets but was Stanch to my Word."<sup>82</sup>

Marten's position was precarious. He did not have a commission and was made the master of York Fort because he was the second in command at the time of Isham's death. As a result of this, rank began to play an important role in Marten's use of the Company's private justice system governing relations between Company employees. Because Bloxham was a peer

according to Company custom, and a member of the post council, Marten was forced to let his defiance go unpunished. In fact, the only disciplinary action taken on the surgeon came at a time when, in a fit of drunkenness, the surgeon apparently went mad. On 7 January 1762,

Marten wrote:

... the Doctor either mad or Foolish, I know not which he has been twice up in my Room to seek for his Father and Mother & he says I keep in my Cabin, I know not whether Remorse for his Crime has turned his brain, but this I know that he is a worthless Idle Drunkard, nor will he do anything for the Indians when they are ailing without being drove to it, this Night kept a Strict watch over him least any damage might be done by him to your Honours Fort or Servants.<sup>83</sup>

Finally, Marten violated the rules of class and rank the following day when he confined the doctor to his cabin and kept him under guard. The following week, Marten fixed an order on the wall in the fort's guard room. His journal entry stated:

A Caution to the Honourable Hudson's Bay Companys Servants not to admit James Bloxham Surgeon of York Fort into their Cabins, on any account without the Consent of the Chief of the said Fort nor are they to give lend or sell the said Bloxham any Spiritous Liquors as they will answer it at their Peril if the said Bloxham should ask for any Liquors as aforesaid, and no being refused should [?] the Person so refusing\* is directly to acquaint the Chief of the same who will take proper care in [?] them too.

Signed

H:y Marten

\*George Richardson informed me that the Doctor used to ask the men for Liquor and which they were afraid to refuse him, when an Officer will drink with the Common Men, it is all over with him.<sup>84</sup>

The section of this entry that is particularly telling is the asterisked section regarding class and rank. In this, Marten reveals why he did not discipline Bloxham in the same manner as other men.

Bloxham's rank shielded him from the punishments that were commonly delivered to Company servants. Indeed, Bloxham's incident of sexual impropriety shows the way rank

functioned in the total institution of the factory. Bloxham in this case was immune to the private justice system of the Company notwithstanding his crime was as great as those committed by Peter Isbister and Peter Vincent. This was because Bloxham was from the gentle class. He was educated and he was supposed to set an example for the other Company servants. When the system of rank broke down, so did discipline in the post itself. An example of this took place in the spring of 1762, when Marten entered in the journal a letter written by Hugh Jones, a Company labourer who had threatened another servant with a pistol and spoke insolently to Marten,

These Letters would never have appeared had not his very bad behaviour since forced me to enter them: one Morning when I sent to order the Men to their work he was standing by the Fire and though not spoke to, made the following expression

NEW LORDS, NEW LAWS

NEW DEVILS, NEW CLAWS

my having no Commission from your Honours to act as Chief of York Fort, but on the Contrary it being well known that I was ordered home, long before the Packet was opened, seem to be the reason for this strange Behaviour however let the cases be how it will, I will behave my self suitable to the Station Providence has so remarkably placed me in, and this in Justice I must declare that Christopher Atkinson has behaved in the best manner, his whole study as well as Anthony Hendey being to keep the peace below [?] your Honours will pleased to remember I have not one of the Council at this place fit to consult with.<sup>85</sup>

With this level of disciplinary breakdown, the only instrument available to Marten to restore order at York Fort was to summon a post council in order to discipline Hugh Jones.

Mutinous words and a letter sent to Humphrey Marten led to the summoning of the Company's highest private court at the Bay on 2 April 1762. As a disciplinary instrument, the post council was established in the 1680s as an active vehicle of the private justice system of the Company to deal with refractory employees and was probably modelled on the Company's central management.<sup>86</sup> However, in other ways it was similar to a court martial and the petty

sessions of a magistrate. The punishments handed out by councils were in most ways similar to military punishment and they were conducted with a quorum of post officers. They were different from courts martial in the law they followed and the flexibility of the instrument itself. Unlike a court martial, a council could be summoned at any time. At a council depositions might be taken or a person accused of a disciplinary infraction might just be interrogated by the post's officers. All this was recorded in the post journal so a permanent record exists for all of these councils.

During the Company's struggle with the French for control of the Bay, military discipline was an aspect of the Company's disciplinary regime along with collective decision making under the control of a chief factor. Nevertheless, if the Company's officers were not on good terms with the chief factor, collective decision making was impossible. It was necessary to have the loyalty of the officers for this type of governance to work. If this did not exist, mutiny was a serious possibility.

In an early post council that took place at Albany Fort in 1696, a quorum of Captain James Knight, governor, Mr. John Fuller, deputy governor, Mr. Gilbert Kerr, warehouse keeper, Samuel Adams and Dr. George Fullerton passed sentence on an employee named John Cartwright. The judgement stated,

Whereas you John Cartwright have been stirring up Mutiny and Rebellion in the Factory endeavouring the utter destruction of the Government and Country throwing out lies and false reports upon my Deputy and his Brother, relating up and down the factory they should stir up the men to demand the ship of me to carry they all home, which I have made diligent inquiry into & strictly examined all persons and now find it to be no other thing than your own invention Malicious contrivance and Devilish design to embroil utterly destroy and overthrow the whole Country, both to the ruin of the Company's interest and Loss of the Kingdom of England Being at Such a time before it can well expected that any ships can be so soon here out of England.

Moreover To aggravate your mutiny and faction When Thomas Lee should say that if it was our fortune to have no ships and Supply this year from England, we most of necessity be forced to eat Succoo's which is the Indian Name of Carp, You replied, that there was a word two of three more to say to that yet, we will Go to the Governor and demand the ship to go home

The Governor And Council taking the above mentioned things into serious consideration well pondering and Considering the Bad Inconvenience that doth accrue from such factious turbulent follows To prevent the like for the future and that it may be an example to others, had ordered that you John Cartwright Shall be whipt thirty stripes, Lye in Irons confined close prisoner, and fed upon Succoo's as you call them, till either Our ships arrive here from England to carry you home, or the Ship wee have Now in the Country Go from there. Dated at Albany Fort America the 15:th day of August 1696.<sup>87</sup>

In this incident another conspirator, named William Lilpot, was sentenced to 39 lashes over the course of three days, and placed in the *Perry Frigate* in irons and with a beaver coat, water and a half pint of peas per day until he was carried home.<sup>88</sup> Although this punishment seems harsh, when placed in the context of a war with France and the naval background of governor Knight, it comes as no surprise that the post councils that he convened had a decidedly punitive dimension.<sup>89</sup> Knight, although rarely using the instrument of the post council to punish obdurate employees (it is recorded that he used it only three times between 1682 and 1719), surely found it useful when severe disciplinary misconduct existed.

When Marten faced a similar problem it came in the form of a letter from Hugh Jones on 2 April 1762. In it Jones stated,

I Beg to acquaint you that as you come to thereto and have told me that you have been informed that I have been plotting Cabals and [?] to raise a mutiny...and to clear your suspicion in this I made be a Leave to quit the factory, some score miles, for I would not nor cannot stay Here or any place else where my Master has such an opinion of me on any account whatever...as it can be of no manner of Service to their honours of my staying Here I humbly beg that you would please to let me go away either with these North river indians now come down while the rest comes... Otherwise I must leave this place by my self and trust to Providence for I am resolved not to stay here.<sup>90</sup>

Upon receiving this letter, Marten resolved that the only way he could prevent Jones' desertion was to hold a post council. However, as he stated in the months prior to this incident, he did not have adequate officers to properly use the instrument. Fortunately for Marten, the Company's private justice system allowed a certain amount of flexibility and discretion on the part of the Company's officers since the matter would be resolved before Marten's London employers had a chance to scrutinize his actions. For this reason, detailed records were kept complete with dates and signatures. The post council held on 2 April 1762, was attended by Hugh Jones, the accused, and Humphrey Marten, Christopher Atkinson, Anthony Hendey and George Richarson, who were all tradesmen and labourers excepting Marten. The transcript read as follows:

Question the 1	Pray Sir what is your Reason for wanting to leave the Fort
his Answer	Because I don't like to stay at it,
Question the 2	What make's you dislike it? did I ever use you ill? If so, speak in Gods Name and tell me in what.
his Answer	No Sir you never did, but some=body else has,
Question the 3	Pray who is the Person, & His Answer I Know who very well, M:r Atkinson
4:th Question	In what Pray as you are both now face to face, speak and Justice shall be done you
Jones Answer	No Sir I shan't say anything now, but if I meet him in England: I will let him know,

this answer made me most angry, when I expressed my self in the Following Terms  
 You deserve Sir to be horse whipped for declaring you would leave the Fort, as you have not given one Substantial Reason / and indeed I know none can be given / for so doing: so far Sir an I from giving you leave to quit the Fort: that You must immediately sign this piece of Paper of be confined in Iron's till shiptime, so take your Choice, Jones hesitated some time, but at last signed the Following Paper which was Sealed with your Honours Seal

York Fort April the 2:nd 1762

I Hugh Jones do declare I will not leave the Factory at which I now am without the leave of Humphrey Marten Chief of the Fort, witness my Hand

Hugh Jones

Present as                   Ge:o Richardson  
witnesses                   Anthony Hendey

We whose Names are under-written do testify and are ready to make Oath / if so required / that Hugh Jones Servant to the Hudson's Bay Company at York Fort did Voluntarily declare in our hearing that M:r Humphrey Marten Chief of the said Fort had not in the past used him ill,

Witness our Hands this second of April, 1762

Ge:o Richardson  
Anthony Hendey

I Humbly hope your Honours will pardon my Prolixity in this Affair, as I would willingly have my Character appear as clear as noon day<sup>91</sup>.

Regardless of this, Marten's tenuous control over his charge was compromised again on 18 April 1762, with Jones once again penning letters although no longer signing them. As Marten commented,

he laughed full in my face and gave me such Language that I could not bear it: he has frequently called all in this house without distinction Black=Guards, Irish=Men and Taylors, which was repeated to my face this day on which provocation I gave him Manuel Corrections had I been Born in Ireland I should not have been ashamed of my Country, but I can glory in being an English=Man Born in Somersetshire, neither to my knowledge is there an Hibernian in the Fort<sup>92</sup>.

Jones' actions were representative of the plebeian culture of England as much as they represented the Company's system of internal discipline. The idea of class conflict and resistance abounds in these records. In addition, it is apparent that ethnicity played an important role in the social ordering of the fort. The Company hired English and Orcadian employees who, among the ranks of the officers, often had a background in the navy. In this example, the slur against Irishmen was in many ways no different than that cast against Orcadians. Joseph Isbister was from the Orkney Islands and ruled with an iron hand while Isham, Marten and Jacobs, all English born officers, tended to rule more softly.

After being recalled in 1762, Marten was replaced by Ferdinand Jacobs and stability

was restored to the fort after about a year of adjustment. Marten returned to the Bay the following year as second to Robert Temple at Albany Fort, and in 1765, he was appointed chief factor at Albany and Henley House which he reestablished in 1765.<sup>93</sup> He remained chief at Henley until 1768 when he returned to England to fight off illness. He returned to his post in 1769 to once again face a series disciplinary transgressions, when the London Committee of the HBC sent a letter to Thomas Hopkins, and the council at Albany, where they expressed their disapproval of an altercation that took place between Marten and John Richards, the master of Henley House. The Committee's letter detailed the chain of command to the council, stating that the chief factor at Albany was always to be obeyed by the master of Henley and any other subordinate servants. Marten's career in the HBC continued for another two decades and will be dealt with later.<sup>94</sup>

Ferdinand Jacobs' career with the Company continued well into the 1760s. While he was portrayed by the chief factors of Fort Prince of Wales as a sober and honest man, he began to diverge from the example of the governors whom he served under and their predecessors.<sup>95</sup> He will be discussed in further detail with respect to the fur trade and the Company's expeditions inland to the Saskatchewan River, and north to trade with the Inuit people.

Isbister was recalled to London in 1756 with a letter in which he was instructed to return on the *Sea Horse* and deliver the fort to the care of Robert Temple. It seems that one of the reasons for his recall was because he supervised the trial and execution of a number of First Nations People at Albany Fort, who he felt were responsible for the destruction of Henley House and murder of five Company employees in 1754. Isbister retired from the service in 1756. It appears that Isbister went to the new colony of Quebec by 1770 and died between



November 1770 and August 1771 leaving his wife Judith behind.<sup>96</sup>

As for Bevan, his command of Moose Factory met an ill fate when on Christmas Day, 1735, the newly established post was burned to the ground in two hours. As it turned out, the fire originated in one of the two cook rooms.<sup>97</sup> It soon became apparent that it began because several of the men were drunk. Richard Staunton was then sent out to relieve Bevan, who was subsequently sacked by the Company. According to Staunton, "Bevan as post-master... had been made a tool of by the men, even the apprentices had been 'deboched', and vice and ignorance predominated 'to a monstrous degree of wickedness both amongst the English and the Indians.'<sup>98</sup> The London management learned a lesson from all this when they admitted that the tragedy was due to "Wickednesse, Extravagance, and Carelessness," and ordered their Bayside leaders to keep the men from excess in drinking and to punish it severely.<sup>99</sup> It was after this that Isbister began to make a reputation for himself as a disciplinarian.

It is evident that all these governors, masters and chief factors developed rather different techniques for dispute resolution. In the closed system of the individual fort, discretion defined the type of society that existed. In Isham's case, benevolence and the discriminant exercise of power seemed to be the rule. His approach to the administration of justice was based more on the model of deference and the master-servant relationship that existed in Britain than on constant punishment. Marten followed this example to some extent but found that asserting himself was the only way his authority could be maintained. In Isbister's case, the full range of legal alternatives were administered to the men under his charge as well as the local First Nations People. In most instances, internal discipline under Isbister followed the naval model of discipline, where he would administer summary punishments personally. Jacobs

began to change his tune as time passed and became one of the most important Company chief factors on the Bay because of the social order that he maintained as well as his ability in the fur trade. As a generalization, disciplinary infractions among Company employees tended to receive less attention as a governor's position at a post became established and routine. This is why most infractions took place in the first few years of a new command as well as on or around the sailing time of the yearly packet.

In the HBC, two models of internal discipline existed. The "household" that Isham attempted to foster at York Fort seems closer to the disciplinary model of the master-servant relationship that existed in Britain than to the model of the navy. Even in cases where Isham considered that some form of disciplinary punishment was necessary, he failed to use the formal legal apparatus available to him: that is, the post council. Instead, Isham more often than not had his servants placed in irons, or else had the entire fort participate in a ritualized form of punishment. Isham's discretion as a Bayside governor led him to exercise a form of autocratic paternalism when dealing with Company men that was similar to the position of the master in husbandry.

The other model tended to resemble shipboard life and the navy. Isbister's disciplinary regime was based closely on his background in the Company's naval service. This was reflected in his approach to dealing with uncooperative Company servants. In most cases, Isbister, as chief factor, chose personally to beat or "cuff" servants who refused to obey his orders in a manner that was similar to the way a ship's captain dealt with transgressions. Isbister, in contrast to Isham, exercised a form of disciplinary discretion that can best be described as benevolent despotism, which was often associated with shipboard life in the naval model of

discipline.

Autonomous decision making was an important characteristic of the private justice system of the HBC. Governors, because of their distance from London and the obvious communication problems that accompanied it, were given a great deal of latitude in their dealings with insubordinate Company servants. Although the Charter, legislation, and the Company's orders and instructions laid out rather rigid remedies to behaviour that could be regarded as illegal, the personalities of the various officers of the HBC influenced the private justice system of the Company to a much greater degree. Thus, what is referred to as a private justice system can also be considered a personal justice system in the context of justice at the various posts, factories and forts of the Hudson's Bay Company.

#### Notes:

1 There is a great deal of literature on the social history of Britain in the 17<sup>th</sup> and 18<sup>th</sup> centuries. Of particular interest here is the work of E.P Thompson, in his monographs *Customs in Common* (London, 1991), and *Whigs and Hunters* (London, 1975).

2 Greg Denning, *Mr. Bligh's Bad Language* (Cambridge, 1992), 149. The British *Articles of War*, 1661 (U.K.), 13 Car. II & St. 1, c. 90 and their revision of 1749 (U.K.), 22 Geo. II, c. 33, were directed at officers rather than seamen in the British navy. The Act of 1661 was meant to counter the "baseness of spirit" and cowardice among officers that had led to their defeat against the Dutch in 1652.

3 Ibid.

4 Edith Burley, *Servants of the Honourable Company* (Toronto, 1997), 1.

5 H.W. Arthurs, *'Without the Law' Administrative Justice and Legal Pluralism in Nineteenth Century England* (Toronto, 1985), 2.

6 E. H. Oliver ed., *The Canadian North-West: Its Early Development and Legislative Records, Vol. 1* (Ottawa, 1914), 150.

7 Russell Smandych, "Company Discipline in the Hudson's Bay Company, 1660-1770," unpublished paper presented to the Canadian Law and Society Association and the Canadian Historical Association at the Learned Societies Conference, Calgary, 1994, 15. Supra note of Joseph Robson, *An Account of Six Years in Hudson Bay* (London, 1752), 17.

8 Smandych, "Company Discipline in the Hudson's Bay Company, 1670-1770," 38.

- 9 K.G. Davies ed., *Letters from Hudson Bay 1703-40* (London, 1965), 341.
- 10 HBCA, A.11/2, London Correspondence In to Albany, 24 August 1740.
- 11 HBCA Search File, Biography Section, Joseph Isbister; see also Davies ed., *Letters from Hudson's Bay*; see also Clouston J. Storer, "Orkney and the Hudson's Bay Company," *The Beaver* (December 1936, March 1937, September 1937).
- 12 HBCA, B.42/a/33, Fort Churchill Post Journal, 24 May 1750.
- 13 HBCA B.42/a/33, Fort Churchill Post Journal, 26 May 1750.
- 14 Russell Smandych and Rick Linden, "Administering Justice without the State: A Study of the Private Justice System of the Hudson's Bay Company to 1800," in *Canadian Journal of Law and Society*, vol. 11, no. 1(1996): 41.
- 15 HBCA B.42/a/37, Fort Churchill Post Journal, 26 September 1751.
- 16 HBCA B.42/a/38, Fort Churchill Post Journal, 10 October 1751.
- 17 Burley, 20-21.
- 18 Marc Linder, "The Employment Relationship in Anglo American Law. A Historical Perspective," in *Contributions in Legal Studies* 54 (Wesport, Connecticut, 1989): 46-47.
- 19 Ann Kussmaul, *Servants in Husbandry in Early Modern England* (Cambridge, 1981), 31-32, 38-39, 45-46.
- 20 Smandych and Linden, 33.
- 21 N.A.M. Rodger, *The Wooden World An Anatomy of the Georgian Navy* (London, 1986), 237.
- 22 Smandych and Linden, 41.
- 23 HBCA, B.42/a/44, Fort Churchill Post Journal, 13 February 1755.
- 24 Smandych and Linden, 32-33.
- 25 HBCA B.59/a/2, Eastmain Post Journal, 7 January 1738.
- 26 Ibid.
- 27 HBCA B.59/a/1, Eastmain Post Journal, 3 June 1738.
- 28 HBCA B.59/a/4, Eastmain Post Journal, 6 October 1739.
- 29 HBCA, Search file, Biography Section, Joseph Isbister.
- 30 See generally Jennifer Brown, *Strangers in Blood. Fur Trade Company Families in Indian Country* (Vancouver, 1980); see also Sylvia Van Kirk, *Many tender ties: women in fur-trade society, 1670-1870* (Winnipeg, 1980).
- 31 HBCA, Search file, Biography Section, Joseph Isbister.

- 32 HBCA, A.11/114, fo. 79, York Fort Correspondence Out, 27 August 1736; see also Davies ed., *Letters From Hudson's Bay*, 219-222.
- 33 HBCA, Search file, Biography Section, James Isham.
- 34 E.E. Rich, *The Hudson's Bay Company, Vol. 1* (Toronto, 1960), 565.
- 35 Ibid, 563.
- 36 Ibid, 566.
- 37 Ibid, 567.
- 38 Ibid, 569.
- 39 Ibid.
- 40 E.E. Rich, ed., *James Isham's Observations on Hudsons Bay, 1743* (London, 1949), 318-325.
- 41 HBCA A.6/8, fos. 118d-119, Correspondence In; HBCA A.6/7, fo. 170, Correspondence In.
- 42 HBCA B.42/a/38, Fort Churchill Post Journal, 8 February 1751.
- 43 HBCA B.42/a/32, Fort Churchill Post Journal, 2 October 1748.
- 44 Ibid.
- 45 Ibid.
- 46 HBCA B.239/a/36, York Fort Post Journal, 17 February 1753.
- 47 HBCA, B.3/a/30, Albany Fort Post Journal, 10 August 1741.
- 48 HBCA, B.3/a/33, Albany Fort Post Journal, 6 June 1742.
- 49 Rich, *Hudson's Bay Company, Vol. 1*, 80-81.
- 50 Ibid, 504-505.
- 51 Ibid, 506.
- 52 Michel Foucault, *Discipline and Punish, The Birth of the Prison* (New York, 1979), 142.
- 53 HBCA, B.35/a/3, Moose Factory Post Journal, 14 January 1735.
- 54 Michael Payne, *The Most Respectable Place in the Territory. Everyday Life in Hudson's Bay Company Service York Factory, 1788 to 1870* (Ottawa, 1996), 8; Map by E. Elrick and D Kappler.
- 55 HBCA, B.35/a/3, Moose Factory Post Journal, 15 January 1735.
- 56 HBCA, B.35/a/3, Moose Factory Post Journal, 23 April 1735.

- 57 HBCA, B.35/a/3, Moose Factory Post Journal, 9 May 1735.
- 58 HBCA, B.35/a/3, Moose Factory Post Journal, 12 June 1735.
- 59 HBCA, B.35/a/3, Moose Factory Post Journal, 28 July 1735.
- 60 Foucault, 144.
- 61 HBCA, B.239/a/36, York Fort Post Journal, 29 August 1753.
- 62 HBCA B.239/a/36, York Fort Post Journal, 6 April 1753.
- 63 See generally Brown and Van Kirk.
- 64 Foucault, 141.
- 65 Ibid, 170.
- 66 HBCA, B.239/a/37, York Fort Post Journal, 27 December 1754.
- 67 HBCA, B.239/a/37, York Fort Post Journal, 30 December 1754.
- 68 HBCA B.239/a/37, York Fort Post Journal, 27 December 1754.
- 69 Rodger, 80.
- 70 B.R. Burg, *Sodomy and the Perception of Evil: English Sea Rovers in the Seventeenth Century Caribbean* (New York, 1983), 25.
- 71 Rodger, 81.
- 72 Clive Emsley, *Crime and Society in England, 1750 -1900* (Essex, 1987), 214.
- 73 HBCA B.239/a/39, York Fort Post Journal, 16 July 1755.
- 74 HBCA, Search File, Biography Section, James Isham; see also A.S. Morton, *The History of the Canadian West To 1870-71* (London, 1939), 217-25. James Isham was involved in providing information to a Parliamentary Select Committee when he was recalled from the Bay in 1748. His help was required in London on account of attacks being made by Arthur Dobbs of London in conjunction with a group of Liverpool and Bristol merchants on the Company's Charter privileges. After the return of the *Dobbs-Galley* and the *California* from their unsuccessful expedition in search of the northwest passage, Dobbs and his associates had tried to obtain a charter of their own, granting 'the like Privileges and Royalties' as had been granted to the Hudson's Bay Company. By the time Isham arrived in October 1748, the Company had learned of their failure before the Privy Council and were busy obtaining support public support in order to get a more favourable decision from the House of Commons. Publicity was used and petitions were circulated to move the House to action. This activity resulted in the House appointing on 9 March, 1749, a Select Committee under the chairmanship of Lord Strange 'to enquire into the State and Condition of the Countries adjoining Hudson's Bay, and of the Trade carried on there.' The evidence given before the Committee was ordered to be printed on 24 April, and on 4 May, when the House of Commons sat as a Committee of the Whole to consider the report, Isham and other servants of the Company gave evidence. On 8 May, a motion was made for an address to His Majesty that he would be pleased to have a proper method taken to try the right claimed by the Company to exercise an

75 HBCA, B.239/a/37, York Fort Post Journal, 27 and 30 December 1754.

76 Philippe Aries, 'Thoughts on the history of homosexuality,' in Philippe Aries and Andre Bejin eds. *Western Sexuality. Practice and Precept in Past and Present Times* (Oxford, 1985), 65.

77 Foucault, 170.

78 Ibid, 105.

79 Ibid, 90.

80 HBCA, B.239/a/52, York Fort Post Journal, 24 June 1764.

81 HBCA, B.239/a/49, York Fort Post Journal, 21 October 1761.

82 HBCA, B.239/a/49, York Fort Post Journal, 3 December 1761.

83 HBCA, B.239/a/49, York Fort Post Journal, 7 January 1762.

84 HBCA, B.239/a/49, York Fort Post Journal, 16 January 1762.

85 HBCA, B.239/a/49, York Fort Post Journal, 2 March 1762.

86 Smandych and Linden, 39. In this study Smandych and Linden draw a conclusion that the Company, between 1680 and 1713, military law was in effect even though the idea of collective decision making was encouraged by the London management.

87 HBCA B.3/z/2, fo. 2, Albany Fort Miscellany, 15 August 1696.

88 HBCA B.3/z/2, fo. 3, Albany Fort Miscellany, 15 August 1696.

89 Smandych and Linden, 40-46. Smandych and Linden note that Knight was responsible for recapturing the Bay in 1692, and was encouraged by the Governor and Committee to pursue a regime of collective decision making and benevolent paternalism.

90 HBCA, B.239/a/49, York Fort Post Journal, 2 April 1762.

91 Ibid.

92 HBCA, B.239/a/49, York Fort Post Journal, 18 April 1762.

93 HBCA, Search File, Humphrey Martin Biography (LC 17253, 18 October 1933 to J.B. Tyrell ).

94 Ibid.

95 Rich, *Hudson's Bay Company Vol. 1*, 626.

96 HBCA, Search File, Joseph Isbister Biography.

97 Rich, *Hudson's Bay Company Vol. 1*, 547.

98 Ibid.

99 Ibid.



## CHAPTER FOUR

### The Henley House Homicides and the Company's External Relations

We Said Council find upon Consideration of the whole Examination of these three Savages, first that the old Pirate Wappisiss alias Wouldbe, confesses himself And, his two Sons who are now in Custody to be guilty of willful murder as likewise his Son in law, Annusit Assittaham, And Pethessw are guilty in the barbarous murder of the Master and men at Henley and Robbing the House... and we find that those absent three Savages are as worthy of death as those in Custody, therefore we pronounce them to outlawry and Condemn them to be hanged or shot when they are ever Caught... [and] pronounce the Sentence of death upon Wappisiss Alias Wouldbe the Land Pirate, And his two Sons, Sheanapp, and Young Snuff the Blanket, to be hanged until they are dead, dead, dead for a terror to all the Savage Natives from ever being guilty of the like barbarity in future Signed by the Chief Officers and Men at Albany Fort June the 12<sup>th</sup> 1755

Samuel Moone	Joseph Isbister, Chief
William Allan	George Rushworth
Robert Taylor	Robert Isbister
John Fairfont	Thomas Eldridge Seddon
Peter Stephens	Guy Warwick
Alexander Graham	John Favell
Robert Lish	Thomas Austin
Thomas Halero	Thomas Stephens
Patrick Mulvoy	George Pahllantine
John Astley	George Astley
William Wren	James Cuttsirome
Joseph Bowns	John Meyrick <sup>1</sup>

HBCA B.3/a/47, Albany Fort Post Journal, 12 June 1755.

The execution of Wouldbe, Shenapp and Young Snuff the Blanket in 1755 marked the first occasion the Hudson's Bay Company attempted to impose the criminal aspects of its private justice system on Aboriginal People. Their trial and execution provides an unusual example of the imposition of the Company's private justice system on First Nations People in Rupert's Land. It is the only reported occasion of a criminal trial and execution of Aboriginal people during the first century of the Company's Charter. It was unusual, because Company justice

did little to draw the First Nations People of Rupert's Land into its legal system. Instead, a barren effort was made to separate First Nations People from Company men, which is evidenced in almost every general letter from London. Left to the discretion of the Company's chief factors, it also became counterproductive to the fur trade. In order to effectively develop a trade that involved the interaction of European mercantile/capitalist enterprise, and a multifaceted Indigenous exchange system that was socially complex when compared to a simple cash transaction, traders had to adopt new methods of exchange and social interaction.

Aboriginal women played an important role in these methods. They acted as cultural liaisons, provided the essential products for the survival of HBC men in Rupert's Land, acted as linguists and messengers, and generally educated Company men.<sup>2</sup> In the case of the Henley House homicides, Joseph Isbister's first report of the raid on Henley House came from Wouldbe, who came forward and denied any involvement. However, when Mammy, an Aboriginal woman from Richmond House on the east coast of Hudson's Bay, and a "leading Indian" came to the fort, they told Isbister that they blamed Wouldbe for the sacking of the house, which ultimately caused a number of children who were dependent on Henley to starve.<sup>3</sup> Of these accounts, Mammy's story was "the most plausible of Any," according to Isbister, which strengthened his resolve to prosecute Wouldbe and his sons. Mammy was afraid of retribution from these men. According to Isbister, she "bound me with Strong promises Never to devulge it to any body who told me for if I did her life would be in danger."<sup>4</sup> Regardless of this confidence, Isbister used this information against the conspirators when they were prosecuted at Albany Fort.

The story that Mammy recounted was as follows. In the beginning of December 1754,

Wouldbe, two of his sons, a son-in-law, an anonymous man who was the son of Napamus, and their families who numbered over 20 people went to Henley House on the pretence of starving and were welcomed by William Lamb, the master. Lamb offered them food and lodging, and they stayed in the house that night. The next day, Lamb sent two of his men to the trap line and another two to do odd jobs around the house. He asked Wouldbe and his band to build a tent on the “plantation,” meaning in close proximity to the house. Wouldbe and his son Snuff the Blanket then seized Lamb, and Snuff the Blanket shot Lamb through the head while the other conspirators murdered the other men who were working around the house. Following this, the men at the traps were shot on their way home. James Short, who was one of these men, was only wounded in his arm and attempted to get his gun out of its case when “he was shot in at the breast by Annuset Wouldbes Son in law.”<sup>5</sup> Finally, Mammy recounted how ropes were tied around the necks of the murdered men and how their bodies were thrown into the river. With this information, Isbister determined that he would get to the truth of the matter. On 3 June 1755, he stated:

... I should never Come to the truth of this affair had I not given my word that who so ever should tell me the truth should have the protection of this factory so long as they lived (wouldbe is Still about and in Expectation of a fine Coat and his two Sons is also here, but I Cannot get them all three together to invite them into the factory, but Shall treat them Kindly and conceal my Suspicion of him and his sons until I can get them all together and have a fair opportunity to invite them into the Factory.<sup>6</sup>

It would appear that the homicides were related to an attempt by Isbister via Lamb to impose a foreign legal system in a territory that was subject to the law of England only in name.

Although the Company was armed with the laws of England, their interaction with First Nations People seemed to be based on nation-to-nation interaction, filtered through the dogma

of ethnic superiority and paternalism. The term “savage” proliferates the documentation and is used in conjunction with the more judicial term, “willful murder.” With respect to First Nations People, the Company was granted proprietary rights in Rupert’s Land but did not apply the criminal law of England to Aboriginal inhabitants. During this period there was no reception of common law in Rupert’s Land, and the Company’s management and the Colonial Office made no effort to draw First Nations People into the English criminal justice system. The Company was primarily “hugging the Bay” for the first century of its existence, acutely dependent on the local people the Company men named the “Home Guard” for provisions as well as furs. Thus, the officers of the Company were naively directed not to have sexual liaisons with Aboriginal women nor allow any First Nations People within the walls of the fort, and to treat them well in order to induce them to bring furs.

While post life was governed by the customs and laws of the navy, British society, and the discretion of the ranking officer of a fort, a completely different legality functioned with respect to First Nations People. What began as diplomatic cross-fusing developed into cultural cross-fusing where custom and ritual were adapted on both sides in order to foster a relationship between nations.<sup>7</sup> What resulted was an elaborate set of tributes and ceremonies that took place on trading days. The thread that seemed to flow through the first 100 years of the Charter was the development of a legal system in which the Company’s Bayside governors either ignored imposing the Company’s private justice system on First Nations People, or adopted the custom of the country in order to legitimate Company law.

The fur trade introduced a new form of social organization into Aboriginal society around the Bay and even further inland that was unique to the fur trade and Rupert’s Land. The

cultivation of a “trading captain” from the ranks of the primarily Cree “Home Guard” meant that the Company officers had to develop an understanding of that position, as well as an appreciation of what motivated an Aboriginal man to seek that role. In an egalitarian society, the role of the “trading captain” was precarious. Thus, HBC factors and governors extended many courtesies such as extra tobacco and clothing to develop the status of the captain among his own people.<sup>8</sup> In this way the HBC attempted to co-opt the prestige of local leaders to curry favour with the local people. However, an attempt to impose an English form of dispute resolution on First Nations People was not discussed in the Company's orders to the Bayside posts. The discretion of the Company's officers was largely influenced by the dependent position they were in with regard to the “Home Guard” for provisioning the posts as well as for their trading alliances with other nations.

A good example of this attitude was expressed in the orders to John Bridgar, the governor of Port Nelson in 1682. The Governor and Committee stated:

There is another thing which we think of great Moment and therefore recommend to your particular care that is that you Endeavour to make such Contracts with the Natives for the River in & above Port Nelson as may in future times ascertain to us a right & property therein and the Sole Liberty to trade & peaceable Cohabitation with such Ceremonies as you shall find to be most Sacred and Obligatory amongst them.<sup>9</sup>

This directive was made when the Company was just beginning to establish a post on the Bay and when French aggression against the HBC was at its height. According to E.E. Rich, the HBC was intent upon establishing itself, and to do this it began to explore the Bay vigorously and build posts where they felt trade could be prosperous. The Company was also motivated by political challenges to the royal Charter that granted a monopoly to them in Rupert's Land. Thus, they erected forts at Port Nelson and New Severn, and attempted to secure title by

making treaties with the First Nations People that supposedly conveyed large blocks of territory to the English Crown.<sup>10</sup> Bridgar himself was captured by the French in 1683. After his release, he returned to the Bay where he was captured again in 1686.

The economic relationship that developed out of the fur trade created a situation where English law was supplanted by the more flexible dispute resolution system of First Nations People. The Company had no interest in interfering with the lives of Aboriginal people beyond the trade. They did want to create a market for European manufactured goods, but beyond this overt interference with Aboriginal custom was avoided. According to Rich, the "Home Guard" began to depend on European goods and to expect the regular arrival of ships.<sup>11</sup> Rich contends that Aboriginal hunters forgot centuries-old skills such as manufacturing and hunting with bows and arrows, and became irreconcilably dependent on European material culture. Arthur Ray, on the other hand, saw the initial interaction between First Nations People and Europeans as a process of economic maximization. Ray acknowledged the fact that Aboriginal traders who were active in the fur trade possessed agency and made conscious choices. In the area around York Fort, according to Ray et. al., two politically allied groups, the Assiniboine and Western Cree, began to occupy the lower sections of the Nelson River drainage basin by the middle of the seventeenth century. With a steady supply of English arms from the Bay, the Algonquian-speaking Western Cree forced the Siouxian-speaking Assiniboine to sue for peace and thus become enemies of the other Siouxian groups such as the Dakota.<sup>12</sup> Geographically, they were poised to fill the role of intermediary in the fur trade between the Bay and the Gros Ventre, Blackfoot and Chipewyan people further north and west.

Guns, which the Cree and Assiniboine acquired at the Bay, provided the medium of

exchange inland, where they would be used for a season or two after the initial trade and then traded, second-hand, to the nations further inland at an inflated price. These middlemen then began to move further inland in a westerly and north-westerly movement.<sup>13</sup> Initially, nations such as the Sarcee, Blackfoot, Blood, Gros Ventre, Mandan and Crow were mentioned in the post journals at York Fort in the early eighteenth century. However, few of these people were arriving after 1730.<sup>14</sup> The position of the middlemen coalesced around their ability to use and supply arms to neighbouring nations. In fact, it would seem that Company men were more dependent on the “Home Guard” than they were dependent on the Company. The middlemen expanded and consolidated their position in the fur trade by enlarging their territory through their continued access to English arms and ammunition. Trading networks among the various bands, tribes and nations in Rupert’s Land were not for strictly economic purposes. In some years, however, warfare and animosity was replaced with mutual aid and alliance. Relationships were not static.

Another aspect of the fur trading relationship on the Bay was European adaptation to Aboriginal customs. For example, the French and the English accepted the custom of exchanging gifts and gift giving became an integral part of the business. When competition was strong, European traders began to give lavishly in an effort to be more generous than their rivals. During these periods, the “trading captains” and their lieutenants received royal treatment which included extra clothing, tobacco, liquor and English food before the actual fur trading began.<sup>15</sup> According to Rich, the English traders had not mastered the finer techniques of trading during the early years of the Company’s operation in Rupert’s Land. Instead, First Nations People were allowed to swarm over the posts, pilfer their creditors and defraud the

Company. In an attempt to counter this, HBC traders developed a system known as the "Standard of Trade."<sup>16</sup> The standard was a technique of accounting where all skins were reduced to a prime beaver skin or a "made beaver." These skins were considered prime because they were trapped in the winter when the coat was thick and worn as beaver robes for at least one season so the outer, coarse hairs, of the skin were worn off, leaving just the downy undercoat. In this system, the "made beaver" specified the amounts of tobacco, cloth, guns, gunpowder, beads, needles or other goods to be traded. For example, in 1684, the rate of exchange was nine "made beaver" or other skins of equivalent value, for a three-and-a-half-foot gun.<sup>17</sup>

Throughout the century, the standard varied according to the year and the post, where some posts offered a much better standard than others. An indication of this is seen in a complaint lodged against James Isham, governor at York Fort, by Ferdinand Jacobs, chief factor of Fort Prince of Wales in 1756. After interviewing an Aboriginal lieutenant and providing him with customary presents, Jacobs noted,

... for all this Encouragement he had the Imprudence to tell me he was Sent for to York fort by Mr. Isham, and unless I would give him More Liquor he would not Only go there, but induce all the Indians he Could from this Factory to that Place, this Gentlemen One Proof of the Methods Used at York Fort to Draw the Trading Indians from the Other Factories to that Place.<sup>18</sup>

Factors could counter the regional cost variation of furs by employing a double standard (or factor's standard). This was achieved by providing inaccurate measures or simply placing a thumb on the scale when weighing powder or other goods. While this method of accounting made the trade look favourable to the eyes of the Governor and Committee, it also raised the hostility of "middlemen," who clearly noticed the variation between the Company's posts. The



trading system that existed in Rupert's Land was in the control of First Nations People, and particularly the middlemen, who through their position formed the most powerful alliance in the northwest by the mid-eighteenth century.

In addition to the standard, debt played an important role in the fur trade, where middlemen were given two to three seasons of credit in order to bring furs back to the posts. The middlemen were specialists.<sup>19</sup> They occasionally trapped furs, but more importantly traded furs for goods on the periphery of their territory and hunted for the HBC's provisions. The underlying economic dimension was an aspect of natural resource extraction where harvests were cyclical. In addition to developing a large trading network and territorial expansion, middlemen incorporated the European debt and credit arrangement into their relations with the HBC. According to Ray, who thoroughly examined the economic dimension of the fur trade through the yearly post returns, a typical Aboriginal visitor to the Bay brought 100 "made beaver" to York Fort in the early eighteenth century. If this figure is accurate, it can be estimated that regional bands provided output for six to ten trappers. Therefore, it is reasonable to conclude that a beaver coat industry would have forced Aboriginal traders to cultivate exchange networks that involved many groups, as well as inspiring them to try to control the number of people involved in it.<sup>20</sup> In addition, First Nations People provided the posts with provisions that were essential to the survival of Company men. Provisioning was the most important economic relationship the Company had with the "Home Guard." It made up the majority of the trade at the posts, where prime furs, most of which were traded to the French "pedlars" inland, were only a minor fraction of the total pelts traded.<sup>21</sup> Middlemen were aware that they could trade lower quality furs at the Bay and still demand a favourable rate of

exchange due to the Company traders' desperate need for good trade returns.

War among the various nations of Rupert's Land was one of the few aspects of Aboriginal culture the Hudson's Bay Company officers attempted to control. It was not controlled through coercion, since the Company had no coercive machinery at its disposal. Instead, diplomacy was the medium of negotiation. War and other disputes among First Nations People were in many cases caused and mediated by the Company. The trade itself caused dislocation in Aboriginal society due to changes in material culture resulting in geographic migration and altered modes of subsistence. Prior to the advent of the fur trade, a great deal of time was spent hunting for subsistence, particularly in the winter and spring. With the fur trade, European traders attempted to persuade the "Home Guard" to hunt for the furs as well as catch furs using European guns. The Cree and Assiniboine had cemented their position in the fur trade from an early date. When any other group attempted to penetrate the middleman zone, and when the Company and the French "pedlars" attempted to move further west, conflicts arose among First Nations People and occasionally with Europeans as well.<sup>22</sup> In 1715, a year after the re-occupation of York Fort, governor James Knight ordered William Stewart, who was travelling with a group of "Home Guard" to the north, to "make peace & not to suffer them if possible to kill hurt or wound any of them but use them with all the friendship you can & to persuade the Indians that You are to bring Six or more of them with you to the Factory where they shall be treated with all the Civility as may be."<sup>23</sup> In their dealings with Aboriginal visitors, the Company officers did all they could to dissuade them from going to war. However, they seemed to be unaware of how their own actions, and the fur trade generally, precipitated violence among First Nations People.

The fur trade altered the traditional forms of interaction in Aboriginal society by providing an economic incentive for warfare in addition to political and social incentives. What distinguished warfare among First Nations People from that of Europe was that in Aboriginal society it was personal and carried on for revenge or prestige.<sup>24</sup> During this period, the Company took a minimal role in mediating conflicts between First Nations People. However, in some cases it was indirectly responsible for inducing raids involving homicide. An example of this took place in 1753, when the master of the Churchill Sloop, John McBean, went north to trade at various meeting places north of Fort Prince of Wales. It was here that the Company carried on a trade with Chipewyan and Inuit bands along the Bay. During the voyage, McBean noticed a puff of smoke toward the shore which he assumed to be "Northern Indians," probably Chipewyan. The smoke was supposed to act as a signal that they had come to trade. Following the chief factor's orders, McBean made no acknowledgment of them because he had no goods to trade and the water was too shallow for the sloop. He then took his ship and crew north to rendezvous with a group of Inuit at Naps Bay. He learned the next year from one of the "Northern hunters" at Fort Prince of Wales that after sailing away, the first group that McBean ignored had attacked and killed the sixteen Inuit people after the Sloop had traded with them, but when the ship was not yet out of sight. As McBean recounted, "they went and fell on 4 tents of the Usquemas that tented on a point that joined to the main and murdered every soul of them men women and children and men they Shot as they took to there Canoes and the women they stabbed in the tents where they found them except one woman which it seem some of them some of the fancied..."<sup>25</sup> The woman was made the captive of the band but escaped at night. Because of the general lack of hiding places on the barren tundra, north of the tree line,

she was forced to hide in a pond where she was soon found and instantly shot.<sup>26</sup> McBean's information came from a "Northern Indian" who was conversant in Cree and who related the story to Moses Norton in the Cree language. Norton, an officer and future bayside governor, spoke and understood Cree and recounted the incident according to the culprits:

... that seeing the Sloop in the offing they made that Smoke for us to Come on Shore to Trade... with us and that when they Saw we Did not mind them they Related with these words that they were obliged to Carry their trade to the English for many miles and then trade on these Conditions But the Usquemay had it Brought to these doors therefore say they Let us go and kill our Rivals or to this purpose there was Several families on the Spot where this smoke was made...<sup>27</sup>

In the following year, Ferdinand Jacobs, the governor at Fort Prince of Wales, commented on this incident in his post journal. What he recounted exemplified the policy of the Company's private justice system with respect to violence between First Nations People. After trading with a group of Chipewyan, he enquired about the killing of the Inuit people the previous year. Instead of chastising them or asserting the principles of British justice, he stated, "I talked a great Deal to them about it, to Persuade them not to Molest the Esquemays any more, in which Discourse I Represented to them the Ill Consequences that will Certainly attend those Murders."<sup>28</sup> The subtext of Jacobs concern is based upon the economics of the fur trade. While Jacobs did not proactively assist the Inuit against their enemies, he provided sanctuary and symbolic protection. In his journal entry of 30 June 1762, Jacobs stated that the leader of the Athabaska people left the fort with his band to go to war along with the Beaver River band to kill "Our farthest Northern Indians."<sup>29</sup> He went on to say that because of this they were "ashamed and afraid" to visit the fort, knowing that he protected the "Northern Indians from Such Cruelties."<sup>30</sup> To quell their apprehension, Jacobs sent tobacco and brandy to these bands

as an inducement to trade, which gave him “great Concern, Our Trade is greatly Diminished at this Place.”<sup>31</sup>

The Company’s authority on the Bay did not extend to relations among First Nations People beyond the advancement of the fur trade and occasionally refuge for individuals.<sup>32</sup> Company posts functioned as supply depots, and Company men were another trading group that acted as intermediaries between the Cree and Assiniboine middlemen on the Bay and the fur market of London. However, in circumstances when acts of violence were committed against Company employees by First Nations People, a hazy definition of the Company’s legal authority was all that existed. The Company’s Charter was clear. The Governor and Committee had the right to enact laws for the government of the fur trade and to promote tranquillity in Rupert’s Land. However, this permissive legislation was as far as the Company’s authority went. There were no orders to Company chief factors other than that they should try to promote friendly relations with the Indigenous inhabitants and not to let them into the posts. While the latter recommendation was rarely followed, the former was required for the fur trade to prosper.

Joseph Isbister’s response to the sacking of Henley House was the first recorded occasion where Company men imposed their formal legal system on people that were not British subjects. It was also the Company’s first attempt to establish a post inland from James Bay, and was a direct response to competition from the “pedlars” from Canada. The French traders were granted licences to move inland and trade furs, and by the 1750s had begun siphoning off the best prime furs from the trade. Coincidentally, it is during the 1750s that the majority of violence directed at Europeans by the “Home Guard” was apparent. Joseph Isbister,

the chief factor at Albany Fort, engineered the Company's first attempt at judicial colonialism.<sup>33</sup> His reputation for authoritarianism and cruelty within the walls of the post was well reported. Externally, Isbister was an astute fur trader who realized the advantage of friendly relations with the "Home Guard," as well as the fact that the majority of the best furs were ending up in the hands of the competition. Isbister also realized from an early date that the only way the Company could protect its trade would be to face the competition on their own ground at the head of the Albany River, one hundred and twenty miles of rapids and portages away. The Governor and Committee resisted this policy because moving goods inland was costly due to the higher wages employees demanded and the fact that most of their people lacked the skills to carry on such a trade. Isbister, on the other hand, was convinced that Albany's trade would be destroyed if such a move was not made. In 1743, he single-handedly made the decision to go inland with a small group of men to establish a post at the junction of the Albany and Kenogami Rivers, appointing William Isbister, his brother, master of Henley House.<sup>34</sup> The Committee approved Isbister's action, but insisted that the new fort serve as a showcase of the items available at the main fort in order to defend the trade.<sup>35</sup>

According to Sylvia Van Kirk, the underlying factor that motivated Wouldbe and his band to attack Henley House was Isbister's governing style at Albany. She points out that Isbister, while keeping an Aboriginal wife, forbade his officers and servants from doing the same. He also enforced strict discipline, which alienated his men as well as the local "Home Guard." Prior to his reassignment to Albany Fort, discipline was allowed to slide and the local people were given free access to the fort and its supplies by chief factor George Spence. Van Kirk's contention was that Wouldbe became so enraged when William Lamb arrived and began

following Isbister's example that he murdered the men and plundered the house.<sup>36</sup> While this explanation is plausible, it lacks an analysis of the larger context of the 1750s. During this period, French Canadian "pedlars" had secured their position inland and began to penetrate further into the interior of Rupert's Land. Henley House represented yet another incursion into the territory controlled by the Cree-Assiniboine alliance. However, what distinguished the HBC from the "pedlars," was that the HBC built a permanent settlement or "plantations," which allowed them to monitor the inland trade all year round. It is clear that competition as well as the governing style of Isbister facilitated the tragic events at Henley and Albany.

From the 1750s to the 1770s, a number of international homicides took place in Rupert's Land. The term "international homicide" is borrowed from Hamar Foster's work, and refers to the situation where there was no reception of common law in Rupert's Land and no Crown-appointed justices.<sup>37</sup> As well, up to this point the Company had followed a policy of nation-to-nation interaction where diplomacy rather than colonialism dominated their interaction with Cree people. In addition, after almost eighty years in Rupert's Land, the Company had implicitly adopted some aspects of Aboriginal custom. Marriage was one area that was adopted and modified by the Company's men. Company chief factors also followed local custom with respect to accidental death. Such was the case in 1770 at Fort Prince of Wales when governor Moses Norton learned of a child who was mauled by one of the Company's dogs. Norton wrote,

... this Evening an Accident happened to a poor Indian Child about 4 years old he Strolling about by himself 4 of our dogs fell on him and tore him in a shocking manner and would have Killed him on the Spot, if Brander the Mason had not Luckily seen him, who run and Rescued him though with some difficulty on Which I had the 4 dogs shot in order to pacify the Friends of the Injured Child...<sup>38</sup>

At common law there was no liability in a case of accidental death.<sup>39</sup> However, in this case, Norton stated that he “promised them some other Acknowledgement if the Child should not survive.”<sup>40</sup> Norton had acknowledged the Cree system of compensation for accidental death out of the necessity of maintaining good relations with the child’s family and kin group. In the pre-colonial setting, Company officers had to accept the nuances of Cree law in order to maintain their alliances with the “Home Guard.”

In other areas, Aboriginal and English custom were almost transferrable. James Knight kept Aboriginal slaves, which was part of customary practice in Rupert’s Land.<sup>41</sup> He admitted this in his post journal and the practice was followed throughout the century. In 1753, Ferdinand Jacobs stated that “... this Day Gentlemen I Bought a Slave Indian man he is about 20 years of Age and Seems to be of an agreeable Temper, and According to the Jokes way of selling Horses he is found wind & Limb.”<sup>42</sup> The slave, named Churchill by Jacobs, was mentioned in his post journal of 1757. After being adopted into the internal disciplinary system of the Company, he began following the example of the other Company servants by disobeying the chief factor. Jacobs wrote:

... Last Night Mr. Norton Desired your Honours Slave Servant Churchill to go out the mens House to his bed in my House; for which he had the Imprudence to Strike him, Mr. Norton then Ordered Henry Moor the Steward to bring him home to my House when I ordered him to his bed he being in Liquor which he was not willing to do, i therefore Endeavoured to put him to bed at which time he Struck at me from which I gave him his reward; and this Morning Dismissed him from Your Honours Service, and Sent him away with the Other Indians that Came Yesterday to Provide for himself.<sup>43</sup>

The Company’s customary practice was to purchase slaves taken in raids against neighbouring bands and nations and incorporating them into its society. Churchill was referred to not just as a slave; he was also a quasi-servant who laboured for, and received his maintenance from the



post. Because of this status he was subject to the disciplinary discretion of Jacobs. In the end, his expulsion from the fort also corresponded to the Aboriginal practice of freeing slaves and re-establishing their status after they had been incorporated into the conquering nation's society.

First Nations People were also incorporated into the Company's internal private justice system by being contracted for posse duty. Who better to search for fugitives than the people most familiar with the country? Isbister, who was astute at using all the resources available to enforce his will, directed a group of "Home Guard" to pursue William Fosette, who deserted his eight o'clock watch at Eastmain with a gun, some hatchets, and a small sailboat in May 1738. In addition to dispatching his local allies, he received information from a "Northern Indian" who tracked Fosette for fifteen miles. The "Home Guard" group found his boat and scraps of his clothing, which prompted Isbister to send two of his men to wait for him to return.<sup>44</sup> Fosette was eventually found with the aid of the locals. The "Home Guard," while not being completely incorporated into post society, performed significant roles in the Company's internal dispute resolution system. Their role was defined by custom that was modified by interaction with the Company's people.

Bayside leaders were often farsighted enough to promote Aboriginal enculturation within Company ranks. They wanted their men to learn Aboriginal hunting and survival techniques to reduce their reliance on the "Home Guard" for provisions. The survival of Henley House was dependent on Company employees learning the practices of the country. They could not manufacture their own canoes, much less commandeer them, and few employees could speak the local languages. Factors such as Henry Pollessen, of Moose Factory, instituted a

policy of sending men hunting and living with the local people. Predictably, Company servants who went to live within Aboriginal society were often the victims of assault.

The murders at Henley House can be explained by studying the dynamic of European-Aboriginal interaction. In the pre-colonial period, the Company's private justice system had absorbed aspects of Aboriginal custom, which did not regard international homicide as a crime. Speaking almost one hundred years later, after the establishment of a more formal mechanism for dispute resolution in the Indian Territories, chief factor Peter Ogden stated that custom of the country was his guide where summary legislation was the rule.<sup>45</sup> For example, when the Company sent its first expedition inland to establish Cumberland House in 1771 on the North Saskatchewan River, Samuel Hearne noted that a Company servant named Flatt was robbed and enslaved by a band of First Nations People who were entrusted to guide him from the post to the head of Lake Winnipeg. The incident was reported to Hearne by a group of "Strange Indians" who were staying where Flatt was abandoned. Hearne noted, "from the very unkind usage he Received from them, there was little hopes of their taking care of him."<sup>46</sup> Flatt was supposedly stripped of all his belongings prior to being rescued by a "pedlar" from Montreal and subsequently returned to the house. This was an example of the type of assault that took place when the Company began to move inland and interacted with Aboriginal people.

The Company men could not have been ignorant of Aboriginal dispute resolution since they had some experience and knowledge of the custom of the country. Henry Kelsey, who provided one of the first ethnographies of Cree middlemen whom he travelled with in 1689, 1690 and 1691, was aware of Aboriginal custom as well as the role the middlemen played. Kelsey, who began his career in the Company in 1684, was posted to the fort at Nelson River,

which was later resited and named York Fort. He developed his knowledge of the country by travelling between posts with a guide. Kelsey's ability to survive in the country was noticed by governor George Geyer, who suggested he travel inland on a diplomatic mission.<sup>47</sup> On these Company-sponsored journeys, Kelsey was expected to inform the inland people of the Company's presence on the Bay and to persuade them to come to trade at York Fort. During his travels, Kelsey went south to the North American plains, and north to the "Barren Grounds" past the tree line where he met six different bands of Nayhaythaway, Home, Stone, Eagles Birch, Mountain Poets and Naywatame Poets corresponding to the Cree, Assiniboine, Ojibwa, Sioux, Dene, and Chipewyan Nations.<sup>48</sup> His foray exemplified the diplomatic relationship that was an ingredient of contact, and made him a novelty and a source of power in the interior. At one point, the group of Cree people with whom he was travelling appointed him master of the feast in order to keep the Naywatame Poets from murdering them.<sup>49</sup> Much like the peace making performed at the Bay, Kelsey sought to foster diplomacy among the various bands when, on 15 August 1690 he refused to give encouragement to his travelling companions to go to war. In an effort to promote peace, he cut tobacco and invited all of the elders to his tent to tell them that he would not provide them with guns in order to fight their enemies.<sup>50</sup> He used the economics of the fur trade to entice inland people to forgo raiding one another, and labour for the trade instead. To promote peace, he stated,

...I filled that pipe which the Governor had sent me with tobacco & then sent for the Captain So then I made a speech to him & told him that he should not mind what had passed formerly as concerning the nayhaythaways killing Six tent of his Country men & for the future we English will seek for to prevent it going any further for if so be they did so any more the Governor says he will not trade with them...<sup>51</sup>

Apart from Kelsey's diplomatic mission, he made a number of important observations

about Aboriginal life and customs. For example, he noted that the Cree, who had the prestige and fire power associated with direct contact with the English, blocked access to the Bay to other nations.<sup>52</sup> From Kelsey's writing, Dale Russel has ascertained that the Cree Nation around the Bay were composed of several groups who were separated by dialect and geographic adaptations where the largest unit, or regional band, was made up of 200 to 400 people. This was the level where group identity occurred, and was fragmented into smaller local bands consisting of several related families. During periods of distress, which usually occurred during the spring or winter, a smaller trapping unit was made up of 15 to 50 people in order to find subsistence. At the time the murders at Henley House occurred, the social unit that was responsible for the killings was undoubtedly the trapping unit. Finally, the smallest unit of social organization was the household, which was made up of one or more nuclear families. This relationship was fluid, flexible and united during ecologically productive times with ceremonies and feasts.<sup>53</sup>

In the fifty years after Kelsey's journey, only two other Company servants, Richard Norton and William Stuart went inland, until Anthony Henday went on year long journeys to the base of the Rocky Mountains in 1754 and 1755. Henday was a net maker and one-time smuggler who was hired by the Company as a labourer. He measured the rivers around the post and in 1754 volunteered for an inland expedition. Henday travelled in the company of a group of "Home Guard" with a female companion he called his "bedfellow."<sup>54</sup> After travelling with a group of Cree to the South Saskatchewan River, Henday continued his journey further west with a group of Assiniboine in search of the Earchthinues or Blackfoot. He then travelled southwesterly with a band of 400 people until he met a group of "Eagle Indians," and continued

west until he found the great buffalo herds of the northern prairies and mounted Blackfoot hunters. On this journey, Henday learned about the heavy Cree/Assiniboine opposition to drawing the Blackfoot Nation to the Bay, which would cut off their position as middlemen. He also made observations on the trading habits of the French “pedlars,” noticing their ability to speak several languages and their mastery and skill in fur trading.<sup>55</sup>

Henday also observed the nature of dispute resolution and warfare in the interior, and particularly among the Blackfoot. While Henday’s journal was of questionable authenticity, being revised and censored by governor James Isham of York Fort, it contained a great deal of ethnographic information that could only be learned while in the country. For example, in December 1754 Henday asked the group he was travelling with why they did not trap wolves. They replied that it was not their country, and “if the Earchithinues should see us they would kill us all.”<sup>56</sup> They then asked Henday if he would defend them if they were attacked, which he stated he would not unless they shot at him first. Dispute resolution on Henday’s journey was adopted from the country. When William Grover could no longer keep pace with Henday and his party, he was placed on shore in order to walk back to York Fort. Henday advised his companions that they must protect him or answer to his country men.<sup>57</sup> Grover was apparently “quite jaded,” and could no longer paddle a canoe. In addition to adopting Aboriginal concepts of collective responsibility to protect his “country man,” Henday was also privy to the nature of warfare among First Nations People. After learning of a war between a group of Earchithinues who were allies of the English and other Earchithinues, Henday learned about the practice of scalping. According to Isham and Henday,

...it’s a Common Rule when any is killed on Either Side to Scalp them; that is taking the

skin from the forehead to the pole of the Neck off, with the Hair on the Skin, this they tie upon a Long stick and Carry before them, when Return from war, as a mark of their abilities &c. This way of Scalping is done when the person is alive sometimes, having a Esinepoet Captain who was used this place many years who was served so, made his Escape by the Assistance of another Indian I observed the Hair never Grow on that part afterwards tho I knew the said Indian 2 years.<sup>58</sup>

Henday's journey and Isham's comments provide insights into the type of legal system the Company invoked when dealing with First Nations People. It also gives us a glimpse into the discretionary nature of governing a post, and how it was often in an officer's best interest to ride roughshod over the traditional rules of law that came from the Charter and the London Committee.

Externally, both Isham and Isbister used rather different legal mechanisms for dealing with First Nations People. The world view of both of these men was quite different. Isham, exercised paternalism toward First Nations People, and favoured the idea of country marriages if it benefited the trade. He wrote about Anthony Henday on his return from a year-long voyage inland stating, "... I Can but own if I had been in Captain Henday's place when the King of the Earchithinues offered him his Daughter in Marriage and I a single Man as he was would have Embraced that proposal which would have Created a firm friendship and would have been a great help in Engaging them to trade."<sup>59</sup> Isbister, for his part, operated his post according to the rules prescribed in London, and made every attempt to stamp out any liaisons his men had with Aboriginal women, even though he recognized the value of these relationships and had an Aboriginal wife as well as a Country-born son.

While it seems that Isham tacitly recognized the concept of Aboriginal nationhood, Isbister sought to impose legal sanctions and capital punishment. As disparate as they seemed,

the actions of both men may fit into the Aboriginal dispute resolution system based on collective responsibility and the vendetta. In 1755, Isham, upon learning of the death of Samuel Skrimsher, found out that his injuries were inflicted by an Aboriginal man before he left for a goose hunting trip. On 23 May 1755, he stated,

Its to be observed Mr. Skrimsher got a hurt Across the face and foot by a drunken Indian before he Left the house... by a fine Brandy; John Hughes writes me work he Complained Every day till his death and that he Several More does think it was the Cause of his death...<sup>60</sup>

When Isham examined the deceased he "... found the Right side of his face had Received a Blow, the Right Eye very Red, Surlied & Closed, and is our opinion the blow Get by the Indian and the cause of his death."<sup>61</sup> Isham ignored the criminal jurisdiction of the Company's Charter as well as the restitutive aspects of the custom of the country, and the incident was not spoken of again.

Isbister, when faced with the occurrence that took place at Henley House, invoked the full retributive power of the Company's private justice system. Immediately after learning of the incident at Henley from three men who had come to trade, he surmised that the men had fled the post or were scalped since the French apparently gave "a reward of the Value of five pound for the Scalp of every English man they bring."<sup>62</sup> The Aboriginal traders stated that they had visited the house to trade some furs for provisions, and found it in a deplorable condition with the door knocked off its hinges, but no shot holes nor marks in the ice. Initially, Isbister blamed his men for not properly defending the house despite his contention that they were the "Stoutest And best men belonging to this fort."<sup>63</sup> Contrary to Isbister's description, William Lamb complained about the qualities of his men, stating "if there is a drunkard at Albany Fort

I am sure to have him: which I think is not Right where there is but one Master and no Officer Under him.”<sup>64</sup> In the end, Isbister surmised that the men were cowards since they had plenty of arms and a pallisade guarding them. Overall, however, he blamed the French “woodrunners.” He stated,

... Strength and Vigorous efforts is absolutely Necessary to put a Stop to this growing Evil, which to Accomplish my best endeavours shall in no shape be wanting and to revenge this insult done to the Company’s Factory And to this end an appeal to parliament for redress and a kings Commission is also Necessary...<sup>65</sup>

To consider the consequences of the murders at Henley House, Isbister summoned the only official governing instrument that he had at his disposal: the post council. The first post council he held relating to the incident at Henley House was convened on 8 March 1755, and passed a resolution cosigned by George Rushworth, the post’s second and surgeon. It stated:

That as the french by their Treacherous Means have Seduced and Corrupted the Indians or employed them to delude the English out of their place of defence, have taken and Carried off the Master, men and Company’s effects, the men to Captivity or massacred them and not demolished the Said Factory House we Judge and it is our opinion that the Said House was preserved in order for the French to take possession of.<sup>66</sup>

The resolution then ordered the post’s “Trusty Indians to Set fire to the Said Henly House and burn it down to the Ground.”<sup>67</sup> Over the next weeks, Isbister began questioning any First Nations traders who visited the fort. On some occasions he “Tested and Cross questioned them,” in others he provided them with inducements to talk.<sup>68</sup> On 23 May he gave Wachisk a coat, hat and liquor and stated that, he “[could] get no Account of him who they were that has done us this injury at Henley & yet I am of opinion he knows Something of the matter Though I believe him to have no hand in the Villainy.”<sup>69</sup> Wouldbe was the first to come forward with information about the homicides, stating that the murders took place after



Christmas before his son went to the post and found one strange Aboriginal man who was allied to the French and whom he did not know. Wouldbe then gave Isbister a number of furs, and told him that Lamb probably let a number of people into the house who seized him and his men before they were able to take up arms. Wouldbe also stated that he suspected the French had encouraged the attack.<sup>70</sup> Although Isbister was suspicious of Wouldbe's involvement in the murder, he admitted the story was plausible.

One week later, on 2-3 June, Isbister ordered the building of two "prisons in the Ends of our Sheds," after learning from a group of First Nations People and Mammy the revised story of the murders. Mammy told of how the men were murdered and how Wouldbe assumed the role of master of the house, where he traded the Company's goods with others who had no role in the attack. She also stated that when they had expended all the provisions, Wouldbe and his accomplices plundered the post.<sup>71</sup> Wouldbe and his sons were in the vicinity when this information came to light, and on 7 June 1755 Isbister invited Wouldbe and his two sons into the fort, telling him that he had a coat for them. They apparently were "readily little thinking but that they were to be dressed in a Very gay Manner."<sup>72</sup> Isbister then had the gates of the fort shut behind them and had the three men seized by the Company's servants. Isbister noted, "when they found that their Villainy was discovered began to Confess their guilt so Soon as our men laid hands on them, and the Noses of the two Young fellows Gushed out with blood without our using any Violence to Cause it..."<sup>73</sup>

Isbister then had Wouldbe and his two sons Shenapp and Snuff placed in irons where they confessed to their guards. The three men were then led to separate prisons and examined separately by Isbister prior to his writing a formal deposition of the examination of the three

men. This was “taken by Mr. Joseph Isbister Mr. George Rushworth, John Fairfowle, And in the presence of Twenty one men belonging to the Fort...”<sup>74</sup> It is clear that Isbister was anxious to make his prosecution seem fair and meticulous for the eyes of the Governor and Committee. With regard to the confessions, Isbister wrote,

...their first confession differs only in the disposing of the dead men & Killing the Master, from that of Mammy’s report, Woudbee And his two sons Says that they did not put the dead men in the river but laid them on the land and Covered them with wood, and Snuff the Blanket says that he did not shoot the Master, but his brother Shenap did ( in all other particulars in the Charge against them is true and that they did Kill the English men but gave no reason for so doing...”<sup>75</sup>

The chief factor was still not satisfied with this. When asked why they committed the act, all the prisoners implicated two other men, named Pethessw and Assittaham, who were not in the vicinity of the post, and stated that they were hungry and that William Lamb had no victuals for them, which inspired the violence. When pressed, Wouldbe burst out calling Rushworth a liar and stated, “Victuals is as much for the Indians as for the English men; and that York Fort would be taken in a Short time and that I should not live long.”<sup>76</sup>

Isbister now had the names of five men, three of whom were in custody and who assumed responsibility for the death of five Company men. He needed a reason for this act of “wilfull murder,” and to get his answer he resorted to a curious form of interrogation. Isbister wrote that he had the men separated again and fired two pistols in the yard, “in order to know the sentiment of the Indians, making believe I had killed two of them and that one only was left alive, and likewise that each of the three prisoners should think that he only was Spared.”<sup>77</sup> Although he did not coerce a motive from the three, Isbister noted that he did this to learn the sentiment of the “Home Guard.” He was interested in finding out whether the execution of the

men would alienate the locals and stated that he found that most of them seemed pleased while some were afraid that he shot them. Whether his action was supported by the locals escapes the record. Nevertheless, Isbister resolved to execute the men. He wrote,

...therefore as to a public or private death it matters not which for we find by the generality of the Indians that they detest and abhor Wouldbe's barbarous proceeding against the English as well the Indians, for which reason they are desirous he should Suffer for bringing Such a Stance upon their Country men in Killing the English who so often have Saved his life and the lives of many distressed Indians it is thought by some that Assittaham and Pethessw have been Sent by the French to join with any disaffected of our Indians to do the English this injury...<sup>78</sup>

Isbister went on to say that Wouldbe had received the kindest treatment from him for twenty years, and that he had cost the Company ten thousand pounds "by his rude behaviour to the upland Indians when they came here to trade, by thieving and robing them which has discouraged them from Coming down at all."<sup>79</sup> Trade, it would seem, was an extenuating factor in the murders at Henley.

While Wouldbe, Shenapp and Snuff languished in irons, they seemed unaware of their plight. This was evidenced in the fact that they asked the Company's men when they would be let out to catch some Sturgeon for the fort. On 12 June 1755, Isbister convened another post council to sentence the prisoners. He stated, "where upon the Consideration of the whole Confession the Sentence was passed and judgement given by the whole Council of 24 men, that Wappesiss Alias Wouldbee and this two Sons Shenap and Young Snuff the Blanket should be hanged until they are dead, dead, dead for so barbarously murdering the men at Henley and robbing the Company's Factory House."<sup>80</sup> Harkening back to medieval English law, Isbister also condemned two of the accomplices, namely Annusit Assittaham and Pethessw to "outlawry and to be hanged or Shot when ever they are Caught..."<sup>81</sup> Isbister was convinced that

exemplary punishment was necessary in this case “for a Terror to all Such Savages from ever being guilty of the like in future.”<sup>82</sup> Sensing that he may have overstepped his authority, Isbister then suspended the execution of these men until he received the approval of the council at Moose Factory. Nonchalantly, he stated he was “not caring to proceed with too much precipitation in those cases.”<sup>83</sup>

Approval from chief factor Thomas White and his council at Moose Factory arrived on 21 June. Isbister noted that the manner of writing suggested that he had postponed the execution too long and so proceeded that very day. He stated,

at 20 minutes after 4 PM: all the men in this Fort joined their hands to the Execution of Wappesiss Alias Wouldbee Shenapp And Young Snuff the Blanket, for barbarously Murdering William Lamb, Robert Ash, Daniel Bowlland, James Short And George Gun and robbing the Company’s Factory House at Henley, they hung 30 minutes until they were dead, after which we let them down And put them all three into an old Sawpitt which is some distance below this Fort and Covered them with Earth, a Gentle punishment for so heinous a Crime, at the Same time to let the Indians Know that the English will not put up with Such Villainous Treatment from Indians, although we are a people Strangers to all Savage brutality.<sup>84</sup>

From this it can be discerned that Isbister was motivated by retaliation and the need to set an example, even though the proceedings leave an impression of formal legality and collective decision making. Notwithstanding the cultural implications of taking the lives of three for those of five, it appears Isbister was in fact following customary law rather than common law. By ignoring the formality of the council, which was ad hoc in this case, the executions at Albany Fort displayed some similarity to Aboriginal custom. It was a situation where retaliation overrode any other legal concept, where Isbister and the Company men assumed the role of a personal kinship group.

In other cases of international homicide in the latter half of the eighteenth century, the

Company's private justice system did not include jurisdiction over First Nations People. Following the homicide of a Company apprentice that took place at the Whale River House outpost in 1754, no mention was made of apprehending or trying the perpetrators. Whale River House had a great deal in common with Henley. It was the outpost of Richmond House and was built to exploit the whale fishery and make contact with the Inuit of Eastern Hudson Bay. After making contact with a group of hunters, the Company men gave them presents and established friendly relations. One day in February, the men from the post went hunting, leaving Matthew Warden the apprentice boy and two Inuit men behind. When the men returned they found Warden missing and the house plundered. When word reached Richmond House, it was arranged that on their return, two of the Inuit hunters would be held prisoner for the safe return of Warden.<sup>85</sup> Two were then taken while a third man was allowed to escape. In the end, the prisoners tried to escape at gunpoint and were subsequently killed. It was later discovered by a group of Aboriginal traders at Richmond House that Warden's remains were found about two hundred yards from Whale River House.<sup>86</sup> The Inuit hunters were found by a group of Richmond's "Home Guard," who killed them with the exception of four children they kept as slaves.<sup>87</sup> At Whale River, the Company's private justice system functioned in a similar manner to Aboriginal custom. By holding hostages, and trading for the life of Warden, the master, consciously or unconsciously, followed local custom. He did not invoke formal justice, and Warden's life was ultimately avenged by an allied group of First Nations People.

The establishment at Henley House proved to be a source of distress for the Company for many years. After the murders of 1754, Isbister ordered the burning of the house for fear that it would fall under the control of the French "pedlars." Rich blamed the tragedy on the

English inability to adapt to the country and live alongside the First Nations People. He also mentioned the fact that Lamb had two women in the house “at Bed and Board” while the other men had their “squaws” living in the post.<sup>88</sup> He also noted that Isbister was ignorant of any procedure that could be used to prosecute international homicides, but felt that the Charter and the sovereignty of the Crown in Rupert’s Land had conferred sufficient rights to the Company to try and execute First Nations People.<sup>89</sup> However, he ignored Isbister’s fate and the ramifications of his action. Isbister’s contract expired in 1756 and he was recalled in compliance with his wishes and for fear of reprisal from the kinship group of the executed men. The Committee, while not admonishing him, did not approve of his actions. What Isbister did was introduce a whole new field to the Company’s law-giving powers that seemed anathema to maintaining friendly relations and trading furs. In 1757, he petitioned the Governor and Committee for the command of a Company ship. After being denied, he retired in Quebec where, according to Van Kirk, he “got along well with the Indians because of his knowledge of the language.”<sup>90</sup> Isbister died in Quebec City in 1771 as the first Orcadian to reach the rank of Bayside governor in the HBC, and the first Englishman to execute Aboriginal people in Rupert’s Land.

Henley House was reestablished in the spring of 1759 after a number of delays, caused by chief factor Robert Temple’s inability to find a suitable staff. Tragedy followed on 23 September, when James Inkster and John Cromartie of Henley House told Temple that the master, Mr. Clark, was shot dead and John Spence wounded in the thigh. On 5 October, Temple wrote,

Friday Chubby and Capuchun returned from Henley and brought Mr. Clark with them

on examining the Body we found he had been shot in twelve different places they had Scalped him and left him under the Bank; as to the House they have burnt it to the ground carried off or destroyed every thing that was in it...<sup>91</sup>

It seems that the precedent of Isbister's trial of these perpetrators was not followed by Temple when he learned of the homicide from a number of men who traded at Henley. As they stated, the crime was carried out by ten French Canadians, ten "Canadian Indians" and some "Upland Indians." He learned that a number of them were killed, "and two Wounded in such a manner that they could not live."<sup>92</sup> He did not attempt to avenge the deaths and continued to trade with all those who came to the fort. However, four years later, he noticed a curious celebration on the plantation which may have been related to the death of Clark. He stated,

... watching the Indians, they are continually dancing and Singing the War and begging Songs; and are so impudent in their demands that I know not what to do, the green scalp of the unhappy wretch they murdered are presented as a trophy of their valour to ever person they come near: at the same time they demand a reward for killing those they call our Enemies...<sup>93</sup>

Notwithstanding these observations, it was apparent to the Company chief factors that Aboriginal customary law was not overridden by the Charter. The Company did little to prosecute the perpetrators of crimes against its employees. Where they did, the process resembled Aboriginal dispute resolution rather than English criminal law.

Henley was not attacked after 1759 despite a number of threats and false rumours that circulated regarding an imminent attack in 1767. Although the reports proved to be false, they indicated that the problems associated with Henley were certainly not isolated events. While Van Kirk and Rich attribute the murders to the inability of Company men to adapt to life in the interior, and the jealousy of Aboriginal men when the HBC men courted their wives, they fail to address the fact that the post at Henley was a direct incursion on the Cree/Assiniboine

trading network. By moving inland, the Company saw exactly how the middlemen had used the competition between the French and English to maximize their advantage. The Company men became acutely aware of the fact that they were subject to the same law that existed between First Nations People who raided one another. With the dawning of the competitive age, a culture of violence ensued. Middlemen, who had customarily asserted their advantageous position in the fur trade, did not distinguish between competing Aboriginal, English and French traders. All were subject to the Cree/Assiniboine attempt to restrict access to the fur trade and the trading system. The Company was learning the lesson the French “pedlars” had learned forty years earlier when two traders from New France were murdered and thrown into a river with rocks around their necks, when it was realized they did not have provisions.<sup>94</sup>

Individually, First Nations People were occasionally disciplined by Company officers if unacceptable acts occurred within the confines of a fort. In 1771, governor Ferdinand Jacobs of York Fort reported in his journal an incident that occurred when an Assiniboine man, who was drunk, broke into his apartment and attempted to stab him. Jacobs dealt with the man in his own way, and “Seized & wrenched” the knife from him and quietly turned him out of the fort.<sup>95</sup> Despite this, once off the plantation Company men were subject to Aboriginal law and no attempt was made to impose English justice. Louis Primo, a French Canadian trader who defected to the HBC in 1765, found himself on the receiving end of a vendetta when travelling inland with Mathew Cocking in 1772. Primo, who worked for the Company as an emissary in the inland trade, was an experienced “woodrunner” who spoke a number of First Nations languages and had travelled inland for much of his life. In 1772, he learned that the son of an Aboriginal leader named Sesiwappew, whom Primo accompanied from the fort and who died



in passage, intended to kill him. Cocking wrote in his journal, "they are such a superstitious people when any one of them dies they suppose some Person to be the cause; this is the reason they tell me of this man's wanting to kill Primo."<sup>96</sup> The men who travelled inland had to develop an understanding of a foreign culture that was in many ways at variance with English law and the Company's motivation in the fur trade.

Survival off the arguably safe ground of the Company forts was only tenable with the assistance of First Nations People. Henry Kelsey learned this lesson in the 1690s when he travelled inland in the company of a guide. The Company needed Aboriginal knowledge of geography, survival skills, languages and political skills to advance their trade, but paid little attention to their motivation in the fur trade.<sup>97</sup> Anthony Henday's experience inland in 1754 enlightened him to the power of "Home Guard" leaders. When faced with threats from de la Come's men at Fort Paskuyac, Henday's guide, Atticashish protected him and rather smugly stated that they wouldn't dare.<sup>98</sup> In 1772, Mathew Cocking, the second at York Fort and inland explorer, observed the cultural value of the trade among middlemen. He provided a description of the farewell smoking ceremony which took place in October, before the larger summer band would break up into smaller winter hunting groups. He stated,

The Leader Wippetanassowin [began the] ...throwing away of things, this they commonly do every year. On this occasion all the Men and Women were invited, the Leaders grand pipe Stem being exposed to view, and several speeches made. Two Looking Glasses with several other trifles were presented those were to be given to the ground to induce it to favour them with plenty of Furs and Provision; they have a notion that these gifts have a great effect when any thing happens contrary to their desires, they commonly use this method to appease the ill Demon. When sick especially they are very foolish this way throwing away many things; also presenting to others as payment for singing their God songs so that if the sick Person recovers he is a poor wretched creature having scarce any thing to cover his Nakedness.<sup>99</sup>

In the context of the situation, the biases Cocking displayed are reasonable. He was, after all, an English fur trader who had not had a great deal of experience inland. It is curious that the Company paid little attention to First Nations cosmology and its relevance to the fur trade. Nevertheless, chief factors were reliant on the “Home Guard” for trade and provisions and many were versed in First Nation’s languages. A general lack of candour may be one reason why this information was not transmitted to London until Cocking wrote of it. Another reason was that Company men often accepted these practices as an aspect of fur trade society. A contention has been made that the men who travelled inland became “Indianized” with much more frequency than First Nations People adopting European custom. It follows that non-Aboriginal traders adapted to the system of kinship, marriage, language, clothing and trading.<sup>100</sup> It stands to reason that they also followed the Aboriginal dispute resolution mechanisms which in turn shaped Company law in Rupert’s Land.

Over the past twenty-five years, a number of anthropological and historical interpretations have been advanced to develop the theoretical aspects of Aboriginal dispute resolution. From a historical basis, this attempt can be tenuous since the only observations that can be made will be compromised by the historical sources themselves. With respect to the HBC, all the correspondence and daily journals were written for the scrutiny of London management, and consequently dealings with First Nations People were described in the most favourable light possible. As well, in all the correspondence for the first hundred years of the Charter, the HBC had no administrative apparatus for its justice system on the Bay beyond the post council, whose powers were primarily discretionary with absolute authority vesting with the officer in charge.<sup>101</sup> For this reason, it is useful to develop the context of First Nations-

European relations using Bourdieu's concept of "habitus." From this concept stems the idea that an objective basis for regular modes of behaviour can be attained and that practices can be predicted. For example, that punishment follows a certain crime. Within this framework, predictability overshadows formal rules of conduct.<sup>102</sup> Like legal pluralism, Bourdieu's concept accepts the fact that rule-bound behaviour exists in various and sometimes countervailing forms. With respect to homicide, punishment follows the crime in both Cree and Assiniboine society, European society, and consequently fur trade society. Fur trade society in this context refers to the junction of European and Aboriginal dispute resolution systems that incorporated aspects of both. The differences were procedural.

Llewellyn and Hoebel, in their study of the Cheyenne Nation, recognized that the principles of European dispute resolution displayed a close resemblance to Aboriginal custom. For example, they cite the fact that "primitive law" runs much more heavily into "tort" or private wrong rather than the public order offences.<sup>103</sup> However, by attempting to reconcile "modern" (i.e. European) law to Aboriginal concepts of dispute resolution, they inherently fail to address post-contact interaction and adaptation and apply European definitions to describe Aboriginal law. This approach facilitates comprehension but neglects the social context of Aboriginal law, and more particularly the law of homicide. In John Phillip Reid's study of the Cherokee Nation after contact, the concept of law without a state was examined in an attempt to overcome the ethnocentric conceptions of Aboriginal law. Reid makes the astute point that although there were no state-supported sanctions, sanctions existed that were imposed by kinship groups and neighbours. This was also understood among various nations, notwithstanding the fact that they were in many ways dissimilar. Reid states, "[in] situations of

homicide, the certainty of vengeance was a sanction, while for other anti-social acts they employed ridicule, sarcasm, ostracism, withdrawal and perhaps even gossip.”<sup>104</sup> Social order was maintained outside of formal rules, and compliance was an aspect of group membership. In the HBC, the 1754 homicides at Henley House and execution at Albany, if viewed from this perspective, fell within the purview of Aboriginal concepts of homicide and collective responsibility. Surprisingly, it seems that the Company was not aware of this fact. Isbister did nothing to extol the virtues of English law, much less provide the men with a fair trial. He also took lives for lives and was advised that this type of justice should be swift. On the other hand, he attempted to follow English custom by following some basic procedural rules which included collective decision making and careful record keeping.

In Louis Primo’s situation, the vendetta imposed upon him was indicative of law without a coercive state. Primo was forced to accept the fact that someone intended to extract revenge. Primo was probably also aware that the situation could be mediated in some way other than bloodshed. Liability was the operative element of law in this context. Sesiwappew’s father died and it was his belief that Primo was liable. The concepts of guilt and innocence were not of great concern in Cree society, and compensation was an alternative to vengeance. Primo was drawn into the Aboriginal dispute resolution system and operated within it. However, in the eighteenth century, the introduction of European material culture, and particularly firearms, altered traditional legal forms. The result is what Sally Falk Moore calls the “not fully controllable aggregate effect of the multiplicity of reglementary sources and arenas of action.”<sup>105</sup> For Sesiwappew, the legal obligation to avenge his father’s death was an aspect of self-help and strict liability.

Sid Harring's analysis of the reception of common law and Canada's First Nations People provides an important caveat to the study of Aboriginal legal systems. He states that every interpretation is shrouded in layers of misunderstanding and value judgements, and that issues of racism and ethnocentrism structure the historical discourse.<sup>106</sup> In the case of the HBC, this statement is particularly poignant. The sources display a level of misunderstanding and omission. For First Nations People, legal institutions and law were bound up with all the other aspects of Aboriginal society. Harring suggests that the Company adopted a system of dualism in Rupert's Land, where Company law functioned only in the posts and local legal systems were left intact. Ultimately, he suggests that this resulted in the creation of a legal duality that was incorporated in the later *Indian Acts* which accorded separate rights for Aboriginal and non-Aboriginal people.<sup>107</sup> What happened later was indicative of a shift in the power balance in Rupert's Land. When the HBC moved inland and became a colonizing force, they also stepped up their attempt to impose formal European law.

The Company's authority in Rupert's Land was thought to be theoretically impervious to outside influence. Generally, this was supposedly backed up by the Company's navy, English arms and the superiority of British citizens. Officially, this was the dogma of the Governor and Committee, and British colonial practice. Beyond the official rhetoric, however, was a legal system that grew out of the fur trade and incorporated aspects of both local custom and English law. Internally, English law, administered at the discretion of a post governor, was the norm. Externally, the Company's men inadvertently adopted local custom and responded to cases of international homicide accordingly. Blood vengeance, while having a number of similarities in English law in the eighteenth century, was essentially an adaptation to Rupert's Land's

conditions and circumstances. Company law did not flow from the Charter as much as it was an acclimation to an economic relationship with First Nations People. Non-involvement, diplomacy, peacemaking, and blood-for-blood vengeance were all aspects of the Company's external justice system and functioned in a territory without Crown appointed justices, not to mention a state. Private justice in this context was pragmatic and fluid; it was an aspect of an economic relationship where power was clearly exercised by First Nations People over the Company's employees.

#### Notes:

1 HBCA B.3/a/47, Albany Fort Post Journal, 12 June 1755.

2 See chapter six which focusses on the legal position of Aboriginal women who became involved in the European fur trade.

3 HBCA B.3/a/47, Albany Fort Post Journal, 28 May 1755, 3 June 1755, 6 June 1755.

4 HBCA B.3/a/47, Albany Fort Post Journal, 3 June 1755.

5 Ibid.

6 Ibid.

7 For a discussion of the anthropological and historical antecedents of colonialism and European/First Nations contact the metaphor of the middle ground is useful since it can be described as a place where cultural adaptation flows from cultural similarities and forms bridges between societies with truly different cosmologies. For a more comprehensive examination of this concept see Richard White, *The Middle Ground. Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (Cambridge, 1991).

8 See generally A.J. Ray and D.B. Freeman, *'Give Us Good Measure': An Economic Analysis of Relations between the Indians and the Hudson's Bay Company before 1763* (Toronto, 1978).

9 "Instructions for Mr. John Bridgar Governor of Port Nelson the 15th of May 1682," in E.E. Rich ed., *Copy-Book of Letters Outward &c Begins 29th May, 1680 Ends 5 July, 1687* (London, 1948), 36.

10 Rich, *Copy-Book of Letters Outward Begins 29th May, 1680 Ends 5 July, 1687*, xiii.

11 E.E. Rich, *The Fur Trade and the Northwest to 1857* (Toronto: 1967), 38.

12 A.J. Ray, *Indians in the Fur Trade* (Toronto, 1998), 6.

13 Conrad Heidenreich and A.J. Ray, *The Early Fur Trades: A Study in Cultural Interaction* (Toronto, 1976), 37-39.

14 Heidenreich and Ray, 39.

15 A.J. Ray, "Some Thoughts About the Reasons for Spatial Dynamism in the Early Fur Trade, 1580-1800" in Henry Epp ed., *Three Hundred Prairie Years: Henry Kelsey's "Inland Country of Good Report"* (Regina, 1993), 121.

16 Rich, *The Fur Trade and the Northwest to 1857*, 59.

17 Ibid.

18 HBCA, B.42/a/46, Fort Churchill Post Journal, 12 July 1756.

19 Ray, "Some Thoughts," 121.

20 Ibid, 117.

21 Heidenreich and Ray, "The Early Fur Trades," 34.

22 Ibid, 37.

23 HBCA, B.239/a/1, York Fort Post Journal, 27 June 1715.

24 James Dempsey, "Effects on Aboriginal Cultures Due to Contact with Henry Kelsey" in Henry Epp ed., *Three Hundred Prairie Years. Henry Kelsey's "Inland Country of Good Report"* (Regina, 1993), 133.

25 HBCA, B.42/a/42, Fort Churchill Post Journal - Churchill Sloop Log, November 1755.

26 Ibid.

27 Ibid.

28 HBCA, B.42/a/46, Fort Churchill Post Journal, 18 November 1756.

29 HBCA, B.42/a/56, Fort Churchill Post Journal, 30 June 1762.

30 Ibid.

31 Ibid.

32 HBCA, B.42/a/53, Fort Churchill Post Journal, September 12, 1759. On this occasion a woman came to the fort for refuge after she and her husband had "Some Difference & he was Intended for her Life."

33 Joseph Isbister was the chief factor at Albany Fort from 1740 until 1756, with the exception of the years 1747 when he was in England and from 1748 to 1752 when he was placed in charge of Fort Prince of Wales.

34 Sylvia Van Kirk, "Joseph Isbister" *Dictionary of Canadian Biography*, vol. 4 (Toronto, 1966-), 380.

35 Ibid.

36 Ibid, 381.

- 37 Hamar Foster, "The Queen's Law is Better than Yours': International Homicide in Early British Columbia," in J. Phillips, T. Loo and S. Lewthwaite eds., *Essays in the History of Canadian Law: Crime and Criminal Justice* (Toronto, 1994). 41-111.
- 38 HBCA, B.42/a/80, Fort Churchill Post Journal, 4 October 1770.
- 39 Foster.
- 40 HBCA, B.42/a/80, Fort Churchill Post Journal, 4 October 1770.
- 41 HBCA, B.239/a/2, York Fort Post Journal, 7 May 1716.
- 42 HBCA, B.42/a/40, Fort Churchill Post Journal, 21 July 1753.
- 43 HBCA, B.42/a/48, Fort Churchill Post Journal, 2 January 1757.
- 44 HBCA, B.59/a/2, Eastmain House Journal, 30 May 1738.
- 45 Foster.
- 46 HBCA, B.49/a/1, Cumberland House Journal, 9 October 1774.
- 47 K.G. Davies, "Henry Kelsey" *Dictionary of Canadian Biography vol. 2* (Toronto, 1969), 308.
- 48 Dale Russel, "The Puzzle of Henry Kelsey and his Journey to the West" in Henry Epp ed., *Three Hundred Prairie Year: Henry Kelsey's "Inland Country of Good Report"* (Regina, 1993), 77.
- 49 Henry Kelsey, "Journey to the Plains, 1690," in *The Kelsey Papers* (Regina, 1994), 5.
- 50 Ibid, 7.
- 51 Ibid, 11.
- 52 Dempsey, 131.
- 53 Terrance H Gibson, "Whom Kelsey Met: Lifestyles and Technology of the Late Seventeenth Century Cree" in Henry Epp ed., *Three Hundred Prairie Years: Henry Kelsey's "Inland Country of Good Report"* (Regina, 1993), 97.
- 54 Rich, *The Fur Trade and the Northwest to 1857*, 123.
- 55 Ibid, 126.
- 56 HBCA, B.239/a/40, Anthony Henday's Account of a Journey and Isham's Notes of that Journey, 27 December 1754.
- 57 HBCA, B.239/a/40, Anthony Henday's Account of a Journey and Isham's Notes of that Journey, Isham's Comment, 51.
- 58 Ibid.



- 59 HBCA, B.239/a/40, Anthony Henday's Account of a Journey and Isham's Notes of that Journey, 23 June 1755.
- 60 HBCA, B239/a/38, York Fort Post Journal, 23 May 1755.
- 61 HBCA, B239/a/38, York Fort Post Journal, 24 May 1755.
- 62 HBCA B.3/a/47, Albany Fort Post Journal, 6 March 1755.
- 63 Ibid.
- 64 HBCA B.3/a/47, Henley House Journal, 8/9 January 1753.
- 65 HBCA B.3/a/47, Albany Fort Post Journal, 6 March 1755.
- 66 HBCA B.3/a/47, Albany Fort Post Journal, 8 March 1755.
- 67 Ibid.
- 68 HBCA B.3/a/47, Albany Fort Post Journal, 17 May 1755.
- 69 HBCA B.3/a/47, Albany Fort Post Journal, 23 May 1755.
- 70 HBCA B.3/a/47, Albany Fort Post Journal, 28 May 1755.
- 71 HBCA B.3/a/47, Albany Fort Post Journal, 3 June 1755.
- 72 HBCA B.3/a/47, Albany Fort Post Journal, 7 June 1755.
- 73 Ibid.
- 74 Ibid.
- 75 Ibid.
- 76 Ibid.
- 77 Ibid.
- 78 Ibid.
- 79 Ibid.
- 80 HBCA B.3/a/47, Albany Fort Post Journal, 12 June 1755.
- 81 Ibid.
- 82 Ibid.
- 83 Ibid.
- 84 HBCA, B.3/a/47, Albany Fort Post Journal, 3, 7, 21 June 1755.

- 85 HBCA, B.182/a/6-7, Richmond House Journal, 8, 21 February 1754.
- 86 HBCA, B.182/a/6-7, Richmond House Journal, 25 May 1754.
- 87 HBCA, B.182/a/6-7, Richmond House Journal, 11 August 1754.
- 88 Rich, *The Fur Trade and the Northwest to 1857*, 107.
- 89 Ibid.
- 90 Van Kirk "Joseph Isbister," 381.
- 91 HBCA B.3/a/52, Henley House Journal, 5 October 1759.
- 92 HBCA B.3/a/52, Henley House Journal, 14 August 1760.
- 93 HBCA B.3/a/53, Henley House Journal, 24 August 1764.
- 94 HBCA, B.239/a/2, York Fort Post Journal, 8 August 1716.
- 95 HBCA, B.239/a/65, York Fort Post Journal, 27 June 1771.
- 96 HBCA, B.239/a/69, York Fort Post Journal, 12 August 1772.
- 97 Paul Thistle, "Dependence and Control: Indian-European Trade Relations in the Post-Kelsey Era," in Henry Epp ed., *Three Hundred Prairie Years: Henry Kelsey's "Inland Country of Good Report"* (Regina, 1993), 125.
- 98 Ibid.
- 99 HBCA, B.239/a/69, York Fort Post Journal - Mathew Cocking's Journey Inland, 2 October 1772.
- 100 Thistle, 126.
- 101 See generally chapter three.
- 102 Pierre Bourdieu, *In Other Words: Essays Towards a Reflexive Sociology* (Stanford, 1990), 77.
- 103 K.N. Llewellyn and E.A. Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Oklahoma, 1941), 47-48.
- 104 John Phillip Reid, *A Better Kind of Hatchet: Law Trade and Diplomacy in the Cherokee Nation during the Early Years of European Contact* (University Park, Pennsylvania, 1976), 10.
- 105 Sally Falk Moore, *Law as Process: An Anthropological Approach* (London, 1978), 3.
- 106 Sidney L Haring, *White Man's Law: Native People in Nineteenth-Century Jurisprudence* (Toronto, 1998), 8.
- 107 Ibid, 18.

## CHAPTER FIVE

### **“The Yearly Packet Arrived August 24”: The Company’s Navy and Naval Discipline**

While the HBC has been examined as a chartered trading company and the progenitors of British government and law in Rupert’s Land, first and foremost it was a maritime enterprise. With a fleet of ships, distant seaside posts and the Company’s apparent disinterest in moving inland for the first century of its existence, its disciplinary structure drew from, and was transformed by its private navy. While the Company’s posts were firmly placed on dry land, they functioned as naval outposts. As such, the social relationships in the posts resembled shipboard life in many respects due to the isolation of Rupert’s Land, its climate, the fluidity of its labour force, and the architecture of the forts themselves. The social order of a ship was also duplicated in the types of social relationships that existed at a post. It differed only in the fact that there was a greater sense of collectivity among the Company’s naval employees when compared to the land-based servants who came from a variety of occupations.

The legal pluralism paradigm provides a conceptual model to explain social organization and discipline in Company posts, as well as its private navy, since neither conformed directly to the examples of the merchant and royal navy. Commissions granted to its ships were granted by the Crown. While the ships were armed and equipped for engagement, it was a private navy responsible for moving the cargo of provisions and trade goods into Rupert’s Land, and carrying back furs to be sold in Europe. Enforcing the Company’s monopoly was part of this responsibility. Another part was the fact that ship’s captains were under the command of post factors when management deemed it necessary. Such was the case in 1682 when the London Committee instructed governor John Bridgar of Port Nelson that the recently landed captain

Gillam and his crew were at the service of the Company and that the ships were required to obey the orders of the chief factor.<sup>1</sup> While in the Bay, supreme governing authority reverted to the post governors. On the water, the Company's Charter also had a great deal of importance with regard to admiralty law. The London Committee affirmed their rights in naval law when they wrote in the same letter that captains were "to use their utmost endeavours to prevent and detect all private trade" and to send all offenders to England to face trial in the Admiralty Court. It also stated that captains had the right to seize any foreign vessels as lawful prizes if caught sailing within the limits of Rupert's Land and the Bay according to the *Navigation Acts*.<sup>2</sup> The Charter, therefore, was a fountain of law and government on land and at sea.

With regard to legal authority, it can be claimed that in the navy of the seventeenth and eighteenth centuries, a ship's commander had a great deal of autonomy to rule over his crew, as well as the right to impress a crew if volunteers were not forthcoming. Nevertheless, a great deal of professionalism was incumbent upon a crew in order to survive the trans-oceanic voyage. The position of captain in the British merchant navy, according to Marcus Rediker, was a singular experience in the history of labour. The concentration of authority in the navy tended to restructure the relationship between the church, state and labour. Here, resistance toward authority among seamen was often necessary for their survival.<sup>3</sup> For Rediker, work at sea was a form of incarceration which limited a seaman's space, freedom, movement, leisure activities, food and sensory stimulation.<sup>4</sup> This was not only an aspect of the HBC's navy, it was also an important component of life in a Company post. This form of social organization linked seamen and servants in a functional and hierarchical arrangement where a captain was socially isolated from his crew, creating a phenomenon called "command isolation."<sup>5</sup>

Nevertheless, the picture offered by N.A.M. Rodger portrays the royal navy as “easy going” and “informal,” with respect to discipline. As he notes,

In reality, when brutality occurred, it tended to destroy naval discipline which rested on unstated consent, not force. Ill treatment, especially capricious and arbitrary ill treatment, made for disordered and dangerous ships.<sup>6</sup>

For Rodger, informality and summary violence in the form of a beating administered by an officer denoted benevolence, no matter how despotic it seemed. Life aboard a ship, at least while at sea, depended on the collective labour of all seamen and “intelligent cooperation in survival.”<sup>7</sup> This was the case, “... not because the officers suddenly recollected their duty,...[but] because the prospect of drowning concentrates a man’s mind wonderfully.”<sup>8</sup> Thus, it comes as no surprise that records of disciplinary infractions in ship’s logs are sparse. At the posts, the various labourers and tradesmen lacked a sense of labour solidarity, and a sailor could be forced to cut wood or shovel snow.

Naval wars, which were frequent during the first century of the Company’s existence, included the War of the League of Augsburg (King William’s War) 1689 - 1697, War of the Spanish Succession (Queen Anne’s War) 1702 - 1713, War of Jenkins Ear 1739 - 1742, and the War of the Austrian Succession (King George’s War) 1740 - 1748. During wartime, wages in the merchant navy increased as a form of compensation for the possibility of attack and seizure. In addition, the policy of incarceration by the Crown in the form of impressment was constantly a threat to men unfortunate enough to have been coerced into service by impressment gangs.<sup>9</sup> Commissions for HBC vessels were granted by the Crown to enforce the Company’s and England’s security on the Bay. A commission granted to the Company’s transatlantic fleet from the Crown during their conflict with France included several orders and

commissions signed by its Deputy Governor, Edward Dering. In this list, Company captains and governors were ordered to attack any French ship and any ship sailing in Hudson Bay contrary to its privileges. Following admiralty law, the royal commissions granted the Company the right to seize French vessels as lawful prizes anywhere on the sea or in port or any other navigatable body of water.<sup>10</sup> Bayside governors were also instructed to enter into “Leagues and allyemds” with the Aboriginal inhabitants to persuade them to ally with the English against the French, and authorized Company men to attack disloyal First Nations People. To deal with deserters and to fulfill the labour needs of the expedition, the Company’s commission allowed impressment. It stated,

Servants may have Liberty and Authority from His Majesty to beat or Drum in ports Proper to raise or intortaine Seamen, till they are Supplied with Seventy Seamen, which is the Number for which his Majesty had already been graciously pleased to grant them a Protection.<sup>11</sup>

From an early date, commissions granted to the captains of the HBC’s navy outlined their duty not only to the Company but also to the Crown, when they were ordered that the “...Kings-Jack or Colours were to be worn from your Entrance into the streights of Hudson Bay & until your return homeward bound to the same place.”<sup>12</sup> Ordinarily during this period, merchant ships did not fly the King’s Jack without a special warrant, flying St. George’s Cross instead.<sup>13</sup>

Commissions in the royal navy afforded captains a great deal of discretionary power over their men while at sea, which flowed directly from the *Articles of War*. In addition to this, if his ship was royally commissioned, the *Regulations and Instructions relating to His Majesty’s Service at Sea* also applied. The *Articles* were a haphazard collection of regulations and admonishments concerned with court martial offences committed by officers, and

regulations which described the duty of each officer in terms of accounting responsibilities.<sup>14</sup>

The *Regulations* also stated that a captain could not on his own authority punish a seaman with greater than twelve lashes with a cat of nine tails. Company captains were also subject to admiralty law regarding the taking of prizes, piracy and the contractual agreement between the Company and the seamen. According to Rediker,

Vast bodies of legislation and legal opinion were produced in an effort to guarantee the exchange. In signing a set of articles, the legal agreement among owner and captain and crew, seamen were usually required to affirm that they could not “go away from, Quit or leave the said Ship... in any port abroad, or go on board any Ship whatsoever, unless impressed or required to do so by force.” But seamen always reserved the right to terminate that contract, to take their chances at law...<sup>15</sup>

Seamen aboard the HBC ships signed on and received a wage of 24 - 26 shillings per month while at sea during the 1680s. Monthly wages in the merchant marine around 1700 provided an average of 22 - 35 shillings in peacetime and 35 - 45 shillings in wartime. According to Rediker, admiralty law had established criteria to guarantee a seaman’s pay by 1700.<sup>16</sup> E.E. Rich concludes that “[it] would be hard to say whether the Company had to pay well in order to attract men to its service.<sup>17</sup>

In the HBC, a ship’s officer with some experience could make a much better wage than the average seamen. Such was the case in 1684, when a mariner named John Ford of Dorsetshire was paid £3 per month as the Mate in the Company ship *The Lucey*.<sup>18</sup> By 1729, *The Act for the Better Regulation and Government in the Merchant’s Service* was applied to the HBC’s private navy. It defined the contractual terms of who the principals of the agreement were, set a seaman’s wages, set the date for signing on and receiving a pay advance, and outlining a seaman’s obligation with respect to service, duty and obedience; it became the “...

foundation of authority in the shipping industry.”<sup>19</sup>

The Company followed the custom of contracting captains for the journey to the Bay and back. Officially, the contract was for the return trip and included all provisions and preparations. In the Committee meeting of 29 March 1684, a typical contract was authorized which read,

At this Committee were openly read the Charter Partys Between the Company and Leonard Edgcomb and Jonathen Wilde for the Good Pink called the John and Thomas to and from Hudson’s Bay for £675. which was approved of Ordered the Secretary Signe the Companys Part in these words

By Order of the Deputy Governor And Committee of the Hudsons Bay Company. Onesiphorous Albin Secretary

upon which it is agreed that £200 be paid unto the Mr. Leonord Edgcomb on account of Freight and by way of Imprest on the Good Pink Called the John and Thomas to and From Hudsons Bay £200...<sup>20</sup>

Following the custom of the merchant navy, the Committee then ordered their agent to pay various naval contractors for work and provisions. This included keeping the weapons in good working order, cleaning and repairing cables and cordage, repairing all carved work on the ships, and providing moorage fees, salted meat and powder for the journey overseas.<sup>21</sup> In cases where captains exceeded their allotment for provisions, the captain’s own accounts were billed. Such was the case on 21 June 1682, when Captain Gillam, the senior captain of the expedition, was charged for his negligence. The Committee charged Gillam for the overrun on his own account up to £12 and the remainder on the other captain’s accounts.<sup>22</sup>

Wages for seamen stationed in the Bay offered a more lucrative form of employment for naval personnel. For sailors who had been contracted for the voyage to and from the Bay, the merchant monthly wage was provided. During war-time, this was to be paid at the second port of delivery and every second port thereafter until the completion of the voyage and return



to the home port.<sup>23</sup> However, if they were hired by the Company for year round service on the Bay, the remuneration they received was in excess of the wages of the average merchant seaman. For example, in 1683 Magnus Brown, seaman, was engaged by the Company for service at the bottom of the Bay for four years with annual wages of £6 for the first year, £8 for the second, £10 for the third and £12 for the final year of his contract. Wages were to commence on his arrival at the Bay.<sup>24</sup> While the range of pay during these early years ranged from a starting wage of £5 per annum increasing to £10 per annum, by the 1760s, the wage was only slightly inflated to £15 per annum for a seaman with experience.<sup>25</sup> At the same time, a ranking Bayside naval officer in the employ of the HBC might earn £200 per annum plus an annuity of £60.<sup>26</sup>

In the spring, two or three of the Company's ships would leave Gravesend and sail to Stromness in the Orkney Islands in order to take on fresh water and employees, and continue on to the Bay. Timing was crucial. The ships could only enter and leave Hudson Straights when the ice receded. The window of navigation lasted a few weeks, and if a ship was late in departing from the Bay the crew would be forced to winter on board their vessel without provisions apart from those supplied by the limited resources of Company's posts. In one circumstance, the entire crew of the *Prosperous Hoy* refused to return to England presumably because their captain was unable to command the ship. In this incident, their original ship, the *Hudson's Bay*, had sunk on 24 August 1719 with all its provisions. In a post council held at York Fort on 22 September 1719, governor Henry Kelsey and his officers ordered the *Prosperous* to Fort Prince of Wales since York was unable to provide enough food for the complement of extra men. When the men resisted this order, Kelsey threatened to withhold

their wages, which subsequently convinced the men to sail to Fort Prince of Wales with Mr. Lucas, the chief mate of the *Prosperous*.<sup>27</sup> In this example, a post council was held in order to find provisions for the shipwreck's crew for the winter.

In the posts, provisioning resembled that of the navy. Preserved provisions such as salt pork or beef as well as liquor were part of the winter diet of employees. In addition to this, and what made Bayside life slightly more comfortable than that on a ship, was the fact that "country provisions" such as deer, geese, ducks and fish (usually pike) were available as well as beer that was brewed at the posts. Nevertheless, in a closed system where the food needs of the inhabitants were carefully calculated, the addition of twenty-five extra mouths surely put a strain on the post.

In the above incident, the *Prosperous* departed for England on 20 September 1719, only to return the next day when the crew concluded that the ship was not fit to sail. Governor Kelsey advised chief factor Staunton of Fort Prince of Wales, that because of their extra grain and meat and fewer men, the sailors were sent to him. He also reminded Staunton that the Company had ordered that the posts were responsible for the welfare of shipwrecked sailors.<sup>28</sup> That winter, the Bayside posts were forced to absorb the living costs of the seamen from the wreck without any contractual agreement for their labour, which in turn strained the already limited food resources of the post. Kelsey suggested that if captain Belcher and the other HBC ship was still in the country, he should bring the shipwrecked men on board to ride out the winter.<sup>29</sup> In the following spring, Kelsey appointed John Hancock to captain the *Prosperous*. The sailors were ordered to obey Hancock's lawful orders and to proceed on a journey of discovery north of Fort Prince of Wales. Hancock was ordered to take possession of every

place he discovered in the name of King George I for the property of the HBC under the Company's seal. The governors and factors, in these circumstances, were authorized to appoint captains and present commissions by virtue of the commissions granted by the Crown in 1718.<sup>30</sup> The power of post commanders was unchecked on the Bay primarily because the authority of the Company's management was far off and its orders could easily be ignored without drawing the censure of the Committee. With respect to the appointment of naval officers, it was evident that the power of a Bayside governor was unlimited.

By virtue of the Charter, it would seem that a governor had sovereign power on the Bay largely as a result of the logistical problem of running an enterprise thousands of miles from England. Communication with the Company's headquarters was hampered by the climate of the North Atlantic Ocean, since a "packet" was received and all correspondence, post journals and accounts were sent to England on an annual basis. From the incident involving the *Prosperous*, it appears obvious why authority in Rupert's Land and on the Bay was delegated to the resident governor. Isolation, which was an inescapable component of naval life, was a similarity shared with the posts. It was for this reason that a number of resident managers or Bayside governors were hired from the ranks of its navy. Commanding a post was similar to commanding a ship. A post shared a number of similarities with a ship including its command structure, labour force, and the shared desolation of working in a distant locale.

Although communication with England was limited, communication between the posts on the Bay was not as circumscribed. Each post had a sloop that sailed between the various Company establishments to move men, supplies and correspondence. The correspondence records reveal some of the most candid remarks of the factors. While most dealt with matters

related to the everyday running of the posts, insights into how the command structure functioned in practice, and the motivations and personality of each of the commanders can be discerned from a limited number of letters. The Company's navy employed a full complement of naval employees on the Bay. In addition to sailors, shipwrights were employed who manufactured and maintained sloops and smaller craft in Rupert's Land. The Company's deep sea navy, in 1740, consisted of the *Hudson's Bay V*, the *Mary IV* and the *Sea Horse*. In addition to these transatlantic ships, commanded by captains Christopher Middleton, William Coats, and George Spurrell respectively, were several sloops, shallops, brigantines, cutters and longboats which were used for communication between the posts as well as trading, exploration and whaling.<sup>31</sup> Included in this list were the *Hayes*, *East Main*, *Churchill*, *Beaver* and the *Moose Sloops*. These ships were attached directly to the major posts and had sloop masters and crews assigned to each.<sup>32</sup> They were under the direct control of the chief factors regardless of the claim of many sloop masters that they answered only to the Company's London management under admiralty law.

In his general letter to London in 1724, Thomas Macklish, governor of York Fort, requested a clarification of the Company's order that sloop masters and crews were under the command of the chief factor.<sup>33</sup> It is striking that the London management was called upon to clarify something most factors asserted as common usage. Perhaps such a request was indicative of weak management or the influence of a powerful captain. Nevertheless, questions of this sort ran consistently through the correspondence between London and the Bay. Recalcitrance on the part of sloop crews may have come from their own separateness from the rest of the post's workforce. They lived and worked on board their sloops, and paid allegiance

to their immediate superior, the sloop master. This in many ways resembled the type of social setting that existed on a ship at sea. In an effort to reinforce the authority of the Bayside chief factors and governors, the Company instituted a policy under which oaths of allegiance and fidelity were administered to all employees in England and on the Bay. Further, these orders, as well as any other orders a chief factor felt compelled to make, were usually nailed up in the men's quarters.

The following was an oath of allegiance taken by all those at York Fort, and administered by Henry Kelsey on December 24, 1718. It read as follows:

**I do hereby Voluntary Swear Engage & Promise to Obey & be faithful to his Royal Majesty King George & own him my lawfull King and Hereditary Lord and more Especially I promise to turn all any thoughts & so use my utmost Efforts & care for the preserving the Sovereign Monarchical Power against all private or Public Conspiracies or Plots against his Majesty's Person & to Stand Steadfast to the Reformed Protestant Religion as they are administered in these Kingdoms by law Established & to oppose with all my might all Popish pretenders & Superstitions with their Criminal Jurisdiction and Authority of the Roman Catholic Religion... to abhor their Tyranny Defy their Malice & to disdain all the Black Misrepresentations that either begot prejudice can Suffer... to do all that is in my Power to promote the Benefit & Advantage of his Royal Majesty and to Oppose with all my might all that may be Injurious or detrimental to him & to maintain the Hereditary Right of his Royal Majesty to these Kingdoms & Countries without any alterations and that the same may Continue to his Lawful Heirs Acknowledging myself to be engaged & Obligated hereunto under the pain of losing my life & Estate...<sup>34</sup>**

In addition to this the men were also obliged to take the oath of fidelity to the Company which read:

**I do hereby Engage myself by Oath to Use my utmost Power With Fidelity and Courage to defend the Interest of the Hudsons Bay Company against all Enemies either foreign or as Our nation And will Obey all Such lawful commands as the Governor or Chief Factor Shall Impose upon me and in my Station Shall Endeavour the Defending keeping and Securing all the Rights & Privileges of the foresaid Company against all opposers whatever & this I Will do without any discontent or Cowardice to the Utmost Peril of my Life.**

Further... in Case I Shall be found guilty of any Clandestine or private trade or abetting or Coniveing with any other Person or Persons in Perloining or Confiscating any of the afore Said Company Goods to my own or any other Persons or Persons Use then & in Case I will Remit not only such Wages as Shall be due me from the Said Company but will be answerable for All Damages that Shall arise through my Neglect or Breach of and of the Above Mentioned Articles.<sup>35</sup>

The oath of fidelity went on to describe what the Company called private trading and the punishment attached to such behaviour. In this way, its legal system set fast rules as to what men could and could not take in the form of perks, and what punishment was attached to the transport of illegal goods to and from the Bay. In practice, however, these rules functioned as a rough guide and conduct often diverged from the canon of the oaths.

Liquor was in large measure the basis of the underground economy between ships and posts. In the correspondence between the Bay and London, as well as the post journals, there were several references to the smuggling of liquor into the Bay from the ships. In his letter to the London Committee, Thomas McCliesh, chief factor of Albany Fort, wrote in September 1736:

We shall observe your orders in being careful and watchful in all respects to prevent any person or persons running any quantities of spiritous liquors from on board the ship or vessels, and we have caused to be read publicly your honours' orders concerning the same and have placed the said order in the public room.<sup>36</sup>

In typical cases, the enforcement of this order reflected the ship captain's and chief factor's personal style of governance. In many cases there were few complaints from chief factors because the rule was not enforced. In other places, such as those governed by Joseph Isbister, who commanded various posts in the mid-eighteenth century, liquor was the fundamental cause of why life was so miserable in Rupert's Land. K.G. Davies remarked that the complaint of liquor being sold from the ship was an evil that the correspondence attests to. The perceived

evil of this lay in the question of what currency the men ashore were using to buy the liquor.<sup>37</sup>

He noted,

What the Company feared... were the twin evils of 'Private Trade' between individual employees and Indians, and its consequence, smuggling, the private export of furs for the benefit of particular individuals with the connivance of the ships' captains or crews.<sup>38</sup>

Although Company employees exercised a customary right to trade on their own accounts, following medieval custom as well as the precedent set by other chartered companies, it was forbidden by the Company's Charter, and in the various orders and instructions sent to the Bay.<sup>39</sup> Nevertheless, a degree of private trade to ship's captains and Bayside officers was allowed. According to Rich, the evidence contained in the Minutes of the Hudson's Bay Company "...makes it clear that both the captains and the crews and the Frenchmen took part in the private trade on their accounts..."<sup>40</sup> In 1672, the London headquarters ordered that no employees were to trade in beaver, and in 1679 the privilege of trading any furs was completely curtailed. Private trade of any sort by employees was considered to be one of the greatest breaches of Company law in the context of a competitive fur trade.<sup>41</sup> However, the orders and instructions from the management had little effect on restive captains and Bayside governors who regularly ignored unpopular decisions made thousands of miles away.

Smuggling was also a common component in the merchant marine of the eighteenth century. Customary law allowed for the adventure system where crew members paid freight on small shipments in order to turn a profit. As Rediker notes,

Seamen's filthy and laborious work often involved some "clandestine trading" on their own accounts which padded their wages. It took the experience of several voyages - or being "bred up" to the trade...<sup>42</sup>

In the HBC, smuggling was an aspect of customary maritime law that required curtailment. Thus, smuggling became an offence that was continually reported in the Company's navy and posts, and was symbolic of the changing economy of Europe. Customary rights were coming under attack with the rise of mercantilism. The *Frauds Act* of 1662, according to Peter Linebaugh, established the Board of Customs in plantations, which in turn hired customs officials who took kickbacks, and became pillars of the mercantilist state.<sup>43</sup> It was also tied to the erosion of paternalistic forms of labour control and the emergence of free wage labour. Perks, which were considered a part of the traditional economy based on the local community, mutual obligations, reciprocity and deference, gave way to the rise of the market economy.<sup>44</sup> The HBC, because of its conservative management, preferred to avoid lawsuits. Thus, it is no surprise that charges and lawsuits over smuggling in the HBC's navy were rare. Instead, punishing sailors for smuggling usually resulted in them not being hired for additional voyages. On the Bay, however, the Company's private legal jurisdiction allowed for the punishment of offenders on the order of a post council. The case of Thomas Butler, who traded privately in 1714, provides a good example of this.<sup>45</sup>

In most ways, the Company's landed staff lived under a modified version of naval law. Shipboard life allowed seamen a semblance of recourse when offending disciplinary regulations. These men had the option of suing an officer for wages or charging an officer with assault in Vice-Admiralty Court.<sup>46</sup> In addition to this, the society of a ship at sea lent itself to a natural cohesion that was lenient by the standards of the day and reflective of plebeian culture.<sup>47</sup> What distinguished post society from that of the navy was that this cohesion evaporated on shore. Society there was based on an interaction between disobedient and criminal behaviour, and



immediate admonishment through summary punishment. The posts were in many ways a total institution that fit somewhere between the workhouse and the penitentiary. The exercise of authority in this context can best be analyzed using Foucault's categories of distribution: enclosure, rank, functional sites and surveillance.

Enclosure or "... the specification of a place heterogeneous to all others and closed in upon itself... is the protected place of disciplinary monotony."<sup>48</sup> This was an overwhelming aspect of social organization on the Bay. Contact with Europeans was limited to the space within the post because of the nature of the setting; a new and foreign land in the far north devoid of any Europeans for hundreds or thousands of miles and visited annually from England or by other Company employees from other posts. Control was exercised in this closed system to "... derive the maximum advantages and to neutralize the inconveniences (thefts, interruptions of work, disturbances and 'cabals')" among the servants.<sup>49</sup> The option of deserting the posts was unimaginable as it would surely mean death. Here the labour of each individual was calculated by the Company and every individual had a indispensable role to play both socially and functionally. Disciplinary space in this context can be seen as divided into as many sections as there were servants.

An aspect of this division was rank. In the exercise of discipline in a fort, the chief factor ordered punishments which were administered by himself or servants of lower rank. Thus, a trial in HBC law was based on summary procedure through the post council. Indeed, the Company's private justice system was in the process of transformation from a system of disciplinary paternalism to a system similar to a hybrid of admiralty and common law. As an aspect of discipline, rank served to create social relationships which were ultimately based on

one's expertise or tenure.

As a functional site, the post individualized and compartmentalized servants according to rank in order to fulfil "... the need to supervise, to break dangerous communications, but also to create a useful space."<sup>50</sup> Individuals were distributed in space according to trade and the official hierarchy, yet intricately linked together with the aim of survival. Hence, an attempt was made to isolate individuals while at the same time weaving them into the fabric of the social relationships that existed in the post. Surveillance in this setting was hierarchical and continuous. It was linked internally to the economy of the fort and to the aims of the mechanism in which it was practised. Thus, it comes as no surprise that the taxonomy of Bayside crime resembled crime in the navy since it was a naval enterprise.

Piracy and mutiny appear on many occasions in the post journals, which were part of the canon of admiralty law. If similar offences were committed on land, piracy would have been considered larceny, and mutiny riot. At the posts, the discourse of naval law flowed through most disciplinary entries in the journals and was administered by post councils. The actual order relating to the *Piracy Act* was sent to Anthony Beale, governor of Albany Fort, in 1705. From 1697 to 1714, Albany was the only permanent Company post in the Bay after the surrender of York Fort to the French and the abandonment of Moose Factory and Rupert House.<sup>51</sup> Upon his arrival at Albany, Beale's authority was challenged by captain John Fullartine, who was the governor of Albany since 1700. Beale had been Fullartine's deputy governor since 1700 and was named to replace him in 1704. Fullartine, an Edinburgh tradesman who had been employed by the Company since 1683, had been a witness to many battles the Company fought against the French. He was apparently on board the Company's chartered ship the *Dilligence* when

Captain Nehemiah Walker captured the interloping ship the *Expectation*. On another occasion he was captured by the French and sent to Canada in 1689, where he spent the next two years in penal servitude.<sup>52</sup> Fullartine, after receiving no ship in 1704, and running aground in Hudson Bay in 1705, returned to Albany before wintering at Gilpin's Island. According to Beale, on 26 September Fullartine attempted to take over the post by saying his ship was not out of the River and threatened to "tie them Neck and heels immediately" all those who opposed him. Fortunately, Beale was able to calm Fullartine, who was "given to passion," and took charge of the post despite Fullartine's defiance.<sup>53</sup>

Among Beale's first orders in the 1705 packet from London, which contained a copy of the 1701 *Piracy Act*, was that the Act had to be "Publicly Read once A month in the Factory."<sup>54</sup> Beale recorded in 1706 that he had, "... observed the Act of Parliament against Piracy read publicly in the factory once a month."<sup>55</sup> It appears that Beale reminded his charge of the 1701 and 1536 Acts in order to impress upon the men that offences related to free trading that took place at the posts were cognizable as offences that took place on the high seas or where the British Admiralty had jurisdiction. With respect to procedure, this meant that an accused could be

... tried, heard, determined, and judged, in such Shires and Places in the Realm, as shall be limited by the Queen's Commission under the Great Seal of England, in such Manner and Form, as in and by an Act made in the twenty-eighth year of the Reign of King Henry the Eighth...[and] shall be convict of any of the said Offence or Offences last mentioned, or shall stand mute, or preemptorily challenge the above the number of twenty persons returned to serve on the Jury, shall suffer Death without Benefit of Clergy.<sup>56</sup>

Although this order was strong in tenor, the actual prosecution of a single Company sailor or servant for such a crime escapes the record. In fact, this legislation can be viewed as part of

a general increase in the number of non-clergyable offences. Even after the Company's conflict with France, making a claim to a lawful prize was the order of the day.

The fear of piracy was part of a general malaise in the merchant and royal navy. From the late sixteenth to the late seventeenth century there were two trends in the navy. First, was decay under the mismanagement of James I, and second, the corresponding growth of piracy that harassed shipping throughout the world.<sup>57</sup> Recorded examinations, interrogatories, presentments and warrants in Admiralty Court for the crime of piracy abound during this period. However, for the crime of straight piracy, where no serious bodily injury or death occurred, the only avenue a plaintiff had was to use the Admiralty Court to interrogate the witnesses and the accused, and imprison the crew while the plaintiff ransacked the pirate's ship.<sup>58</sup> According to Rediker, by 1726 the *Piracy Act* had been effectively curtailed with a rise in the number of seamen engaged in the merchant and royal navies.<sup>59</sup> It can be assumed that within the fort, the practice of reading the *Piracy Act* was soon curtailed as well. Notwithstanding this, Bayside chief factors regularly posted orders, which were met with resistance throughout the century. Such was the case in 1751, when James Isham wrote that he "... Stuck up the Orders Marked &c... in the mens house, when they was Pulled down Directly by (Piccar Surgion) had them fixt up again."<sup>60</sup>

Although piracy had a specific legal definition that could easily be adjudicated by the Company's post councils or in Admiralty Court, there is no record of any such proceedings in the post journals throughout the first century of the Company's presence in Hudson Bay. At the time, verdicts in cases of small piracy, which were undoubtedly the only form that could have existed at a Company post, resulted in letting the malefactors off easily, which

occasionally included a public flogging.<sup>61</sup> Perhaps it is the formality incumbent on the *Piracy Act* that made it difficult to prosecute in the Bay. Alternatively, acts of piracy may not have happened at all.

Mutiny, on the other hand, was an often reported and often prosecuted offence in the Company's Bayside navy, as well as in its posts. There was a curious tension between the sea commanders and post leaders. The correspondence between James Duffield, the chief factor at Moose Factory, and Joseph Isbister, the chief factor at Albany, during the years 1742 - 1743 reflected incontrovertible contempt for navy personnel, both deep sea and local. In a letter to Isbister, Duffield wrote that he had managed to reform his men, and stated that he "... will no longer suffer their Sea Commanders to uphold Sottishness and disobedience wherein they have so long found their advantage."<sup>62</sup> In another letter, Duffield wrote,

I am also too Sensible of the exorbitant power the Captains have been advancing themselves unto for these ten years past;... The Consequence thereof is not plainly seen, for the Captains are so offended at the Alterations, reformations... which have been Deployed, to the Sloop many years whereby their Interest in disposing brandy to Uphold Sottishness & rebellion was prevented: that they are not Content to endeavour to Starve us, but first Seduce, corrupt our own people; they join them with... the Ship they are entreated with & being overwhelmed with [pride] and ambition & giddy with powers & malice, Madmen like Venture on that atrocious crime against the Company's just Authority, of taking us prisoners...<sup>63</sup>

Mutiny, in this case was carried out by the Company's sloop crew. According to Duffield, it was influenced by Captain William Coates of the *Mary*. It was a naval "cabal" where the crew of the sloop as well as the servants and officers attached to the post began to protest the governing style of Duffield. The group in this case coalesced around the crew of the sloop.

Characteristically, Isbister encouraged Duffield to follow his personal legal theory when he proposed that they consult each other in order to command their posts, since the officers

present at their respective posts were “disaffected.” He stated,

...I have not whipped any as yet, though I have had them lashed to the rails of the Stove, but it was in my power both to pardon and to punish, the first is preferable to the last, Especially when the Criminal acknowledges his fault, & promises better behaviour for the future, but if obstinate it is quite the otherwise...<sup>64</sup>

Duffield apparently took Isbister’s advice of 5 January 1742, when he noted that there was a mutinous fifth column among the naval personnel. In his post journal, Duffield wrote:

... Caned John Ridley one of our Seamen who is a Lazy Idle fellow, & one of Captain Coates Stockdon guard who is not worth his Victuals, I finding by his Country men 9 in the Sloop who are all Stockdon, that he is a runaway fellow, & that no Master would employ him in his own Country... At 3 Called John Ridley up to Me carried him out upon the Shed ordered him to be Stripped,... on my Ordering him to be Seized to the Gun, he fell on his knee & with many tears promised a full amendment of his Conduct... & Some of the Council Interceding on his behalf which Indeed they are always ready to do & for which have privately reprimanded them...<sup>65</sup>

In the end, Duffield’s sense of mercy prevailed when he decided to remit Ridley’s punishment.

He faced a similar situation on the part of his seamen the following April, when he forced the men to free the sloop from the spring deluge and ice jam. He stated that after the crew complained all day about the danger of going out on the ice, he “... took them all on board with me, also putting my pistols in my belt, letting them know their business was to free her or Sink in her with me...”<sup>66</sup>

The cabal was a form of strike in the early modern economy, and examples of this abound in the post journals. In a similar case, the clerk of Albany, Joseph Adams, wrote about a mutiny that was taking place at Moose Factory. He stated on 16 October 1731, Mr. Jewer, the chief factor, had been dealing with a mutiny engineered by Mr. Ronder, who had beaten Jewer and with his men combined together to refuse orders or any work until they received an answer to their grievances from the governor.<sup>67</sup> Mutiny in this context was a function of the

setting. In this, architecture, ethnicity and the divisions of rank were played out through acts of insubordination.

The typical example of mutiny, however, was usually based on an individual act of insubordination in both the Company's posts and navy. Discipline in the posts was based on the whims of the chief factor and not the captain.<sup>68</sup> Therefore, sailors owed obedience to the nominal authority of their captain and the supreme authority of the post leader. Sailors often reacted to the second tier of authority in the posts with violence that was usually dealt with summarily by the chief factor. An incident that took place in 1732 under the command of William Bevan at Moose Factory is illustrative. Bevan wrote,

... John Smith Sailor being Disobedient to Command & talking after a mutinous manner for which I corrected him, herein Directly & took up a Hatchet & had I come down at that Juncture of time he might have done me mischiefs after which I ordered him to his work he absolutely Denied my Command & Said he would not & if they would I ordered Smith directly to make Shackles of Legs & hand Cuffs...<sup>69</sup>

In this incident Smith submitted to Bevan's authority after spending the evening in irons. The Company disciplinary system most resembled that of the navy in situations such as this, where punishment and forgiveness were swift and the need for a servant's labour was clearly an aspect of this practice.

While at anchor, the HBC sloops were under the authority of the chief factor, but in some circumstances, sloop captains co-opted this authority to deal with disobedient seamen. Although a record of such an occurrence rarely was rare in the journals, an incident took place on 20 September 1770, when captain Robinson of the whaling brigantine *Charlotte* approached governor Moses Norton of Fort Prince of Wales to deal with a disobedient sailor. After collecting provisions for the ship and mustering the sailors, James Morrison refused to go on

board the ship by pretending to be drunk. When captain Robinson insisted on his boarding, Morrison assaulted him by throwing him onto the ground. At this point, "... one Hallen his messmate Came to his Assistance and Mr. Robinson recovered himself and this Morrison threatened Mr. Gordon's life." When Norton heard of this he had Morrison put in irons with a sentry guard since "... several more was ripe for mutiny." According to Norton, "[this] said Morrison Last fall threatened my life for Compelling him to his Duty."<sup>70</sup> On the following day, he begged forgiveness and was let out of irons. Robinson wrote that a post council was convened for Morrison to answer the charge of mutiny. Morrison contended that he was in liquor the previous day and promised good behaviour in the future.<sup>71</sup> This was a typical response to insubordination in a post, but not so common on board a Company sloop.

Generally, an adversarial relationship existed between Bayside leaders and sloop masters. This was especially evident under governor Joseph Isbister at Fort Prince of Wales.<sup>72</sup> In the previous incident, power was exercised by the governor on all the employees including those at sea. However, Norton could not effectively supervise the sloop's crews, and for this reason the naval employees showed more collectivist tendencies when compared with the Company's other labourers.

Ethnicity and the occupation of making a living at sea made the HBC's navy unique with respect to the social relationships that existed on the sloops. Ship's crews were often hired in the "Northern Countries" of the British Isles, and the HBC employed an agent to take on crews when their ships visited Stromness, in the Orkney Islands, on their way to the Bay. In most cases, these men were commended for their hard work and sobriety. George Howy, chief factor at Moose Factory, described his Orcadian servants as "very willing I hope your Honours



will consider them a Small Matter in Wages.”<sup>73</sup> For Duffield and Isbister, the assessment was quite different. With respect to Captain William Coates and his crew from Stockton, Isbister and Duffield suspected a conspiracy. As Isbister wrote,

I Console your misfortune and am heartily Sorry to hear of the untimely Death of Mr. William Pitt

I have had occasion to whip Thomas Bach our Cook and In narrowly Escaped being hussled in the dark but the Conspirators not being able to Complete their design I got the day & the lot of punishment fell on our Cook whose Crimes were Unpardonable & Could not be bore with, but this as well as other irregularities are owing to the bright Stockton Captain who Can in one day overset a reformation of 2 years.<sup>74</sup>

Bach had apparently gotten drunk on some Brandy smuggled into the country by Coates and deserted his watch, for which he was punished with six lashes of a cat-of-nine-tails. During the corporal punishment Isbister noted, that “...not one of my Tradesmen or labourers would assist to the lashing of this fellow to the Stove rails fearing the law our of pretence, however I let them Know that None of them Should Escape Such unpunished...”<sup>75</sup>

Duffield, for his part, described Stockton servants as clowns. In response to the cook’s insubordination, Coates tried to “extenuate” the offence by saying that the cook meant no harm. He pointed to the cultural differences between Duffield and people from the Northern Countries, stating “... it was their Innocent language at home...” Not accepting this excuse, Duffield was convinced a conspiracy against himself and Isbister was afoot when Stockton sailors banded together to place a Stockton mate on board the *Beaver* sloop after it had departed the post. Duffield described their scheme as sedition aimed at spreading sottishness and rebellion.<sup>76</sup> Nevertheless, he was forced to endure this challenge to his authority until Coates was dismissed in 1751, for “clandestine trade” after a remarkable career which included losing the frigates *Mary II* on his maiden voyage to the Bay in 1727, and the *Hudson’s Bay IV*

in 1736.<sup>77</sup> Coates was viewed by Isbister and Duffield as a master corrupter, in part because of the collectivity that apparently existed among not only the sailors in the frigates, but also those from Stockton who resided on the Bay. Ethnicity here had social meaning that went beyond rank and class.

As on board a ship, labour collectivity in an HBC post did not involve only ethnicity. Posts differed in the variety of occupations that existed when compared with the navy. The result was that factions based on occupation, religion, and ethnicity began to evolve. Working as a seaman was just one of a number of collectivities. Ethnically, Company employees, and particularly officers, were for the most part British and as such, they celebrated Coronation Day, the King's Birthday, Christmas, Gunpowder Plotter's Day (Guy Fawkes), and Saint George's Day. These holidays usually included a feast, "... as well as could be Expected in this Country" and liquor.<sup>78</sup> On Guy Fawkes day in 1718, Henry Kelesy wrote, "... in the Evening Made a Bonfire gave a quart of Brandy ½ pound sugar & a pot of strong beer a Mess in commemoration of the horrid designs against our Nation..."<sup>79</sup> Presumably, all the men took part in celebrations that offered free liquor. This was in fact one of the causes of the fire at Moose Factory in 1735.<sup>80</sup> In addition, oaths of allegiance to the Crown and oaths of contract to the Company were taken on Christmas eve, which were followed by a celebration.<sup>81</sup>

Religious conformity was also enforced as part of the royal mandate of the Company. In addition to outlining whom the men should be loyal to, the oaths also outlined the official Crown position with respect to the Roman Catholic church. All employees had to swear their loyalty to the Church of England which was an aspect of their oath to the king. Included in governor John Nixon's orders in 1680 were orders related to the observance of religion in the

fort. They stated:

In the first place, We do strictly enjoin you to have public prayers and reading of the Scriptures or some other religious Books wheresoever you shall be resident, at least upon the Lords days, As also to order the several chiefs in each Factory under your command to do the same, That we who profess to [be] Christians may not appear more barbarous than the poor Heathens themselves who have not been instructed in the knowledge of the true God. This is what we have formerly directed, and have sent over proper books for the use of the Factory (to wit) the Common prayer Book, the Bible and the Book of Homilies...<sup>82</sup>

Religion remained one of the first commands issued to post leaders each year. In the forts, religious compliance could be enforced if the officer in charge was up to the task. However, in the royal and merchant navy, there seemed to be an irreligious thread that ran through making a living at sea. According to Rediker, the irreverence that many seamen exhibited toward religion was grounded in the fact that for the men it meant "... subordinating religious preferences to practical activity, for in the context of ever-doubtful survival, self help was valued above religious sentiment."<sup>83</sup>

One example of enforced conformity took place under governor Joseph Isbister in 1750. In this incident, John Watson, an armourer, refused to attend prayers. Isbister noted that four servants refused to come to prayers after being summoned by a bell at ten thirty. The bell was rung a second time to no avail. Isbister then sent a messenger to ask the four men to come to prayers on behalf of the governor. According to Isbister, "...John Watson our Armourer sented the Messenger with contempt - hold a Cale of fire to his face Cursing and Swearing and bade him tell them that he could not come to prayers..."<sup>84</sup> Upon the messenger's return, Isbister decided to take the matter in his own hands. He stated,

... I went my Self to the Armourer & others, And said to them Come brothers Come to prayers, those who were more Sociable went, but John Watson Made Answer And

Swore by that he would not... (so abandoned are those men in their principals that they would rather Spend the whole Sabbath in Swearing, lying & drunkenness, then have me here to Hear the word of God...<sup>85</sup>

Isbister then forced Watson to hear divine service, and in his parting comment stated that it was difficult to curb the vices of the Company workers because they "... reason it the Greatest of tyranny to be interrupted in them..."<sup>86</sup>

Like most pro-active governors, Isbister forced attendance at religious ceremonies upon his men. However, in situations where a member of the post's council, and therefore of a higher rank, demonstrated resistance to a governor's orders little could be done. In 1764, Ferdinand Jacobs reported that the surgeon, Mr. Cauldwell, turned his back to him and began to sing when he said grace. Apparently, Cauldwell had made a habit of disrupting grace by singing or drumming on the table as a sign of his derision towards Jacobs. Jacobs noted that "... he Told me once in the winter that Old men were like Snarling Currs would neither F-K themselves nor let Other Dogs F-k..."<sup>87</sup> Jacobs went on to explain that his contract was the only reason he had put up with the abuse of Cauldwell as long as he had, considering that he could think of no reason why the surgeon was so contemptuous toward him.

Generally, a governor encountered little difficulty forcing labourers to attend services. However, when it involved the crew of a sloop and a recalcitrant sloop master, he could only remove his friendship and favour. In an incident that took place at Moose Factory in 1773, a number of sailors, the sloop mate, as well as two tradesmen and a labourer made threats on the life of chief factor Euevius Bacchus Kitchin. Kitchin learned that "...[some] are to Shoot, other to Stabb, and Quarter me, and Nail me up to the Bellfree men whom I have never had a word with."<sup>88</sup> Kitchin related this incident to one that occurred on the previous Sunday when none

of the sloop's crew attended prayers. He wrote:

... I sent for him and the People on Sunday to come to prayers then he came up I asked why he brought not the People to prayers, on which he Damned my Soul who to the Reason I cannot Read prayers to my People as well as you do to Yours told him that he and them were all under my Command, and that if he persisted in Such behaviour I certainly should turn him from the Table on which he told me he valued my Table not a Straw, and this before other People which obligated me not to Mess any longer with him.<sup>89</sup>

Kitchin really had no other option but to allow the conspiracy between the sloop's crew to continue, since his ability to govern was directly affected by the crew's unwillingness to follow his orders. Although Kitchin had the highest authority in the post, resistance to his authority was collectively vested in the people employed on the sloop. For this reason, the men consciously choose to combine themselves under their naval master rather than their landed one.

In the posts the type of labour collectivity that existed in the navy, based on the shared risk of travelling by sail, did not develop substantially. There was a collective existence, but it was segmented among groups, and under no common leadership. In essence, a post was more of a total institution than a ship because the authority of post governors was weaker than that of sea captains. Employees disobeyed officers at posts because their relationship did not incorporate the same mutual obligations that naval life implied. In return, post governors tended to be more despotic than sea officers in their punishment options and their use of violence.

Post architecture was reflective of the social institution contained within. Enclosure was every bit as real as it was on a ship. Employees working on the Bay were faced with the terror they felt toward the environment every bit as much as a seaman's fear of the deep blue. Throughout the Company's first century in Rupert's Land, the problem of desertion rarely

manifested itself in the record. In addition, most of the men were reluctant to move inland under any circumstances, for fear of the First Nations People as well as the scarcity of provisions and a general fear of the unknown. Indeed, it would seem that the only method of desertion that was possible, if one's contract had not expired, was to be insubordinate in the hope that the governor would send the employee home. As well, in some circumstances letters addressed to the London Committee requesting the discharge of an employee for familial reasons were occasionally complied with. The contention of Rodger, that ships in the royal navy were less of a total institution and more of a carefully organized enterprise with social fluidity between the ranks, did not follow in Company posts. A post's labour needs were not as carefully calculated as a ship's, and a post could normally function with a number of men excluded from the ranks due to illness or incarceration. While there are similarities between a post and a ship in terms of enclosure, on a ship every seaman's labour power was vital, which made survival a collective effort. At the Bay, expendable employees cropped up in the journals of every post on a yearly basis. Ill-equipped workers were a normal aspect of every post's complement. Nevertheless, the reporting of such employees depended on a chief factor's disposition and can only really be discerned from the year end report on the men's behaviour if there was one.

Architecture was an important factor in determining the disciplinary regime that existed in a fort. Much like the navy, men were organized in watches, the posts were defensive in design, and armed with cannons. A typical post in the eighteenth century was affectionately described by fur traders as the "Old Octagon."<sup>90</sup> These forts were essentially a square house with attached flankers and bastions, sometimes in the form of four flankers linked with sheds

that served as curtains. They were constructed of heavy squared logs that were corner notched and rested on the ground, with lead roofs, plastered walls and one or two lines of palisades. With respect to actual fortification, the forts were highly vulnerable. One weakness was that the posts depended on the countryside for provisions. Add to this the fact that log construction could not withstand bombardment, and gun batteries outside of the palisades could easily be turned on the fort itself. Finally, fur traders, tradesmen and labourers did not make good soldiers, regardless of the regular drilling in small arms that took place under some leaders.<sup>91</sup> For most of the century, the lifetime of a post was about 30 to 40 years, at which time rotting walls, leaking roofs and sagging buildings needed renovation or replacement.<sup>92</sup> The Company's posts shared this characteristic with the wooden world of the navy.

Under the charge of George Howy, Moose Factory was faced with a dilemma that was directly connected to the architecture of the post. On 9 April 1747, Howy reported an incident involving Lionel Farquson, a carpenter, who struck the post's surgeon and attempted to strike Howy himself. Howy summoned a post council to deal with the incident and it was decided to confine Farquson to his quarters. As Howy wrote,

... the people informed me that if they had not Seized the fellow, they verily believe he declared last Night he would be the Surgeons death or the Surgeon Should be he;... at the Council we all of us thought Absolutely Necessary to Confine the Carpenter, to his Room, which was accordingly Executed, to prevent Murder, for he has declared to be Revenged on Mr. Longland & the Surgeon; For my own Security we had our whole proceedings in writing; Signed by my Self & all the people then at home...<sup>93</sup>

On the following day, Howy "... called all hands..." that were absent when the council was held the night before, and it was agreed that Farquson should remain confined until the ship for England arrived.<sup>94</sup> At this second council, Howy noted that his second, Richard Bridges,

objected to the confinement and refused to sign the order, "... insisting upon the Carpenters being set at Liberty..."<sup>95</sup> Fearing for his life and the fact that he may attempt suicide, the carpenter's knife was confiscated the next day. What transpired after this was indicative of the fact that the fort, like a ship, was unsuitable for the housing of prisoners. Just over a month after Farquson was confined, Howy noted in the post journal that the council had decided to release him for air and to bathe because,

"... this Beastly fellow he Eats, drinks, and Sleeps in his own Excrements, although his Room has a large a window as any in the Factory, Yet for all that he will not throw it out, its enough to Poison himself & all those that live in the Bastion along with him, Especially now in the Summer when hot weather is coming In, it will be apt to Breed Contagious Distempers amongst the people..."<sup>96</sup>

The council also resolved to send two Company men and one Aboriginal guide to accompany Farquson to Albany, which was under the command of Isbister. Several of the men that lived in the bastion said they could not endure the "Nauseous Smell," and by that point the council resolved that he was no use to the post when confined, which was considered a necessary result of his insubordination.

As a functional site, situations such as this were avoided by the judicious exercise of mercy and forgiveness. It was common for a transgression to be forgiven after a day of confinement, with an apology and a promise of better behaviour in the future. This was the typical outcome of insubordination in the navy. However, in this situation, this was not possible, and a form of internal transportation was invoked in order to place the defiant carpenter under the charge of Isbister. Curiously, after his change of venue, the carpenter was not mentioned in Isbister's journal. In this way, the architecture of a Company post was in many ways similar to a ship where confinement was not only impractical, it was dangerous. The



main difference was that incarceration in a post could last much longer than incarceration in a ship at sea. As well, the judicial exercise of power in times of mutiny tended to be more discretionary in posts because no person's labour was vital, in itself, for the survival of everyone else. It was much different aboard a ship.

Nevertheless, the Company's use of watches directly mirrored that of the navy. In the post, however, the watch was mainly a night-watch that supplemented regular duties. It represented sentry duty rather than a naval watch. In the merchant navy, men were assigned in equal numbers to the larboard and starboard watches, half of which were supervised by the captain and the other by the mate. They were four hours in length with a dog watch between four and eight, when they were divided into two hour shifts.<sup>97</sup> According to Rediker, the watch was an "...objective line of demarcation and division within the ships crew."<sup>98</sup> At anchor, watches were sometimes continued, but when securely moored some ships abandoned the watch altogether and gave the seamen recreation time.<sup>99</sup> At Company posts, the watch was primarily set up as a form of surveillance directed at keeping men in their cabins, out of liquor, and to monitor any "clandestine trading." Governor James Knight's seventh order from the London Committee in 1714 was "... that no person goes off of his Duty on the Watch not twill he sees the Nest up & take his place as is to Succeed him but to be Vigilant & Careful to give timely Notice on all Occasions nor to Suffer Drinking & to have but one Lamp burning..."<sup>100</sup> Watches were divided into the first, middle and last watch and under the command of a master of the watch, and were used by the labourers and tradesmen as a chance to get drunk. Of all the Bayside governors in the eighteenth century, Joseph Isbister wrote the most on watches that took place at Albany, including the insolence of Thomas Bach and Thomas Nelthorpe and their

respective punishments.<sup>101</sup>

In another more notable situation, Isbister broke the leg of a servant who had been drinking with the watch on Christmas Day in 1743. He wrote that at eight o'clock he ordered the bell to be rung and the watch to be set, while the other men were ordered to their beds for the night. He then sent Mr. Spence, a Company officer to see if his orders had been carried out. Spence discovered "... John Hillyard a Caballing with the watch so ordered him to go to his Cabin but with some words the Said John Hillyard went to his cabin..."<sup>102</sup> Hillyard, who was apparently drunk then came down stairs and was subsequently ordered back by Isbister two times until Isbister lost his patience. He wrote:

[For] his disobedience I gave him a Cuff with my hand & he fell on the floor I lifted him up my Self & put him from me to go to his bed but he Continued his language Saying damn me now in your time upon which I gave him a Cuff on the Side of the head or Shoulders but he fell on the floor & broke his leg an unlucky thing to happen to an old man, Notwithstanding his gray hairs had not Taught him obedience...<sup>103</sup>

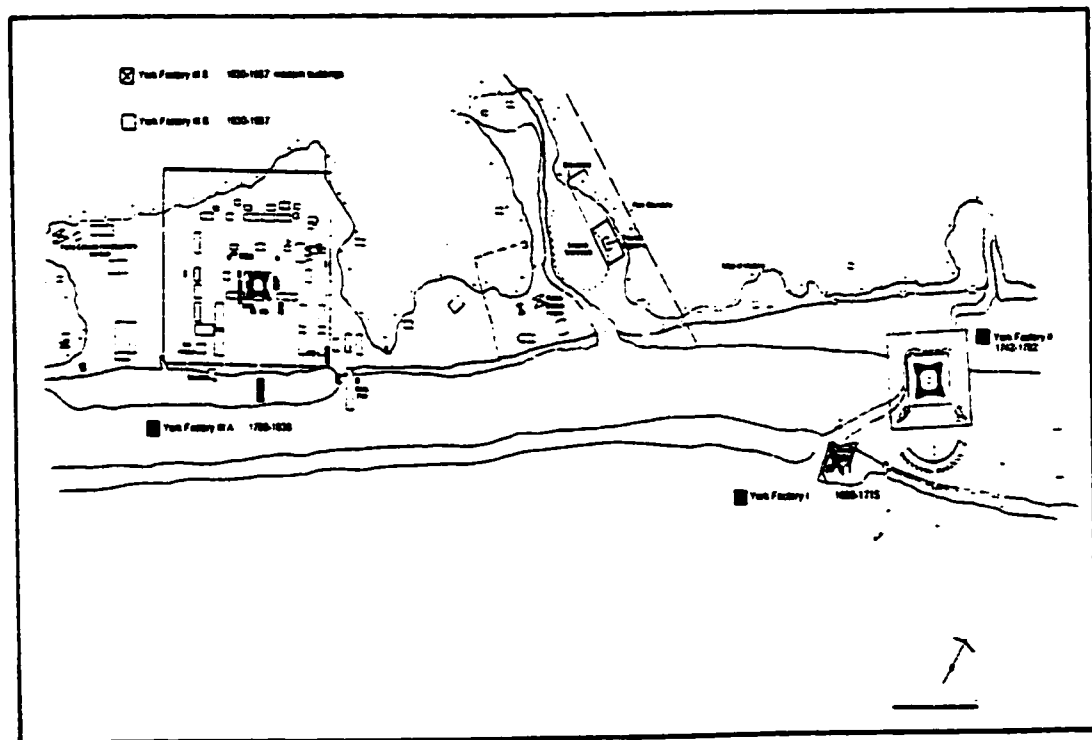
Isbister's apparent cruelty was also a sign of the social tension that existed within the confines of Albany Fort. With a background in the navy and reaching the rank of "able," Isbister attempted to duplicate the disciplinary regime that existed on board a ship when he was a child and a young man. His background was typical of the time, where boys joined the merchant or royal navy at a young age. His callousness was derived from the expectations he had of his post and his attempt to run it like a deep sea ship. He was doomed to failure in this pursuit because the men at Albany did not depend upon him for their survival, and did not share in the collective experience of life at sea. Consequently, Isbister summarily beat the men under his charge as well as formally summoning a post councils to order proper lashings.

Social ordering in the Hudson's Bay Company's navy as well as the posts in Rupert's

Land was largely based on the models provided by the royal and even more so, merchant navies. The Company's deep sea navy was part of the merchant navy of the day, and its local navy was directly influenced by this. As well, the influence of the royal navy made itself felt on Company ships, since many were chartered under a royal commission and armed for war against any "interlopers." Thus, at least on Company ships, the influence of the larger wooden world was felt by seamen and naval officers alike. Consequently, the collective nature of working and living at sea gave its seamen a sense of shared experience; a reality among naval employees that was not easily translated into life at a post.

### Map 2.

Locations of the various York Fort sites. Drawing by D. Elrick<sup>104</sup>



Employees within the walls of a Company post had a lot in common with the seamen. They were isolated in an ocean of unknown land that was inhospitable in the best of times and deadly in the worst. The physical setting of the fort also had much in common with a ship. The men had cabins and a mess, as well as having to perform watch duties. The men were also under the control of a usually despotic post leader whose main concern was keeping them from drinking, becoming “mutinous” or “piratical,” and at their work. What was different in the post was the heterogeneity of the people. The well developed collectivity of a ship did not exist in the posts. Labourers did whatever job they were told to do and tradesmen did the work they were apprenticed to. On a ship, skills and experience were vital to each crew member’s survival. In a post, they were not as important since a post was closer to a total institution. Bells told people when to work and when to eat. People were separated by rank. People’s bodies as well as souls were punished and educated for the smoother running of a fort. They were also educated in what it meant to be a British man. Religious instruction brought people together in their supposed hatred of “popery,” and conformity was enforced according to rank. Nevertheless, in the total institution of the post, resistance seemed to occur more often than in a ship. As Joseph Isbister alluded to in 1743,

the only means I can propose to hinder those Vices ever taking root again is that the order of Saint Ignatius founder of the Jesuits were Introduced & that all those who come into this Country do take the three Vows of Poverty, Obedience, & Chastity...<sup>105</sup>

#### Notes:

1 E.E. Rich ed., *Hudson’s Bay Company Letters Outward, 1679- 1694* (London, 1948), 35-36.

2 Ibid, 36.

3 Marcus Rediker, *Between the Devil and the Deep Blue Sea. Merchant Seamen, Pirates, and the Anglo-American Maritime World, 1700-1750* (Cambridge, 1987), 161.

- 4 Ibid, 159.
- 5 Ibid, 155.
- 6 N.A.M. Rodger, *The Wooden World. An Anatomy of the Georgian Navy* (London, 1986), 212.
- 7 Ibid, 207.
- 8 Ibid.
- 9 Rediker, 32.
- 10 PRO, CO, 134 - 1, fo. 143., Colonial Office Papers Relating to North America, 1689.
- 11 PRO, CO, 134 - 1, fos. 128-133, Colonial Office Papers Relating to North America, 13 May, 1689.
- 12 E.E. Rich ed., *Minutes of the Hudson's Bay Company 1679-1684, Second Part 1682-84* (London, 1946), 18 n3.
- 13 Ibid.
- 14 Rediker, 119.
- 15 Ibid, 100.
- 16 Ibid, 119.
- 17 E.E. Rich ed., *Minutes of the Hudson's Bay Company 1679-1684, First Part 1679-82* (London, 1945), xxxiv.
- 18 Rich, ed., *Minutes of the Hudson's Bay Company 1679-1684, Second Part 1682-84*, 222.
- 19 Rediker, 210.
- 20 Rich, ed., *Minutes of the Hudson's Bay Company 1679-1684, Second Part 1682-84*, 221.
- 21 Ibid, 4.
- 22 Ibid, 5.
- 23 Rediker, 119.
- 24 Rich, ed., *Minutes of the Hudson's Bay Company 1679-1684, Second Part 1682-84*, 95.
- 25 HBCA, A.11/114, London Correspondence from the Bay, 25 August 1769.
- 26 K.G. Davies ed., *Letters from Hudson Bay 1703-40* (London, 1965), 205n1.
- 27 HBCA, B.239/b/1, fo. 5-6, York Fort Extracts, Transcript of York Fort Post Council, 22 September 1719.
- 28 HBCA, B.239/b/1, fo. 25, York Fort Extracts, Transcript of York Fort Post Council, 22 September 1719.

- 29 HBCA, B.239/b/1, fo. 25, York Fort Extracts, Transcript of York Fort Post Council, 18 January 1720.
- 30 HBCA, B.239/b/1, fo. 26, York Fort Extracts, Transcript of York Fort Post Council, 20 June 1720.
- 31 Davies ed., 335-341.
- 32 Ibid, 341.
- 33 HBCA, A.11/114, London Correspondence from the Bay, 16 August 1724; see also Davies ed., 97-98.
- 34 HBCA, B.239/b/1, fo. 4, York Fort Extracts, Transcript of York Fort Post Council, 24 December 1718.
- 35 Ibid.
- 36 Davies ed., 225.
- 37 Ibid, xxiv.
- 38 Ibid.
- 39 Edith Burley, *Servants of the Honourable Company* (Toronto, 1996), 24 supra note 15.
- 40 E.E. Rich ed., *Minutes of the Hudson's Bay Company, 1671-1674* (London, 1942), 5 supra note 3; see also Burley, 24 supra note 15.
- 41 Burley, 24-5; Gerhard Ens, "The Political Economy of the "Private Trade" on the Hudson Bay: The Example of Moose Factory, 1741-1744 in Bruce G. Trigger et al eds., *Le Castor Fait Tout: Selected Papers of the 5th North American Fur Trade Conference, 1985* (Montreal, 1987), 382-410.
- 42 Rediker, 50.
- 43 See generally Peter Linebaugh, *The London Hanged. Crime and Civil Society in the Eighteenth Century* (London, 1991), chapter five.
- 44 Rediker, 207.
- 45 See chapter six, 215.
- 46 Rodger, 208.
- 47 Ibid, 210.
- 48 Michel Foucault, *Discipline and Punish, The Birth of the Prison* (New York, 1979), 141.
- 49 Ibid, 142.
- 50 Ibid, 144.
- 51 Russell Smandych and Rick Linden, "Administering Justice Without the State: A Study of the Private Justice System of the Hudson's Bay Company to 1800," in *Canadian Journal of Law and Society* (Spring, 1996): 47.

- 52 Davies ed., 361.
- 53 HBCA, B.3/a/1-2, Albany Fort Post Journal, 26 September 1705. Cited in Davies ed., 364-5.
- 54 HBCA, A.6/3, fo. 69. Cited in Russel Smandych and Rick Linden, "Administering Justice Without the State," 48.
- 55 Davies ed., 17.
- 56 *Piracy Act*, 1701 (U.K.), 2Wm. & M., c.9-111.
- 57 Evelyn Berckman, *Victims of Piracy. The Admiralty Court 1575-1678* (London, 1979), 5.
- 58 Ibid, 17.
- 59 Rediker, 283.
- 60 HBCA, B.239/a/35, York Fort Post Journal, 20 September 1751.
- 61 Berckman, 44-45.
- 62 HBCA, B.135/a/12, Moose Factory Post Journal, 23 September 1742.
- 63 HBCA, B.135/a/12, Moose Factory Post Journal, 19 March 1743.
- 64 HBCA, B.135/a/11, Moose Factory Post Journal, 5 December 1741.
- 65 HBCA, B.135/a/11, Moose Factory Post Journal, 5 January 1742.
- 66 HBCA, B.135/a/11, Moose Factory Post Journal, 30 April 1742.
- 67 HBCA, B.3/a/29, Albany Fort Post Journal, 16 October 1731.
- 68 See chapter three generally for a comparison of the governing styles of Joseph Isbister and James Isham and their use of discretion in their respective posts.
- 69 HBCA, B.135/a/3, Moose Factory Post Journal, 9 October 1732.
- 70 HBCA, B.42/a/80, Fort Churchill Post Journal, 20 September 1770.
- 71 HBCA, B.42/a/81, Fort Churchill Post Journal, Journal of the Churchill Sloop, 21 September 1770.
- 72 See chapter three which deals with the governing style of Joseph Isbister and his use of discretion in the internal discipline in the Company.
- 73 HBCA, B.135/a/17, Moose Factory Post Journal, 14 April 1747.
- 74 HBCA, B.3/b/1, Albany Fort Correspondence Book, 13 September 1742.
- 75 HBCA, B.3/a/34, Albany Fort Post Journal, 6 September 1742.
- 76 HBCA, B.135/a/12, Moose Factory Post Journal, 10 April 1743.

77 Davies ed., 339-341; Glyndwr Williams, *Andrew Graham's Observations on Hudson's Bay 1767-91*, (London, 1969), 284n.; Glyndwr Williams, "Captain Coats and Exploration along the Eastmain," in *The Beaver* (Winnipeg, Winter 1963).

78 HBCA, B.239/a/3, York Fort Post Journal, 25 December 1716.

79 HBCA, B.239/a/5, York Fort Post Journal, 5 November 1718.

80 Davies ed., 217, 217n5. The fire at Moose Factory took place during the Christmas celebration in 1735. The fire apparently started in the cookroom on the morning of 26 December 1735. When asked about the smoke, John Robinson, the cook insisted that it was steam from the dishwashing water. In the evening, Post Factor William Bevan discovered the cookroom ablaze which resulted in the death of an Aboriginal girl.

81 HBCA, B.239/b/1, York Fort Extracts, 24 December 1718.

82 Rich, ed., *Hudson's Bay Company Letters Outward, 1679- 1694*, 4.

83 Rediker, 173.

84 HBCA, B.42/a/32, Fort Churchill Post Journal, 4 March 1750.

85 Ibid.

86 Ibid.

87 HBCA, B.239/a/51, York Fort Post Journal, 14 May 1764.

88 HBCA, B.135/a/52, Moose Factory Post Journal, 29 June 1773.

89 Ibid.

90 George Ingram, *York Factory: A Structural History* (Ottawa, Parks Canada Report, 1979). 38

91 Ibid, 40-41.

92 Ibid, 39.

93 HBCA, B.135/a/17, Moose Factory Post Journal, 9 April 1747.

94 HBCA, B.135/a/17, Moose Factory Post Journal, 10 April 1747.

95 Ibid.

96 HBCA, B.135/a/17, Moose Factory Post Journal, 11 May 1747.

97 Rediker, 88.

98 Ibid, 89.

99 Rodger, 43.

100 HBCA, B.239/a/1, York Fort Post Journal, 26 September 1714.



101 See chapter three which deals with internal discipline and the insubordination of Bach and Nelthorpe.

102 HBCA, B.3/a/35, Albany Fort Post Journal, 25 December 1743.

103 Ibid.

104 S. Biron Ebell and Peter J. Priess, "In Search of the Octagon: Archaeological Investigations under the Depot at York Factory," *Environment Canada Parks Service Research Bulletin* no. 302 (Ottawa, 1993), 3.

105 HBCA, B.135/a/12, Moose Factory Post Journal, Letter from Joseph Isbister, 24 February 1743.

## CHAPTER SIX

**“That no Woman of this Country be allowed in the Honourable Company’s Forts”:**

### **Gender Relations and Sexual Liaisons**

When Hudson’s Bay Company officers wrote about First Nations People in their post journals, a sense of ethnocentricity tended to permeate their writing. It was obvious that these men from Great Britain regarded all Aboriginal people as the “other” at the time of contact and for the first century of the Company’s North American enterprise. Regardless of such biases, these men came to rely on Aboriginal people for the fur trade, for the provisions they provided for the various Company posts, for their guidance in exploration, and inevitably for sexual intimacy. To write the legal history of Aboriginal women in the fur trade, the legal pluralism approach has proven useful because the points of contact between HBC employees and Aboriginal women amplify separate and vastly different social mores and levels of interaction in what can best be described as fur trade society. There were a number of legal systems functioning in fur trade society. The Company, although not carrying English common law in a backpack to Rupert’s Land, was aware of how their actions could be held up to the scrutiny of the British legal system. As well, Company law was private law, commercial law; above all, a hybrid of the various legal systems that the chief factors were familiar with. Finally, Aboriginal law or “custom of the country,” to varying degrees, affected the social interaction between Aboriginal women and Company men.

While the Company’s management in London forbade anything other than trading relations with First Nations People, relations between Aboriginal women and Company employees were an established aspect of fur trade society. As Francis and Morantz note in

*Partners in Furs*, Company servants were strictly forbidden to interact with the local population. With respect to Aboriginal women, they state:

The official injunction against sexual relations with local women was no doubt an attempt to maintain discipline at the posts but, further than that, Indian women were suspected of being thieves and spies, potential fifth columns who might in the middle of night open the fort to an attack by their jealous menfolk.<sup>1</sup>

The fur trade altered the role of some women in Aboriginal society. The first historian to comprehensively address the role of women in the Company's fur trade was E.E. Rich. Rich developed the literary angle of HBC records in his lucid descriptions of chief factors and their attitudes toward Aboriginal women. This history included a description provided by John Nixon at Charles Fort, when he became the Bayside governor in 1679. From this early date, Nixon observed that, "everything [was] in disorder, with the servants living licentiously, spending and 'imbazling' goods..."<sup>2</sup> While Nixon alluded to Company men having relationships with Aboriginal women, in the 1684 directive to Henry Sergeant, the orders from London were more explicit. They stated that Sergeant, acting as the chief factor of newly established Albany Fort, was to be "... careful that no Indian women were allowed within the Company posts."<sup>3</sup>

During the early years, a short-lived experiment in colonization was attempted by the Company. The London Committee allowed Sergeant to bring his wife and her companion, Mrs. Maurice, to Hudson Bay. This was the only time the Company's management allowed European women to enter the Bay for almost another century and a half. It has been suggested that the reasoning behind this was based on the Committee's fear that the men were more likely to surrender their forts to the French in war time, in order to protect the women.<sup>4</sup> While this may have been the Company's justification for such a policy, the fact that colonization was

anathema to a successful fur trade cannot be ignored. The Company was primarily “hugging the Bay” for the first century of its existence, and was acutely dependent on the local Aboriginal people they called the “Home Guard,” for provisions as well as furs. Thus, the officers of the Company were directed not to have sexual liaisons with Aboriginal women nor allow any First Nations People within the walls of the fort. While the Company expected its Bay employees to be chaste and celibate, the documents suggest that very little successful regulation could be imposed from London.<sup>5</sup> Instead, country marriages became a new aspect of customary law in the context of Rupert's Land.

The literature devoted to the history of Aboriginal women in the fur trade is dominated by the work of Sylvia Van Kirk and Jennifer Brown. Their two monographs, *Many Tender Ties* and *Strangers In Blood*, provide important perspectives on the role of women in the fur trade drawn from European sources. Van Kirk's work was ground-breaking when it first appeared in 1980. Relying primarily on HBC sources, she sought to explain why Aboriginal women were not simply passive victims of commercial expansion within the male dominated fur trade. This she feels is an oversimplification. Thus, she extended the concept of “active agent” to women in order to show that, although limited in their opportunities, they managed to maximize their role in fur trade society.<sup>6</sup> She pointed out that women used the fur trade to enhance their status by becoming wives to important Aboriginal men or the HBC's officers and servants.

Jennifer Brown's monograph appeared in the same year as Van Kirk's work, but rather than challenging her thesis, it examined it in a complementary way. Brown's work was written from the perspective of historical anthropology, comparing and contrasting the HBC to their

Canadian competition, which eventually became the North-West Company. While using many of the same sources as Van Kirk, Brown broadened the research base of her work by incorporating the official sources of the North-West Company. Brown claims that these were not colonial or missionary enterprises. The fur trader's commercial role in Rupert's Land, and the remoteness of territory, led to the development of a new set of domestic arrangements that were unique in themselves. This tradition was largely oral and would have been lost if it was not for the literacy the traders brought with them. These were incomplete "social spheres" with respect to social relations.<sup>7</sup> A level of superficial understanding existed between fur traders and First Nations People without resulting in the cultural assimilation of either group. Nevertheless, there was no complete fit between the two cultures. According to Brown, in the case of the HBC, the officers and servants did not adopt Aboriginal custom as their own, but their own European culture became adapted to fur trade society and the isolation of Rupert's Land. What is most appealing about Brown's work is its emphasis on the process of institutionalization and how individual experience feeds back into cultural standardization.<sup>8</sup> As she states:

The European influences from the two somewhat differing contexts of the companies had great significance, but they were in turn mediated and modified by the differing internal organizational and personnel characteristics of the firms. The dynamics of the isolated, foreign environment in which they operated also influenced these patterns; distinctive fur trade rules and customs appeared in response to distinctive fur trade conditions...<sup>9</sup>

Brown's work relied on probate records in order to assess the social and legal status of traders' "country" families. If the British legal system deemed their offspring illegitimate, they became "strangers in blood," and the courts were used to assess their status.<sup>10</sup> Brown acknowledged the limits of her sources, stating that the documentary sources limited the scope of the work

and disallowed certain types of investigation.<sup>11</sup>

Recently, historians have taken issue with the sources used by women's historians. They claim that the empirical model of historical research, where knowledge relies on experience, relegates the story of women in the fur trade to the observations of male fur traders. How then can a woman's experience be uncovered? According to Ruth Roach Pierson, the interior experience of Aboriginal women cannot be recovered from the sources that exist. Pierson contends that Van Kirk was distanced from her subjects by ethnicity and time while her sources were distanced by ethnicity, sex/gender, class and time. Thus, according to Pierson, her claim of reconstructing the "perspective" of Aboriginal women is implausible since she derived her knowledge from "a conception of experience as having a core of subjectivity knowable first-hand only by those whose minds and bodies lived the experience."<sup>12</sup> This criticism raises a number of important issues related to the writing of women's history. While it is possible to arrive at some of the social meanings behind Aboriginal women's participation in the fur trade, it is impossible to uncover the meaning of this interaction.<sup>13</sup> Any realization of subjective experience is mired in the discourse of the historian's world. In this chapter, no attempt is made to examine the interior experience of women. The voice of Aboriginal women in the fur trade is not an aspect of this discourse. Their voice is unrecorded. Instead, the extant record points to the perceptions of male fur traders and how their world was altered by the Aboriginal women that became involved in it. This story is the purpose of this chapter.

The most predominant Aboriginal group in the region around Hudson Bay were the "Home Guard," an Algonqian-speaking Cree group. In addition, there were "Southern Indians," "Northern Indians" and the "Esquimays," which correspond to the Ojibwa,

Chipewyan and Inuit respectively. On the periphery were the Slave, Beaver, Blackfoot, and Assiniboine groups who were occasionally referred to in post journals. Thus, for the most part, the HBC men were met by Cree people who became closely associated with the Company as the “Home Guard” or “Home Indians,” and became known for this association with the Company among the other groups in Rupert’s Land.<sup>14</sup> Each group must be dealt with separately.

While the history of the Cree people’s involvement in the fur trade will be developed elsewhere, context requires familiarity with the work of Arthur Ray. According to Ray, the Siouxian speaking Assiniboine and the Algonqian-speaking Western Cree people were relative newcomers to the area around southern Hudson and James Bay. Basing his conclusions on archeological evidence, Ray has surmised that just prior to contact, the Assiniboine occupied the region north of Lake Superior between present day Minnesota and Ontario as well as a large part of southern Manitoba, with the Cree occupying the region to the direct north and east.<sup>15</sup> Prior to this period, the Cree and Assiniboine were part of the southern trading network associated with the French and Ottawa Nation. Once the HBC arrived, they were drawn north with the establishment of York Fort in 1684. The Cree, supplied with British guns by the HBC, forced the Assiniboine to sue for peace. Both became the enemies of the other Siouxian speaking First Nations People in Rupert’s Land. Together they became the middlemen of the northwestern fur trade with the Cree occupying the place of “Home Indians.”

The portion of Cree women in the fur trade needs to be examined from the perspective of Aboriginal society as well as the position they occupied within the society of the Company’s posts. The picture of Aboriginal society that is drawn from the post journals is obviously

wrought with ethnocentric notions of what is proper and what is not. On the other hand, by the mid-eighteenth century, HBC men and “Home Indians” were integrated into a society that was unique to Rupert’s Land. First Nations People who lived near to, or in Company posts, carried out the necessary aspects of survival for the posts such as hunting, and depended on the HBC in times of dearth. For their part, Company men developed relationships with First Nations People, and in many cases raised families, which resulted in the formation of a unique system of social ordering that encompassed Aboriginal as well as European legal cultures.

The primary documents relating to the role of Cree women in Cree society during the first century of the Hudson Bay fur trade are comprised of HBC post journals, correspondence, orders, and James Isham’s *Observations and Notes 1743-1749*. As mentioned in the previous chapters, James Isham began his career with the Company at York Fort in 1732, when he was employed as a writer at the age of sixteen. As a result of his sobriety and good record keeping, Isham managed to distinguish himself, and by the late 1730s had become governor of York Fort.<sup>16</sup> His observations were written during the winter of 1743 and were submitted in 1744. As Rich notes, “[he] probably kept a commonplace book and wrote out his fine volumes during his illness in cold Days and Long winter Nights out of sheer boredom and lack of Divertisement, and to escape from the Vapours.”<sup>17</sup> Isham also appended a Cree English dictionary to his *Observations*. Although he paid little attention to the ceremonial quality of the customs followed by the “Home Guard” who came to trade at York, his approach to the social and economic life of these people is “at least spontaneous,” according to Rich.<sup>18</sup> Although his work was based on personal experience, he did speak generally of Company policy and the role of women in fur trade society. As it turned out, Isham had a country wife and country-born son



named Charles Prince Isham, who was provided for in Isham's will. Thus, he spoke directly to the role of women in fur trade society.

Isham described Aboriginal women, who were probably Cree, as "... for the most part short and thick, and not so Lively as the men when they are turn'd 20 years; But very frisky when Young &c. - the young women are well shap'd..."<sup>19</sup> Isham's account is not terribly surprising considering his own relationships with Aboriginal women, when he stated:

... they are of a Swarthy complexion, and have seen Europeans not so fair, Especially those Indians that has had copulation with the English, has Brought forth into the world as fine Children as one would Desire to behold, - straight limbed, Lively active, and Indeed fair exceeds the true son Indians in all things, these are most an End Light haired, and will Venture to say without any Disgrace to that they are pretty Numerous...<sup>20</sup>

While his candour is surprising, considering his *Observations* were written for the Governor and Committee in London, he did not implicate himself in any infraction of the Company's rules. Isham simply stated a fact that had become obvious by the mid-eighteenth century; Company men were having sexual relations with Aboriginal women and it was not being checked by the majority of the Company's chief factors. In fact, a few years later Andrew Graham remarked on how children of white men were held in high regard because of their apparent physical superiority.<sup>21</sup>

The marriage customs of the Cree in the area around York Fort were well documented in Isham's *Observations*. His writing on marriage and domestic life among the Cree is cursory, lacking the depth of a thorough modern ethnographic study. Instead, he presents an encapsulation of Cree society as seen through the eyes of an Englishman who had spent the majority of his life in fur trade society. His view, although thoroughly English, was obviously

tempered by the society in which he lived. Isham's contact with people not attached to his post consisted of a yearly letter from London, monthly correspondence with other posts and almost daily interaction with the "Home Indians." With respect to actual marriage customs, Isham stated:

When a Young man has a mind for a wife, they do not make Long tedious Ceremonies nor yet use much formality's the method is this Viz't. - the man goes out of his tent, to the woman's tent door, where he Looks in and Lays before her as much Cloth as will make her a Smock, Sleeves, and Stockings, no words Spoke, he then Return's to his own tent, and waits for the woman's Coming, - in the mean time, if the woman takes this Cloth up the match is made, that she will be his wife, when she get's up and goes and Sits by him in his tent; as man and wife and all is over; But if the woman [refuses] to take the Cloth, some one in the tent Carry's it and Lay's it by the man, which Denotes she will not be his wife, when he Looks out for another and perhaps may Light of ten Disappointments, before he gets one &c.<sup>22</sup>

Although this is only a partial glimpse of the marriage ritual between Aboriginal people, it expressed a general picture of Aboriginal marriage custom during the eighteenth century. Women had choices in this society. From this, it is clear that women were not coerced into marriage, but were encouraged to enter into such unions based on politics and productive relationships. Cree fathers did play a part in offering their daughters to potential husbands, but only as far as they tried to influence their daughter's choices.<sup>23</sup> With respect to marriages between fur traders and Aboriginal women, Brown cautions that, "[the] importance of Indian marriage practices as models for these customary unions is difficult to assess."<sup>24</sup> Nevertheless, it seems that a very fluid marriage arrangement existed among the Cree on the Bay. This explains the relative ease with which Cree divorces were attained. Essentially, it simply required the consent of both partners.

Polygamy was a normal aspect of Aboriginal domestic relations according to the HBC

sources. It was important for the survival of a family as well as an aspect of rank. According to the HBC men, Aboriginal women did not question this aspect of marriage. As well, they were occasionally loaned to other men, particularly if the other man was capable of taking care of her and her children in times of need. This could last for days or years, and the woman was welcomed back to her initial marriage along with any children born in the interim.<sup>25</sup> This may speak to the customary background for the settlement of Aboriginal women at the Company posts. The marriage relationship, according to the sources, was fluid, pragmatic, and occasionally based on diplomacy. Van Kirk, who wrote extensively on polygamous relationships in fur trade society noted that polygamy was an economic necessity and a badge of prestige for an Aboriginal man since it showed that he was obviously a good hunter if he could support several wives. As well, European concepts of chastity and fidelity had very little relevance to Cree marriage customs, where there was little premium placed on virginity. Van Kirk goes on to say that the primitive custom of offering wives and daughters to strangers was also practised by the Cree.<sup>26</sup> Her observations were based on the writing of Samuel Hearne in the 1770s, Andrew Graham in the 1760s, and Isham in his *Observations*. All these men were literate and longtime officers of the Company who had relationships with Aboriginal women. One example of this type of interaction that occurred with respect to HBC employees took place in 1753 when a group of "Northern Indians" (Chipewyan) offered their wives to the crew of the Churchill Sloop when they were on a trading journey to the northern part of the Bay. As James Walker, Sloop Master, noted:

[In the morning] Several of the Natives Came Alongside And Would be on board the sloop Whether We Would Let them or Not. In two Hours after they Went on shore and Made a Raft of this Canoe and Brought all their Women off and put them on our boat

Astern of the sloop then the Men left them and Went on the Rocks Where they Stay Near an hour. At the same time I gave our Men orders not to say or take Notice of the Women in Any shape. The Men on shore seeing we Would Not take No Notice of the Women they Came offended And Carried their Wives all on Shore.<sup>27</sup>

The subtext of this passage would suggest that the men, who had attacked the crew of the sloop the previous day, had decided that offering their women to the crew would ease the tensions.

From the sources it would seem that Aboriginal women did not always welcome polygamous domestic relationships, and in some cases resisted the practice through violent means. Women in fur trade society possessed agency and made decisions autonomously. One example of this took place in September 1728, when Thomas Macklish, the governor and chief factor at York Fort, reported what he called “An unfortunate Accident.” He stated

... this Day... A Indian Man & his Wives Viz't the Said, and having Married a young wife last May against the Consent of the first wife and she being Enraged to Such a Degree of Jealousy by reason her Husband would not put away the young wife so that the Said first wife had killed the Young Wife had not this husband went to part them upon which the first wife took up a Stone and fell a beating of her husband to Such a degree that his Life is to be doubted; After the Man had come to his senses he took Said Stone that his Wife had beat him with and has beat her to such a degree that her life is much to be doubted having broke her Scull and tore all the flesh off one side of her face and one of her Ears off. They are both under the Doctors Care; the said man has three Children by the first wife whom their Grandfather will take Care of until such time as our Doctor can make a cure of their parents.<sup>28</sup>

In order to bring about a cure, the Doctor dressed their wounds, but doubted the ability of the husband and wife to recover. Macklish stated, “... they are A Strange Superstitious people and are often possessed with Strange Notions of their own Ability by Singing to their Gods for Succor and will Run out of their Tents in the Cold and often takes the dressings from the Wound making a Hideous noise to their Gods.”<sup>29</sup> In comparison to the Company’s reliance on

bleeding and plasters, this treatment must have seemed strange indeed. They were both cured, and by December of the same year they were back together when the woman's husband returned to York Fort to collect her and her children. The domestic relationship was restored although there was no mention of the other wife after this incident.

The domestic relationship in Aboriginal society seemed violent from the perspective of the Company's documents. Indeed, in another incident that took place at Moose Factory in 1777, which hearkened back to this earlier example, a trapper named Me,cau,cull was killed by one of his wives with a hatchet. Moose Factory's chief factor, Eusebius Kitchin, reported that the murder was motivated by the "... Jealousy of the other Wife having precedence of his affections."<sup>30</sup> The HBC's officers often pointed to jealousy as the cause of much of the violence that women perpetrated on their husbands. However, this may be an oversimplification based on partial information and the cultural bias of the post journals. To understand the complex relationship that existed in Aboriginal domestic relations at the time of contact, it is necessary to understand the division of labour. What is known of the life cycle of Aboriginal women prior to the emergence of the fur trade is difficult to ascertain for the Western Cree. There really are no written sources that describe pre-contact society aside from the oral tradition which has been corrupted by contact. Anthropology may provide some clues. With respect to First Nations People who interacted with the men of the HBC, all inferences are drawn from the fur trade tradition where the life cycle of the Aboriginal family was altered by the emergence of the Cree as conduits for European goods to reach other Aboriginal groups in Rupert's Land. Essentially, women who were part of the fur trade played an important role in trading as well as producing necessary products for the trade. Van Kirk rightly states that women were the

only people skilled in the manufacture of snowshoes and moccasins.<sup>31</sup> As well, the task or taking care of children was left to women. Thus, when violence was meted out by women, it may have been related to the protection of children.

Henry Ellis noted a peculiar aspect of Aboriginal domestic relations in his *Notes on his Journey on the Dobbs Galley, 1746 and 1747*. While the use of alcohol among Aboriginal people is considered in chapter four, Ellis wrote, "... when the Natives are Lightheaded or in a mad fitt, they frequently attempt to Kill their wife or children, or any other Indian That is near, in Such a case, their wife, or other Indians will put them to Death, by Shooting them or Killing them with a hatchet, for their own preservation..."<sup>32</sup> True to this is the account of an incident that took place three years earlier at Fort Prince of Wales. In his post journal, Richard Norton wrote on 13 February 1740 that,

...Come two Indian Women In a most miserable Condition of being one of them is the mother of the Other and they Relate the following Tragical Story; the daughter had a husband and 3 children and was one of Our Goose hunt spring and fall; Some Time last Month this family was in Such a starved Condition that the man murdered his youngest Child and Eat it and in 4 days after he murdered his Elder Son who was a bout [?] years of Age the Women fearing he would murder them all they left him with the dead boy, taking with them their second child which was a Girl about 7 or 8 years Old, and made for the factory they then being about 150 miles distance from here; 3 days after, he pursued them, and Coming up with them, he Endeavoured to Wrest the Girl from the mother but both the Women Endeavouring to preserve the Child, he throatered it in its mothers hands and after that Sized his wife to murder her also, but the two women overcame him, and his wife Knocked him on the head with a hatchet after they had Slew him they buried him and his Daughters together under the snow and Come for the factory and in 16 days time they Got here which is very Surprizing at the time of this disaster there was plenty of dear about them and he has ammuniton and might have killed venison which his family Strongly Desired him to do, but he gave no manner of Care to their Solicitations but his Mind Seemed to be fixed upon what is above Related, the Subsistence the women got to bring them forward, was for Several Days Deers Dung, which they Picked up & Dissolved in warm water & to Drank it until at Length providence flung in their way the scraps of Deer that the wolves had Killed and Left, & after that, Such another Booty which was also Killed by wolves which Supported

them to the Factory otherwise they would Probably have Perished by the way.<sup>33</sup>

These women displayed bravery and resistance to the practice of cannibalism, which did not happen infrequently according to the Company's records. Although it was not an entirely accepted practice according to Aboriginal custom, according to Isham the perpetrators of these acts "...Commonly take other Indian's Children and bring them up as their own; in Remembrance of the unfortunate Children They massacred..."<sup>34</sup> Nevertheless, it may be that in Aboriginal society this practice had certain rules attached to it. If there was a chance that a woman's children might be eaten by their father, it was permissible for them to defend their lives with whatever means they had available. However, if an act of cannibalism did occur that went unchallenged, the perpetrators of the act would be welcomed back into the group or band and allowed to adopt other peoples children to overcome the grief of eating their own.

While the above examples portray Aboriginal women as empowered in their domestic relationships, it was often the case that women were beaten and killed by their husbands rather than the other way around. According to Van Kirk, "[the] Indian was certainly not without his own moral standards [and] when found guilty of a clandestine amour, a wife could expect violent punishment or even death."<sup>35</sup> The impression that can be drawn from the writing of HBC employees is that domestic violence in Aboriginal society was common and did not involve peer interference. Ferdinand Jacobs, governor of York Fort, noted in 1764:

One of our Indian men that Came here yesterday Evening to Shoot Geese for us Killed one of his Wives Last Night & Dragged her Body on the river, I got the Body off the river & Laid On Boards on the Bank & have had a grave Dug for them to Bury her in, the Cause of this Rash Action I Find to be her Declining to cohabit with him all the winter & the men was jealous of her, we Buried her for the Indians would not Bury her...<sup>36</sup>

Why her people would not bury her is a mystery that Jacobs fails to explain, making the picture of a woman's plight in fur trade society appear violent and uncertain. While this impression occasionally shows through in HBC post journals and correspondence, making any generalization would be a mistake. Clearly, the discretionary nature of what is included in these sources makes them somewhat unreliable, and from them the complexities of Aboriginal domestic life in the fur trade cannot be sufficiently explained. These examples are simply impressions that, for some reason, were considered noteworthy to the HBC writer or chief factor.

The nature of the relationship between an Aboriginal husband and wife in fur trade society is also difficult to ascertain behind the cloak of eighteenth century English social thought. What Henry Ellis wrote in his notes on the Bay from 1746 and 1747 may provide some clues. Ellis had no vested interest in his portrayal of the HBC since he was not an employee. He came to the Bay as an observer through an expedition in search of a north-west passage. He was also a civilian. When describing the circumstances surrounding the sinking of a canoe in Hudson Bay, he told a story of bravery and self-sacrifice between a man, woman and their child. He stated:

Two small Canoes, passing Hayes River... one of them...sunk, in which was an Indian, his Wife and Child: The other Canoe being small, and incapable of receiving more than one of the Parents, and the Child, produced a very extraordinary Contest between the Man and his Wife, not but that both of them were willing to devote themselves to save the other, but the Difficulty lay in determining which would be the greatest Loss to the Child. The Man used many Arguments to prove it more reasonable, that he should be drowned, than the Woman. But she alledged on the contrary... because he, as a Man, was better able to hunt;... The little Time there was still remaining, was spent in mutual Expressions of Tenderness... This being done, they took leave in the water, the Woman quitting the Canoe was drowned, and the Man with the Child got safe a-shore... Upon the whole it appears, that the single Object in View, was the Preservation of their



Child...because on other Occasions they behave with no great Respect to the Sex.<sup>37</sup>

Obviously, the family unit was important to First Nations People. Here the question of the child's best interest was addressed in a lamentable situation. Still, this story was written from the perspective of an Englishman who possessed social status. Comparatively, this impression of the family probably shows more tenderness than that which existed in working class England in the eighteenth century. In addition to this, mercy killing seems to have been an accepted practice in Aboriginal fur trade culture. An example of this appears in the post journal of Moose Factory in 1760, where Henry Polleasen wrote, "... the Indian Brothers of yesterday came in with their Wives & Family's having 7 Children in a famishing Condition, and informed me that their Mother being very ancient and almost Starved and unable to Travel desired them to put her out of her misery and accordingly they were obliged to hang her about 10 days ago..."<sup>38</sup> What changed the Aboriginal family the most was undoubtedly the introduction of the fur trade. It brought drastic changes in productive relationships between men and women, a steady supply of liquor as payment for services to HBC traders, and the emergence of forbidden relationships between Company men and Aboriginal women.

English women did visit the Bay in the early years. However, the Governor and Committee discontinued the practice of allowing officers' spouses to join them on the Bay after only one year. According to Brown, in the early years the posts were socially organized along "communal family" lines. Under the governorship of Sergeant, this was replaced with "military monasticism" in 1684, when the prohibition on allowing European women into the Bay began.<sup>39</sup> This change also marked the end of any colonization effort by the Company for more than a century. It began a hiring policy that preferred bachelors, demanding both celibacy and chastity

from its employees.<sup>40</sup> The Company's London management was intent on controlling employees' lives from the other side of the Atlantic Ocean by hiring resident managers who would stand as models of propriety. This was an ambitious and untenable goal. As early as 1674, it was reported to the Committee that a jealous Aboriginal man had entered Charles Fort, pulled out his hatchet, and wounded his wife when he discovered she was in the fort.<sup>41</sup> Van Kirk notes, "[the] Committee's emphasis on the Indians' jealousy of their wives reflected a superficial understanding of their attitude toward women..."<sup>42</sup>

The difficulty in trying to control the intimate lives of HBC employees appeared early and did not end in the period under review. Van Kirk notes the futility of this attempt by pointing to the fact that when the French under the command of Des Troyes arrived at the Company's fort at Hayes Island (Moose Factory) in 1685, they found two Aboriginal women in the cabins of Anthony Dowrage, the chief factor of the fort, and John Fortnam, who was the second.<sup>43</sup> The emergence of the "Home Guard" as a social unit provided Company men with the opportunity for frequent contact with Aboriginal women. For Aboriginal women, the posts became a place to obtain food in times of hunger, and goods in exchange for the goods and services they supplied to the fort. It was a relationship where women and children, as dependents of their husbands, were allowed into the forts and taken care of in order to encourage their husbands to perform their role as suppliers to the fur trade.<sup>44</sup> Examples of this breach of the rules abound in the records, including an incident in 1706 when Anthony Beale gave three Cree women shelter after they were turned out by their husband because he could not provide for them.<sup>45</sup> In another incident noted by Van Kirk, it was revealed that a leading man had been able to influence his wives as well as the women of his band to provide sexual

favours to Company men. Richard Staunton remarked, after taking command of Moose Factory in 1738, that vice had grown rampant and First Nations People had been corrupted more than they were corrupting.<sup>46</sup> While the “Home Guard” seemed to have been incorporated into the society of the post, it is certain that they were still considered the “other” by the employees of the HBC and taken advantage of when the opportunity presented itself.

While it would be naive to think Aboriginal women were completely uninterested in the world behind the factory walls, whether they willingly entered the forts or did so through coercion cannot be ascertained through the extant records. Van Kirk points to liquor addiction as a factor that increased social interaction between the Company men and Aboriginal women. She states that Aboriginal women, who had become addicted to brandy, began prostituting themselves, which was not scrupled at by Company employees. According to chief factor Andrew Graham, prostitution also took place when Aboriginal men began to lend their wives to Englishmen for brandy.<sup>47</sup> One example of this occurred in fall of 1762 when governor Ferdinand Jacobs noted on 22 September that,

... Two of the men that are Sick is John Hughes & Joseph Waggoner where Cause of Sickness is my Not Letting them have [women] Come into their Cabins, Nor Even into that House as Usual, And indeed Gentlemen it was High time to Put a Stop to Such Proceedings, and I [Provide] to Say it the worst Brothel House in London is Not So Common a [?] as the mens House in this Factory was before I Put a Stop to it,...<sup>48</sup>

On the following day, Jacobs noted:

... Joseph Waggoner is Now So Delirious that he Threatens to Destroy himself with the First Instrument he Can get for that use for which Reason we have been Obligated to take all Sharp Instruments & his Gun Out of his Cabin and Ordered one of the Watch to be always with him to Prevent his Laying Violent Hands on himself or any Body Else. This is gentlemen the Effects of the Former Masters [?] in Permitting these People to have Indian women Constantly in their Cabins and Letting them take the Indian women with them when Sent abroad

One of the wooders, James Jock when I first Sent them to the woods had the Assurance to Ask me Leave to take an Indian woman to the Tent with him which I absolutely Refused, to Such a [Loss] are Some of Your Honours Servants at this Factory Come to with Regard to Keeping of Indian Women, this Affair Calls Loudly for Reformation which I hope Your Honours will Redress...<sup>49</sup>

Finally, on 24 September, Jacobs made a note of what can best be described as prostitution when he wrote:

...an Indian man Asked me if I would Let his wife Come into the Factory to James Sebbiston the Taylor which I absolutely Refused also an Indian Woman Pleaded Hard to be admitted into the Factory to her Husband, as She calls him, Henry Pressick, which I would not On Any account admit of I mention this as a Conformation of what I writ yesterday on this Head and Indeed Gentlemen there has been Such doings in this Factory as would Surprise you, but it is Not fit to be Mentioned.<sup>50</sup>

Jacobs was in fact complaining about the management of York Fort while Humphrey Marten was in charge. What he does not mention is that he and Marten had Aboriginal wives of their own. This would tend to reinforce the contention that rank was an important determinant in who was allowed to interact with Aboriginal women.

Whether the Company began to replace the “tribe” as Van Kirk contends is a matter of conjecture, since contact and European material culture may have changed the social organization of the “tribe” by the time the “Home Guard” was established. Whether there was an advantage for women to live around an HBC fort, rather than traditionally, is also a matter of contention. While the posts offered food, shelter, and as Van Kirk notes “...relief from labourious duties imposed by her nomadic way of life,” some women preferred living in the posts over a more traditional pre-contact existence. By considering the posts their homes, Aboriginal women were drawn into an existence that offered them European goods and the Company’s paternalism.<sup>51</sup>

Regardless of their efforts, the management was unable to control the lascivious desires of its servants. This was as true in London as it was at the Bay. Company chief factors exercised a great deal of discretion in how they dealt with sexual liaisons between Company employees and Aboriginal women. What seems apparent is that the Company, at certain points in time, promoted employees on the basis of their authoritarian governing style in an effort to stamp out vice. The promotion of Joseph Isbister and James Duffield in the 1730s and 1740s are testament to this fact. Nevertheless, these men could only rule as much as their complement was willing to be ruled. For example, in 1750, Isbister discovered his officers participating in what appeared to be an incident of attempted sexual assault. He wrote as follows:

...(it is mentioned in Yesterdays Transactions that two Indian women set out for their Tent with 3 pairs of Snow Shoe frames to knit but [also] mentioning three pints of brandy also toward the payment for the three pairs they brought last [?] Yesterday in the evening those two women returned back to this Fort one of them being a little froze on [?] that they Could not reach their tent for the Violence of the weather... they Came into the factory went to the Cook room fire to warm them which my Servant Acquainted me of I went down Stairs to into the Yard having no bad thoughts in my Mind, but as I opened the door I See two Men went into the Cook room in great hurry as if they were running for a prize, presently in third with the same Spied, upon this I ordered the Cook to go & see what was the mater & who those were that ran in first into the Cook room & with orders to turn the women out of the Cook room into my dwelling house Malcolm Jock the Cook went & brought me word that those who I See run into the Cook room so fast are these officers mentioning their Names, Robert Bass, James Walker & Timothy Sutton, with the women who Could not get to come out upon which I went my Self into the Cook room and asked those officers what discoveries they were making here but no answer was made me upon which I Concluded that their designs were no good... Mr. Bass went away but Mr. Walker & Sutton took the second bidding before they went out nor could I get the women out lest they were [gone] who I ordered to go into [my] dwelling house the place were all Indians in the winter do lodge when at the factory

The houses of those three indiscreet men if so it may Call them (was that as those two women had returned back at that time in the evening [?] then help that the were drunk & a fine time for those officers & Councillors to gratify their base appetites & abuse the women before it Could come to my knowledge but they were mistaken for I put a Stop to their intentions my Self (this is the use those Councillors make of their

place to Act most rudely & fly in the Masters face & promote a Separate interest which is rebellion and disobedience...<sup>52</sup>.

Isbister's sense of morality seems to show through here. What is surprising is the fact that he did not mete out his characteristic cuffing or throw the men in irons, which was his normal way of dealing with disciplinary infractions. While he gave the impression that he did not approve of such liaisons, it appeared that he did not consider them deserving of the same punishment he meted out for insubordination or drunkenness. In another example, Isbister censured a servant for his relationship with an Aboriginal woman without the use of violence. On 10 September 1753, he wrote in his journal that,

[Our] Armourer Mending Indians Guns until about 4 O'clock, PM that a Signal was made him by one of his Indian Mistresses who wanted his Company Just then (he put on his great Coat in order to wait on his lady, & Left work when he Came out into the Yard I demanded of him where he was going & why he had left work before other men or before he was Called off from work. (this Armourer, Joseph Staton by Name replied & said if they have a mind to be make Neagors of, that was no reason he should be so & plainly told me that he would work no longer nor would he be Confined to hours, upon which I took My Gentleman by the Collar & led him away to his shop where he works where I talked to him Sharply telling him of the ill Consequence of Such his ill behaviour & Example, he rudely Answered and Said he did not Care & that he had Spent thirty Pounds Sterling upon an Indian woman not at the Company's Expense but his own, to which I replied, that is false for that he Could not Keep an Indian woman but that it must be of Prejudicial to the company's Interest & Surprized at his behaviour & ill Conduct letting him Know that he shall Never have so much Conversation with Indians as to be at that Expense again.<sup>53</sup>

While the above examples illustrate the manner in which liaisons between Aboriginal women and Company men were reported, it would seem that a conspiracy of silence was more often the case. Although it is unwise to speculate on the frequency of sexual liaisons between Aboriginal women and Company men based on the lack of recorded evidence, one point that can be made is that some chief factors wrote about infractions, others did not, and some only

mentioned the state of debauchery that existed in the post before their arrival. This would suggest that some chief factors were permissive about this breach of Company law, or at least only mentioned it when it served their personal ambitions.

On some occasions, chief factors deemed the summoning of post councils useful in order to punish employees who had transgressed Company law. Under the governorship of James Knight in 1715, a council was summoned to deal with, among other things, a servant's relationship with an Aboriginal woman. This actually occurred soon after the Treaty of Utrecht was signed and Knight, who had become a substantial stockholder in the Company, returned to the Bay to re-establish York Fort after the French occupation. Thomas Butler proved to be an unworthy servant when he was tried by a quasi-judicial council on 27 December 1715. The record of the council stated:

**Thomas Butler** being Arraigned and brought before wee the Governor & his Council to be tried for high Crimes and Misdemeanours and to Answer to the Several Indictments as is Charged Against him for Feloniously Stealing at Sundry times as likewise threatening Mens Lives and also most Seriously in very Unbecoming Language abusing his worthy Governor and most Slanderously Scandalizing his Honourable Masters the Company in England which tended to the Subverting of this Government by causing such Misunderstandings Amongst the Men enough to make them Mutinize if they had not been better Satisfied of the Justness of the Company in there due payments of the Wages as is due to them in their Honours Service and Under their Governor here who in Disobedience and Contrary to the Express Orders for Mens Behaviour here for keeping these Indians from rising against us he Abusing the Natives here by lying with a woman of this Country which is to the Endangerment of all our Lives and we may be cut off by them as a great many of the French Men was for so doing when they was in Possession of this Place which is a thing will not be Suffered by those Natives the Witnesses against the said Thomas Butler to all and each particular Indictment are as follow they being Sworn first before us the Governor & his Council...<sup>54</sup>

Throughout the course of Butler's trial, a number of Company employees deposed that he had stolen goods from the Company, accepted gifts from the French governor, privately traded, told

the men that they were not going to be paid because the Company was broke, struck an Aboriginal man, called the governor a devil, rogue, son of a bitch and whore, and declared that he would stab and shoot somebody before he left Rupert's Land. As well, Richard Burrige, a Bayside officer, testified that Butler had lain with a woman of the country on two occasions. Butler was unanimously found guilty of these "Crimes and Misdemeanours... speaking little in his own Defence."<sup>55</sup> Although the documentary record ended at this point, it can safely be assumed that Butler spent the rest of the year performing his usual tasks until he was sent home in the summer. Whether he was tried in England is doubtful, since there is no Company record of his prosecution or a record of him suing the Company for unpaid wages. What this example shows, however, is a situation where a servant was guilty of a number of unlawful acts, where lying with a woman of the country was only one. While the formal post council was the most severe and formal procedure related to an infraction of Company law, it was rarely used for the infraction of having a sexual liaison with a Aboriginal woman. Here, it was placed within a catalogue of offences charged against Butler. This suggests that liaisons with Aboriginal women, while not generally accepted, were nevertheless not unusual.

In other examples that appear in the documentary record, long-lasting relationships appear to be the norm, particularly in the latter half of the Company's first century. What is striking is that in most of the writing about women in the fur trade, only officers married Aboriginal women. As Brown remarks,

Early alliances between Hudson's Bay Company men and Indian women in the Bay are not traceable in any detail from the existing evidence...Company rules forbade traders to "converse" with women in the Bay and provided for punishment of those who permitted such relationships...[but] it is possible to document, with varying degrees of reliability and detail, at least fifteen instances of Hudson's Bay men (typically officers)



taking Indian women as mates before 1770.<sup>56</sup>

None of these women were identified as wives in the European sense, and in a third of the cases the men married British women. The examples used by Brown in her discussion of marriage in the “custom of the country” are highly instructive since they encompass one hundred years of fur trade marriage between Company officers and Aboriginal women. Included in the list of men who married according to the “custom of the country” were Henry Kelsey, Joseph Adams, Robert Pilgrim, Richard and Moses Norton, James Isham, Ferdinand Jacobs and Humphrey Marten. In these examples, Brown notes that in some cases the relationships were not monogamous, and that “...these officers unions, if monogamous, came to be tolerated by their colleagues, and eventually, by a resigned London Committee,” while polygamous relationships on the Bay were considered a violation of British values.<sup>57</sup> However, even monogamous relationships were not tolerated by the London Committee and Company officers on the Bay if the men were of a labourer’s or tradesman’s social position.

Upon taking over the command of Moose Factory in 1741, James Duffield encountered a well established relationship between one of the factory’s servants and a “Home Guard” woman. Duffield took over the command of Moose Factory from Richard Staunton, a Company veteran who came out of retirement to command the post for three years. Duffield encountered a post that was rife with rebellion. A thorough reportage of disciplinary infractions occupied a primary place in his journal. Two weeks after taking command, Duffield noted that he suspected a bricklayer named Augustine Frost and an officer, George Howie (Howey) of “foul play” with the locals. Frost in fact had a large fur trade family in Rupert’s Land. As Duffield noted on New Years Day, 1742,

... My Self & William Pitt traded a Small matter with the Indians refused him credit gave him some Victuals to carry to his Mother & Sister which by report of our people is one of Frost' wives & sent them, Observing that they Crossed our river directly to the place where our men was at work & Frost among them, I took my Snow Shoes & followed them, being resolved to prevent any Communication of Sentiments, it being my Opinion that the Natives may be easily managed if they are not upheld by our own disaffected, & therefor if I do not keep them Asunder all my Labour may be in vain, more especially as I am at present [described as] a Tyrant, as Mr. Isbister was last year I know not how far their resentment may Carry them to give dangerous hints & encouragement to the Natives to watch an opportunity of throwing me away. (an expression for a lost or dead man) Which I must own would be a dextrous method of getting end of me with Impunity.<sup>58</sup>

Frost had apparently been left to his own devices for some time at Moose Factory, and had developed a relationship with an unnamed woman. Prior to Duffield's arrival, however, Frost was never disparaged in the post journal. Staunton actually recommended him for a raise for his good service to the Company. What Duffield observed in Frost is particularly poignant. He stated:

Should I Suffer any of the Indians to have any discourse with this Frost, my endeavours would in a great Measure be rendered fruitless, he being so in favour with the Natives & so much an Indian himself that he has no Concern either for his Native Country or the Company's Interest —<sup>59</sup>

Due to Frost's influence among the "Home Guard," he was in a more powerful position than Duffield since his brothers-in-law were the "... Sons of old Himetitige father of the rabbit Skin guard" who were important hunters and trappers among the "Home Guard."<sup>60</sup> As Duffield noted in his journal after a conversation with Frost,

... There is no Artifice left untried Intimate one Frost having told me that as he was burning the Lime at the kiln that they expressed their dislike of my Measures & that they were all going to the french, unto which I asked him what fault they found & why they would not rather go to Albany where they know the Master & could be Sure of Civil Usage as they had here he could not give any Answer but said it was his duty to acquaint one with what he heard--  
But this proved all false for our home guard went down to the Marsh to Shoot & the

others that went home to the Southward traded what they had & let them go where they would they Carried no furs with them for if Civil & honest Usage will not Induce them to Come here nothing will but this is an Artifice [of] Frost's own Coining, who wants it to become an Indian Factory with his own wives & Numerous family both in & about it as was the Custom before-----

Having given your Honours his Character in page [&c] I shall Say no More here but Submit it to you, how any Servant can Maintain such a Numerous Clan as belong to that guard, who bring nothing here to trade & for ever will be Indolent whilst they are Supported by such a fellow who has lived here without Control before my Arrival...<sup>61</sup>

As it turned out, Duffield blamed the defection of the "Home Guard" as well as the poor fur returns on Frost, and subsequently sent him to Albany Fort, which was under the command of Joseph Isbister. After his departure, the trade continued to decline, much to Duffield's chagrin. Mention of Frost appeared again in the record of York Fort, which was under the command of James Isham, who among other things also had a Country-born child and an Aboriginal wife. One conclusion that can be reached is that Frost and Isham shared an understanding of fur trade society which was a direct result of their connection to Aboriginal women. They used this understanding to increase the Company's trade while ignoring its official position regarding such relationships. As it turned out, the influence of a Company tradesman like Frost, who was proficient in the Cree language, was more effective in furthering a viable fur trade than the despotism of Duffield.

While Duffield's success in severing the ties between Frost and his Aboriginal family on the basis of Company law resulted in a decline of trade, in other cases the motives of Company factors in stifling the relationships between Aboriginal women and Company servants were reflective of their benevolence. An example of this took place in 1744 at Moose Factory while under the command of Duffield, involving venereal disease. The surgeon learned that a carpenter's assistant, John Ashley, contracted the disease in London. After interrogating him,

Duffield learned that, "... by his own Confession he has had to do with several [of] our Indians at Ship time to that I wish it may not spread amongst them to the great prejudice [of] the Company's Interest, I am Certain that none of them has had any Conversation with our Indians, after the Sloop returned..."<sup>62</sup> In this situation, Duffield pledged to keep Ashley in the fort and hard at work until ship time, whereupon he was to be sent home in order to curtail the spread of his disease. Curiously, the always officious Duffield posited his benevolence within the Company's interest or trade rather than in his personal morality.

In another example, the safety of the post was the motive for keeping Company men away from the local women when, in 1765 at Eastmain, David Jones had words with a local man over his "...Connections with the Indians Wife..."<sup>63</sup> Jones subsequently snapped a loaded musket at the man but was subsequently disarmed by chief factor, James Hester. Hester wrote that the incident "...had made me and the People that is with me very uneasy, dreading their Resentment, Our Number is few & certain it is, was there any other than friendly Correspondence between us & them, they might soon master us."<sup>64</sup> It is obvious that the Company men were suspicious of First Nations People, which probably motivated the Company's prohibition on sexual relations with Aboriginal women. Regardless of this, it became more acceptable for these relationships to exist by the latter part of the century.<sup>65</sup> As a post-script, Hester went mad two years later. He had become convinced that the "Home Guard" were going to shoot him. After a month of being unfit to command, he attempted to castrate himself. George Isbister, who took over the command while Hester was mad, wrote:

[The] master taking the second fit of madness, when James Stanton which Attended on him was absent from him, I the same time busy taking Geese from the Indians, James Stanton luckily went upstairs before the master called him, who found the master, with

a pen knife in his hand, cutting his private parts in desperate manner, who instantly called out murder, which I ran up stairs, in great haste, and found the master Shirt in a gore of blood Instantly took the knife from him, the rest of the hands coming home from the fishing creek came running up the Stairs when we examined him found the wound not mortal, we asked him the reason why he did so, who Answered it was for Fornication that he had committed, and that God almighty had told him to do so...<sup>66</sup>

Whether this act of fornication actually took place, and if so, whether it took place on the Bay, is a matter of conjecture. It would seem likely that his regret may have been due to a relationship that he had on the Bay since his arrival in fall 1763.

Serious transgressions of sexual mores also took place among the Company men and Aboriginal women on the Bay. With respect to Company servants, a statement made in the York Fort post journal of 1762 alleged an incestuous relationship between John Hughes and his daughter. Ferdinand Jacobs noted on September 24,

... there is a Report Prevails here with the Natives and Some of your Honours Servants that John Hughes has had Carnal Knowledge of His Own Daughter and I have been Credibly Informed that he is a Corrupter of Other mens Morals in Particular with regard to Your Honours Interest & the [?] of the Factory...<sup>67</sup>

While it was mentioned in Isham's *Observations* that incest was not necessarily prohibited in Cree society, it certainly was in English society. As Isham observed,

The generality of these natives has some Regard in not marrying too nigh a Kind, though some few I have Known, has not Stood upon these formality's having took their own Daughters to wife, - and one man to have two Sister's in Common, though not so odious and Brutish in my opinion as the former<sup>68</sup>

Jacobs portrayed Hughes as a master corrupter who, prior to Jacobs' taking command of York Fort, acted in concert with other employees in extorting brandy from the newly arrived servants, where they "... made the Poor Men Pay Each a Quart of Brandy or be Tied up by the Heels."<sup>69</sup> Whether the report of Hughes' crime was genuine is a matter of speculation,

considering the social dynamics that existed at York Fort. As it turned out, the issue of his connections with Aboriginal women was as much a crime against rank as it was a crime against Company law. What is important to note here is a point made by Brown. She states that by this period country marriages were becoming partially acceptable to the London Committee as long as they were between Company officers and Aboriginal women, and benefited the trade. It is at this juncture that British and Aboriginal law seem to find common ground, at least from the perspective of Company officers who had married Aboriginal women.

The question still has to be asked: How did the Company officers and men justify their country marriages in the context of English common law, which was supposed to be in operation in Rupert's Land? As Brown and Van Kirk are quick to note, in most cases these connections were not considered equal to European marriages, and for that reason the Company men may not have even considered the legality of these unions. However, if they did, it would seem that common law allowed some room for these arrangements. In the absence of a vicar, these marriages would have been considered clandestine during the period between 1670 and 1753. During this time the frequency of these types of marriages actually increased in England. As J.H. Baker notes, informal marriages were recognized as legal as long as two witnesses were present to attest to the union. The advantages of clandestine marriages were "... secrecy, expedition, the avoidance of parental control, and sometimes deception - as where marriages were antedated on the register to avoid illegitimacy."<sup>70</sup> This arrangement lasted until 1753, when under *Lord Hardwicke's Act* clandestine marriages were completely abolished. The publication of bans or the purchase of a license, two witnesses, and the recording of the marriage in a public register became essential requirements for nuptials to be valid.<sup>71</sup>

Nevertheless, the statutory provisions of the Act were not applicable to marriages outside of England and Wales, and when marriages did take place abroad, local custom was followed. Disputes could be resolved in the courts of England.<sup>72</sup> Thus, it seemed that Company employees who did enter into marriage bonds with Aboriginal women did so without violating English law in the sense that the union took place outside of England and Wales. However, in another sense, because Rupert's Land was considered a royal manor of East Greenwich through a legal fiction, fur trade marriages may not have been considered valid if this definition of Rupert's Land applied.

Brown suggests that these men may have been following Scottish marriage law, which she notes was "strikingly permissive."<sup>73</sup> According to Scots law of the period, consent to be united as husband and wife, which was competent to a contract, made a marriage exist between them regardless of the statutory forms of religious requirements.<sup>74</sup> Thus, country marriages between Company men and Aboriginal women, or marriage by "custom of the country," may be an amalgam of Aboriginal law and English or Scots Law since a liberal interpretation of the simple ceremony of the "Home Guard" Cree would satisfy the requirement of English law if the legal fiction of Rupert's Land was not recognized, and would satisfy the requirements of Scots law in every sense. In addition, customary marriage was normal in rural England even after the passage of *Lord Hardwicke's Act*, in areas that lacked resident vicars.

In cases where Company men had children in the Rupert's Land, the only mention of their offspring normally came in the form of wills drafted by Company officers. This is discussed at great length in the work of Brown and Van Kirk and needs little mention here. One generalization of this arrangement was that female children were usually left in the country,

while the males were occasionally sent to England for their education. Gender obviously affected the treatment country born children received. A good example of this is James Isham's son, Charles Prince Isham, who was sent to England for his education and inherited his father's fortune before returning to the Bay to have a long and distinguished career with the Company. James Isham was also the Company servant who suggested that Anthony Henday marry an Aboriginal woman while he was on his journey inland. As Brown notes, when it came to offspring, the established custom of the land and the relative ease of Cree divorce allowed children to be reintegrated into First Nations society. This was assisted by the "... Cree conceptualizations of the mother-child relationship which allowed traders' children to be reintegrated without stigma, along with their mothers, despite the patrilineal and patrilocal tendencies of the Cree."<sup>75</sup> This arrangement also served the Company men, who would often leave the Bay and marry British women while on furlough. Thus, customary marriage was flexible enough to allow for a simple divorce and to exclude children and spouses from the Company's society.

Women who were drawn into the HBC's fur trade through country marriage or simply as labourers were important to the Company's survival in Rupert's Land. Examples of how Aboriginal women served the Company abound in the post journals as well as in the work of Brown and Van Kirk. These include the story of the Chipewyan Slave Woman who acted as a linguist for James Knight from 1716 to 1717. This woman was responsible for informing Knight of the land to the north as well as bringing peace to the "Northern Indians" and the Cree. Although she was in Knight's service for less than a year, she was described by him as a woman of "... Very high Spirit.... of the Firmest Resolution... of great Courage, [and] Endued



with an Extraordinary Vivacity of Apprehension...”<sup>76</sup> Fifty years later, an “... Esquemay woman Doll...” was mentioned as a linguist in the Company’s service by Moses Norton chief factor at Fort Prince of Wales.<sup>77</sup> When she died in 1769, Norton wrote:

... [this day doll the Esquimause Woman Dyed who has left a Small Child behind her, the Death of the Woman I doubt will be a Loss to the Northern Trade with the Esquimaux as she has been of great Service in assisting to make Peace between the Northern Indians and her Country People But shall still Endeavour to preform the Same harmony among the Natives to the Northwards as much as Possible as we have a young fine Lad of a Esquimaux and also a man and his wife]<sup>78</sup>

It seems obvious from both of these examples, as well as that of Frost, that even though Company law forbade interaction with Aboriginal women, breaking this law was beneficial for the fur trade and ultimately an employee’s career. It was a situation where commercial aims and Company law conflicted, and where discretion among Company officers determined which rules were followed. In fact, according to Van Kirk, even Isbister contracted the services of Aboriginal women, since,

... the expense of maintaining an Indian woman was largely offset by her own economic contribution in performing essential tasks unique to fur trade life. Only the Indian woman was skilled in netting snowshoes & making moccasins without which the Englishmen would have been immobilized in winter.<sup>79</sup>

In addition, women traded furs, caught martens and performed other essential tasks which the English were unskilled at performing.

Aboriginal women, although not officially allowed into the society of the post, ultimately affected the Company’s success in the fur trade. During the century after 1770, the children of these country marriages were responsible for creating the legal heritage of western Canada when the District of Assiniboia became the retirement community for Company men and their country families, and the Company’s monopoly came to an end. These unions led to

a unique mixture of law. Some of it was obviously Aboriginal, while other aspects were English and Scottish in origin. It was a hybrid and plural legal system since state law had not been received in Rupert's Land in the Company's first century, and various legal systems converged in what could loosely be called fur trade society.

#### Notes:

1 Daniel Francis and Toby Morantz, *Partners in Furs: A History of the Fur Trade in Eastern James Bay 1600-1870* (Kingston, 1983), 90-91.

2 E.E. Rich, *Hudson's Bay Company 1670-1763, Vol. 1* (London, 1958), 81.

3 Rich, *Hudson's Bay Company 1670 - 1763, Vol. 1*, 145-146.

4 Sylvia Van Kirk, *The Role of Women in the Fur Trade Society of the Canadian West, 1700-1850* (Ph.D. Thesis, University of London, 1976), 28-30.

5 Jennifer Brown, *Strangers in Blood: Fur Trade Company Families in Indian Country* (Vancouver, 1980), 12-13.

6 Sylvia Van Kirk, "Many Tender Ties" *Women in Fur-Trade Society in Western Canada, 1670-1870* (Winnipeg, 1980), 8.

7 Brown, *Strangers in Blood*, xvii.

8 Ibid, xx.

9 Ibid, xvii.

10 Ibid, xxi.

11 Ibid, xiii.

12 Ruth Roach Pierson, "Experience, Difference, Dominance and Voice in the Writing of Canadian Women's History," in *Writing Women's History: International Perspectives*, Karen Offen, Ruth Pierson and Jane Rendall, eds. (Indiana, 1991), 74.

13 Ibid, 83.

14 See generally John Milloy, *The Plains Cree: trade, diplomacy and war, 1790 to 1870* (Winnipeg, 1989); Daniel Francis and Toby Morantz, *Partners in Furs. A History of the Fur Trade in Eastern James Bay 1600-1870* (Kingston, 1983); Arthur Ray, *Indians in the fur trade: their role as trappers, hunters, and middlemen in the lands southwest of Hudson Bay, 1660-1870* (Toronto, 1974); Dale Russel, *Eighteenth-Century Western Cree and Their Neighbours* (Ottawa, 1991).

15 Arthur Ray, *Indians in the fur trade: their role as trappers, hunters, and middlemen*, 4.

- 16 E.E. Rich ed., *Isham's Observations And Notes 1743-1749* (London, 1949), xiii.
- 17 Ibid, lxi.
- 18 Ibid, lxxiii.
- 19 Ibid, 79.
- 20 Ibid.
- 21 Van Kirk, *The Role of Women in the Fur Trade Society*, 145.
- 22 Rich ed., *Isham's Observations*, 101.
- 23 Jennifer Brown, *Company Men and Native Families: Fur Trade Social and Domestic Relations in Canada's Old Northwest* (Ph.D. Thesis, University of Chicago, 1976), 177.
- 24 Ibid.
- 25 Van Kirk, *The Role of Women in the Fur Trade Society*, 32.
- 26 Ibid, 31-32.
- 27 HBCA, B.42/a/41, *Fort Churchill Post Journal*, 20 August 1753.
- 28 HBCA, B.239/a/11, *York Fort Post Journal*, 4 September 1728.
- 29 HBCA, B.239/a/11, *York Fort Post Journal*, 5 September 1728.
- 30 HBCA, B.135/a/58, *Moose Factory Post Journal*, 28 January 1777.
- 31 Van Kirk, *The Role of Women in the Fur Trade Society*, 45-46.
- 32 Rich ed., *Isham's Observations*, 224.
- 33 HBCA, B.42/a/21, *Fort Churchill Post Journal*, 13 February 1740.
- 34 Rich ed., *Isham's Observations*, 100-101.
- 35 Van Kirk, *The Role of Women in the Fur Trade Society*, 32.
- 36 HBCA, B.239/a/51, *York Fort Post Journal*, 30 April 1764.
- 37 Rich ed., *Isham's Observations*, 223.
- 38 HBCA, B.135/a/32, *Moose Factory Post Journal*, 4 February 1760.
- 39 Brown, *Company Men and Native Families*, 53.
- 40 Ibid, 55.

- 41 Van Kirk, *The Role of Women in the Fur Trade Society*, 26.
- 42 Ibid, 31.
- 43 Supra note Sylvia Van Kirk, *The Role of Women in the Fur Trade Society*, 28. Van Kirk refers to a letter by Monsr. Jollet's letter dated at Misiko to Hugh Verner, Hudson's Bay Company's Chief Agent, dated June 25, 1685 in E.E. Rich ed., *Copy Book of Letters Outward &c. 1679-1694* (London, 1948), 313 .
- 44 Van Kirk, *The Role of Women in the Fur Trade Society*, 30.
- 45 Ibid, 31.
- 46 Ibid, 33; see also K.G. Davies ed., *Letters From Hudson Bay. 1703-40* (London, 1965), 270-71.
- 47 Van Kirk, *The Role of Women in the Fur Trade Society*, 33.
- 48 HBCA, B.239/a/50, York Fort Post Journal, 22 September 1762.
- 49 HBCA, B.239/a/50, York Fort Post Journal, 23 September 1762.
- 50 HBCA, B.239/a/50, York Fort Post Journal, 24 September 1762.
- 51 Van Kirk, "*Many Tender Ties*," 17.
- 52 HBCA, B.42/a/36, Fort Churchill Post Journal, 17 November 1750.
- 53 HBCA, B.3/a/46, Albany Fort Post Journal, 10 September 1753 .
- 54 HBCA, B.239/a/2, York Fort Post Journal, 27 December 1715.
- 55 Ibid.
- 56 Brown, *Company Men and Native Families*, 132.
- 57 Brown, *Company Men and Native Families*, 144.
- 58 HBCA, B.135/a/11, Moose Factory Post Journal, 1 January 1742.
- 59 HBCA, B.135/a/11, Moose Factory Post Journal, 12 February 1742.
- 60 HBCA, B.135/a/12, Moose Factory Post Journal, 21 November 1742.
- 61 HBCA, B.135/a/11, Moose Factory Post Journal, 18 May 1742.
- 62 HBCA, B.135/a/14, Moose Factory Post Journal, 25 March 1744.
- 63 HBCA, B.59/a/34, Eastmain Post Journal, 17 May 1765.
- 64 Ibid.

65 Brown, *Company Men and Native Families*, 133. Brown notes that Company policy changed over the course of the eighteenth century, where "country marriages" were becoming acceptable to the Company's management.

66 HBCA, B.59/a/36, *Eastmain Post Journal*, 21 May 1767.

67 HBCA, B.239/a/50, *York Fort Post Journal*, 22 September 1762.

68 Rich ed., *Isham's Observations*, 101.

69 HBCA, B.239/a/50, *York Fort Post Journal*, 5 Oct 1762.

70 J.H. Baker, *An Introduction to English Legal History* (London, 1990), 548-549.

71 *Ibid.*, 549.

72 *Ibid.*, 550.

73 Brown, *Company Men and Native Families*, 178.

74 *Ibid.*

75 *Ibid.*, 158.

76 Davies ed., *Letters From Hudson Bay*, 412-413.

77 HBCA, B.49/a/62, *Fort Churchill Post Journal*, 13 July 1765.

78 HBCA, B.49/a/73, *Fort Churchill Post Journal*, 15 September 1769.

79 Van Kirk, *The Role of Women in the Fur Trade Society*, 45-46.

## CONCLUSION

The study of law without a state has been the primary focus of this work and Rupert's Land has proven to be an ideal terrain, both geographically and temporally, in which to develop themes in comparative law and legal systems. In this colony, English common law met naval law, Scots law and Aboriginal custom, resulting in the transformation of each in what has been described as fur trade society. This society was unlike other British colonial settings. It was isolated from the power centres of Europe and was primarily concerned with extracting a resource from the northern reaches of North America through low capital investment and a small working staff. Because Company posts were visited only once a year by ships from Britain, a unique dispute resolution mechanism developed upon the various layers of custom and law.

The central management and control of the Company was in the metropolis of London. It was from here that major decisions were made with respect to the trade and the people engaged in it. Nevertheless, this control lacked force. On the Bay, Company employees brought personal prejudices and a variety of dispute resolution mechanisms. Some of these were derived from formal English law while others drew on the varying traditions of the men the Company employed. The labourers of the Company, who voluntarily left their homes in Britain for the monetary rewards it offered, usually encountered brutal officers, awful living conditions and a form of employment that closely resembled penal servitude. Naturally, naval law was one of the legal traditions transplanted into Rupert's Land since a number of the officers and sailors had previously been employed in the merchant or royal navy. The strong influence of naval law can also be attributed to the British assertion of naval supremacy during the eighteenth century.

In addition to the naval influence, the background of Company employees often fell outside of the mainstream of English society. Many were hired in the Orkney Islands, a group of islands to the north of Scotland that only became part of Britain in the fifteenth century. Others came from areas also considerably removed from London. Some were apprenticed as orphans at the age of fourteen. As various as these backgrounds were, a semblance of British law, whether customary or common law, followed these men to Rupert's Land. Whether consciously or not, these men also became quickly aware of the traditions that existed in Rupert's Land, which were adapted within and outside of the walls of the forts.

The question of the Company's survival was decided in London. The HBC was one of the last monopolies granted by the Crown to a group of shareholders through a royal grant. In the Restoration era, one of the final assertions of royal absolutism resulted in the granting of a Charter to Prince Rupert and a group of courtiers and businessmen. These powers were, on paper at least, expansive. The Company was empowered to create any by-laws and regulations for the good government of Rupert's Land. Nevertheless, the Company did not attempt to codify or enforce the common law. The monopoly rights were on shaky ground for much of its history, and for this reason it was reluctant to assert its legal powers. Instead, Bayside leaders disciplined their charges with indiscriminate violence based on personal emotion and the exercise of mercy. This lack of predictability was based wholly on the level of discretion afforded to post leaders. The lack of communication between the Bay and London forced the officers to rely on their personal ability to lead, which in many ways was analogous to the position of a ship's captain while at sea. Discipline was based on benevolence and despotism, and the men who lived and worked within the posts had to conform to this framework.

Company posts were not islands of British colonialism within the vast reaches of Rupert's Land, and title to this area had been the subject of heated debate both internationally and domestically. Because the land was granted through royal prerogative, the Glorious Revolution put the HBC's title in a precarious position. In addition, the French captured the majority of the Company's posts at one time or another prior to the Treaty of Utrecht in 1713. Following the Treaty of Utrecht, the Company's Charter was challenged by Arthur Dobbs in the 1740s. Finally, with the fall of New France in 1759, a new group of merchant entrepreneurs from Montreal began flooding into Rupert's Land via the Great Lakes to compete with the HBC. In the end, these challenges to the HBC's Charter failed for a number of reasons. First and foremost was the nature of the fur trade itself. Even a small contingent of British men in Rupert's Land bolstered Britain's colonial ambitions. In the case of the HBC, which was a corporation responsible to its shareholders, this contingent did not cost the Crown which made its enterprise agreeable to Parliament. The lessons learned during the first century of the HBC's existence set the stage for the events of the nineteenth century when, under the Governorship of George Simpson, the HBC became the dominant corporation of the Canadian northwest.

It was also during the nineteenth century that the Company drafted its first criminal and civil code, specifically created with a mind to the social conditions of Rupert's Land and the HBC's monopoly. Adam Thom, the first Recorder of Rupert's Land, took office in 1839, drafted the code and presided over the colony's first common law courts. Thom received the common law of England as of the reign of Victoria, but vigorously justified the reception based on the power conferred by the royal Charter. Thom was well aware of the Charter and the Company's past which displayed the endurance of its private justice system. The HBC had



carried on business for over one hundred and fifty years when Thom arrived. He was a product of its history. Although formal, Thom's legal regime introduced even more disciplinary discretion and placed it in the hands of fewer men. The change that occurred during Thom's regime was due in large part to the considerable number of Company servants who retired, with their country families, at the inland colony of Assiniboia during the nineteenth century.

During the first century, however, the English newcomers did little to colonize an area that made up about one-fifth of the land mass of North America. Instead, they built posts on the shores of Hudson Bay and awaited the arrival of First Nations People, encouraging them to trap furs for remuneration in the form of European goods and spirits. This interaction, while not drastically altering Aboriginal dispute resolution mechanisms, introduced a new economy into an area and people who had previously faced other cultural transformations. Aboriginal society was not frozen in time. Warfare, diplomacy and migration had taken place since time immemorial. The fur trade introduced another change that resulted in the adaptation of both First Nations People and British men. In many ways the HBC's Bayside leaders did little to persuade First Nations People to adopt British customs. Instead, they fostered a relationship that resembled nation to nation interaction. While respecting the social structures that existed in Aboriginal society, Company men attempted to curry the favour of local leaders by providing them with extra tobacco, brandy or special clothing. In this way, diplomacy became the medium of trade. At ceremonies, Aboriginal and HBC leaders met and exchanged gifts and tributes prior to trading.

When conflicts did arise between Company men and First Nations People, the former did very little to impose British law. Dispute resolution in these circumstances was adopted

from First Nations People, regardless of how the post leaders wrote about the infractions. Blood for blood vengeance and mitigation were important facets of this system. When violence was meted out by Aboriginal people on Company men, it was either ignored or vengeance was invoked. When Company men did violence to Aboriginal people, the records do not provide a clear picture. It seems that retaliation was generally the most popular mechanism for settling these types of disputes. However, whether Company men acknowledged they were following local custom is not discernible.

The post journals distort as well as clarify. This is especially true with respect to the relationships that developed between Aboriginal women and British men. These liaisons were not officially sanctioned by London headquarters and post leaders were often admonished for those relationships. Nevertheless, relationships existed and developed alongside the fur trade. Country marriages and Country-born children became the norm in Rupert's Land, and Bayside leaders did little to conceal these relationships from their superiors in London, often sending their Country-born boys to England for their education. The contradiction in all this was that the post journals tell an entirely different story. Bayside leaders, while personally maintaining these relationships, chastised their men for attempting to do the same. The result is a one-sided picture of the types of relationships that existed between Company men and Aboriginal women. Aboriginal women were separated from Company men based on ethnicity, gender and class. Law supported this creation of the "other." Nevertheless, Company men adopted the ways of First Nations People with respect to marriage and family relations. Contrary to the law of England, divorce in Rupert's Land was common and children often returned with their mothers to the Aboriginal community.

The sources used in this work are clearly one-sided. They are based on the thoughts of British men who made their living in the fur trade. For this reason, their musings and reports are predominantly related to the viability of the fur trade and the manner in which they maintained discipline within the post. While this material proved useful in developing the context of the Company's internal dispute resolution regime, it cannot fully describe their relations with First Nations People. However, on some occasions these men were very candid in their descriptions of their relationships with First Nations People. While this candour was filtered through the individual experiences of the man who wrote it, some concept of the legal regime that existed can be discerned. There were many layers to this justice system. It was based on diplomacy, vengeance, and a superficial understanding of local custom. This work has not attempted to develop a picture of Aboriginal law at the time of contact. Instead it examines the reactions of HBC men to their interaction with First Nations People. The result was the development of a pluralistic society where British law interacted and was transformed by local custom.

The major theme of the dissertation is internal discipline and the interaction of naval, customary and common law in developing the history of a pluralistic source of law in Rupert's Land. The fur trade introduced a moderate level of interaction between European and First Nations People. The HBC men, armed with guns and the finest European goods, remained dependent on local people for their survival and the Company's prosperity. The result was a series of toothless orders from London aimed at regulating the fur trade and the conduct of employees in Rupert's Land. What developed in actuality was a process of mutual modification where both Aboriginal people and Company men found the middle ground. While discretion

determined the course of dispute resolution, a whole set of customary practices developed in the fur trade.

This dissertation has departed from a number of previous works in that it defines, explores and derives meaning from the interaction of various methods of dispute resolution that developed in the first century of the HBC fur trade in Rupert's Land. The important contributions of E.E. Rich and A.S. Morton have provided a foundation for this. The focus here, however, is not political history. Instead this work looks at the legal history of Rupert's Land. In addition, this work also departs from the work of Sylvia Van Kirk and Jennifer Brown since the focus here is the nexus of laws that surrounded the establishment of country families and not the experiences of individual women. This is also a departure from the work of Edith Burley in that here, the focus is the legal justification for discretion and discipline and not the labour history of Company employees. This work is not an examination of the history of the fur trade and First Nations People. For this reason it differs from the work of Arthur Ray as well as a host of ethno historians and historians who have examined specific First Nations during this period. Finally, the work of legal historian Hamar Foster and criminologist Russell Smandych have been influential in the development of this dissertation. Both of their works analyse the interaction between Company law with that of First Nations People. In addition they have developed themes such as internal and external discipline and the role discretion played in the HBC, which have been followed up in this work.

While a dispute resolution system existed prior to the arrival of the HBC, this story starts at its inception. It is here that the interaction between two very different legal systems began. It is also here that the manuscript records began. Every post journal of this period has

been examined with an eye to comparative law and legal systems. From the journals, the concerns and methods of Company leaders have been developed. The time period this dissertation focusses on also distinguishes it from previous works. While most monographs provide a survey of the first hundred years of the HBC, many emphasize the developments of the nineteenth century. The first hundred years of the HBC's foray into Rupert's Land were chosen because the Company was struggling to survive and did very little to colonize the area. Instead, during this period the Company laid the groundwork for what later became an empire of fur. In this context, various and sometimes competing legal systems vied for prominence. Internally, discretion in the hands of Bayside leaders often led to despotism. Externally, an entirely unique legal system developed. First Nations People were far from marginalized in the seventeenth and eighteenth centuries. As a result, fur trade custom was adapted from Aboriginal law. By the nineteenth century, Aboriginal marginalization did occur which coincided with the Company's first serious attempt to impose common law.

By 1770, the fur trade had begun to heat up. The HBC faced inland competition and were forced to develop a new fur trade strategy. They began to set up a numerous posts in the interior and in close proximity to their competition in an effort to compete head to head. In this climate, the Company began losing money in the fur trade while having to expend large sums to keep the business afloat. In addition, First Nations People became more actively involved in the rivalry that existed between the HBC and the "Pedlars" from Montreal. As a result, the level of violence associated with the fur trade increased as well as the use of liquor and the level of interaction between fur traders and Aboriginal people. Thus, the year 1770 marks not only the centennial year of the HBC, but also a major departure in the development of dispute

resolution mechanisms in Rupert's Land. For fifty years following 1770, violence and lawlessness became the norm in Rupert's Land as two trading empires embroiled First Nation's People in what became comparable to war. In the end, the position of the HBC prevailed, and its ad hoc justice system continued along a familiar course following its merger with the North-West Company in 1821.

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