Cultural Eclipse: The Effect on the Aboriginal Peoples in Manitoba

Kwesi Baffoe[1]

INTRODUCTION

Cultural eclipse is a phrase that I coined to describe the inter-relationship between the Aboriginal and European cultures as seen by an observer in space. It depicts the scene of two cultures initially rotating separately in time through the Universe. The European culture slowly drifts towards the Aboriginal culture and partially covers it without consuming it. This paper explores one of the ways indigenous culture is damaged during this "union." As time passes, however, more of the Aboriginal culture emerges. The phrase is appropriate in the sense that it expresses the hope that, with time, the two cultures – like Siamese twins – will be joined, but mostly separate, peaceful and in harmonious coexistence.

There are three types of reserves in Manitoba: 1) the official reserves created by statute;[2] 2) the de facto reserves formed by the movement of Native peoples into urban ghettos and; 3) the prisons. Despite growing national concern about native issues, the penitentiary system has become a repository for Aboriginal people. Over forty percent of the inmates at Stony Mountain Federal Penitentiary are Aboriginal, and in provincial jails, fifty-five percent are native people.[3] The figures for youth and women are even more disturbing. In some of Manitoba's youth correction facilities over three quarters are Aboriginal and at the Portage Jail for Women, over two thirds of all admissions are indigenous people.[4]

This paper posits that cultural eclipse is responsible for this catastrophe. It will first show how one Aboriginal tribe lived peacefully in a self-organised society prior to contact with the Europeans. Secondly, it will examine the historiography of law and legal institutions in Manitoba during the eclipse process and outline the factors that have contributed to the transformation of Manitoba prisons into storehouses for Aboriginal people. Thirdly, this paper will call to task the work of historians for largely ignoring the cultural genocide and the inequities of the Aboriginal experience, thus perpetuating historical injustices. Finally, a word of advice for harmonious cultural coexistence will be offered.

The present situation with regard to the incarceration rate of Aboriginal people in Manitoba can be deduced from the figures provided by Statistics Canada for the period 2000-2001:

---

[1] Kwesi Baffoe is currently a candidate for a doctorate degree in law at the University of Ottawa, Canada. Mr. Baffoe engaged in a professional career as a dentist in The Pas, Manitoba until 1993, when he lost his eyesight. His dentist practice of nearly twenty years included work with Medical Services Canada serving aboriginal communities across Northern Manitoba. Mr. Baffoe returned to scholarly studies in 1994 and earned his B.A. in 1996 from the University of Winnipeg, Manitoba, and his LL.B. in 2000 from the University of Manitoba. Mr. Baffoe continued his legal studies after passing the bar in 2001 in the Province of Manitoba, and earned his LL.M. in 2002 from the University of Ottawa where he is continuing his studies towards an LL.D. In the academic year of 2003-2004, Mr. Baffoe received a Fullbright Scholarship and studied at the University of New Mexico School of Law where he took various classes, including Law of Indigenous Peoples where he wrote this paper.

[2] Indian Act of 1985, R.S., cl. 1-6, § 18.

[3] A.C. HAMILTON & C.M. SINCLAIR, ABORIGINAL JUSTICE IMPLEMENTATION COMMISSION, REPORT OF THE ABORIGINAL JUSTICE INQUIRY OF MANITOBA (1999), *at*http://www.ajic.mb.ca/volume.html [hereinafter ABORIGINAL INQUIRY].

[4] *Id.*

-Admissions Remand [those arrested and held pending trial]: 6,955
-Admissions Other: 4,924
-Admissions Total: 14,780
-Percentage Change from previous year: 1.3
-Characteristics of sentenced inmates - percent female: 6
-Characteristics of sentenced inmates - percent Aboriginal: 64[5]

Although these figures only address admissions, it is safe to assume that in any given year the number of prisoners in the correctional system is the same as the total figure. The change from the previous year was 1.3 percent, which is statistically insignificant. In sum, a total of 9,459 Aboriginal persons currently reside in the provincial prison system. The situation is even worse in the federal system. With respect to the Stony Mountain Institution, the only federal institution in Manitoba, Cameron Daphne states, "Our rated cell capacity is 557, however, the current rated capacity is 506 (several cells are allocated as healthcare, suicide cells, etc). Our count today is 468 and of that 271 (approximately 57%) are of aboriginal descent."[6] Over all, the percentages have increased by 17 percent since the Aboriginal Inquiry report ten years ago. On average 9,730 Aboriginal persons live in Manitoba prisons every year. From the figures provided by the Department of Indian Affairs and Statistics Canada, it can be seen that for the same year, 2001, the number of Aboriginal persons in the Manitoba prison system is much higher than the number of Aboriginal persons living on any given reserve in Manitoba.[7]

In fact, the number of Aboriginals in the prison system is greater than the combined population of the top three largest reserves in Manitoba.[8] Furthermore, from my experience working as a dentist for twenty years in northern Manitoba, it was common for Aboriginal people living in towns and cities nearby reserves to count themselves as living on the reserves in order to maintain the benefits accrued to them as Indians. Therefore, the actual number of Aboriginal persons living on reserves may be lower than the reported number. As a result, there may indeed be more Aboriginal people in jail than those that live on the reserves north of the 49th parallel. It is for this reason that I refer to prisons as one type of a "reserve" for the Aboriginal people of the north.

I. The First Nations and Their Laws

A. Traditional Law

It is certainly true that North American Aboriginals are many people with distinct cultures.[9] It is unfortunate that the United States and Canadian governments

[5] STATISTICS CANADA, ADULT CORRECTIONAL SERVICES IN CANADA SURVEY 2000, 2001 (2002).
[6] Email from Cameron Daphne, Prairie Research Associates (Feb. 12, 2003) (on file with author).
[7] *See* STATISTICS CANADA, ABORIGINAL OFFENDER STATISTICS (2001), *at* http://www.aboriginalcanada.gc.ca/acp/site.nsf [hereinafter STATISTICS].
[8] *Id.*
[9] Noelle M. Kahanu & Jon M. Van Dyke, *Native Hawaiian Entitlement to Sovereignty: An Overview*, 17 U. HAW. L. REV. 427, 432-33, 445 (1995) (listing 499 tribal groups with federal recognition by the United States and 136 without recognition); *See also* BUREAU OF INDIAN AFFAIRS, AMERICAN

deal with Aboriginal peoples as if they were a homogenous group. As Fergus Bordewich notes, "[t]he Indian, as such, really exists only in the leveling lens of federal policy and in the eyes of those who continue to prefer natives of the imagination to real human beings."[10] Therefore, it is impossible to describe one traditional system of government for even a province like Manitoba. As a result, I have selected the Sayisi people of Tadoule Lake to represent a form of indigenous government that existed prior to European contact.

B. The Sayisi People

The Dene People of Northern Canada have lived in the territory they call "Denedeh" since time immemorial.[11] Anthropologists refer to the Dene people as the *Edthen-eldili-dene* or "Caribou eaters."[12] Their land, centered on the Mackenzie Delta, extends west into Alaska, east into Nunavut and south to the prairies. Culturally the Dene nation is divided into the Dogrib, Chipewyan, the Gwich'in and the South and North Slavey.[13] The people of Tadoule Lake are Chipewyan and are traditionally referred to as the Sayisi Dene, or the "People of the East." Their ancestral homeland stretched west from the shores of Hudson Bay and occupied a vast territory that straddles what are now northern Manitoba and the southern regions of the Northwest Territories.[14]

The Sayisi Dene had their own complex set of cultural and social institutions, customary laws, traditional methods of dispute resolution, and social control. Since this paper focuses on incarceration, only the criminology of the Sayisi people will be discussed in this paper.

C. The Criminal Justice System

Aside from the specific rules surrounding hunting and trapping there are very few rules regarding criminal behavior. Due to the familial bonds of the Sayisi camp and the communal conception of property, serious crimes are rare.[15] Traditional values are all-encompassing, allow little room for transgression and the value of the community takes precedence over personal needs. The watchful eyes of family members are everywhere, and indeed, there is no better police officer than a mother. Elders, who reach decisions by consensus, establish

INDIAN TODAY, *available at* http://www.doi.gov/bia/aitoday.html (listing 554 tribal governments with more than 250 different languages).

[10] FERGUS M. BORDEWICH, KILLING THE WHITE MAN'S INDIAN: REINVENTING NATIVE AMERICANS AT THE END OF THE TWENTIETH CENTURY 18-19 (1996).

[11] Joan Ryan, Traditional Dene Justice Project (1983) (unpublished) (on file with author). Although the survey was not complete at the time that it was given to me in 1985 by Mr. John Carton, who was the principal of the Lac Brochet Elementary School, I came across a more organized, but still incomplete version in my studies. Course Manual: Studies in Human Rights Aboriginal Law, taught by Mr. Larry Chartrand, University of Ottawa (2001).

[12] ILA BUSSIDOR & ÜSTÜN BILGEN-REINHART, NIGHT SPIRITS: THE STORY OF THE RELOCATION OF THE SAYISI DENE 11 (1997).

[13] Ryan, *supra* note 11; Chartrand, *supra* note 11, at 69.

[14] BUSSIDOR & BILGEN-REINHART, *supra* note 12, at xxiii.

[15] Ryan, *supra* note 11; Chartrand, *supra* note 11, at 109. However, some offences, such as the raping of wives were not considered a crime since women were expected to give into their husbands' sexual demands. Furthermore, incidents such as "shaken baby syndrome" were considered accidents.

the rules families enforce. Their decisions are based on a lifetime of knowledge.[16] For those who break the rules, healing circles attempt to understand transgression, resolve disputes and reconciliatory measures are preferred over punishment.[17]

However, some crimes demand punishment, and the most serious offenses generally relate to hunting and are dealt with by the gravest of sentences: banishment.[18] Minor offenses, such as stealing of food by children, are dealt with simply by holding the guilty up to ridicule and shame.[19] More serious offenses, such as the theft of an animal from a trap line, require some deliberation with respect the appropriate punishment. An offense is reported to the head of the camp, who may publicly scorn the offender, and ask the offender to admit his guilt and compensate the victim of his misdeed.[20] If the offender does not comply, a healing circle may be convened to deal with the situation. More serious punishments, such as social shunning, which falls short of actual banishment, may be meted out to those who break hunting or trapping rules; often the mistreatment of animals or selfishness with the spoils of the hunt. Other hunters will thereafter refuse to hunt with a shamed hunter. Although merely socially ostracized, the isolation of a hunter is tantamount to banishment and could, if not rescinded, lead to starvation. Nonetheless, in the vast majority of incidences, there is eventually forgiveness and reconciliation. Much of the Aboriginal justice among the Sayisi people are concerned with maintaining the peace, rather than an emphasis on punishment.

D. The Aboriginal Legal Concept of Habenquedoic

The Aboriginal legal concept of *habenquedoic* referred to a process originally translated by the Europeans as "he did not begin it, he has paid him back, quits good friends."[21] A good example is the Gitxsan law, where:

Settlements of disputes are reached and witnessed in the feast hall with payments and demonstrations of power. The breaking of a law, seen as fundamental disrespect, requires some form of compensatory payment. Compensation and public admission made at a feast symbolically redress wrongdoing. Historically, payments were made with land, songs, material wealth, or in extreme cases, a life. The results were negotiated settlements in which wrongs had been put to right.[22]

---

[16] Ryan, *supra* note 11.

[17] Personal Interviews with the tribal elders at Tadoule Lake. There were too many elders to mention, but the one who stood out the most was John Clipping, who was the Chief in 1964. I lived and fished with him and he visited me in the Pas. Others include former Chiefs Gladys Powderhorn, Moses Powderhorn, David Thorassie and Sarah Cheekie, who was also the administrator of the nursing station where I worked and lived at Tadoule Lake. Ila Bussidor, Steven Thorassie, Fred Duck, Sammy Bussidor, Joe Thorassie, Jimmy Clipping and best of all Betsy Anderson, who at the age of seventy, could well have been the oldest person in the community at the time.

[18] Sara Cheekie, *supra* note 17.

[19] Ryan describes one method of pinning the food on the child's clothes. Ryan, *supra* note 11; *See also* Chartrand, *supra* note 11, at 98.

[20] Interview with John Clipping, *supra* note 17. *But see* Ryan, *supra* note 11; Chartrand, *supra* note 11, at 98. There appears to be no public humiliation associated with this crime in the Dogrid community.

[21] J.S.Y. Henderson, *First Nations Legal Inheritances in Canada: The Mikmaq Model*, *in* CANADA'S LEGAL INHERITANCES (DeLoyd J. Guth & W. Wesley Pue eds., 2001).

[22] Val Napoleon, *Raven's Garden: A Discussion about Aboriginal Sexual Orientation and Transgender Issues* 17 C.J.L.S. 165 (2002).

Incarceration was never used as a form of punishment.[23] In contrast, a post-contact case from the Court of Assiniboia[24] is illustrative of the difference between Aboriginal and European justice on the point of incarceration.

E. Aboriginal versus European Justice

In *The Public Interest v. John Longbones*, Mr. Longbones was charged with feloniously and unlawfully cutting and wounding his wife, Annie Wells, with intent to maim and disfigure her.[25] The Sayisi Dene solution would have been banishment. His actual punishment by the Court of Assiniboia was flogging and two years imprisonment with hard labour.[26] It would be interesting to know what happened when Longbones returned to the community after his sentence. Having paid his dues for the crime, the elders were powerless to take any action without running afoul of the law themselves. John Longbones could have been angered by the humiliation and the incarceration, and could seek revenge. Furthermore, the feelings and wishes of Annie Wells were never considered by the Court. These issues, not to mention the damaging effect of the cultural transformation, are still a neglected area of study.

II. The First White Settlers in Manitoba

In order to understand the current Aboriginal situation, it is best to start at the point of contact. Although the Hudson's Bay Company (hereinafter, "the Company") is a familiar sight in the lives of Canadians, the Company's long history and the role it played in the early justice system in Manitoba is generally less well known. In the1670 Royal Charter, which created the Company, Charles II granted the Company exclusive jurisdiction over a huge swath of North America.[27] In the Charter, the Company enjoyed, "the sole Trade and Commerce of all those Seas Straights Bays Rivers Lakes Creeks and Sounds in whatsoever Latitude they shall bee that lie within the entrance of the Straights commonly called Hudson's Straights…"[28] This territory eventually would come to be known as Rupert's Land.

Under the authority of this Charter, the Company was given the power to enact any laws and regulations "not repugnant" to the laws of England that were deemed necessary to govern its servants and to maintain social order in the

[23] The closest punishment to prison is banishment. I have never come across any tribe in Canada that has had prisons.
[24] The Court of Assiniboia was set up by the Hudson's Bay Company at Fort Garry in 1835 to deal with conflicts and other judicial matters in Rupertsland.
[25] GQCA, PAM, MG2, B41 (May 16, 1871) (cases before the General Quarterly Court of Assiniboia may be found in the Hudson's Bay Company Archives, Provincial Archives of Manitoba, Winnipeg, Manitoba).
[26] *Id.*
[27] *The Royal Charter Incorporating the Hudson's Bay Company (1670)*, *in* THE CANADIAN NORTHWEST: EARLY DEVELOPMENT AND LEGISLATIVE RECORDS 135-53 (E.H. Oliver ed., 1914)[hereinafter Royal Charter].
[28] *Id.*

territory.[29] The Charter demanded that the company ensure that the "laws Constitutions Orders and Ordinances Fines and Immurements be reasonable and not contrary or repugnant but as near as may be agreeable to the Laws Statutes or Customs of this our realm …"[30]

A. Interpretation of the Company Charter

In assuming the right to grant the Company jurisdiction over this huge tract of territory, British authorities disregarded both the rights of the Aboriginal inhabitants, and the competing claims of France.[31] Consequently, under international law, the legal validity of the Company Charter was never entirely certain. Indeed, the ambiguous language of the Charter itself betrays the lack of legal certainty. For instance, use of the term "subject" raises the immediate issue of the legitimacy of its application to Aboriginal people.[32] How courts would answer this uncertainty was, and continues to be, critical for the determination of the legality of Crown authority over the former Rupert's Land territory and its Indigenous inhabitants.

In a discussion of the common law tradition in western Canada, Louis Knafla has suggested that the law making powers of the Hudson's Bay Company extended only to company employees. The First Nations peoples were not subject to the Crown and thus not bound by the provisions of the Company Charter.[33] In effect, Aboriginal people were immune from the Company's authority. Unfortunately, Knafla's theory of the immunity of the Aboriginal people has been misunderstood by many prominent historians – including Stubbs,[34] Gibson,[35] McLeod,[36] and Foster.[37] A case in point is Gibson's work. While accepting the notion of Aboriginal immunity, Gibson argues that the Company Charter created an *ad hoc sui generis* legal regime governing the Native inhabitants of Rupert's Land.[38] According to Gibson, due to the Company's very rudimentary judicial institutions, the Indigenous tribal legal systems were largely left to resolve their own disputes.

Despite Knafla's legal theory of Aboriginal immunity, the fact remains that the Hudson's Bay Company became a law unto itself. The transformation of the Company from a commercial entity to the government of Rupert's Land,

[29] D. GIBSON & L. GIBSON, SUBSTANTIAL JUSTICE: LAW AND LAWYERS IN MANITOBA 1 (1972).
[30] Royal Charter, *supra* note 27.
[31] Russell Smandych & Karina Sacca, *The Development of Criminal Law Courts in Pre-1870 Manitoba*, 24 MAN. L.J. 201, 206 (1996).
[32] *Id.*
[33] *Id.*
[34] R. Smandych & R. Linden, *Co-existing Forms of Native and Private Justice: An Historical Study of the Canadian West*, *in* LEGAL PLURALISM AND THE COLONIAL LEGACY 1-27 (K.M. Hazelhurst ed., 1995).
[35] Smandych & Sacca, *supra* note 31.
[36] R. Smandych & R. Linden, *Company Discipline in the Hudson's Bay Company, 1670-1770, Administering Justice Without the State: A Study of the Private Justice System of the Hudson's Bay Company to 1800*, 11 C.J.L.S. 21 (1996).
[37] Smandych & Sacca, *supra* note 31.
[38] GIBSON & GIBSON, *supra* note 29; Smandych & Sacca, *supra* note 31.

according to Knafla, was largely facilitated by Adam Thom, the Company's recorder.

B. Adam Thom

More than anyone else, responsibility for the incorporation of Aboriginal peoples into British colonial law fell on Adam Thom. Appointed in 1839 as Councillor of the District of Assiniboia, Thom would become "the active head of legal affairs."[39] In his pioneering study, Stubbs describes Thom as "the father of the Bench and Bar of Western Canada."[40] Likewise, Gibson admires what he considers to be Thom's sound judicial reasoning and administrative judgement.[41] Knafla, on the other hand, due to the mistreatment of Aboriginals and the Métis who found themselves before Thom's bench, is less than admiring of Thom. According to Knafla, Thom consistently exceeded his authority in a drive to marginalize Aboriginal culture and institutions. Simply put, Knafla has argued that Thom's court was governed more by racism than by rule of law.[42] Knafla argues that Thom's extension of the Company's law into Aboriginal affairs was without legal foundation.

Although not disputing Knafla's assessment of Thom's legacy, Professor Smandych, a well-known historian and scholar in sociology,[43] maintains that the Company began to impose its rule on the Aboriginal population well before Adam Thom's arrival in 1839.[44] After reviewing the historical records, Smandych's view, that Thom was more symptomatic than causative, seems to be the correct one. Despite the Hudson's Bay Charter and subsequent enabling legislation expressly granting judicial immunity to the Aboriginal people, the Hudson's Bay Company had imposed its law on Aboriginal people regardless of the legitimacy of their legal foundation.

Gibson agrees that the Company law never applied to Aboriginals, possibly because he equates the prohibition on Aboriginal persons from participating in civil actions with immunity from the law in general. Despite the fact that the Charter expressly stated that Aboriginal people were to be left to govern themselves, the Company became instrumental in the cultural eclipse process. Not wishing to recognize Aboriginal civil rights, the Company resolved disputes with the Aboriginals in terms of criminal law. Thus, Gibson confuses a lack of legal standing and rights with immunity, and interprets this "exclusion" from the justice system to mean autonomy. Smandych, on the other hand, recognises the structural dominance of the Company, but misses, or does not discuss, the most pertinent phenomena – the construction of identity which became the driving force of destruction within the cultural eclipse.

---

[39] H. Baker, Creating Order in the Wilderness: Transplanting the English Law to Rupert's Land, 1835-51 (2000) (thesis on file at the University of Manitoba).
[40] GIBSON & GIBSON, *supra* note 29, at 30.
[41] *Id.*
[42] Smandych & Sacca, *supra* note 31.
[43] Professor Smandych teaches at the University of Saskachewan and has written many books and articles related to this topic.
[44] Smandych & Sacca, *supra* note 31.

C. The Eclipse Process

Through history the state has acted as the "self" in relation to others. As observed by Robert Young, "already I know all about the 'reality' that supports History's progress: everything throughout the centuries depends on the distinction between the selfsame, the own self … and that which limits it: so now what menaces my-own-good … is the 'other.'"[45]

Charles II left the Aboriginal people to govern themselves. That is "other" in the true sense of the word. The Hudson's Bay Company ignored the autonomy of the Aboriginal people and dragged them into the Company's criminal justice system, while at the same time, excluding the Aboriginal people from the benefits of the civil side of the same legal system. This creates another notion of "other." "It is the other in a hierarchically organized relationship in which the same is what rules, names, defines, and assigns its other."[46] So when Gibson and other historians claim that the Aboriginal people were left to resolve their own disputes, it is the usual alterity that falls into the dialectical circle that allows for the subordination of the "other."[47]

D. The Assiniboia Courts

The preamble of the bylaws which reeled the Aboriginal people into the courts of Assiniboia provides, "it being found that the public tranquillity of the Settlement is greatly endangered, by the sale and traffic of beer to Indians…"[48] This preamble exaggerates good and evil, creating clear targets of the Aboriginal people. History instructs us as clearly as any primitive mythology, how to locate our friends and enemies and set down the rules for exclusion. These are all part of the process of the construction of identity.

The establishment of the Assiniboia Court by the Hudson's Bay Company in 1835 altered the political and judicial landscape of the area now called Winnipeg. It also changed the lives of the Aboriginal people in Rupert's Land. By restricting enforcement of Company law to its servants, the Charter implicitly recognised the judicial, political and social autonomy of the Indigenous peoples of Rupert's Land. This legislative restriction would have little reality on the ground. The Hudson's Bay Company began to infringe on Aboriginal sovereignty. The first attempt to legislatively regulate Aboriginal behaviour was an 1836 law prohibiting the sale and traffic of beer to Indians.

> It being found that the public tranquility of the Settlement is greatly endangered, by the sale and traffic of beer to Indians It is Resolved 7th. That such sales or traffic be prohibited from and after the 1st of July of the current year, and that any one who may sell to or traffic beer with Indians, after that date be liable in a penalty of twenty shillings, for every such offence,

[45] ROBERT YOUNG, WHITE MYTHOLOGIES: WRITING HISTORY AND THE WEST 2 (1990).
[46] *Id.*
[47] *Id.*
[48] *Minutes of the Council of Assiniboia*, *in* THE CANADIAN NORTHWEST: EARLY DEVELOPMENT AND LEGISLATIVE RECORDS 277 (E.H. Oliver ed., 1914).

> all such fines and penalties to be made applicable to Public Works.[49]

This law was broadened in 1837, ordering "all persons who give information of sale and traffic of beer with Indians, shall, upon conviction of the offender, receive one half of the penalty levied."[50] It was further resolved "that the evidence of an Indian be considered valid, and be admitted as such in all Courts of this Settlement."[51] While the objectives of this law may appear innocent and modest, the drive to regulate Aboriginal alcohol use would lead to special treatment of the Aboriginal people under the law and eventually to the criminalization of alcohol use by Aboriginal people pursuant to the Indian Act of 1876.[52] Thereafter, Aboriginal communities would be policed and controlled.

A look at the incarceration rate of Aboriginal people shows that it is highest in the area previously under the jurisdiction of the Hudson's Bay Company, specifically, Alberta, Saskatchewan and Manitoba. On average, the percentage of Aboriginal people incarcerated is sixty percent higher than the other provinces.[53]

Apart from failing to highlight the role of the Hudson Bay Company in Aboriginal criminology, and the destructive effect of the cultural eclipse, another serious sin of omission by historians, except in the case of *Capenesseweet*,[54] has been the general failure to examine the severity of the punishments handed out to Aboriginals by the courts of Assiniboia.

E. Inferior Culture - Inferior People

It is hard to explain why historians, including Gibson, make no mention of the fact that Natives were never fined in the courts of Assiniboia, but rather all that were found guilty were imprisoned. Some received lashes,[55] and one unlucky soul was hanged.[56] This phenomenon is very peculiar since impecuniousness cannot account for the court's reluctance to levy fines. Aboriginal people had money. At the very least, they could afford to buy liquor, which all too often was the reason for their appearance in court. At the time, the cost of alcohol was higher than some fines for the most serious offences.[57] Yet, the underlying causes for the harshness of the punishments imposed on Aboriginals have received scant attention. Whatever the reason, the silence did not help in solving the problem of the over-representation of Aboriginal people in institutions. It would, therefore, be

---

[49] *Id.*
[50] *Id.* at 279.
[51] *Id.* at 278.
[52] Indian Act, *supra* note 2.
[53] In Saskatchewan, Aboriginals make up 13.52% of the population, yet comprise 76% of the incarcerated population, just as in Alberta and Manitoba: 5.31% and 13.59% of the general population, respectively, as compared to 39% and 64% of the incarcerated population. These incarceration rates are in stark contrast to other provinces: New Foundland 3.74% of the total population as compared to 7% of the incarcerated population, Prince Edward Island, 10.11% as compared to 1%, Novia Scotia, 1.89% as compared to 7%, Quebec, 1.11% as compared to 2%, Ontario, 1.67% as compared to 9%, and British Columbia, 4.39% as compared to 20%. STATISTICS, *supra* note 7.
[54] *The Public Interest v. Capenesseweet*, GQCA, PAM, MG2, B41 (Aug. 14, 1845).
[55] *The Public Interest v. Neganecapo*, GQCA, PAM, MG2, B41 (May 15, 1851).
[56] Capenesseweet, *supra* note 54.
[57] *The Public Interest v. Peter Hayden*, GQCA, PAM, MG2, B41 (Feb. 19, 1846).

appropriate to dissect the one case that historians could not ignore, in order to expose the reasons for the harsh treatment of Aboriginal people.

F. The Infamous Trial of Capenesseweet

Capenesseweet is of particular importance in that it is a quintessential demonstration of cultural eclipse at its peak. First, the Court of Assiniboia did not have the jurisdiction to hear this case since it was a crime involving three aboriginal people.[58] It had nothing to do with Company business. Second, if the Canadian courts did have the right to prosecute Capenesseweet, the case should have been tried in the Courts of Upper Canada.[59] Third, Adam Thom was aware of the lack of jurisdiction, and most likely found it easier to use Aboriginal offenders in the struggle for judicial control over the territory.[60] Fourth, it shows how the European legal system utilizes Aboriginal people to the system's advantage.[61] Finally, the passing of the death sentence on Capenesseweet was unprecedented, even in the territory controlled by the Hudson's Bay Company.[62]

The murder trial of Capenesseweet was held at a Special Meeting of the General Court on August 4, 1845.[63] A "Saulteaux Indian" was convicted of murdering a rival Sioux and accidentally, with the same bullet, killing another member of his own tribe. It can be gathered from the evidence that the father of the victim, Patunga-okay-snay, had murdered the father of Capenesseweet. For unexplained reasons the Chief of the Saulteaux Nation, Black Robe, had put a bounty on the head of the victim, Patunga-okay-snay – a situation which made the victim a target for any member of the Saulteaux Nation. The judge, strangely enough, did not make this known in his introductory remarks, his summation to the jury, or at any point during the trial. Instead, the court, within four days of the incident, rushed to swear in Augustin Nolin as an interpreter for the Aboriginal who could not speak or understand English.[64]

With respect to the trial itself, four witnesses were called on behalf of the prosecution. The first, John Cire of the Red River Settlement, was in the company of the victim. He was an evangelist and it is very likely that the victim was a member of his congregation. Apart from that, his evidence was circumstantial at best. He claimed that he was "stunned by the report of a gun over his left shoulder, and on turning round observed the Indian Capenesseweet … retire two or three

[58] Smandych & Sacca, *supra* note 31.
[59] In the Act of 1803 Parliament extended the "Jurisdiction of the Courts of Justice in the Provinces of Lower and Upper Canada, to the Trial and Punishment of Person's guilty of Crimes in Rupert's Land and the Indian territories." GIBSON & GIBSON, *supra* note 29, at 32-24; Smandych & Sacca, *supra* note 31, at 207.
[60] In The Case of James Calder, GQCA, PAM, MG2, B41 (Aug. 17, 1848) (citing an order to the court clerk by Thom to record an elaborate explanation concerning his assertion of jurisdiction over a murder committed on the Peace River, which was outside Assiniboia authority).
[61] This is evidenced by the fact that four Aboriginal witnesses came forward after the incident, but only one was allowed to testify.
[62] GIBSON & GIBSON, *supra* note 29; *See also* Smandych & Linden, *supra* note 34.
[63] Capenesseweet, *supra* note 54.
[64] While not questioning the ability of Augustin Nolin to interpret the Saulteaux language, one cannot help but wonder as to how such a complex proceeding could be interpreted by a person with no legal training.

steps and draw back the gun and lay it over his left arm."[65] He further stated that the "brother of Capenesseweet, who also carried a gun, came up and lowering his gun said, 'let my Brother alone. It is not he who has killed the Indians.'"[66] The witness then claimed that he examined the gun of Capenesseweet and found it empty. The crucial point is that neither the witness nor anybody else examined the gun of the defendant's brother to find out if the brother's gun was also empty. John Cire further testified that, "some Indian women who were beside him called out denying that Capenesseweet had killed them."[67] Interestingly, the witness had sufficient doubt, he left the defendant alone and returned to Fort Garry where Mr. Grant, one of the jurors, told him and some others to "pursue & bring back the Indian Capenesseweet."[68]

The second witness, Margaret Pepin, was also in the company of the victim. This is her recorded statement: "[a]s they were proceeding towards the Fort, she saw the Indian Capenesseweet quietly fall back two or three steps after firing his gun; his gun, as he retreated, being over his left arm."[69]

It is pointless to dwell on the discrepancies in the two witness accounts, that is, the first stating that the gun was being placed on the left arm during the defendant's retreat while the second claiming that the gun was already over the left arm during the retreat. It is the similarities that are disturbing. It appears that Margaret Pepin's testimony was greatly influenced by the evidence of the first witness. According to her testimony, she was in the midst of the crowd. Capenesseweet on the other hand, according to the record, was "but near the outside of the crowd…"[70] Unless Mrs. Pepin had her eyes at the back of her head, or walked looking backwards, she could not have witnessed what she described since the victim was behind Mrs. Pepin and the bullet entered the victim from the back. The only way Mrs. Pepin could have seen the defendant fire the gun was if she were beside or behind Capenesseweet.

The third witness deserves more attention. He was Rayome, an unbaptised Saulteaux Indian. Not only was he not in the company of the victim, he and the victim were members of the same religious organization. As a matter of fact, they both had a close relationship to the bishop of that church. He stated, "on the Sunday in question he was with the Sioux at the Bishop's."[71] Most importantly, there was evidence that he did not witness the incident since he was at the front of the crowd. His testimony was hearsay at best.

The fourth witness was not at the scene either. Alexander Ross, Esq. was an Assiniboia Councilor as well as a Magistrate. He testified that Capenesseweet had stated, "I fired the gun, I did the deed but was told to do so by the Chief called 'the Black Robe' who told a number of us Saulteaux to kill the Sioux."[72]

While this seems to be a confession, Capenesseweet could be protecting his brother. This can be deduced from the following evidence. Immediately after

[65] Capenesseweet, *supra* note 54.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] Capenesseweet, *supra* note 54.
[71] *Id.*
[72] *Id.*

the incident, Capenesseweet's brother told John Cire, the first witness, that it was not Capenesseweet who killed the Indians. Furthermore he confronted those who arrested Capenesseweet saying, "kill me at once … if you do anything to my Brother, kill me; we are three Brothers and will all die together, we have no father for the Sioux killed him."[73]

Although at least three witnesses came forward to claim that Capenesseweet was not the murderer, none of those witnesses were called to testify. These witnesses were in closer proximity to the scene of the crime and were in a better position to tell the court exactly what happened. The fact that they were "Indians" was not the reason for their exclusion as Rayome, an unbaptised Saulteaux Indian was called to testify on behalf of the prosecution. It appears that Capenesseweet was condemned even before the trial, because a successful defence would have been possible. As it stands, Thom sentenced Capenesseweet to be executed and he was immediately hanged in public from a gallows erected on the walls of Fort Garry.[74] It is not difficult to imagine the feelings of the Aboriginal people when, only a few months later in the case of *The Public Interest v. Peter Hayden*, a non-Aboriginal who pleaded guilty to killing another was sentenced to a mere fine of one shilling and to give security for his good behaviour for the next two years.[75] Even if Capenesseweet had been guilty of murder, the extreme leniency of Peter Hayden's sentence provides a disturbing contrast to the execution of Capenesseweet. Offended by the manifest inequity just displayed, a colonial notable, Sir George Simpson, chastised Thom, suggesting, "every case in which you took a part was decided, not according to law or to its merits, but by your dictum."[76] It is precisely this racism towards Aboriginal people in criminal matters that has persisted throughout the history of colonial domination and to this date, evident by the high rate of incarceration of Aboriginals.

G. Repugnant Laws and Legal System

Although the murder cases were more dramatic, it was through liquor control that Adam Thom, the recorder, solidified his authority over Aboriginal affairs. The Council of Assiniboia, at the instigation of Thom, decreed in 1845 that any Indian found intoxicated should, in default of providing two sureties, "be kept in gaol, if he was not in liquor, for one calendar month, or, if he was in liquor, till he prosecute the party guilty of furnishing the means of intoxication."[77] Since most Natives were unable to furnish sureties[78] and unlikely to initiate criminal proceedings, the law guaranteed that a great number of Aboriginals would languish in the colonial jail.[79] Armed with racial laws, all Thom needed was the right

[73] *Id.*
[74] GIBSON & GIBSON, *supra* note 29, at 30; Smandych & Linden, *supra* note 34, at n.85.
[75] Hayden, *supra* note 57.
[76] Simpson to Thom, HBCA, PAM, D. 4/42, fol. 27d (July 1850).
[77] *Minutes of the Council of Assiniboia*, *supra* note 48, at 321.
[78] In this instance, sureties meant not only posting a bond, but also a guarantee that the accused would report to the court as instructed. Since Aboriginals did not have legal standing, they did not qualify for sureties.
[79] GIBSON & GIBSON, *supra* note 29, at 31-32.

institution to fill the cells with Aboriginal people who should not be in Thom's court in the first place.

Despite Thom's honoured position as founder of the court system in Manitoba, the law of his court was idiosyncratic rather than principled. It was *sui generis*, a hybrid greatly influenced by the laws of New France and the United States.[80] Enos Stutsman, a lawyer originally from the United States, was one of the first defense attorneys to practice in the Court of Assiniboia. Referring to the *McLean* trial, Stutsman commented, "I have had considerable experience in the practice of law, and I have never seen a judge acting as Crown attorney."[81] One of the jurors later described the case as a "memorable pantomime" in a letter to the Nor'Wester, and the editor of that newspaper referred to it as a "farcical burlesque."[82]

In brief, in his struggle with the Courts of Upper and Lower Canada for judicial control over Rupert's Land, Adam Thom used his power over the "weaker" Aboriginal offenders, and used racial laws in an idiosyncratic legal system to solidify his position. That served as the foundation of the prisons as reserve and displayed the darkest side of the cultural eclipse.

H. No Traditional Culture, No Common Law: Total Darkness

The Indian cases during the eclipse were not only *ad hoc*, but also raise serious issues of fundamental fairness. The case of *John Longbones*[83] illustrates this point. John Longbones was indicted for assault with intent to maim. The Indictment was read and the prisoner pleaded not guilty. According to the records, the prisoner also declined to exercise the right to challenge.

> Which Jury having heard the case for the prosecution and defence, the indictment charging him the said John Longbones did assault his wife Annie Wells and her did feloniously unlawfully cut and wound, with intent to maim and disfigure the said Annie Wells – being asked if they were agreed on their verdict and what that verdict was, said by their Foreman James Mulligan, "Guilty." The Court thereupon ordered the flog sentence to be recorded, "That John Longbones be committed to the Common jail, there to remain for the space of two years, with hard labour." The prisoner was then removed.[84]

The Assiniboia records generally, could only serve to provide future litigants with guidance as to the evidence necessary to establish certain claims. But in the records of the Aboriginal cases, even this minimal attribute of common law is lacking. To make the situation worse, no witnesses were called, no evidence recorded, and no questions asked. As it stands, the jury weighed the evidence, usually without instructions, deliberated, and reached a verdict according to its own

[80] Adam Thom received his legal training in Montreal, Quebec, which had a civil legal system, but most of the lawyers that appeared in Assiniboia courts hailed from the United States and were trained in the English common law system.
[81] DALE GIBSON, ET AL., ATTORNEY FOR THE FRONTIER, ENOS STUTSMAN 87 (1983).
[82] *Id.* at 85.
[83] *The Public Interest v. Kenney*, GQCA, PAM, MG2, B41 (May 16, 1871).
[84] *Id.*

view of justice.[85] No principles of law can be derived from these proceedings. The *Longbones* case, which was held in 1871, demonstrates the flagrant disregard for basic procedures at a period when common law in the commonwealth was well advanced. In short, contrary to historic conceptions, the Court of Assiniboia was not a court of common law, but a series of *ad hoc* deliberations.[86] This is in spite of the fact that the Company Charter demanded that the Company's laws be "not contrary or repugnant but as near as may be agreeable to the Laws Statutes or Customs of this our realm …."[87] These "farcical burlesque" proceedings continue to have profound impact on the Aboriginal peoples.[88]

III. The Eternal Return and the Criminal Injustice System

Western culture conceives of time in linear terms. If time is an arrow, then the future is open to radical new possibilities. Human beings can affect change. In other words, human agency allows the future to be free of the past. Thus, from the distance provided by progress, Western culture easily absolves its conscience from past misdeeds. If any culture is underdeveloped economically, socially or politically, then it is due to their own inability to better themselves. Yet, what if time is not like an arrow? Other cultures have different concepts of time. The Aboriginal people, for instance, perceive time in cyclical terms. The future repeats the past and freedom is conceived of in terms of an acceptance of the inevitable. History and daily life tell us that there is a degree of truth in both concepts. Time shapes our present the way a potter shapes clay, molding each moment as presented by past rotations, thus determining the form of the future. It is best to conceive of time as a spiral. At any point one is not far from a similar situation – past or future.

With regard to Aboriginal cases from the Court of Assiniboia, time is clearly a tightly bound spiral. The injustices of the past continue to haunt the present and little progress has been made. The problems that Aboriginals face in the contemporary judicial system may be classified as cultural, conceptual, socio-economic, political and systemic, all of which are products of the past and still contribute to the high incarceration rate that still exists today.

A. Sharing versus Stealing

Many current criminal issues stem from divergent cultural experiences between European and Aboriginal conceptions of crime itself. For example, the French were frequently critical of the Huron for a perceived leniency towards thieves.[89] Yet the simplicity and relative impermanence of Huron possessions, as well as the sharing of goods and housing among extended families, made the European notion of ownership alien to Huron culture.[90] Thus, an innocent act in Huron culture of, say, appropriating an object needed for a particular purpose for

[85] In my review of the case law, 71% of all cases reported no jury instructions, and 100% of the cases against Aboriginals had no jury instructions.
[86] Baker, *supra* note 39.
[87] Royal Charter, *supra* note 27.
[88] GIBSON, *supra* note 81.
[89] ABORIGINAL INQUIRY, *supra* note 3.
[90] *Id.*

the benefit of the community, could be misconstrued by Europeans as a crime against individual ownership and thus a crime against the community. To the French, the protection of personal property is the very basis of society. To the Huron, property is not the possession of individuals, but of society as a whole. Thus, taking an object without leave could at one and the same time be a crime among the French, while socially encouraged among the Huron.

Here a personal anecdote is illustrative of this point. While working at Lac Brochet, I noticed that the residents would go and get logs for heating every Saturday. Winters in the north can be brutal, but occasionally the temperature turns friendly. On one such "not so cold" Saturday, I asked one of the young men why he did not take advantage of the nice weather to fetch more logs. He responded that if he were to do so, the lazy boys would help themselves. Coming from the Ghanaian culture where we shared things, I was not surprised by the response. What is astonishing is that the logs that the young fellow was hauling were placed outside the house. Had he gone for more logs, the extra logs would be placed at the same spot. This means that the "lazy boys" will not touch what was needed – only the surplus.

Another incident from my personal experience further illustrates the lack of a strong conception of property as an individual right among Aboriginals in Canada. One day I was invited by an Aboriginal friend to go fishing. We went to the dock, and while he was putting our gear in the boat, I asked him if he owned the boat. To my surprise, he said no. "Whose is it?" I queried. "John's," he responded. "Did you ask to borrow his boat?" I wondered. "No," came the answer. So I asked, "Did he give you permission to use it?" He had not. What will happen if he decides to go fishing? He assured me that he could use another boat moored nearby. "Does that belong to him?" I asked. It did not. Confused, but trying to be smart, I asked him, "Why don't we take that one?" He agreed and started towards the other boat. Who owned that one I still do not know, and that makes me question some of the theft charges involving Aboriginal people at the Court of Assiniboia.

Similarly, in the case of *The Public Interest v. Aysassooquun*, an Aboriginal was accused of stealing "out of the stable at Upper Fort Garry one cloth Capot of the value of ten shillings."[91] The accused confessed and received a one-month jail term. However did the prisoner possess the *mens rea* necessary to have actually "stolen" the coat? The prisoner was probably a worker at the stable and on a very cold winter day borrowed the hooded coat for protection. Emphasis is being placed on this point because a large number of Aboriginal children in Manitoba are still being arrested and sent to Juvenile homes for "borrowing" their neighbours articles.

Another anecdote is apt here. I visited my brother, Dominic Baffoe in Thomson, Manitoba. He lived in an apartment complex that housed a number of Aboriginal people. He went down to retrieve an article from his truck and returned, fuming, "They stole my bicycle." I asked, "Who are they?" He told me that there were Aboriginal children playing where he parked the bicycle. I told him that if Aboriginal children took the bicycle, they would bring it back. He phoned me the following day in The Pas to tell me that I was right. The children returned the

[91] *The Public Interest v. Ayssassooquun*?, GQCA, PAM, MG2, B41 (Feb. 20, 1845).

bicycle. Had historians considered this cultural difference in their writings, a better solution to incarceration could have been found by this century.

B. Reconciliation versus the Adversary Approach

The Aboriginal tendency to avoid confrontation makes adversarial procedures particularly problematic.[92] As reported in the Aboriginal Inquiry of Manitoba, "refusal or reluctance to testify, or when testifying, to give anything but the barest and most emotionless recital of events" appears to be the result of deeply rooted cultural behaviour.[93] This behaviour is frequently misinterpreted within European culture as being indicative of untrustworthiness. For example, in *The Public Interest v. Larceny Francois*, the court held that, "an Indian who not consenting to the form of oath and not being baptized was refused by the bench."[94] A man's freedom hung, not on his actions, but on the differences between two cultures.

C. Sorry versus Not Guilty

Within the plea-making function the mechanics of the Canadian justice system are in direct conflict with Aboriginal cultural values. Aboriginal individuals, who in fact have committed the deeds with which they are charged, are often reluctant or unable to plead not guilty. To them such a plea is a denial of the truth and contrary to a basic tenet of their culture.[95] There are no words in the Aboriginal vocabulary for "guilty" or "not guilty."[96] The closest word in English to the Aboriginal concept of culpability would be "blame."[97] This conceptual gulf is problematic for the accused since it is difficult to distinguish between the *actus reus* and the *mens rea*. For many Aboriginals it is impossible to have committed a blameworthy infraction, and to be morally innocent.[98]

In *Capinesseweet*, for example, the accused voluntarily admitted that he had "done the deed."[99] However, there is no evidence that any effort was made as to what was intended when he fired the gun, or if he indeed fired the gun killing two Indians. Again, the purpose of a justice system in an Aboriginal society is to restore the peace and equilibrium within the community. The end goal is to reconcile the accused with his or her own conscience and reach an understanding between the accused and the individual or family who has been wronged. It is very easy, therefore, for an innocent Aboriginal to plead guilty in a court of law just because he feels sorry for the victim. The *mens rea* may be totally absent. In *Capinesseweet* the malfeasant was executed without a proper analysis of his state of mind at the time of the offence. Indeed, in all the Aboriginal cases between 1835 and 1851, only three pleaded not guilty, and in most cases no plea was taken.

---

[92] ABORIGINAL INQUIRY, *supra* note 3.
[93] *Id.*
[94] *The Public Interest v. Larceny Francois*, GQCA, PAM, MG2 B41 (Nov. 20, 1856).
[95] ABORIGINAL INQUIRY, *supra* note 3.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] Capenesseweet, *supra* note 54.

In the Western tradition the presumption of innocence governs. It is the duty of the prosecution to prove guilt beyond a reasonable doubt. The accused has no duty to confess. Consequently, a plea of innocence is understood to be a customary response to an accusation.[100] In Aboriginal societies, however, to deny a true allegation is seen as dishonest. Such a denial is a repudiation of fundamental standards of honour. Historians dealing with the early development of the court system have tended to overlook the importance of this cultural conflict.

D. Language Barrier

It is the language barrier that brings the cultural divide most sharply into focus. Judges have been known to become exasperated with an accused Aboriginal or witness when that individual does not respond clearly to questions.[101] The problems of language move beyond mere comprehension and create a poisonous atmosphere of intimidation. Yet very little has been done to deal with this problem. Barbara Whitford, of Portage la Prairie, told the Manitoba Aboriginal Inquiry, "I was appalled to learn that a man had been hired [as an interpreter] who does not speak any native Aboriginal language at all and it still exists…"[102]When steps are taken, the measures are often woefully inadequate. In some cases those hired to be interpreters have nothing more than a rudimentary grasp of the language.[103] The court in *The Public Interest v. Aysassooquun* was not even sure of the defendant's name and marked Aysassooquun with a question mark "[?]" documenting its incomprehension.[104] The question mark was not an artifact because it was used every time the name came up in the records. The problem of incomprehension persists to this day.

E. Systemic Problems

To understand the lack of progress in remedying blatant defects in the system, institutional and structural causes need to be analysed. How the criminal justice system deals with people from different socio-economic classes before, during, and after an arrest is of critical importance. An excellent example is the case of Donald Marshall where all the factors mentioned above came into play.[105] The end result was that an innocent Aboriginal youth was convicted of murder and imprisoned for years until the real offender came forward.

Apart from racism, profiling is a particularly insidious problem. In many ways it is a self-fulfilling prophecy. Through mathematical extrapolation it is possible to label all minorities as potential criminals. Assuming that all other things are equal between group A and B, if the police searches group A for drugs twice as frequently as group B, the police will in all probability find that a drug problem within group A that is twice greater than that of group B. On the basis of this

[100] ABORIGINAL INQUIRY, *supra* note 3.
[101] This is a common occurrence today in the legal proceedings in Thompson and The Pas.
[102] ABORIGINAL INQUIRY, *supra* note 3.
[103] *Id.*
[104] Assassooquun?, *supra* note 91.
[105] THE MARSHALL REPORT, ROYAL COMMISSION ON THE DONALD MARSHALL PROSECUTION (1989).

skewed body of evidence, the authorities could then justify stricter policing of group A, thereby creating a vicious circle of incrimination.

In *The Public Interest v. Kenney*,[106] thieves broke into the store of Alexander Sutherland. Alexander Sutherland and another investigator followed tracks from the scene of the crime. Even though they lost the tracks within the settlement they continued walking until they spotted an Indian tent. They went in and looked around, but did not find any of the stolen goods. That did not stop them from arresting the occupant. The prosecutor, without a shred of evidence, still prosecuted the prisoner. Fortunately, Kenney was found not guilty by the jury. Upon reading the cases, one gets the impression that profiling was very common during the era of the courts of Assiniboia.

IV. Confusion Amidst the Eclipse

Apart from the problems created by the cultural invasion, Adam Thom acknowledged that he had little patience for English common law. In a letter to Sir George Simpson, Thom wrote, "nothing can be more vague than the criminal law of England, as it exists, whether in theory or in practice, among us. I take my version of it from 1670 in theory; but in practice reason and equity compel me sometimes to admit modern ameliorations."[107]

Adam Thom was not talking noise when he made that statement. The case of *Christopher Vaughn Foss, Esq. v. Augustus Edward Pelly, Esq. et al.*, is illustrative of Thom's ability to take the law into his own hands.[108] This was the first major case Adam Thom tried on returning to the court after a year's leave of absence. Thom was asked to take the break to calm the unrest that his arbitrary judgements had created in the settlement. He was soon suspended since the manner in which he conducted the case demonstrated that he was no longer fit for the bench. The disgrace of the *Foss* case would bring about Adam Thom's removal from the bench. One clear demonstration of abuse of process toward a non-Aborignal and Adam Thom was off the bench. What about the blatant abuse of power and process in the cases concerning Aboriginal people? What about the destruction of the Aboriginal criminal system? Adam Thon was finally removed from the bench, but the erosion to the Aboriginal criminal culture had reached the point of no return. The only answer to the above questions is a move towards a Siamese relationship.

V. Conclusion

> *As we edge close and closer to the darkest day - Dec 21st, we will remember the hope of the eternal light and the rhythm of our planet's season as it edges for the cusp of darkness towards the hope of spring.*

[106] GQCA, PAM, MG2, B41 (May 16, 1871).
[107] Smandych & Sacca, *supra* note 31 at 234.
[108] GQCA, PAM, MG2 B41 (March 15, 1851).

– St. Joe's Communications Group[109]

All the defects in the contemporary Aboriginal justice system were present in the Court of Assiniboia. The fundamental problem is cultural eclipse. However, historians dealing with the criminal justice system of Manitoba have shied away from exposing these defects. Rather, they have presented the history of the Manitoba justice system as if the Aboriginal people were left on their own, and as if the high incarceration rate of the Aboriginal people is of their own making. Consequently, problems have festered. In the words of Stephen Cornell, "new histories are built on the foundations of the old; only with time do they transcend – or remake – their origins."[110] It is clear that previous researchers have not addressed important theoretical questions to explain legal developments that occurred in the Aboriginal territories. These include the lack of investigation of how trauma affected the Aboriginal people when they were displaced, their culture swept aside, and how these factors could have affected their behavior. In short, the internal law of the Aboriginal people is a much neglected field of study. It must be stressed that the concern of this paper is not to suggest an alternative history of the courts of Assiniboia, but rather to elaborate a different framework for thinking about its impact on the Aboriginal people. From the practical point of view it is essential to unpack the myth about Adam Thom. Despite the spectacular examples of abuse of process, most historians laud Adam Thom as the "father of the Bench and Bar of Western Canada." If anything, Adam Thom is the Father of prisons as a reserve for Aboriginals. As Savard emphasizes, the "real catastrophe is not the over-representation of this particular clientele in Canadian carceral institutions, but rather their very presence therein."[111] Unless Canadians come to terms with this fact and give back to the Aboriginal people control of their own affairs, thereby helping to unravel what Adam Thom seeded, the Siamese stage of the cultural eclipse will remain a pipe dream.

[109] Email from St. Joe's Communication Group, sjemail@sympatico.ca (Nov. 27, 2003) (on file with author).
[110] STEPHEN CORNELL, THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE 7 (1988).
[111] GIBSON & GIBSON, *supra* note 29, at 3.