

# TRANSPLANTING ENGLISH COMMON LAW AND BRITISH MILITARY ORDER AT THE FORKS IN THE 1840S

*DeLloyd J. Guth*

“Discovering the Americas” conference’s theme, begs the question: who is discovering whom? Europeans have made themselves uninvited, ocean-crossing invaders for centuries, since the 1490s or for the past eleven centuries, if you accept the Icelandic Viking claim, since Erik the Red. All such discoverers had self-admitted and total ignorance of who and what they might be discovering. There was always a blank, fearful yet hopeful state of mind about the discovered. As with all geographical explorations and discoveries, the acts and impacts are first-and-foremost about self-discovery, generated inside the discoverer’s consciousness: discovery is a state-of-mind experience. Those who are already there, the Native/Indigenous/Aboriginal peoples, do not need to be discovered. They have known for the same centuries who they are and where they belong. They equally have no idea of who their so-called discoverers are, where they come from, and why. Centuries later, in 2015, our evidence for such first contacts is both in the oral traditions of the peoples discovered, locked into their generational memories, and secondly in the written texts of the discoverers, which end up—if we are lucky—in collections such as the Archives of Manitoba, for the Hudson’s Bay Company’s discoverers since 1670. By combing both the oral and the literal evidences, we can re-visit, retrieve and reconstruct the discoveries. Discovery then is a word-metaphor for new, directly encountered knowledge and for an invasion of mutual ignorance, in the discoverer and the discovered.

From the time of Homer’s Odysseus, when wandering for a decade on his own Mediterranean discoveries after the Trojan Wars, our extant discovery evidence reports a huge variety of observed topics, about places, persons and things new to the discoverers. Most prominently, such travel literature emphasizes the twin roles of law and violence. As with Herodotus (cca. 484–425 B.C.E.), law is reported in the form of rules and customs peculiar to the cultures of the discovered peoples, the Natives (from the Latin *natio* meaning birth-place). Violence, as opposed to the law’s peaceful process, is recorded in both private acts, done by individuals within their communities, and in public acts, most notably as warfare between different communities. Physical force, or the threat thereof, replaces law’s rule-governed behaviour. Both the discoverers and the discovered confront the other’s law and the other’s violence. Each is a captive of its own history, of its own cultural law and violence. These are the two most basic observable options for conflict resolution, the one orderly and peaceful, the other physical and forceful.

Events manifesting law and violence, then, are the most frequently remembered and recorded, in the minds and on paper, of acts of geographical discoveries. Notice that, for the discoverers, law means civilizing the discovered Natives, and violence

means conquering them. Either instrument, law or violence or often both, places the burden of response on the discovered: accept replacement of their own law with the European assertion of a superior law; or retaliate, violence for violence, in what Europeans always designated “Indian” wars.

The Hudson’s Bay Company’s presence in what is now central Canada was never exclusively law or violence, civilizing or conquering. From its charter founding days in 1670, the Company was not interested or mandated by that charter in civilizing, or even baptizing as Christians, the Natives. It was all about commercial trade with them. Furthermore, as we shall see, the Company never had or desired any military means or plans when pushing their discoveries westward, northward and southward. In the early nineteenth century, when the Company claimed a need for a conquering army, it was specifically for use (defensively, of course) against the United States, for potential inter-European tribal warfare, not against their continuously discovered Natives. (Note the huge difference between the Company’s lack of any conquest strategy, or even rhetoric, and the consistent state sponsored violence in American militarizing of its so-called “Indian problem.”) This is not to say that the Hudson’s Bay Company did not bring its own law and violence to confront the law and violence of the discovered Natives.

The remainder of this plenary address will examine one major example each of the law and of the violence that the Company employed; not as any long-term policy to civilize, much less conquer, the discovered. Regarding law, we look at two failed events to see how the Company attempted to move the English law of the discoverers into the discovered lands, in 1819 and in the early 1840s. Regarding violence, we look to the arrival of the British army in 1846, not against the discovered Natives but against real or imagined American military threats of invasion from the south. That expedition to The Forks, Red River Settlement, fizzled out after one year but did secure an existing population base for what became Winnipeg.

The 1670 English royal charter created a strictly commercial trading company with delegated powers to self-govern. For the next 140 years, until the Company negotiated a settlement agreement with the 5<sup>th</sup> earl of Selkirk (1771–1820), there was no plan or desire among Company discoverers to import, impose or adapt the English common law system in the lands of the discovered Natives, mainly the Cree and Ojibway peoples.

By then the four volume *Commentaries on the Laws of England* (1<sup>st</sup> edition 1765–1769) by Sir William Blackstone (1724–1780) had become the first attempt ever to consolidate English law out of the total chaos of royal parliamentary statutes since the 1215 *Magna Carta*, the massive mess of case law judgments selectively collected, the unofficial abridgments, digests, law reports—all unauthorized records of the haphazardly gathered daily, weekly, monthly, annually heard and decided cases cluttering the various crown courts of record. No wonder that everyone immediately cited Blackstone’s *Commentaries*, in England and throughout the British Empire. By the time of the Selkirk colony at The Forks, at the end of the French Revolution/Napoleonic periods, the accumulations of six centuries of laws in England and France had finally found semblances of order in Blackstone’s *Commentaries* and Napoleon’s *Code Civil* (1804). As Blackstone said, he was identifying “...a general and comprehensive Plan of the

Laws of England ... [and] their leading Rules and fundamental Principles." His *Commentaries* and Napoleon's *Code* respectively gave substance to our modern great divide: twenty percent of the world's current countries influenced by English common law, eighty percent by continental European civil law.

Regarding the discoverers and the discovered, these two legal transplants from Europe to North America, had no immediate impacts on the Natives of the two Canadas (Lower = Quebec, Upper = Ontario). English laws were applied by the Company only to its European employees and the small parcels of lands that they actually occupied, at least until the 1840s. The rest, labelled "Indian Territories" on contemporary maps, the discoverers left to the discovered Native law.

The Hudson's Bay Company's Archive at the Archives of Manitoba, Winnipeg, contains three remarkable original documents for attempted legal transplants, England to The Forks. In a year or two before 1819, a mysterious "law code" was drafted, perhaps in London or Montreal, for the Selkirk colony at The Forks. Near its end, at folio 163 *dorsa*, the text reads: "Lord Selkirk says it would be desirable to legalize the cohabitation that frequently takes place between Settlers & Indians." Here we have clear reference to the origins of the Canadian *Metis* and, of course, to the person commissioning creation of this "code." The first third of the manuscript addresses "Of the different Officers of Justice & Judicial Proceedings," followed by criminal procedural rules and actions, ending with one page about contract law. This so-called draft "code" and the colony itself died with Lord Selkirk in 1820.

The second attempt to transplant English common law to The Forks centered on the Company's hiring in 1839 of its first lawyer and judge, Adam Thom, from Montreal. He drafted two separate "codes," one Penal and the other Civil, for the Company. Thom affirmed that he had access to "the excellent library of the garrison," which the Company had built since the 1790s and which contained the four volume set of Blackstone's *Commentaries*. That admirable library had grown by the 1840s to more than a thousand volumes, proving the Hudson's Bay Company's early commitment to transplanted English education generally. Having submitted both of his "codes" to the Company in London, where both were probably sent to the Colonial Office, Thom's two efforts hit the brick wall of bureaucracy and sunk without trace.

Thom's two attempts and the earlier Selkirk attempt failed to create a discoverer's transplant for an English legal system at The Forks. Neither acknowledged the existence of Native laws or of any Aboriginal legal system, a political reality that persists in Canadian government and culture to this day. By the 1840s, the Company had evolved a hodgepodge of laws and offices and courts that applied only to its employees and residents. A Court of Assiniboia had begun in 1836 for criminal and civil pleadings (and its extant case files, over 300 in number, are being edited and published as I speak, by my colleague Professor Emeritus Dale Gibson.) The rest of the story about English transplanted law was not consolidated until after the Confederation of Canada (1867) and replacement of the Hudson's Bay Company's sovereignty (1869) with creation of the Province of Manitoba.

And what about rule of law's nemesis at The Forks, systemic violence in its military form? The Company maintained two locations there, Upper Fort Garry at The Forks and Lower Fort Garry, 30 km. north on the Red River. Unlike the United

States, these were not military outposts. Any police powers inside the two forts was exercised by several constables employed within each wooden-walled fort, subject to the law courts. There was no army, British or Company commanded, since the 1670 charter. That simple fact, that this discovery at least was not initiated or sustained as a military conquest, remains a positive statement for both these discoverers and discovered in central and western Canada.

Therefore when the expansionist neighbour to the south began threatening annexation with the Company's territories, under rhetorical license of the slogan of "Manifest Destiny" in the United States in the 1840s, threatening violence to take control of all of North America, The Forks quickly developed a siege mentality. The U.S. annexed Texas on 29 December 1845, declared war on Mexico six months later, and then forced the Hudson's Bay Company to withdraw from its trading posts in the Oregon Territory. The alarmed British government allied with France to support Mexico's sovereignty in the California Territory.

The Company began begging for British troops in January 1846. By May 1<sup>st</sup>, a troop ship was fitted out with 300 soldiers at Cork, Ireland, for travel to Hudson's Bay, landing at York Factory and thence "to Fort Garry in Boats and Canoes" (15 May 1846). Clothing for the soldiers included: 1200 blankets, 400 great coats, 400 iron bedsteads, hammocks and bedding, and "warm cloaks for the women...strong woolen stockings or socks, and Flannel in bulk." The Sixth Royal Regiment had eighteen non-commissioned officers who were allowed to bring wives and children, six drummers for battle and 270 rank-and-file soldiers. Most challenging, fifteen tons (=33,600 pounds) of their above-mentioned individual supplies left London on Company ships. The British War Department's ships totalled 150 tons of Ordnance, 53 tons of Provisions, and 1 ton of Medical Supplies. From London and Cork they crossed the North Atlantic to York Factory, where the regiment faced an 852 km (530 miles) journey up the Hayes River, south into Lake Winnipeg, then south overland down to Fort Garry. Imagine the scale, weight and pain of this military expedition! Four men would have to carry each of the six three-pounder brass artillery, each piece weighing 344 pounds for the 852 km. trek. Each box of ammunition weighed 104 pounds. By August 1846 the men were carrying this enormous tonnage by hand, by York Factory boats (six oarsmen and a square sail, carrying three tons each) and by ox-carts down to The Forks. Simply reading the original record in 2015 tires you out! They would remain in Winnipeg for two years until the summer 1848, on guard against the Americans, not the discovered Natives. When the withdrawal began, almost the same amount of tonnage and personnel had to be hauled back to York Factory and home to Great Britain.

After this two year military occupation, the British government told the Company to attend to its own defences and fortifications, at its own expense. The American's "Manifest Destiny" was well on its way to success in Texas, Oregon and California. The discoverers were now settlers and the discovered were dispossessed and treated as best as irrelevant, at least in the Company's seven million square kilometres of central and western Canadian lands, from Upper Canada (Ontario) to the Pacific Ocean.

The Hudson's Bay Company's discoverers had promoted little interest or need to transplant an English common law system or a permanent military regime that would

govern the discovered Natives, who equally showed no eagerness to be co-opted into either regimes, of law or violence. Neither the discovered Natives nor the Company discoverers resorted to violence against each other, just as neither sought to impose its law on the other – at least not until after Confederation with Canada in 1867. For law, the stand-off remains, between an imposed discoverer's legal system and a suppressed legal system of the discovered.

At least this historical example for “Discovering the Americas” identifies some subtleties and substantial realities of human encounters that are as old as history itself.