Heart of Ice: Indigenous Defendants and Colonial Law in the Canadian North-West

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> "You thought the national flag was about a leaf, didn't you? Look harder. It's where someone got axed in the snow."
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> Margaret Atwood, *Strange Things: The Malevolent North in Canadian Literature* (Oxford: Clarendon Press, 1995), 12.

On September 25, 1885, Charles Borromée Rouleau, a French Canadian stipendiary magistrate, tried three Cree men for murder in a courtroom in Battleford, a small town in the Canadian Prairies.[1] Rouleau's court

1. Terminology can be complicated when describing Aboriginal Canadian communities. In general, both Métis (people of mixed European and First Nations heritage) and groups sometimes known as "Indian" can be accurately described as Aboriginal or Indigenous. First Nations is often preferred today when referring to "Indian" groups in Canada, although First Nations does not, usually, include the Métis. Here, I have referred to both the Métis and the Cree as Indigenous and Aboriginal, but have restricted "First Nations" to the Cree and Ojibwe. For more on terminology, see: Edward J. Hedican, *Applied Anthropology in Canada: Understanding Aboriginal Issues* (Toronto: University of Toronto Press, 2008), 5–8.

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was in the North-West Territories, which stretched from the barren islands of the Arctic Circle to the northern border of the United States, and from present-day Alaska to the eastern shores of Hudson's Bay.[2] The defendants were Charles Ducharme (alias Charlebois), an eighty-five-year-old laborer, Wawasehowein (Dressy Man), a married man of sixty-five, and Wahsahgamass (Bright Eyes), who was only eighteen. They were accused of murdering an old woman named Riskeyak, known in English as "She Wins."[3] At trial, witnesses described how, on the day of her death, Riskeyak was carried to the site of her execution wrapped in an animal skin. She knelt on the hide, surrounded by dozens of onlookers, both Cree and Euro-Canadian. Ducharme struck her on the side of the head with a green poplar stick. She fell to the ground. Wahsahgamass raised his pistol and fired; the powder scorched her bloodied hair. Wawasehowein then approached and buried his axe in her neck.[4] The

2. Colonial administrators and other Euro-Canadians consistently referred to the parties in question in this case as Cree. To the degree that the colonial archives preserve their testimony, it seems that the defendants and witnesses in this and related cases involving members of the same community also identified themselves as Cree. There is a close relationship between the Cree and Ojibwe peoples of the Canadian Prairies, whose identities Michael Witgen has described as "interlocking" and fluid. Witgen writes that Cree identity was "situational," especially in the early colonial period. See: Michael Witgen, *An Infinity of Nations: How the Native New World Shaped Early North America* (Philadelphia: University of Pennsylvania Press, 2011), 94. The Ojibwe belong to the larger sociocultural Anishinaabe group of nations. Reflecting the connection between the Cree and Anishinaabek, scholars writing about Indigenous peoples in the North-West Territories often refer to a common, "Ojibwe-Cree" or "Northern Algonkian" identity. Therefore, although I have used "Cree" throughout to describe the ethnic and linguistic heritage of the Indigenous defendants in this article, many of the scholars whose work I rely on here variously describe themselves as experts in Cree, Ojibwe, or Anishinaabe history and culture.

3. Stony Mountain Penitentiary Admissions Book, 1885, Library and Archives Canada (hereafter LAC) RG 13, T-11095. The defendants' and the victim's Cree names were given these spellings in the information filed by Alexander Stewart, the Chief of Police, which became part of their capital case file. However, English renderings of Cree names varied widely. In this article, I have used people's Indigenous names where possible, with their English names in parentheses in the first instance. I also use Indigenous names in the notes except in my references to archival documents that are organized using parties' English names. There are no other names used in the archive for Charles Ducharme except for Charlebois. See: Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A (hereafter, Ducharme Capital Case File). Other cases involving Wahsahgamass and Wawasehowein in the archive are: *R v Dressy Man* (1887), LAC RG 18, vol. 1075, in which Wawasehowein was accused of killing a North-West Mounted Police officer at Frog Lake; and Wahsahgamass' 1918 trial for another murder, this one allegedly committed at the Saddle Lake Agency. See: Re-Trial of Bright Eyes for Murder, LAC RG 10, vol. 7469, file 19118–3.

4. Testimony of François Dufresne, Ducharme Capital Case File.

prisoners did not contest this account in court.[5] A jury of six white settlers deliberated for twenty minutes before convicting the two older men of murder.[6] Their sentence was death. Wahsahgamass, perhaps because of his youth, was sentenced to twenty years' imprisonment for manslaughter.[7] But Ducharme and Wawasehowein were not hanged. Following their trial, word reached Ottawa, the Canadian capital, that Riskeyak's killing was no ordinary murder, and that she was no ordinary victim. She was a *wendigo,* a cannibal creature that stalked Cree communities in the snow and ice of the western plains.[8] Colonial officials expropriated, starved, and assimilated Canada's Indigenous peoples. They did not believe in *wendigos.* And yet, the *wendigo's* executioners lived. Why?

What follows is an account of Riskeyak's killing and the fate of her killers, Ducharme, Wawasehowein, and Wahsahgamass. Fragments of their story survive in the letters, petitions, and notes of evidence collected in the defendants' capital case file at the Canadian National Archives in Ottawa, and in the pages of Battleford's *Saskatchewan Herald*. These are colonial sources, produced during a period of military upheaval and white settler entrenchment. They hint at a tragic and fascinating episode in Cree legal history: the discovery that Riskeyak was a *wendigo,* efforts to rehabilitate her, and, finally, her judicial execution by three men charged with protecting their people from a supernatural predator. The archive also frames Riskeyak's death as a moment in the history of colonial Canadian, and British imperial, law: a cruel and mysterious crime, a flash of understanding, and the Canadian government's performance of mercy in its commutation of the defendants' sentences. These two legal processes, one Cree, one colonial, had different chronologies and different objects.

5. Rouleau's Notes of Evidence, forwarded to the minister of justice on September 28, 1885, Ducharme Capital Case File.

6. *Saskatchewan Herald,* Vol.7, No. 36, September 28, 1885, in William L. Clink, ed., *Battleford Beleaguered: 1885, The Story of the Riel Uprising from the Columns of the Saskatchewan Herald* (Willowdale, Ontario: W.L. Clink, 1984), 57–58. The jurors in the trial of Ducharme, Wawasehowein, and Wahsahgamass were Charles Phipps, Charles Atherson, Hugh Cinnamon, George H. Clouston, John Connor, and Hartley Gisbourne. See: Ibid., 57.

7. Rouleau's Notes of Evidence, forwarded to the minister of justice on September 28, 1885, Ducharme Capital Case File.

8. There are several alternative forms and spellings of *wendigo* used by various First Nations peoples. Common variants include *witiko, witigo, windigo, wintigo,* and *wittikow.* Variations on the Cree form, *wihtikow,* spelled *witigo,* are generally used in the Ducharme capital case file. However, I have adopted the most common English form—*wendigo*—throughout this article. On the linguistic origins of the term *wendigo*, see: Robert A. Brightman, "The Windigo in the Material World," *Ethnohistory* 35, no. 4 (October 1, 1988): 337–79.

The first ended with Riskeyak's execution, and the second, with her executioners' imprisonment. Cree law sanctioned Riskeyak's death. Colonial law demanded her killers' lives while doubting its right to take them.

Archival glimmers of a Cree legal history ground my understanding of what happened to Riskeyak and why. However, my quarry in this article is the colonial legalism detectable in the second, Euro-Canadian narrative.[9] Colonial sources make extrapolations about how nineteenth century Indigenous people understood their lives and their law tenuous and often presumptuous. However, it seems clear that the Cree and Euro-Canadian interpretations of the events surrounding Riskeyak's death were at odds: the Cree saw an execution; white jurors saw a murder. And yet, by November of 1885, when Ducharme's and Wawasehowein's death sentences were commuted, Euro-Canadian legal authorities in Battleford and in Ottawa had come to understand the killing as an act of self-defense, and even bravery. Officials' persistent doubts about the applicability of traditional common law understandings of mens rea and criminal responsibility to non-Britons created an unlikely, although incomplete, consonance between Indigenous and colonial interpretations of the guilt of Riskeyak's killers.

Historians have emphasized the tremendous complexity and pluralism of colonial legal orders.[10] Canadian authorities in the North-West regularly, if obliquely, acknowledged the persistence of Cree law, as Rouleau did when, after their trial, he argued that Ducharme, Wawasehowein, and Wahsahgamass believed that they were "in duty bound" to kill Riskeyak.[11] Scholars have used cases in which white settlers called for lenience on the grounds that Indigenous defendants had been acting within their community's customary norms to show how colonial invocations of legal pluralism served

9. Recent histories of the relationship between British colonial and Indigenous law in the settler empire include: Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836* (Cambridge, MA: Harvard University Press, 2010); Shelley A. M. Gavigan, *Hunger, Horses, and Government Men: Criminal Law on the Aboriginal Plains, 1870–1905*, *Law & Society* (Vancouver: University of British Columbia Press, 2012); and Shaunnagh Dorsett and John McLaren, *Legal Histories of the British Empire: Laws, Engagements and Legacies* (London: Routledge, 2014).

10. See, for example: Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge: Cambridge University Press, 2002); Christopher L. Tomlins and Bruce H. Mann, *The Many Legalities of Early America* (Durham: University of North Carolina Press Books, 2012); and Lauren Benton and Richard J. Ross, *Legal Pluralism and Empires, 1500–1850* (New York: New York University Press, 2013). Interestingly, not all contemporary commentators are convinced that Indigenous law survived the colonial encounter. Scholarly arguments for the survival and vitality of Canadian Indigenous legal traditions are still necessary, and important. See: John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

11. Rouleau to Thompson, September 28, 1885, Ducharme Capital Case File.

racist imperial ideology. Canadian historian Tina Loo writes that colonial authorities, as "cultural pluralists," often raised what some have called "cultural defenses" in their post-trial reports on homicide cases involving Indigenous defendants.[12] Loo argues that these references to the cultural and legal difference of Indigenous people bolstered colonial narratives of white supremacy and "native" savagery.[13] In *Law and Colonial Cultures,* Lauren Benton describes an 1835 case in which white settlers in New South Wales argued unsuccessfully for clemency for Aboriginal men accused of raping a white woman on the ground that rape was supposedly "customary" among their people. She sees this as an "example of advocacy of legal pluralism as a vehicle for reinforcing cultural distinctions."[14] Nineteenth-century British colonial officials and white settlers certainly did not equate acknowledging the existence of Indigenous law with recognizing its morality, sophistication, or legitimacy. For them, adherence to the common law was a badge of civilization; non-adherence, evidence of primitivism.

However, a single-minded emphasis on the role of judicial invocations of pluralism in the colonial construction of "native" inferiority obscures its place in imperial jurisprudence and the legal history of the British Empire. In the late nineteenth century, jurists across the British world

12. Tina Loo, "Savage Mercy: Native Culture and the Modification of Capital Punishment in Nineteenth-Century British Columbia," in *Qualities of Mercy: Justice, Punishment, and Discretion*, ed. Carolyn Strange (Vancouver: University of British Columbia Press, 1996), 111. Recent literature on the "cultural defense" includes: Erik Claes and Jogchum Vrielink, "Cultural Defence and Societal Dynamics," in *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense*, ed. Marie-Claire Foblets and Alison Dundes Renteln (Portland, OR: Hart Publishing, 2009), 301–19; Andrew M. Kanter, "The Yenaldlooshi in Court and the Killing of a Witch: The Case for an Indian Cultural Defense," *Southern California Interdisciplinary Law Journal* 4 (1995): 411–454; Sigurd D'Hondt, "The Cultural Defense as Courtroom Drama: The Enactment of Identity, Sameness, and Difference in Criminal Trial Discourse," *Law & Social Inquiry* 35 (2010): 67–98; R. Goel, "Can I Call Kimura Crazy—Ethical Tensions in the Cultural Defense?," *Seattle Journal of Social Justice* 3 (2004): 443; Taryn F. Goldstein, "Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a Cultural Defense," *Dickinson Law Review* 99 (1994): 141–68; Pascale Fournier, "The Ghettoisation of Difference in Canada: Rape by Culture and the Danger of a Cultural Defence in Criminal Law Trials," *Manitoba Law Journal* 29 (2002): 81; Alison Dundes Renteln, *The Cultural Defense* (New York: Oxford University Press, 2004); Deborah Woo, "Cultural 'Anomalies' and Cultural Defenses: Towards an Integrated Theory of Homicide and Suicide," *International Journal of the Sociology of Law* 32 (2004): 279–302; and Charmaine Wong, "Good Intentions, Troublesome Applications: The Cultural Defence and Other Uses of Cultural Evidence in Canada," *Criminal Law Quarterly* 42 (1999): 367–96.

13. Loo, "Savage Mercy," 110.

14. Benton, *Law and Colonial Cultures*, 198–99. The case was *R v Mickey and Muscle* [1835] NSWSupC 5.

became obsessed with the common law concept of mens rea, or fault. Criminal responsibility depended on proof that the defendant had acted deliberately, a prong of the legal test for guilt that new, deterministic medical and anthropological theories seemed to threaten. When colonial legal officials argued that an Indigenous defendant should not be held criminally responsible for his or her actions because of his or her fealty to an alternative legal order, they were intervening in a debate about responsibility and civilization that exercised the British world.[15] Pluralism discourse cast Indigenous defendants as primitive, but also as unfit subjects for judgment—and, consequently, for punishment—under the common law. Colonial officials in the British world saw a community's legal order, including their own, as a reflection of its people's nature. For them, Indigenous moral and intellectual alterity and legal alterity were sides of the same coin. Legal pluralism, as elaborated by colonial authorities, implied not only the coexistence of different legal orders, but also the coexistence of different categories of person. Pluralism and impunity were twinned in British legal-anthropological thought, and colonial officials knew it. Cases involving Indigenous defendants were sites for the elaboration of a complex and often self-contradictory colonial criminal jurisprudence.

The Ducharme case, as I call it here, exposes a genuine dilemma at the core of common law jurisprudence in the British Empire. The implications of pluralism for criminal responsibility mattered deeply to the lawyers who administered justice in British colonial courts in the late nineteenth century. At stake was the general amenability of non-Europeans to British law, and especially to common law understandings of choice, guilt, and responsibility. Pluralism was a seductive idea, but it was also dangerous. The legal difference of Indigenous people in the colonial imagination cut both ways: it justified conquest while simultaneously undermining the legitimacy of the common law, the British Empire's most potent ideological and administrative tool, as a system of colonial governance. Colonial officials invested in the notion of Indigenous legal alterity could find themselves in the uncomfortable position of arguing that the common law was neither universal nor universally just. Colonial authorities' interest in pluralism led them to debate and even to decide criminal cases according to what they imagined to be the precepts of Indigenous law and belief, even in contexts in which colonial jurisdiction was ostensibly exclusive. Occasionally, as in the case of

15. The British preoccupation with responsibility and its complex interactions with developments in anthropology, natural science, and, especially, psychiatry also extended to the United States. On the efforts of nineteenth-century American jurists to square common law notions of responsibility and determinism, see: Susanna L. Blumenthal, *Law and the Modern Mind: Consciousness and Responsibility in American Legal Culture* (Cambridge, MA: Harvard University Press, 2016).

Riskeyak's killers, this process brought colonial and Indigenous understandings of a defendant's guilt into a degree of unexpected harmony.[16] Each of the three subsequent sections situates the Ducharme case in a distinct, but related, context: the history of late-nineteenth-century Indigenous–colonial relations in the North-West, the legal history of the *wendigo*, and the history of British imperial criminal law. Together, they evoke the heterogeneous legal landscape of the Canadian Plains, and show how the *wendigo* made its way from Cree law into the common law.

In this article, I use both "Canadian" and "British colonial" to describe settler law, evoking the wider world in which the servants of empire attempted to administer the common law. This reflects my effort, as Sally Merry urged legal scholars in 1988, to "understand the particularity of small situations and the interaction of large systems at the same time."[17] The circumstances of the Ducharme case are particular to the geography, culture, and history of the North-West Territories. Charles Rouleau, the judge in the Ducharme case, was French-Canadian, a member of a community with an ambivalent relationship to Canadian Confederation and to the English-speaking majority population. Despite its unique history and significant degree of administrative autonomy, the Dominion of Canada remained, in a fundamental way, a British colony in 1885. Charles Rouleau, despite his French heritage, was sent to the North-West to apply British common law principles to the Indigenous people who lived there, just as similar men were dispatched to Madras, New South Wales, or Jamaica.[18] Situating the Ducharme case not only in the history of Western Canada but also in the broader history of law in the British Empire shows its explanatory power. The people involved did not live their lives on an imperial scale.[19]

16. This harmony was by no means complete, given the defendants' criminal sentences and prison terms.

17. Sally Engle Merry, "Legal Pluralism," *Law & Society Review* 22 (1988): 891.

18. Rouleau, like other lawyers in the British Empire, was acutely conscious of his participation in a dense professional network that extended to Britain and to other colonies. Recent British imperial scholarship that has emphasized professional and other networks includes: Zoë Laidlaw, *Colonial Connections, 1815–45: Patronage, the Information Revolution and Colonial Government* (Manchester: Manchester University Press, 2005); Linda Colley, *Captives: Britain, Empire and the World, 1600–1850* (New York: Anchor Books, 2004); Linda Colley, *The Ordeal of Elizabeth Marsh: A Woman in World History* (New York: Pantheon Books, 2007); Emma Rothschild, *The Inner Life of Empires: An Eighteenth-Century History* (Princeton: Princeton University Press, 2011); David Lambert and Alan Lester, eds., *Colonial Lives Across the British Empire: Imperial Careering in the Long Nineteenth Century* (Cambridge: Cambridge University Press, 2006); and Miles Ogborn, *Global Lives: Britain and the World, 1550–1800* (Cambridge: Cambridge University Press, 2008).

19. Unlike the subject of, for example: Colley, *The Ordeal of Elizabeth Marsh*.

They were not particularly cosmopolitan, polymathic, or well-traveled.[20] However, Riskeyak's death drew them together under the auspices of a legal order that crossed continents, and which its elaborators styled as the thread that bound the empire together.[21] The central tensions and dynamics of the Ducharme case were repeated in other places, at other times. In this sense, Rouleau's court in Battleford was an imperial space, and the story of Ducharme, Wawasehowein and Wahsahgamass became an imperial case.

Death in the North-West

1885 is a significant year in the history of Canada. That spring, First Nations and Métis rose against an increasingly rapacious Canadian state, which promoted white settlement in the West through the expropriation and pacification of the region's Indigenous peoples. Riskeyak's death was not a direct result of this rising, now known as the North-West Resistance of 1885.[22] However, her story is inextricable from the broader history of the Resistance. Riskeyak died in April, only days after members of her band led two military assaults on colonial stations. After Canadian forces put down the Resistance and captured its leaders, Ducharme, Wawasehowein, and Wahsahgamass were tried alongside the men accused of killing settlers during the conflict. Their case was heard by Rouleau, who was one of a handful of stipendiary magistrates in the Territories, and Pierre Chrysologue Pambrun, a justice of the peace and the Métis son of a famous French Canadian fur trader.[23] The Battleford press reported on the Ducharme case as if it were an unremarkable part of the Resistance's

20. For an example of a microhistorical approach to a traveller and polymath, as well as a critique of some trends in the writing of global microhistories, see: John-Paul A. Ghobrial, "The Secret Life of Elias of Babylon and the Uses of Global Microhistory," *Past & Present* 222 (2014): 51–93.

21. Richard Haldane, "The Work for the Empire of the Judicial Committee of the Privy Council," *The Cambridge Law Journal* 1 (1922): 143–55.

22. The terminology is in flux with respect to the Resistance, which is also referred to as the North-West Rebellion, the 1885 Rebellion, and the Riel Rebellion. The University of Regina's *Encyclopedia of Saskatchewan* uses "North-West Resistance." See: Stewart Mein, "North-West Resistance," in *The Encyclopedia of Saskatchewan* (Regina: University of Regina and Canadian Plains Research Center, 2007). The Gabriel Dumont Institute, a Métis educational, employment, and cultural institute based in Saskatchewan, recommends "Resistance" rather than "Rebellion." See: "1885: Rebellion or Resistance?" *Back to Batoche* (Saskatoon: Gabriel Dumont Institute, 2005–6).

23. Theodore J. Karamanski, *Fur Trade and Exploration: Opening the Far Northwest, 1821–1852* (Norman: University of Oklahoma Press, 1988), 240. Pambrun's father was Pierre Chrysologue Pambrun Sr. See: Gratien Allaire, "Pambrun, Pierre-Chrysologue," in *Dictionary of Canadian Biography*, vol. 7 (Toronto: University of Toronto/Université Laval, 2003).

legal aftermath, bookended by summaries of cases in which First Nations defendants admitted to stealing settlers' livestock during the siege of a North-West Mounted Police (NWMP) fort.[24] On the November day that Ducharme and Wawasehowein had originally been sentenced to die, eight First Nations prisoners were hanged in Battleford.

Today, Ducharme and Wawasehowein's capital case file is stored among the ones compiled for those eight men. And yet, because Riskeyak's execution sits uneasily alongside the crimes against settlers with which other First Nations defendants were charged, the case is absent from almost all histories of the Resistance. This is a missed opportunity. The Canadian government saw the 1885 Resistance as a crisis; the criminal cases against Indigenous people who participated in the uprising were, in the words of one official, "very exceptional ones."[25] The Ducharme case, in contrast, represented the usual business of colonial justice in the North-West, and exposed its inherent tensions. The men and women who appear in the archive in relation to the case provide a cross-section of the complex social world of the Plains, which included local Cree and Métis people, Catholic missionaries, Hudson's Bay Company (HBC) traders and interpreters, white settlers, mounted police, and a French-Canadian judge. It dramatizes the conflict between Indigenous and common law legal systems that defined colonial governance in the late-Victorian British Empire, and shows that the Resistance did not extinguish or resolve that conflict. Even as the Canadian judicial apparatus targeted some Indigenous defendants for brutal and didactic deaths, legal authorities, such as Charles Rouleau, insisted that the integrity of the colonial system depended on an acknowledgement of Cree tradition. The following section introduces some key moments in the history the Resistance, as well as Rouleau, Ducharme, and Wawasehowein's unlikely advocate.

In 1867, the British North America Act united Nova Scotia, New Brunswick, and the province of Canada, which then consisted of Canada East and Canada West, formerly Lower and Upper Canada (modern Québec and Ontario), creating the Dominion of Canada.[26] The new Dominion moved quickly to consolidate its power over the West. Rupert's Land and the North-West Territory, the land between Ontario and the British Columbia border beyond the Rocky Mountains, had long been administered by the HBC, which operated a network of trading

24. *Saskatchewan Herald,* Vol.7, No. 36, September 28, 1885, in *Battleford Beleaguered*, 56–58.

25. George Wheelock Burbidge to Alexander Campbell, August 10, 1885, LAC RG 13, vol. 2132, part 15.

26. Ged Martin, *Britain and the Origins of Canadian Confederation, 1837–67* (Vancouver: University of British Columbia Press, 2011), 1, 8.

posts in the region. White settlers poured into the plains, seizing land and resources from the Cree, Assiniboine, and Saulteaux First Nations and Métis peoples who lived and traded there.[27] In 1870, the HBC purported to sell these territories to the Canadian government, over Indigenous peoples' objections.[28] That year, Prime Minister John A. MacDonald celebrated the influence of white settlement on the Indigenous peoples of the North-West who were, in his view, "as a whole, quite loyal, though they would have preferred their present wild and semi-barbarous life to the restraints of civilization that will be forced upon them by the Canadian Government and the new settlers."[29]

In 1869 and 1870, First Nations and Métis communities rebelled against Canadian incursions against their sovereignty in the Red River Resistance.[30] Louis Riel, a charismatic Métis politician and self-proclaimed prophet, led the revolt.[31] The 1870 Resistance induced the Canadian government to negotiate with the Métis over individual land claims, and to create the new province of Manitoba.[32] Over the next several years, North-West Cree leaders, such as Mistahimaskwa (Big Bear) of the Fort Pitt region in the District of Saskatchewan, worked to protect their people's autonomy and to preserve their access to the dwindling buffalo herds.[33] In 1876, Treaty 6 and the Indian Act reconfigured the legal relationship between the plains First Nations and the Canadian government.[34] The so-called "numbered treaties," including Treaty 6, were negotiated between the Crown and First Nations peoples beginning in the late nineteenth century, spurred by the government's desire to secure land for white settlers.[35]

27. Gavigan, *Hunger, Horses, and Government Men*, 28.

28. John L. Tobias, "Canada's Subjugation of the Plains Cree, 1879–1885," *Canadian Historical Review* 64 (1983): 526.; and Michael Asch, *Aboriginal and Treaty Rights in Canada* (Vancouver: University of British Columbia Press, 2011), 184.

29. MacDonald to Henry Herbert, the fourth Earl of Carnarvon, April 14, 1870, TNA Add MS 60803, Carnarvon Papers.

30. The Métis described in this article were, like Louis Riel, French-speaking and Catholic. However, there were other Métis groups in the nineteenth century of Scottish and English heritage, many of whom were Protestant Christians and spoke English. Hedican, *Applied Anthropology in Canada*, 7–8.

31. MacDonald to Carnarvon, April 14, 1870, TNA, Add MS 60803, Carnarvon Papers.

32. On economic booms in the settler colonies, see: James Belich, *Replenishing the Earth: The Settler Revolution and the Rise of the Anglo-World, 1783–1939* (Oxford: Oxford University Press, 2009).

33. Tobias, "Canada's Subjugation of the Plains Cree, 1879–1885," 521.

34. For a succinct account of the changes to the legal framework of the Northwest Territories during this period, see: Gavigan, *Hunger, Horses, and Government Men*, 26–33.

35. For an exploration of the Cree perspective on Treaty 6, see: Neal McLeod, *Cree Narrative Memory: From Treaties to Contemporary Times* (Vancouver: Purich Publishers, 2007), 35–37.

Mistahimaskwa initially resisted entreaties to join Treaty 6, but the disappearance of the buffalo forced him to enter the treaty by adhesion in 1882. However, he thwarted the government's efforts to confine his band to a small, isolated reserve by moving camp regularly. He also worked to unite the region's First Nations into a powerful bloc to demand a single, large territory on the North Saskatchewan River.[36] Meanwhile, paranoia and resentment defined the relationship between government agents and Cree on the reserves.[37] The government adopted increasingly punitive policies to force First Nations to conform to Euro-Canadian fantasies of work-discipline and "civilization," often withholding rations from increasingly hungry, impoverished, and restive people.[38]

In 1885, Riel led another more widespread uprising in the North-West. The Plains Cree resisted government authority by refusing to follow orders, holding gatherings, cooperating across communities, and moving their camps without permission. The government responded with policing, false promises, and strategic starvation.[39] The Métis declared war. Shortly thereafter, violence erupted at Frog Lake, a small settlement recently established in the District of Saskatchewan, which served as an agency for the Department of Indian Affairs, a trading post, and a Roman Catholic mission.[40] Mistahimaskwa's band, then consisting of approximately 250 people, approached the settlement.[41] A group of young Cree men in Mistahimaskwa's camp, convinced that passive resistance had failed, attacked, killing nine of the twelve settlers whom they found at the agency.[42] Ten days later, after a brief siege, the Cree seized the government station at Fort Pitt, 55 kilometers southeast of Frog Lake. Fort Pitt consisted of six buildings nestled in a grassy plain near

36. Rudy Wiebe, "Mistahimaskwa," in *Dictionary of Canadian Biography*, vol. 11.

37. Report of Hayter Reed, sent to the Indian commissioner, December 28, 1883, LAC RG 10, vol. 3668, file 10644.

38. Fort Pitt Historical Society, *Fort Pitt History Unfolding: History of the Hudson Bay Post and the School Districts of White Eagle, Harlan, Frenchman Butte, Rock Bottom, Onion Lake, Fort Pitt* (Fort Pitt: Fort Pitt Historical Society, 1985), 37.

39. Tobias, "Canada's Subjugation of the Plains Cree," 536.

40. Sylvia M. Van Kirk, "Kapapamahchakwew," in *Dictionary of Canadian Biography*, vol. 11.

41. Wiebe, "Mistahimaskwa."

42. The three survivors were William Bleasdell Cameron, an HBC trader, and two white women, Theresa Gowanlock and Theresa Delaney, whose husbands were killed in the attack. Although the victims of the assault on Frog Lake are often described as white settlers, it seems that at least two were of mixed Indigenous and Euro-Canadian ancestry. Indian Agent Thomas Quinn was, according to one historian, part Sioux. Another victim, carpenter Charles Gouin, was also apparently part Sioux. Norman Fergus Black, *History of Saskatchewan and the Old North West* (Regina: North West Historical Company, 1913), 288–89.

the Saskatchewan River. Four were occupied by HBC traders and their families, and two housed a detachment of twenty-four NWMP officers.[43] Negotiations between the residents of the fort and Mistahimaskwa's men floundered, and one NWMP constable, David Lattimer Cowan, was killed. The twenty-three surviving mounted policemen escaped upriver in a rickety scow, which the HBC traders had hastily constructed in the fort's central square days before.[44]

The twenty-eight civilians who remained behind, both white and Métis, became prisoners of the Cree.[45] The prisoners were well treated during the six weeks that most would remain with Mistahimaskwa's band.[46] They were allowed to circulate fairly freely within the camp, becoming familiar and even friendly with their captors.[47] It was in the camp, in wartime, surrounded by captured HBC agents, that Ducharme, Wawasehowein, and Wahsahgamass executed Riskeyak. She died on or around April 16, 1885, only two days after the capture of Fort Pitt.[48] The intimacy between the Cree and the Fort Pitt and Frog Lake prisoners that the war precipitated ensured that Riskeyak's execution did not go unnoticed by the colonial state. Within hours of their arrival, the white and Métis outsiders learned of the sick old woman whose plight troubled the Cree. Within days, many witnessed her death. Months later, during Ducharme, Wawasehowein, and Wahsahgamass' trial for murder, they would testify about what they had seen.

In the fall after Riel's defeat, the Cree went to court. Nine members of Mistahimaskwa's band were tried for murder in late September and early October: six for crimes committed against settlers at Frog Lake, and three, Ducharme, Wahsahgamass, and Wawasehowein, for killing Riskeyak. Charles Rouleau was the judge in every case. Rouleau was a French Catholic lawyer originally from Lower Canada (Québec). He had been appointed to his post in 1883, and moving his household from Ottawa to Battleford in the dead of winter. The town of Battleford became the territorial capital of the North-West Territories in 1876. Its homes and government buildings were overshadowed by the hulking Fort Battleford,

43. Fort Pitt Historical Society, *Fort Pitt History Unfolding*, 3.

44. Ibid., 43.

45. Walter Hildebrandt, *Views from Fort Battleford: Constructed Visions of an Anglo-Canadian West* (Regina: Canadian Plains Research Centre, 2008), 73. Hildebrandt describes how, following the end of the siege of Fort Pitt, the twenty-three surviving NWMP officers took refuge at Fort Battleford.

46. The prisoners of the Cree either escaped or were released as Canadian forces closed in on them between the end of May and mid-June of 1885. Mistahimaskwa surrendered to the NWMP in June. Fort Pitt Historical Society, *Fort Pitt History Unfolding*, 48.

47. Ibid., 47.

48. Crown Prosecutor D.L. Scott to the officer commissioner NWMP, January 26 1887 (copy), LAC RG 18, vol. 1075, *R v Dressy Man*.

an NWMP garrison perched on the high ground between the Battle and North Saskatchewan rivers.[49] Battleford was surrounded by Cree reserves. The 1885 North-West census estimated that the District of Saskatchewan, where Battleford was located, then contained 6,260 "Indian" inhabitants, 2,594 Métis, and only 1,892 whites out of a total population of 10,746.[50] As discontent mounted among the Indigenous peoples of the North-West, more and more police were stationed at Fort Battleford. The NWMP complement at Battleford, the most heavily manned station in the Territory, grew from 103 men in 1884 to 197 by the end of 1885. The number of police in the whole of the North-West swelled rapidly during the Resistance. Six hundred and eight recruits joined the NWMP in 1885, nearly doubling its forces in the space of a year, to a total of 1,039 men.[51]

As settler pressure and military presence intensified in the region around Battleford, Rouleau settled into his role as a judge. He was contemptuous of the region's First Nations peoples, but proud of what he interpreted as their enthusiasm for his legal services and expertise. Early in his tenure, he complained that he could not make the Cree "understand anything pertaining to the administration of justice."[52] And yet, according to Rouleau, First Nations and Métis people seeking legal advice came to his house every day that court was not in session, even though he often had to scour the neighborhood for willing Cree interpreters.[53] In the spring of 1885, First Nations forces briefly took Battleford. White settlers, including Rouleau and his family, fled. Rouleau watched his house burn down from across the banks of the North Saskatchewan River.[54] He especially lamented the loss of his impressive library, which included British,

49. Hildebrandt, *Views from Fort Battleford*, 19–20.

50. "Census of Part of the North-West Territories of Canada, August, 1885," *Journal of the Statistical Society of London* 49 (1886): 476.

51. Annual Report of the Commissioner of the North-West Mounted Police Force, Dominion of Canada Sessional Papers, vol. 6 (1886; 8a), 13. At the end of 1884, the NWMP had a total force of 557. See: Annual Report of the Commissioner of the North-West Mounted Police Force, Dominion of Canada Sessional Papers, vol. 13 (1885; 153a), 66. In 1885, there were two divisions ("D" and "K") stationed at Battleford, each consisting of approximately 100 men. See: Royal Canadian Mounted Police, *Law and Order: Being the Official Reports to Parliament of the Activities of the Royal North-West Mounted Police Force from 1886–1887* (Toronto: Coles Publishing Company, 1973), 26.

52. Rouleau to Campbell, December 4, 1884, LAC RG 13-A-2, volume 61, file 1315. Rouleau complained about many aspects of his new life in the Northwest. See: Letters between Charles Rouleau and the Ministry of Justice, November 1883–February 1884, LAC RG 13-A-2, volume 58, file 1594.

53. Rouleau to Campbell, December 4, 1884, LAC RG13-A-2, volume 61, file 1315.

54. Wilbur F. Bowker, "Stipendiary Magistrates and the Supreme Court of the North-West Territories, 1876–1907," *Alberta Law Review* 26 (1988): 169; and Louis A. Knafla and Richard Klumpenhouwer, *Lords of the Western Bench: A Biographical History of the*

American, and Canadian treatises, law reports, and statute books that he had brought with him to the North-West.[55] As a judge, he was known for his scholarliness and penchant for punitive sentencing. His judgments consistently emphasized jurisprudence over precedent, and he had a long-standing interest in judicial reform.[56] He was also, according to one biography, "known to dislike Aboriginals."[57]

In the aftermath of the Resistance, the Canadian government rationed costs and political capital by limiting its harshest retribution to its leaders and anyone accused of murder or "outrage."[58] The Indigenous defendants accused of killing whites in what quickly became known as the "Frog Lake Massacre" were singled out for exemplary punishment. It is likely that their trials, like those of many rebels, were only for show. Britton Bath Osler, a prominent Toronto lawyer who assisted in the Canadian government's prosecution of Métis rebels in Regina, observed that another lawyer had "made a very eloquent speech in their [the Métis defendants'] favour, but it had no effect as the sentences had been fixed before the court opened."[59]

Colonial authorities like Rouleau read the anti-settler violence of the Resistance as political—as earthly and intelligible in a way that *wendigos,* in their estimation, were not. Euro-Canadian authorities did not doubt their right to punish those whom they labeled political murderers and traitors under Canadian law. Rouleau, who at the time was still waiting for his house to be rebuilt, heartily recommended the speedy execution of the First Nations defendants convicted of killing white settlers at Frog Lake.[60] Manachoos (Bad Arrow) and Kittimakegin (Miserable Man) were convicted, Rouleau crowed, on the basis of evidence "so direct and conclusive that there can be no doubt as to their guilt."[61] The proof in

Supreme Court and District Courts of Alberta, 1876–1990 (Calgary: Legal Archives Society of Alberta, 1997), 161.

55. Rouleau to Campbell, September 21, 1885, R-996, Attorney General's Files, 283 L, Saskatchewan Archives Board, Regina (hereafter SAB-Regina).

56. Rouleau was elevated to the Supreme Court of the Northwest Territories in 1887, on which he served until his death in 1901. Louis A. Knafla, "Rouleau, Charles-Borromée," in *Dictionary of Canadian Biography*, vol. 13.

57. Knafla and Klumpenhouwer, *Lords of the Western Bench*, 161.

58. Gavigan estimates that eighty-one First Nations and forty-six Métis prisoners were tried in 1885 for offenses allegedly committed in connection with the Resistance. Gavigan, *Hunger, Horses, and Government Men*, 12.

59. Osler to Burbidge, August 16, 1885, LAC RG 13, vol. 2132, part 11. See also: Patrick Brode, "Osler, Britton Bath," in *Dictionary of Canadian Biography*, vol. 13.

60. Rouleau to Campbell, September 21, 1885, R-996, Attorney General's Files, 283 L, SAB-Regina.

61. Rouleau to Thompson, October 5, 1885, Bad Arrow Capital Case File, LAC RG 13, vol. 1421, file 197A.

the case of another defendant "cannot be stronger," wrote Rouleau, "and the prisoner richly deserves also the sentence pronounced on him."[62] Louison Mongrain, who was tried for the murder of Constable Cowan at Fort Pitt, declared in court that he pitied Ducharme, "the old man who was sentenced to-day."[63] Rouleau shared Mongrain's dismay at Ducharme's conviction, but expressed his horror at Mongrain's alleged crime. "I never heard of anything more cruel than that a man who saw another lying wounded and defenceless should kill him," Rouleau chastised, before pronouncing Mongrain's death sentence.[64] Riskeyak's killing did not strike Rouleau as similarly cruel. Rouleau decried the killings of white settlers as uniquely shocking and savage. In contrast, Riskeyak's death inspired curiosity rather than horror. Because all of the parties in the Ducharme case were Cree, Euro-Canadians in the North-West, even in the wake of the Resistance, could interpret her death as a question of "superstition" and Cree tradition, rather than an attack on settler society.

Although Rouleau was not particularly moved by Riskeyak's death, the plight of her killers troubled him. In his instructions to the jury in their case, he raised the possibility that the defendants might be found guilty of manslaughter rather than murder. "The parties were not civilized," he wrote after the trial, "and may perhaps have thought it was in self-defence; in that case it would be manslaughter."[65] Ultimately, the jury found Ducharme and Wawasehowein guilty of murder, but convicted Wahsahgamass only of manslaughter. The archive does not reveal why the jury considered Wahsahgamass to be less culpable than his co-defendants. Like Ducharme and Wawasehowein, Wahsahgamass had no legal representative, and offered no defense. Wahsahgamass was accused of shooting Riskeyak after Ducharme had struck her with the stick, and before Wawasehowein approached with his axe. No evidence was offered to suggest that Wahsahgamass viewed the circumstances of the killing differently from his co-defendants or that he was coerced.[66] The best explanation for Wahsahgamass' manslaughter conviction is that

62. Ibid.

63. *Saskatchewan Herald,* Vol.7, No. 36, September 281885, in *Battleford Beleaguered*, 58.

64. Ibid. Ultimately, Louison Mongrain's sentence would be commuted to life imprisonment. William McLean and other settlers from the Frog Lake/Fort Pitt region petitioned the Department of Justice for mercy on the ground that Mongrain had assisted whites during the Resistance. There were also allegations that Wawasehowein, and not Mongrain, was responsible for killing Constable David Cowan. See: Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.

65. *Saskatchewan Herald,* Vol.7, No. 36, September 28, 1885, in *Battleford Beleaguered*, 58.

66. Thompson also made this point, that there was "no reason why a distinction should have been made between [Wahsahgamass's] case and that of his fellow prisoners," in his report on the case: Thompson's Report, November 5, 1885, Ducharme Capital Case File.

the jurors were swayed, at least in part, by Rouleau's interpretation of the case: that the defendants executed Riskeyak because they believed that she was a *wendigo.* For his part, Rouleau thought that the white jurors had convicted Ducharme and Wawasehowein of murder despite the fact that they knew that they had killed Riskeyak in a genuine act of self-defense because "the jury thought that it was time to put down such a superstition."[67] Before pronouncing Ducharme's and Wawasehowein's mandatory death sentences, Rouleau expressed his dissatisfaction with the verdict, and his intention to appeal to "a power that [was] higher than [his], to which [he would] send all the evidence."[68]

Many features of the Ducharme case seem, at least at first, to suggest that it was exceptional. The *wendigo* rumors that swirled around Riskeyak distinguished the case from the wartime killings of settlers and policemen. Riskeyak was the only Indigenous person whose killers were prosecuted at Battleford in the summer of 1885. In other ways, however, the Ducharme case opens a window into the quotidian operation of colonial criminal justice in the North-West. The case revolved around a set of dilemmas that predated the Resistance, and persisted after it. Whereas the cases against Indigenous people who had killed white settlers during the Resistance struck government officials as simple, even summary, Riskeyak's identity as a Cree woman changed the colonial political and moral calculus. Her death was not a literal assault on white settlers. Without this impetus for revenge, colonial officials could indulge their anthropological interest in Cree culture. They could allow themselves to acknowledge the jurisprudential complexity that Cree legality introduced, unbidden, into colonial criminal courts. Some officials saw the Ducharme case as an opportunity for exemplary punishment. They wanted to use the case to assert the jurisdiction of "civilized" common law over the Indigenous people of the Prairies. In that sense, the plural legal order represented by the case threatened the triumphant, chauvinistic settlerism that was then ascendant. Others, however, acknowledged the genuine difficulties that cultural and legal diversity presented for common law jurisprudence.

The Wendigo and Cree Law

Two features of the Ducharme case marked it as a particularly Cree matter in the Euro-Canadian imagination: the fact that Riskeyak and her killers

67. Rouleau to Thompson, November 27, 1885, Ducharme Capital Case File.
68. *Saskatchewan Herald,* Vol.7, No. 36, September 28, 1885, in *Battleford Beleaguered*, 58.

were Cree, and the specter of the *wendigo*. Her death was a spectacular demonstration of the vitality of Cree culture and Cree law, which drew the attention of the settler colonial state. By the time of Ducharme, Wawasehowein, and Wahsahgamass's trial, the North-West Resistance had failed in its military campaign against Canadian forces. And yet, colonial authorities could not pretend that their victory had been complete. Killings by people identified as *wendigos* and executions of accused *wendigos* were rare, but compelling. In 1885, the *wendigo* was a symbol of the legal and cultural difference of the Plains Cree in the eyes of Euro-Canadians in the North-West.

The *wendigo* has a long history. Anishinaabe scholar and storyteller Basil Johnston describes it as a kind of malevolent manitou, or spirit.[69] The *wendigo* was a giant predator that concealed itself in blizzards and in the dense, boreal forests of the subarctic. Its hunger for human flesh could never be sated; even as it feasted, it starved. It was, Johnston writes, a loathsome creature, "gaunt to the point of emaciation, its desiccated skin pulled tautly over its bones.…What lips it had were tattered and bloody from its constant chewing with jagged teeth."[70] The *wendigo* was often described as a spirit that parasitized a human being, slowly transforming its host into a monster.[71]

Johnston's contemporary account of the *wendigo* captures historical reports of the being in the Ducharme case and in similar criminal cases.[72] Today, some Indigenous scholars have understood the *wendigo*

69. Basil Johnston, *The Manitous: The Spiritual World of the Ojibway* (New York: HarperCollins Publishers, 1995), xxii. Although Johnston points out that the word "manitou" could refer to a large number of transcendent, divine qualities or beings in Algonkian tradition, and that Europeans misinterpreted the concept when they assumed it always described spirit creatures that resembled European goblins or leprechauns.

70. Ibid., 221.

71. Brightman, "The Windigo in the Material World."

72. Scholarly works describing nineteenth-century *wendigo* cases include: Sidney L. Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (University of Toronto Press, 1998); Hadley Louise Friedland, "The Wetiko (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishnabek and Saulteaux Societies—Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns" (LLM Thesis, University of Alberta, 2009); Borrows, *Canada's Indigenous Constitution*; and Shawn Smallman, "Spirit Beings, Mental Illness, and Murder: Fur Traders and the Windigo in Canada's Boreal Forest, 1774 to 1935," *Ethnohistory* 57 (September 21, 2010): 571–96. The *wendigo* was important to the mythologies of many Algonkian-speaking peoples, including the Cree, Ojibwe and Saulteaux. See: Borrows, *Canada's Indigenous Constitution*, 77. Scholars have noticed a concentration of *wendigo* cases in the late nineteenth century, and a rapid tailing off of *wendigos* in the colonial archive in the first half of the twentieth century. See: Smallman, "Spirit Beings," 587–88.

as a metaphor for greed and selfishness; as a legal category describing those who harmed themselves or their communities by violating taboos, or as an expression of mental illness.[73] Outside Indigenous communities, the *wendigo* has been described as a "celebrated" and "perennial staple" of Algonkian mythology, and also as the defining symptom of a culture-specific psychiatric disorder.[74] Beginning in the 1920s, *wendigos* became objects of Western social-scientific fascination, evidence of the purported exoticism and primitivism of First Nations peoples. In the 1970s, some scholars argued that the *wendigo* was a symbolic expression of a community's horror when a member violated taboos against cannibalism.[75] Others countered that the *wendigo* was a postcolonial construct, born out of Western racism and fear of Indigenous people who only, if ever, resorted to cannibalism in cases of extreme privation and social disorder.[76] Some explained the *wendigo* as a label applied to social outcasts and weak members of Indigenous communities in order to justify their execution.[77] In the late twentieth century, scholarship on *wendigos* focused on so-called *wendigo* "psychosis," in which a sufferer became convinced that he or she had become, or would become, a *wendigo*.[78]

The *wendigo* raises complicated questions for outsiders about what to believe. This was true for nineteenth-century Euro-Canadian authorities, and it is true for scholars now. When the Ducharme case was tried, colonial authorities assumed that the *wendigo*—at least in its supernatural manifestations—did not exist. It was what Ducharme, Wawasehowein, and Wahsahgamass *believed* about the *wendigo* that mattered in assessing their culpability. Cree legal scholar Hadley Friedland has lamented the preoccupation of historians with *wendigo* executions, and with sensational tales of monsters and cannibals.[79] She argues that this emphasis on the supernatural aspects of the *wendigo* and on establishing the "'honestly held' *belief* in the *wetiko*" detracts from the perceived legitimacy of the legal processes that the concept engaged, and the potential usefulness of these processes in addressing contemporary challenges facing Indigenous

73. Johnston, *The Manitous*, 235.; Borrows, *Canada's Indigenous Constitution*, 84.; Friedland, "The Wetiko (Windigo) Legal Principles," 39.

74. Brightman, "The Windigo in the Material World," 337.

75. Ibid.

76. Charles A. Bishop, "Northern Algonkian Cannibalism and the Windigo Psychosis," in *Psychological Anthropology*, ed. Thomas R. Williams (The Hague: Mouton, 1975), 237–48.

77. Lou Marano, "Windigo Psychosis: The Anatomy of an Emic-Etic Confusion," *Current Anthropology* 23 (1982): 385–97.

78. Brightman, "The Windigo in the Material World," 346.

79. Friedland is referring especially to the work of Sidney Harring, although she praises his sensitive engagement with the *wendigo* as part of the Cree, Ojibwe, and Saulteaux spiritual order. See: Harring, *White Man's Law*.

communities.[80] Friedland's position is persuasive, especially from a contemporary policy perspective. Instead, historians might focus their attention not on the "genuineness" of Cree belief in the *wendigo*, but on how colonial officials formulated, tested, and responded to the *idea* of this belief.[81] The controversy in the Ducharme case was about how colonial authorities tried to determine, and to judge, what the defendants thought they were doing when they executed Riskeyak. Rouleau, like many white missionaries, officials, and traders in the North-West, believed in the belief in *wendigos*.

Ducharme, Wawasehowein, and Wahsahgamass left no personal correspondence by which to gauge their motives for killing Riskeyak, or how they felt about their prosecutions for her murder. We also cannot know how they understood the relationship between Riskeyak and the *wendigo*. And, keeping Friedland's caution in mind, the nature of their personal beliefs is, in some ways, tangential to an exploration of how colonial authorities debated their guilt. However, some engagement with the question of what the members of Big Bear's band thought about Riskeyak's condition in the spring of 1885 is necessary in order to situate her execution within the realm of Cree law. The archive cannot describe exactly how they understood the *wendigo* and its place in their spiritual lives. However, contemporary Indigenous scholarship does offer some guidance in how to interpret historical *wendigo* executions. John Borrows, a scholar of Canadian Indigenous law, has argued that nineteenth century *wendigo* cases allow us to grasp a valuable and humane strand of Anishinaabe law, in which people acted collectively to evaluate, support, and, in extreme cases, remove persons who threatened the safety of the community.[82]

Who was Riskeyak, and how did *she* understand what happened to her in the spring of 1885? She appears only in traces in the colonial archive. One Cree witness in the Ducharme case, Paskwyak, said that Riskeyak's daughter reported that her mother refused to eat in the days before her death. Reverend Charles Quinney, a white captive who had witnessed the execution at Fort Pitt, described a meeting with Riskeyak during

80. Friedland, "The Wetiko (Windigo) Legal Principles," 42.

81. This pivot away from probing the genuineness of nineteenth century Indigenous belief in *wendigos* is especially important when the evidence for and against this belief is primarily contained in colonial archives, which are notoriously problematic sources for accessing non-colonial culture, spirituality, and consciousness. See: Gayatri Chakravorty Spivak, "Can the Subaltern Speak?" in *Marxism and the Interpretation of Culture*, ed. Cary Nelson and Lawrence Grossberg (London: Macmillan Education UK, 1988), 271–313.

82. Borrows, *Canada's Indigenous Constitution*, 83.

which he learned that the old woman had not slept for seventeen nights.[83] She was universally described as elderly and weak from sickness and hunger, although her precise age and the nature of her illness are not specified in the case records. Riskeyak spent her last days confined to her tent, while an anxious crowd lingered outside. She was not alone. Members of her family visited her often, as did many of the white and Métis prisoners taken at Frog Lake and Fort Pitt. François Dufresne, a Métis man who worked as an interpreter for the HBC at Fort Pitt, testified that the Cree urged him and other prisoners to check on Riskeyak. "On the day she was killed," recounted Mooswar, another Cree witness, "I heard her say that if she were not killed before sundown she would kill all the children & eat them."[84]

Riskeyak was sick for weeks before her death. Although there is no direct evidence of attempts to cure her, visits by her family and community members over seventeen days suggest some hope of improvement, even if it was ultimately dashed. Her condition and her confinement were not sudden or secret, and her community, including her daughter, seems to have agreed about the nature and danger of her affliction. These reports also suggest that Riskeyak shared her community's belief that she was slowly becoming a *wendigo.* Many witnesses averred that Riskeyak begged for death before her execution, and that she feared that her transformation into a cannibal was nearly complete. The Cree had tried, one Euro-Canadian lawyer wrote, to persuade their white captives to kill the *wendigo* for them. When they refused, Ducharme, Wawasehowein, and Wahsahgamass bravely offered to do the dangerous work.[85] Before striking her, Ducharme reportedly declared, "My friends you asked everybody to kill that woman and nobody would do it. After I strike her, don't say I struck the old woman and laugh at me."[86]

It is important to note that the impression that Riskeyak welcomed her death is only an inference. The witnesses in the Ducharme case may have had their own reasons for portraying her as a willing victim, and some details cut against this theory. For example, Dufresne testified that a prisoner, Henry Quinn, the nephew of Indian Agent Thomas Quinn who was killed at Frog Lake, was compelled to bind Riskeyak's legs before her execution.[87] The old

83. *Saskatchewan Herald,* Vol.7, No. 36, September 28, 1885, in *Battleford Beleaguered*, 57–58. Charles Quinney was the Church of England missionary at Onion Lake, who had fled with his wife to Fort Pitt to escape disturbances there. Fort Pitt Historical Society, *Fort Pitt History Unfolding*, 42.

84. Sharpe to Thompson, November 24, 1885, Ducharme Capital Case File.

85. Sharpe to Andrew Power, November 24, 1885, Charles Ducharme Capital Case File.

86. Testimony of François Dufresne, Ducharme Capital Case File.

87. Henry Quinn had arrived at Fort Pitt on April 3 from Frog Lake. He left the Frog Lake agency, where he had worked as a blacksmith, shortly before the killings. Fort Pitt Historical Society, *Fort Pitt History Unfolding*, 42.

woman was carried from her tent to the site of her execution on an animal skin; she did not walk freely to her death, even though Dufresne claimed that she had recently been strong enough to move camp on foot, although with the aid of a walking stick.[88] This use of restraints troubles the notion that Riskeyak assented to her killing. On the other hand, however, she might have been bound and carried not because she resisted her execution but because, as a *wendigo,* she was dangerous and unpredictable. It also remains possible that Riskeyak was killed because she was a drain on her community's scarce resources, or because ritually killing her in front of the captured whites was an assertion of the autonomy of Cree custom. W. Prescott Sharpe, the lawyer sent to Battleford to prosecute the Indigenous men accused of murder, wrote a letter to John Sparrow David Thompson, the Minister of Justice, that hints at an ulterior motive for Riskeyak's killing. According to Sharpe, Quinney had been briefly convinced that the old woman "had prophesied the success of the troops over the Indians and hence the feeling of the camp was against her," although he had later abandoned the theory that Riskeyak was killed out of resentment or because she was a harbinger of defeat.[89] Although other interpretations of the archival evidence are possible, I believe that Riskeyak's killing was not capricious or cruel; its violence was not inflicted to punish the victim, but to protect the community whose burden two old men and a young one had shouldered. Still, it cannot be known for certain whether or not Riskeyak really wanted to die.

Although non-Indigenous scholars routinely overlooked the legal aspect of *wendigo* executions in the twentieth century, many nineteenth century observers did not.[90] In his closing argument in the Durchame trial, Sharpe stressed that the jury must not make the mistake of thinking that Riskeyak's execution was legal. "Even if the woman were mad," he said, "there was no law for her death."[91] Sharpe's intention was, of course, to argue that Riskeyak's killing was not a judicial execution or an act of self-defense, but a murder. However, one might glean from his statements that the prosecution felt that the killing appeared, or risked appearing, to the jury as lawful. Many whites in the North-West *did* consider the execution of *wendigos* to be legally justifiable, at least among the Cree. One French Catholic priest argued that Ducharme, Wawasehowein, and Wahsahgamass had been "appointed as executioners" by a Cree community that lacked the carceral institutions to manage people like Riskeyak. "As the Indians have no jail, no asylum, no place to

88. Sharpe to Thompson, November 24, 1885, Ducharme Capital Case File.

89. Ibid.

90. Tina Loo also argues that European judges who wrote to government officials to ask for mercy for Indigenous defendants acknowledged the persistence of Indigenous law. See: Loo, "Savage Mercy," 112.

91. *Saskatchewan Herald,* Vol.7, No. 36, September 28, 1885, in *Battleford Beleaguered*, 58.

incarcerate & get rid of those dangerous beings [*wendigos*]," he wrote, "it has always been the use in their Community to kill them for the protection of the rest."[92] Rouleau's view was that the defendants in the Ducharme case had acted in self-defense and out of a misguided sense of duty. He described Riskeyak's death as a "killing" rather than as an "execution" in his official correspondence. However, he returned, again and again, to the idea that duty animated Ducharme, Wawasehowein, and Wahsahgamass, suggesting that he also saw the killing as a legal obligation, or at least as analogous to one. Even though the killing brought the defendants within the jurisdiction of colonial criminal law, legal authorities acknowledged their membership in an alternative normative order.

The Ducharme case was not the first time that Charles Rouleau and other Euro-Canadians in the North-West learned of the existence of *wendigos*. Only six years earlier, one of the most gruesome *wendigo* cases in historical memory had been tried at Fort Saskatchewan, in present-day Alberta.[93] In the summer of 1879, Kakisikutchin (Swift Runner), a Cree man, was tried for the murder of his wife, Charlotte, who was also Cree. The judge in Kakisikutchin's trial was Hugh Richardson, a white Protestant. Richardson was Rouleau's predecessor as stipendiary magistrate at Battleford, and he would try Louis Riel and his allies at Regina in the summer and fall of 1885.[94] The jury included three English-speaking Métis and four white men who were "up on the Cree language."[95] Kakisikutchin and Charlotte had been married for several years, and had six children.[96] That winter, the family had parted ways with the rest of their community on the banks of The Long Lake, about a day's walk from the nearest Hudson's Bay trading post. The Cree struggled to survive in large camps over the long and barren winters of the northern Prairies, and it was their custom to split into small, mobile groups who could seek scarce game over a larger territory.[97] No one would have been surprised when the family disappeared into the woods.

92. G. Cloutier to R. Sedgewick, Esq., December 18, 1889, Charles Ducharme Capital Case File. Cloutier also mentioned the case of a man named "Court Oreille" whose murder conviction for killing his wife, a suspected *wendigo,* had been commuted the previous spring.

93. Brightman, "The Windigo in the Material World"; Marano, "Windigo Psychosis"; Smallman, "Spirit Beings,"; and Colin A. Thomson, *Swift Runner* (Calgary: Detselig, 1984).

94. Thomas Flanagan, "Richardson, Hugh (1826–1913)," in *Dictionary of Canadian Biography*, vol. 14.

95. Richardson to James McDonald, August 20, 1879, Swift Runner Capital Case File, LAC RG 13, vol. 1417, file 138A (hereafter, "Swift Runner Capital Case File").

96. Testimony of Kis-Sie-Ko-Way, Notes of Evidence, August 6, 1879, Swift Runner Capital Case File.

97. Smallman, "Spirit Beings," 572.

Kakisikutchin reappeared, alone, in early spring. He told Charlotte's father that the family had slowly starved to death in the wilderness. Kakisikutchin "was the only one left… [H]is wife was brave she had shot herself that two of his children had died and he had buried their bodies as well as he could, and that the rest of his family had then left him."[98] But Charlotte's father could not help but notice that his son-in-law "did not look very poor or thin, or as if he had been starving."[99] In June, Kakisikutchin and three policemen set out to find the bodies of his wife and children in the forest.[100] After much cajoling, the prisoner reluctantly brought his escort to the graves. Nearby, the police found skulls, bones, hair, and clothing. In the ashes of campfires, they discovered entrails.[101] "The skulls and bones had all been boiled," said one medical man, "and the long ones appeared so broken [sic] that the marrow could be extracted."[102] Kakisikutchin had killed and eaten his family. Throughout the trial that followed, Kakisikutchin asked no questions and called no witnesses. Near the end of the proceedings, one of the policemen read out Kakisikutchin's confession. He admitted to shooting, strangling, and chopping up his wife and children with an axe.[103] They were never more than a day's walk from food and rescue. When asked if he wanted to say anything to the jury, he replied, "No. I did it."[104]

On the day of Kakisikutchin's execution, sixty First Nations and Métis people trudged through thick snow into the prison yard to watch the hanging.[105] The case made a stir among government officials in Ottawa as well. Justice Minister Alexander Campbell wrote to the Prime Minister, John A. Macdonald, to share his views on Kakisikutchin's case.[106] Judicial executions were always likely to attract crowds, but the belief that Kakisikutchin was a *wendigo* drew Indigenous people to Fort Saskatchewan that winter. Kakisikutchin's legal file contains none of the explicit discussion of *wendigos* that Ducharme's and Wawasehowein's does. His sentence was not commuted, and there is no evidence to suggest

98. Testimony of Kis-Sie-Ko-Way, Notes of Evidence, August 61879, Swift Runner Capital Case File. See also, testimony of George Washington Brazian in the same file.

99. Testimony of Kis-Sie-Ko-Way, Notes of Evidence, August 6, 1879, Swift Runner Capital Case File.

100. Testimony of George Washington Brazian, Notes of Evidence, ibid.

101. Testimony of Inspector Gagnon, ibid.

102. Testimony of George Herchmer, ibid.

103. Kakisikutchin's Testimony, ibid.

104. Ibid.

105. Edward Richard to James McDonald, February 4, 1880, Swift Runner Capital Case File.

106. Alexander Campbell to Sir John A. Macdonald, October 24, 1879, Swift Runner Capital Case File.

the authorities even considered it.[107] In this case, Cree and colonial law seem to have been in agreement about how to deal with Kakisikutchin.

Such a crime, and the rumors of supernatural monstrosity that accompanied it, would not be easily forgotten. In 1885, Charles Rouleau, even though he was new to the North-West, took the horror of *wendigos* as a given. As Hugh Richardson judged Métis and First Nations prisoners in Regina after the Resistance, he might well have thought back on the trial that he had presided over at Fort Saskatchewan.

The Problem of Malice

In common law jurisprudence, the mental element of guilt inheres in the intentionality of a defendant's conduct, not his or her motives. Without a guilty mind—mens rea—a person's act is not a crime.[108] Nineteenth century British criminal law distinguished between accidents and intentional harm, and also between defendants who were mentally capable of choosing their acts, and those, like infants, the insane, or even the irate, who were not.[109] American jurist Oliver Wendell Holmes famously captured the reason for the mens rea requirement: "Even a dog distinguishes between being stumbled over and being kicked."[110] Mens rea is usually imagined as a cognitive, rather than an emotional, quality, based on a liberal understanding of human beings as fundamentally autonomous and rational.[111] The

107. This may be because both Cree and Canadian law would have punished Kakisikutchin with execution for his crimes. Gavigan suggests that the case might also indicate a "shared conundrum with respect to mental illness" among colonial and Indigenous groups. See: Gavigan, *Hunger, Horses, and Government Men*, 63.

108. Henry Campbell Black, *A Dictionary of Law: Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* [1891] … (New York: The Lawbook Exchange, Ltd., 1991), 31. On the importance of mens rea in the common law from the medieval period, and even before it had acquired a legal definition separate from that of a criminal act or *actus reus*, see: Elizabeth Papp Kamali, "Felonia Felonice Facta: Felony and Intentionality in Medieval England," *Criminal Law and Philosophy* 9 (2013): 1–25. Although it is important to note that the majority of crimes in English law impose strict liability, in which a person's intention does not have to be proved. Major crimes, however, such as murder, rape, and robbery, embody what Andrew Ashworth calls the "paradigm fault requirement" of intention. Andrew Ashworth, *Principles of Criminal Law*, 6th ed. (Oxford: Oxford University Press, 2009), 136–37.

109. In strict liability offenses, the mens rea of the defendant is not essential for a conviction.

110. Oliver Wendell Holmes, *The Common Law* (The Lawbook Exchange, Ltd., 1881) [1881] (Clark, NJ: The Lawbook Exchange, 2005), 3.

111. Ashworth, *Principles of Criminal Law*, 155.

Victorians were famously committed to a vision of the ideal self as controlled, independent, and self-contained.[112] A clean conscience was not a defense to murder. Except, of course, when it was.

Three days after the Ducharme trial, Rouleau wrote to John Sparrow David Thompson, the newly appointed minister of justice, in Ottawa. Rouleau explained that he disagreed with the jury's decision to convict Ducharme and Wawasehowein of murder. "Taking into consideration their degree of civilization; the impression under which they were, that they could and were in duty bound to do away with their victim, I think," he wrote, "that in law the degree of malice was not sufficient to justify the Jury to bring a verdict of murder."[113] He argued that the defendants' low "degree of civilization" was proved by their belief in *wendigos* and in their duty to execute them. Colonial legal officials such as Rouleau and Thompson wanted the justice they dispensed to be, and to appear to be, just. They also hoped to assert the supremacy of British criminal law, especially in cases of killings.[114] A dead body was a challenge to state authority, but also an opportunity for a colonial government to meet that challenge with a performance of forbearance, administrative competence, and justice.[115] By the end of the nineteenth century, the primary project of British rule had mutated from conquest to pacification. The norms of judicial punishment had, in Foucauldian terms, shifted from spectacle to discipline. Criminal law had to be supreme, but it also had to appear to be just.[116] The twin projects of pacifying Indigenous peoples through the imposition of colonial criminal law and performing the mercy and justice of colonial governance, although generally mutually reinforcing, could clash in homicide cases involving Indigenous defendants.

112. See: John R. Reed, *Victorian Will* (Athens: Ohio University Press, 1989); and Roger Smith, *Free Will and the Human Sciences in Britain, 1870–1910* (London: Pickering & Chatto, 2013).

113. Rouleau to Thompson, September 28, 1885, Ducharme Capital Case File.

114. On this dynamic in colonial Kenya, see: Katherine Luongo, *Witchcraft and Colonial Rule in Kenya, 1900–1955* (Cambridge: Cambridge University Press, 2011), 104.

115. On the colonial politics of capital punishment, see: Stacey Hynd, "Killing the Condemned: The Practice and Process of Capital Punishment in British Africa, 1900–1950s," *The Journal of African History* 49 (2008): 403–18.

116. Michel Foucault (trans. Alan Sheridan), *Discipline and Punish: The Birth of the Prison*, (New York: Vintage Books, 1977), 8. In his 1975 essay in *Albion's Fatal Tree*, Douglas Hay argues that the performance of mercy through pardoning and the exercise of wide-ranging discretion in criminal cases were planks in an elite campaign to terrorize the working classes through the instrument of the criminal law in eighteenth century England. There are important parallels to the working of criminal law in the empire. See: Douglas Hay, "Property, Authority and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, 2nd ed. (London: Verso, 2011), 17–64.

From the middle of the nineteenth century, common law judges around the world increasingly confronted cases that hinged on a person's capacity to be held responsible for his or her actions.[117] Criminal cases involving Indigenous defendants were likely to raise mens rea questions. Occasionally, Indigenous defendants succeeded in convincing British authorities that they had committed their crimes while insane.[118] However, most defendants, whether in Britain or in the empire, could not meet the notoriously strict common law definition of insanity.[119] Despite their inability to mount a convincing insanity defense, British authorities could be reluctant to apply common law punishments to Indigenous defendants. Many Victorian scientists and social theorists denigrated supposedly "savage" people for their weak wills, ignorance, and uncontrollable passion. Indigenous people seemed, if forced to live under the authority of a British legal system, to have little chance of *not* committing a crime. In *The Pathology of Mind* (1895), English psychiatrist Henry Maudsley described the belief among some Victorians that the non-European peoples of the empire were doomed to fall afoul of "civilized" prohibitions against violence: "Being the fit product of his time and place, and his immoral doings the right things for him to do then and there, he [the 'savage'] is necessarily unfitted to feel, think, and act in the vastly more complex conditions of civilized existence, where his natural ways and doings necessarily cause him to be treated as noxious vermin. [A] low savage in a civilized society must needs fare almost as badly as a carnivorous animal would fare in a land of herbivorous animals which it was forbidden to eat."[120]

Could it be just, wondered Rouleau, among other colonial authorities, to expect the same degree of self-control, thoughtfulness, and forbearance from

117. Works on nineteenth century criminal responsibility cases include: Charles E. Rosenberg, *The Trial of the Assassin Guiteau: Psychiatry and the Law in the Gilded Age* (Chicago: University of Chicago Press, 1968); Joel Peter Eigen, *Witnessing Insanity: Madness and Mad-Doctors in the English Court* (New Haven: Yale University Press, 1995); Richard Moran, "The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield (1800)," *Law and Society Review* 19 (1985): 487–519; Lindsay Farmer, "Criminal Responsibility and the Proof of Guilt," in *Modern Histories of Crime and Punishment*, ed. Lindsay Farmer and Markus Dirk Dubber (Stanford: Stanford University Press, 2007), 42–65; Thomas Andrew Green, *Freedom and Criminal Responsibility in American Legal Thought* (Cambridge: Cambridge University Press, 2014); and Nigel Walker, *Crime and Insanity in England: The Historical Perspective* (Edinburgh: Edinburgh University Press, 1968).

118. *Queen Empress v Lakshman Dagdu* (1886), Bombay Law Reports, 512–19.

119. *M'Naghten's case* [1843] UKHL J16 (June 19, 1843).

120. Henry Maudsley, *The Pathology of Mind: A Study of Its Distempers, Deformities, and Disorders* (London: Macmillan and Co., 1895), 29.

"savages" as the law demanded from civilized men? In Rouleau's view, the Cree law that demanded Riskeyak's execution exerted an emotional and moral pull over Ducharme, Wawasehowein, and Wahsahgamass that they, by dint of their primitivism, could not reasonably be expected to resist. Colonial legal authorities, Rouleau argued, should acknowledge the Cree defendants' weakness and credulousness by finding them guilty of manslaughter, not murder. Other officials parried that the only way to bring civilization and justice to Britain's colonial subjects was to declare them guilty and subject to punishment, even if this involved, perversely, abandoning traditional understandings of mens rea and guilt.[121] Often, authorities' solution to this dilemma was to mitigate a harsh sentence after it had been passed, rather than to encourage judges or jurors to deviate from the strict application of English law at trial. By writing to Thompson, Rouleau hoped to secure this kind of executive mercy for Ducharme and Wawasehowein.

Rouleau's argument that Ducharme and Wawasehowein lacked the malice necessary for a murder conviction was initially met with skepticism in Ottawa. Thompson, the Minister of Justice, had been appointed only days before Rouleau's letter arrived.[122] Thompson was a former attorney-general of Nova Scotia, and would later become the architect of the Canadian Criminal Code of 1892. He also served as prime minister of Canada from 1892 until his death in 1894 of a heart attack, which he suffered during lunch at Windsor Castle.[123] But in the fall of 1885, Thompson was new to Ottawa and to Cree culture. His primary objection to Rouleau's argument for clemency was technical.[124] Rouleau told the jury that Ducharme and Wawasehowein needed to have killed Riskeyak with "actual malice" in order to be guilty of murder. Malice, often used interchangeably with intention in criminal law, refers to the idea that a defendant must have intended to kill or grievously harm the victim in order to be considered guilty of murder. "Actual malice," on the other hand, moves away from this legal definition toward a more colloquial one, with connotations of wickedness and ill-will.[125] The defendants in the Ducharme case, in Rouleau's view, had acted out of a sense of duty, not moral turpitude.[126] However, Thompson rejected

121. On exceptions under English law, and on common law as a tool of civilization, see: Damen Ward, "A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia," *History Compass* 1 (2003): 1–24.

122. Peter Busby Waite, "Thompson, Sir John Sparrow David," *Dictionary of Canadian Biography*, vol. 12.

123. Ibid.

124. Rouleau to Thompson, November 27, 1885, Ducharme Capital Case File.

125. Oliver Wendell Holmes Jr., "Privilege, Malice, and Intent," *Harvard Law Review* 8 (1894): 2.

126. Rouleau to Thompson, September 28, 1885, Ducharme Capital Case File.

Rouleau's suggestion that malevolence was required for a murder conviction.[127] "It is perfectly clear from the evidence," Thompson wrote, "that the condemned men fully intended to take the life of their victim, and that they took her life without any lawful excuse or justification. This in law amounts to murder. The design to do such an act is malice. A felonious act done wilfully is done, in the eye of the law, maliciously."[128] Thompson did not contemplate the possibility that Cree law might provide a "lawful excuse or justification" for the killing. To him, the fact that Riskeyak was killed deliberately was the only proof he needed of her killers' mens rea.

Thompson also had political reasons to rejected Rouleau's plea for clemency. He had no patience for what he viewed as mere superstition.[129] To him, the strangeness of Cree culture—and the Resistance to British colonial norms that it represented—called for the harsh imposition of imperial criminal law, not leniency. "If the Indians in that Territory are to be made amenable to the law at all," he wrote, "it seemed to him [Thompson] that a case of very cruel and deliberate murder of an inoffensive old woman was a crime calling for exemplary punishment."[130] The civilizing mission had acquired a new urgency in the wake of the Resistance. At a meeting of the North-West Council, the governing body of the territory, Edgar Dewdney, the Lieutenant-Governor of the North-West Territories, mourned the demise of "the fond hope which Canada had so long entertained of being able to manage the large number of Indians resident in these Territories, without a resort to arms." Some Indigenous people had remained loyal to the government during the Resistance, and "this loyalty was apparently in the ratio in which they had advanced in civilization under the teachings of good Missionaries and able officials."[131] Riskeyak's death seemed to offer the Canadian government an opportunity to flex its legal authority over the Cree, and to continue its efforts to transform its unruly Indigenous subjects into loyal, civilized ones.[132]

127. Thompson's Report, November 5, 1885, Ducharme Capital Case File.

128. Ibid.

129. Ibid.

130. Ibid.

131. Minutes of the North-West Council, November 5, 1885, North-West Territories Government, Record Books, Minutes of the Council, NWT, 1877–1886., Vol. II, 1879–1885, Saskatchewan Archives Board, Saskatoon (hereafter SAB-Saskatoon).

132. Bonny Ibhawoh describes a similar colonial crackdown on what he calls "medicine murders," that is, executions related to accusations of witchcraft, in mid-twentieth-century East Africa. These cases increasingly resulted in capital sentences, intended to send a political message to Indigenous peoples about the strength and inflexibility of colonial justice. Bonny Ibhawoh, *Imperial Justice: Africans in Empire's Court* (Oxford: Oxford University Press, 2013), 95.

"The North" is, as Canadian author Margaret Atwood writes, "a state of mind" as much as it is a place.[133] To many Euro-Canadians, the North-West was both tantalizing and terrifying: a wild, cold, hostile expanse upon which to project their fantasies. The Indigenous peoples of the North-West mirrored their environment in the colonial imagination: ostensibly conquered, but not subdued. The Ducharme case captures this colonial admixture of arrogance and uncertainty on the frontier. In the nineteenth century, colonial governments questing after what Lisa Ford has called "perfect settler sovereignty," territorial jurisdictional supremacy symbolized by "the legal obliteration of Indigenous customary law," sought to assimilate Indigenous peoples and to reconcile them to colonial legal authority, especially on the frontier.[134] But this process often proved expensive, difficult, and politically incendiary. For example, until 1885, there were never more than three stipendiary magistrates employed in the whole of the North-West Territories; in 1885, a fourth was added to assist with the legal work churned up by the Resistance.[135] Magistrates like Charles Rouleau rode such enormous circuits, often by sleigh, that it was not unusual for trials to be delayed for half a year while judges made their way to far-flung communities.[136] With few personnel and limited resources, the dream of perfect settler sovereignty was one perpetually deferred.

There were also barriers to the subjection of Indigenous peoples to colonial law that even men, money, and guns could not overcome. In common law criminal courts, colonial authorities were called upon to interpret the subjectivity of Indigenous defendants—their thoughts, feelings, and beliefs—in order to establish their guilt. Officials often struggled to reconcile their own belief in the inferiority and particularity of First Nations persons with the requirements of a purportedly universal law.[137] The problems and dynamics that the Ducharme case highlights were repeated across the empire. British colonial authorities who fretted about witch doctors and "lion men" in East Africa, about *obeah* in the West Indies, about "payback" in Australia, or about *sati* in India would have found the legal

133. Margaret Atwood, *Strange Things: The Malevolent North in Canadian Literature* (Oxford: Clarendon Press, 1995), 8.

134. Ford, *Settler Sovereignty,* 2. Colonial administrators in India used violence and aggressive criminal law to similar ends, although with less success, on the Indian frontier. See: Elizabeth Kolsky, "The Colonial Rule of Law and the Legal Regime of Exception: Frontier 'Fanaticism' and State Violence in British India," *The American Historical Review* 120 (2015): 1218–46.

135. Bowker, "Stipendiary Magistrates," 270.

136. Ibid., 267–68.

137. See: Gavigan, *Hunger, Horses, and Government Men*, 125.

problems raised in *wendigo* cases familiar.[138] Colonial authorities across the empire routinely tolerated or even encouraged the persistence of Indigenous legal traditions in civil cases, especially in matters inter se.[139] However, this flexibility did not, in general, extend to violence; when it came to crime, nineteenth-century Britons came increasingly to believe that the common law was the only legitimate and ethical legal option. And yet, in many criminal cases, imperial authorities noted the persistence of what they sometimes described as systems of customary law, and at other times as religious or spiritual traditions, despite efforts of the colonial state to assert its own, increasingly exclusive jurisdiction over practices that its officials saw as violent, dangerous, or disruptive.[140] Officials acknowledged the moral jurisdiction that Indigenous traditions continued to hold over Indigenous people. Even if the colonial state aggressively imposed its own law in every criminal matter, in every instance of violence, legal authorities still faced the problem of assessing a defendant's guilt. If defendants acted justly, even selflessly, by the standards of their own community's law, should they be treated as if they were deliberate, or malicious, wrongdoers? If a person didn't *feel* guilty, was it possible that he or she was not?

At first, Thompson made little of the mentions of cannibalism in the notes of evidence that Rouleau sent him. The notes were cursory, and included the testimony of only two witnesses.[141] However, given the Kakisikutchin case, the passing mention of a *wendigo* would have given a North-West official pause. Thompson, who had never sat in a courtroom in the North-West, lacked the necessary context to know that allegations of cannibalism among the Cree were taken seriously, by both Cree and whites alike. Rouleau was not prepared to acquiesce. Despite his ambivalence about the Indigenous peoples of the North-West, Rouleau clearly considered his

138. Luongo, *Witchcraft and Colonial Rule in Kenya*; Ibhawoh, *Imperial Justice*; William J. Cannon, "The Lion-Men of Tanganyika," *The Police Journal* 32 (1959): 28–45; Diana Paton, *The Cultural Politics of Obeah: Religion, Colonialism and Modernity in the Caribbean World*, *Critical Perspectives on Empire* (Cambridge: Cambridge University Press, 2015); Mark Finnane, "'Payback', Customary Law and Criminal Law in Colonised Australia," *International Journal of the Sociology of Law* 29 (n.d.): 293–310; and Lata Mani, *Contentious Traditions: The Debate on Sati in Colonial India* (Berkeley: University of California Press, 1998).

139. It is important to note, however, that British efforts to codify or to formalize Indigenous law in a plural jurisdictional context often resulted in the wholesale reformulation of the local traditions in questions. See: Bernard Cohn, *Colonialism and Its Forms of Knowledge: The British in India* (Princeton: Princeton University Press, 1996).

140. On British efforts to assert a monopoly over judicial violence and the punishment of crime, see: Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (Oxford: Oxford University Press, 1998).

141. Rouleau's Notes of Evidence, Ducharme Capital Case File.

supposed familiarity with the Cree and with the *wendigo* to be a mark of his competence as a judge on the colonial frontier. Officials like Rouleau and other whites in the North-West were intermediaries between the Cree and the government authorities in Ottawa. They saw themselves as having privileged access to the minds and cultures of the Cree through their experiences in the remote Prairies. They acted as self-appointed interpreters, translating the *wendigo* into the language of British imperial criminal law. Rouleau and men like him could demonstrate their value, their authority, and their commitment to common law jurisprudence by educating the Canadian government about the culture and practices of its new subjects in the West.[142] There was less immediate political impetus to punish the *wendigo* killers than there was to punish those who had challenged state authority and killed whites to further the war. The Ducharme case was a chance for North-West legal authorities to display their integrity, doctrinal sophistication, and compassion, and that of the law they practiced. This was especially important in light of the fates of the other Frog Lake killers, and of the Resistance's leader, Louis Riel.

A bowl of blood connects the Ducharme case to the trial of Louis Riel.[143] His life, like the lives of Ducharme, Wawasehowein, and Wahsahgamass, also depended on colonial officials' assessment of the relationship between his indigeneity and his criminal responsibility. Riel was tried in July of 1885 before a jury of six white men, in Regina.[144] The judge in his case was Hugh Richardson.[145] Although Riel vehemently proclaimed his sanity, his defense lawyers insisted that only an insanity

142. Knafla describes Northwest Territories judges as "deeply immersed in English law," but also as conscious of the need to adapt common law tradition to the necessities of frontier life. See: Louis Knafla, "Introduction," in *Laws and Societies in the Canadian Prairie West, 1670–1940*, ed. Louis A. Knafla and Jonathan Swainger (Vancouver: University of British Columbia Press, 2005), 31. Lauren Benton argues that competing authorities routinely invoked their relationship to Indigenous peoples, whether through claims to special expertise or allegations of corruption, in efforts to assert the legitimacy of their jurisdiction in colonial contexts. See: Benton, *Law and Colonial Cultures*, 3.

143. For some examples of Riel's continuing prominence in Canadian media, public history, and popular culture, see "Visitors May Do Double-Take at Exhibit of Famed Canadians," *Kamloops Daily News* (Kamloops, BC), March 26, 2013, B.5.; "Louis Riel has Left a Complicated Legacy," *Peterborough this Week* (Peterborough, ON), April 17, 2013, 1; and Christopher Curtis, "A New Take on Louis Riel's Role; Metis at Core of Canada, President Says," *Calgary Herald* (Calgary, AB), December 28, 2012, A. 17.

144. Riel was tried under the provisions of a Canadian statute, *An Act to Amend and Consolidate the Several Acts Relating to the North-West Territories* (1880), 43 Victoria, c. 25.

145. Richardson had recently been promoted from his post in Battleford, where he was replaced by Rouleau. Rouleau to Campbell, December 4, 1884, LAC RG 13-A-2, volume 61, file 1315.

plea could save him. They worked to show, throughout the trial, that Riel's Métis identity and his French Catholicism made him prone to madness and fanaticism. However, another line of questions implicitly connected Riel's supposed mental instability to a characteristically Indigenous belief in the *wendigo*. Thomas Mackay, a settler and pro-government military volunteer who took the stand for the defense, testified that during one meeting, Riel yelled, "You don't know what we are after —it is blood! blood! We want blood! It is a war of extermination! Everybody that is against us is to be driven out of the country."[146] Riel's counsel seized upon Mackay's mention of blood to suggest that Riel was a habitual blood-eater.[147] On its face, the allegation that Riel ate animal blood out of a bowl, rather than in a sausage or a pie, might have struck the white members of the jury as odd and distasteful, although not necessarily shocking.[148] Evocations of blood-eating might also, however, have struck a deeper, more sinister chord among jurors and lawyers who had lived on the North-West frontier. Richardson had surely not forgotten Kakisikutchin, and the rumors of supernatural cannibalism that circulated among the Indigenous communities of the Plains. Journalists had not forgotten the case either, as it was among the handful of capital cases over which Richardson had presided in his career as a prairie magistrate.[149] Regina jurors, too, were likely to have known about *wendigos.* Although Riel was not openly accused in court of cannibalism, his defense team might have been making subtle reference to the suspicion that Indigenous people who ate blood and claimed to be *wendigos* were, in fact, mad.

The insanity defense failed, and Riel was sentenced to hang on November 16, 1885. Riel's defence counsel appealed his case to the High Court at Manitoba without success, and a petition for leave to appeal to the Judicial Committee of the Privy Council was denied.[150] Although some high-ranking officials feared that Riel's execution would inflame tensions in the West, others argued that he was too disruptive to be allowed to

146. Testimony of Thomas Mackay, *The Queen vs. Louis Riel: Accused and Convicted of the Crime of High Treason* (Ottawa, 1886), 19.

147. Ibid., 25.

148. Riel claimed in a letter to James Wickes Taylor, the United States Consul in Winnipeg, that he had, in fact, been eating stewed blood all winter because he was unable to digest anything else. Riel to J.W. Taylor. Regina. August 1, 1885, George F.G. Stanley, ed., *The Collected Writings of Louis Riel* (Edmonton: University of Alberta Press, 1985), 157.

149. "Riel's Trial: The Rebel Ringleader Brought Before a Jury," *The Globe* (Toronto), July 21, 1885, 2.

150. *Louis Riel v The Queen (Manitoba)* [1885] UKPC 37 (October 22, 1885).

live.[151] In a letter to the Colonial Office, Lord Lansdowne, the Governor General of Canada, argued that fanaticism and belief in the fantastic were natural among Canada's Indigenous peoples.[152] To excuse Riel from punishment on the basis of these mental weaknesses would be to invite disaster. He wrote, "The admission, either by the courts or by the Executive, that in a country circumstanced in regard to its settlement as at the North-west Territories any person with a morbid or excitable temperament, and with a mind subject to occasional illusions or accesses of religious or political fanaticism might break the law with a confident expectation of escaping the punishment which the law awards, could not fail to have far reaching and disastrous consequences."[153]

If all British subjects in colonial Canada who suffered from religious delusions were to be considered irresponsible for their actions, Lansdowne argued, then entire Indigenous communities could find themselves immune to criminal sanction. It was a future that he quailed to contemplate.

Thompson initially saw the Ducharme case as straightforward, perhaps especially so given its place among the highly politicized Resistance trials that crowded his desk. But it did not look that way to legal authorities in the North-West Territories. When W. Prescott Sharpe, the prosecutor dispatched to Battleford to try the alleged murderers of Frog Lake, heard that Ducharme and Wawasehowein would hang, he also wrote to Thompson.[154] Sharpe explained that the Cree believed that a *wendigo,* "a crazy person desirous of eating human flesh," was nearly impossible to kill and possessed powers of resurrection.[155] Sharpe was "informed by intelligent half breeds that the presence of such a person would strike terror into the hearts of whole camps of Indians."[156] After reading Sharpe's letter, Thompson changed his mind. He confessed that he had not initially understood the horror that the Cree faced when they discovered a *wendigo* among them, such that "killing…such a person appear[ed] a commendable

151. For example, Henry Herbert, the fourth Earl of Carnarvon, tried to persuade Lord Salisbury, the Prime Minister, to intervene on Riel's behalf. Carnarvon to Salisbury, October 22, 1885, TNA, PRO/30/6/130. Peter Gordon, "Herbert, Henry Howard Molyneux, fourth earl of Carnarvon (1831–1890)," *Oxford Dictionary of National Biography*, Oxford University Press, 2004 http://www.oxforddnb.com.ezp-prod1.hul.harvard.edu/view/article/1303 (October 24, 2015).

152. "Case of Louis Riel: Reasons for Non-Commutation of his Sentence," Lansdowne to Stanley, November 13, 1885, TNA, PRO/30/6/130.

153. Ibid.

154. Sharpe to Power, November 24, 1885, Ducharme Capital Case File.

155. Ibid.

156. Ibid.

act."[157] Rouleau had wrongly "taken for granted that they [the features of the case] would be known in the Department of Justice."[158] On further questioning, Rouleau confirmed the intensity of *wendigo* panic. He told Thompson "there was no doubt that the woman killed was crazy and threatened on several occasions to kill women and children, that [she] herself asked the favor of being killed, in order to avoid such a calamity."[159] He sent this last letter on 27 November, the day that the Frog Lake defendants were hanged en masse in Battleford.[160] On December 9, 1885, the Governor-General-in-Council commuted Ducharme's and Wawasehowein's sentences to life imprisonment.[161]

A few months after Ducharme, Wawasehowein, and Wahsahgamass arrived at Stony Mountain prison in Manitoba, petitions began to arrive at the Ministry of Justice. One 1887 petition, from a First Nations community at Onion Lake near Fort Pitt, encapsulated the colonial government's dilemma in the *wendigo* case. The petitioners wrote, "As the old woman was dangerous and wanted to kill some children, to eat, it was considered advisable to kill her, and it always has been the custom to kill them, with us: we did not consider we were doing wrong in doing so."[162] They added that the prisoners had been urged to kill the "witch" by the whole camp, including the head HBC trader at Fort Pitt, William McLean.[163] A local missionary joined their plea, arguing that the prisoners had never committed murder in their hearts.[164] The petition failed. And yet, letters continued to arrive in Ottawa requesting clemency for Riskeyak's killers. Much of the testimony at the 1885 trial and the correspondence about it that followed mentioned McLean's alleged terror of the *wendigo.* If a white man, it was implied, could succumb to a "superstitious" belief in cannibals, then how could the Cree be expected to resist it? One Catholic priest, writing to request clemency for Wahsahgamass, expressed this sentiment clearly. "There is no doubt," he wrote, that McLean "counseled and urged the savages to rid themselves of that Wittiko woman, at all costs. If a magistrate

157. Thompson to the governor general in council, November 16, 1885, Ducharme Capital Case File.

158. Ibid.

159. Rouleau to Thompson, November 27, 1885, Ducharme Capital Case File.

160. Report of the Privy Council of Canada, John J. Magee, Clerk, November 6, 1885, Ducharme Capital Case File.

161. Report of the Privy Council of Canada, John J. Magee, Clerk, December 9, 1885, Ducharme Capital Case File.

162. Petition from the Onion Lake Cree, November 16, 1887, Ducharme Capital Case File.

163. Ibid.

164. Père Mérer to Daniel H. McDowell, November 17, 1887, Ducharme Capital Case File.

[who is] supposed to be the interpreter of the law, counseled and urged a murder, what can we say of a poor child of 16, who shoots a corpse?"[165] In 1889, the Canadian government began systematically to pardon and release Indigenous prisoners convicted of crimes committed during the Resistance. The Crown had made its point.[166] Eventually, Wawasehowein and Wahsahgamass were released.[167] On August 4, 1890, Ducharme, who at 90 years of age was the oldest First Nations prisoner by 20 years, died of "debility" at Stony Mountain.[168]

Conclusion

The Ducharme case is best thought of as revealing rather than determining the course of colonial criminal justice. The case had no obvious afterlife in the annals of Canadian law. It was not reported, and is almost never mentioned in histories of the Plains or of the Resistance. However, other *wendigo* execution cases continued to make their way into Canadian courtrooms. One, *R v Machekequonabe* (1897), which involved a *wendigo* execution in a Western Ontario Ojibwe community, is the only reported *wendigo* case. It has become one of the best-known "Native law" cases in the common law world, and has been interpreted as authority, in Canada and elsewhere in the former British Empire, for the idea that Indigenous peoples were bound by colonial law regardless of their religious and cultural beliefs.[169] Some historians might see the result in *Machekequonabe* and similar cases as evidence of the self-confidence of Euro-Canadian lawyers as they worked to impose the common law the Indigenous peoples of the Plains; as proof that Cree law was successfully excluded from colonial criminal courts. Historian Sidney Harring writes that *Machekequonabe* shows that "the very real and intricate cultural world of the Ojibwe

165. Albert Lacombe to Thompson, August 10, 1889, Ducharme Capital Case File. Translation mine. The original, longer passage, in French, reads: "Il est hors de doute que chef traiteur magistrat (que je n'ose nommer) par crainte, conseilla et poussa les sauvages à se défaire de cette femme Wittiko, à tout prix. Si un magistrat supposé être l'interprète de la loi, conseille et pousse un meurtre, que peut-on dire d'un pauvre enfant de 16 ans, qui tire un coup de fusil sur une cadavre? Et certes, Charlebois et Dressy-Man ne sont guère plus coupables."

166. Burbidge to Campbell, August 10, 1885, LAC RG 13, vol. 2132, part 15.

167. Stony Mountain Penitentiary Admissions Book, 1885, LAC RG 13, T-11095.

168. Report on Ducharme's Death, August 3, 1890, Ducharme Capital Case File.

169. For more on *Machekequonabe* as a landmark case in "native" law, see: Lesley Erickson, *Westward Bound: Sex, Violence, the Law, and the Making of a Settler Society* (Vancouver: University of British Columbia Press, 2011), 53.

found no recognition in Ontario courts."[170] And yet, Harring notes, many whites were dismayed when the court dismissed the terror felt by the Ojibwe, and Machekequonabe received a manslaughter conviction and a six-month sentence.[171]

How should one understand Machekequonabe's manslaughter conviction, or Wahsahgamass's? What does the fact that Ducharme and Wawasehowein avoided judicial execution say about law in the British Empire? Executive pardons in cases like that of Ducharme, Wawasehowein, and Wahsahgamass served the colonial state: they reinforced settlers' belief in their own mercifulness, declared the primitivism of Indigenous peoples, and shunted cultural considerations away from the supposedly egalitarian common law courtroom.[172] However, criminal cases involving Indigenous defendants could also show the internal tensions of common law jurisprudence. *Wendigo* execution cases threw the legal pluralism of colonial Canada into sharp relief. The jurisdiction of colonial criminal law purported to extend to Cree land and Cree people but, when confronted with cases in which Cree law had been duly exercised in those places and by those people, colonial law often cracked. These cracks were generally small, resulting in disagreements among officials, lighter sentences, or pardons, rather than acquittals or explicit deference to non-colonial legality. However, these moments constitute recognition, however scant or partial, by the colonial state of the multiple cultural and legal worlds inhabited by the subjects of the empire.[173] Judges could force Indigenous peoples to submit to the law through violence, but doubted their ability to become full and loyal subjects of English law. For all their chauvinism and their bluster, colonial authorities were disturbed by the prospect of hanging a person with a guiltless heart.

170. Sidney L. Harring, "The Liberal Treatment of Indians: Native People in Nineteenth Century Ontario Law," *Saskatchewan Law Review* 56 (1992): 323. For documents related to the original trial, see: *The Queen v Machweekequonabe*, LAC, RG 13, vol. 2089. For the record of the case as it was appealed, see *R v Machekequonabe* (1897) 28 O.R. 309. For more on *Machekequonabe* and other *wendigo* cases, see: Harring, *White Man's Law*.

171. Harring, "Liberal Treatment of Indians," 323.

172. Loo, "Savage Mercy," 108. See Carolyn Strange, *Qualities of Mercy: Justice, Punishment, and Discretion* (Vancouver: University of British Columbia Press, 1996); Hay, "Property, Authority and the Criminal Law." For an example of how one scholar has applied Hay's argument to the North-West Resistance, see Ted McCoy, "Legal Ideology in the Aftermath of Rebellion: The Convicted First Nations Participants, 1885," *Histoire Sociale / Social History* 42 (2009): 175–201.

173. Gavigan, similarly, argues that "oppressive relations are still relations." Gavigan, *Hunger, Horses, and Government Men*, 187.