regard to matters in the Territories. One such memo was forwarded to Colonel Dennis, Deputy Minister of the Interior, in 1880.[112] In this memo Richardson tends to show a bias towards "the evil influences of leading spirits of the Manitoba troubles of 1870, who, during the past season, have been traversing the country, doing at least "no good".[113] It is notorious that Riel was, according to people like Richardson, the prime moving spirit of the "Manitoba troubles". There is also reference to the fact that Richardson's house was accidently destroyed during the excitement at Fort Battleford.[114] It is therefore certainly questionable, if in fact Riel was tried by an impartial judge.

3. **The Jury**

The jury that decided the fate of Riel was composed of six persons, the legality of which is described on page 12 supra. The questionable aspect in this case is the fact that in a population as found in the Territories, the six jurors selected were all English-speaking Protestants. According to Charlebois, Richardson broke the traditional method of jury selection by drawing up a list of 36 people of his own choice, only five of which were French-Canadians or Catholic.[115]

Not much is known or written about the members of the jury. In a short article in the Saskatoon Star Phoenix, the feelings of one of the jurors, Francis Cosgrave, are outlined by his granddaughter:

> Mrs. Sivell said her father had considerable sympathy for the Métis leader and regarded the death sentence as a great injustice.[116]

A more startling statement was made by juror Edwin Brooks in a 1925 interview:

> . . . We (the jury) tried Louis Riel for treason but he was hanged for the murder of Thomas Scott.[117]

Although the jury recommended mercy, there was apprehension in certain quarters as to the impartiality of an all white, English-Protestant panel. In a letter to Taché on August 3, 1885, Carey stated that all the halfbreeds would plead guilty to the lesser charge of treason-felony, which is good because, "Regina juries being very

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[112]Sessional Papers (No. 116), 48 Victoria 1885, at 80.
[113]*Ibid.*, at 81.
[114]*Supra*, note 9, at 220.
[115]*Ibid.*, 220-221.
[116]Accent, Thursday, March 27, 1975, at 4.
[117]*Supra*, note 9, at 227.

hostile".[118] This statement is probably justified on the basis that "race prejudice and passions were running high".[119]

This situation may best be described by the following quote from the book, *Hanged in Error,* by Leslie Hale:

> The case of Edith Thompson shows, as do many others, that the case of 'the woman taken in adultery' was once, before British juries, as difficult to defend as that of a Negro Communist before twelve 'good men and true' of Alabama.[120]

This possibly may be too harsh a statement; however, the fact is that Riel was not given the right to be tried by his peers. The jury, however, as individuals, appear to place the blame of the resistance movement into the government's lap, where it rightly belonged. As stated by one of the jurors in a letter:

> . . . had the Government done their duty and redressed the grievances of the half-breeds of Saskatchewan . . . there would never have been a second Riel rebellion, and consequently no prisoner to try and condemn.[121]

4. **The Trial Proper**

As outlined on page 4, supra, Riel was formally charged on July 6, 1885, and arraigned on July 20, 1885. This would have left the defense with only 14 days to prepare for the arraignment. As well, Riel's voluntary surrender occurred on May 15, 1885; he was delivered to the Regina Mounted Police station on May 23, 1885.[122] Riel was thus afforded less than two months to face his arraignment. Although Riel was penniless, a Defence Committee, located in the province of Quebec, was established and defence counsel retained.

It is, of course, apparent that the raising of funds and the hiring of counsel would take time, as well as their preparation to meet the charge. It was because of this lack of proper opportunity to prepare that the Defence requested a one-month adjournment.[123]

It is also interesting to note that the Defence, prior to asking for the adjournment, had been frustrated in their attempts to interview potential witnesses because they had been instructed, either by the

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[118]*Supra,* note 10, at 417, footnote 9.
[119]*Supra,* note 86, at 232.
[120]Leslie Hale, *Hanged in Error,* 1961, at 10.
[121]*Supra,* note 1.
[122]See page 4.
[123]*Supra,* note 3, at 49.

Prosecution or by someone for the Government, not to speak to the defence lawyers.[124]

The Defence in asking for the adjournment also made a formal request that the Court subpoena potential witnesses for the defence and that their costs be defrayed by the court.[125] This, of course, was because Riel had no money to meet the expenses. The Court, however, stated that they could not do so, as they had no funds.

The court was also informed that three necessary and important defence witnesses had sought asylum in the U.S.A. and that they were willing to testify on the basis that they were granted immunity.[126] However, this would take some time to arrange. These witnesses were required to establish Riel's American citizenship and his true purpose in returning to Saskatchewan, i.e., the legal and constitutional fight for Métis rights and upon the invitation of the Métis.

To also prove this point the defence requested the court to order all documents, petitions, etc., presented to the government by the Métis for the redress of their grievances.[127] These documents were in the hands of the Deputy Minister of the Interior and of Lawrence Vankoughnet, Deputy Superintendent of Indian Affairs. It is noteworthy that Vankoughnet in April, 1885, during the resistance, forwarded the numerous letters and petitions to the Department of the Interior.

> Ottawa, 21st April, 1885.
>
> My Dear Mr. Burgess, I forward to you the following files of this Department: 2094, 3559, 4041, 4145, 4953, 10766, 12014. These files contain correspondence referring more or less to half-breed matters in the Northwest Territories. They have been culled from an immense number of other files on Indian matters, and I think they should properly have been retained in the Department of the Interior.
>
> Very truly yours,
> L. Vankoughnet[128]

These letters and petitions cover the period from 1873 to 1885, and would have been an excellent source to outline the Métis grievances. Nevertheless, this material was never produced and if it had been, would have been argued as inadmissible by the Prosecution.[129]

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[124] *Ibid.*
[125] *Ibid.*, at 46.
[126] *Ibid.*, at 47.
[127] *Ibid.*
[128] *Supra*, note 112, at 1.
[129] *Supra*, note 3, at 54.

In the final analysis, the Defence was only granted a one-week adjournment which in a trial of this nature and physical setting, surely amounts to a denial of natural justice.

There appears to have been a relaxed attitude by the judge in entertaining hearsay evidence, which at one point was objected to by the Defence.[130] That the Judge was biased, however, is much more flagrant.[131] This especially is portrayed in his charge to the jury, which was highly prejudicial.[132]

> My intention now is to read the evidence which has been taken. I feel it my duty to do so, from the way it has been given, and after I have read it, to draw your attention to it *and to make a few observations that occur to me, which may be useful to yourselves in arriving at a conclusion.*[133]

One of the conclusions he observed and in reality reached for the jury was the "fact" that a rebellion had occurred.

> The questions really for you to determine are first: Are you satisfied that there was a rebellion? If you are satisfied that there was a rebellion, *as I think you must be*, . . .[134]

Not only did he conclude this fact for the jury, he suggested to them that Riel's insanity, if in fact he was insane, started in December and not in March as was argued by the Defence.

> I only *suggest* that to you, not that you are to take it as law; I merely *suggest* it to you as turning upon the evidence.[135]

Then, to ensure that the jury could not possibly acquit Riel, Richardson made it clear that the blame and ill-feelings generated by the Métis Resistance and Indian retaliation would be shifted to them.

> On you rests the responsibility of pronouncing upon the guilt or innocence of the prisoner at the bar. Not only must you think of the man in the dock, but you must think of society at large; you are not called upon to think of the Government at Ottawa simply as a Government; you have to think of the homes and of the people who live in this country; you have to ask yourselves. Can such things be permitted?[136]

But, are the Judge and the Prosecutors the only blameworthy participants? There appears to be reasonable grounds now to doubt the effectiveness of the Defence. This is especially so in light of the fact that their sole defence was insanity, whereas Riel did everything in his

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[130] *Ibid.*, at 148.
[131] See pages 10 and 81.
[132] *Supra*, note 3, at 343.
[133] *Ibid.*, at 344. (Emphasis added)
[134] *Ibid.*, at 346. (Emphasis added)
[135] *Ibid.*, at 348. (Emphasis added)
[136] *Ibid.*, at 349.

power to convince the judge and the jury of his sanity. Riel wanted to rely on the history and reasons for the Métis stand. This, however, was denied him. In fact, when Riel tried to contest the validity of Nolin's testimony, his lawyers made it clear that they would withdraw if Riel was allowed to question the witnesses.[137] Riel was, from that point forward, at the mercy and control of all the players in the court.

Riel, in his address to the Court after his verdict of guilty, reviewed the history of his and the Métis nation's struggle.[138] Riel's address certainly displayed his understanding of International Law and the basis upon which he had acted from 1869 to 1885. He also, in a limited fashion, outlined the legitimate grievances of the Métis and of the government inaction. The matters he spoke of certainly would have reflected adversely upon the government's administration in the Northwest. This would have been relayed to all major centers of the world. This is possibly one reason why the Defence chose to rely solely on the insanity defence. From our research it appears that Riel's defence fund came from French-Canadian Liberals who aspired to national prominence. It is, therefore, quite conceivable that the defence of Riel as a political showpiece was desirable, but had to be done without dragging out the sordid details which would reflect upon the whole of white society against the colonized native.

Whatever the reasons or motivations of the Defence not to acquiesce to Riel's wishes and line of defence, there is no reason why the jury was not asked why they felt that Riel should be shown mercy by the Crown.

The Defence was also derelict in their duty in not basing their appeal to the Manitoba Court of Queen's Bench on other errors, in addition to the constitutional issue and the insanity question.[139] The Defence certainly could have argued bias, but more importantly, the issue of the judge's prejudicial charge to the jury. As was erroneously stated by Chief Justice Wallbridge:

> The prisoner was defended by able counsel, and all evidence called which he desired. No complaint is now made as to unfairness, haste, or want of opportunity of having all the evidence heard which he desired to have heard.[140]

It is quite apparent from the preceding remarks that Riel was

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[137] *Ibid.*, at 209.
[138] *Ibid.*, at 350.
[139] *Supra*, note 13, at 26.
[140] *Ibid.*, at 25.

never afforded the opportunity to present the evidence which he believed should be relied upon. In addition, there is certainly every reason to indicate the "haste" of the court to try Riel.

C. THE RECOMMENDATION OF MERCY

Although the jury was forced to find Riel guilty of high treason, they nevertheless realized that the death penalty was not justified because of the surrounding circumstances of which, as residents of the Northwest Territories, they would have been aware.[141]

Macdonald, however, for reasons explained earlier, was determined not to act on this recommendation and in fact completely disregarded it.

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[141]See page 82, supra.

VII.

From Execution to Today

In the almost 100 years that have passed since the execution, Riel has gained the status of a martyr, not only among his people but among Canadians generally. His role in agitating for western rights is now generally recognized by Western Provinces. Both Saskatchewan and Manitoba have remembered him by erecting statues in his honour. His life and the events surrounding him have been studied more, written about more, reproduced more often in drama, than that of any other historical figure in Western Canada and possibly in all of Canada.[142] This is surely a recognition of the justice of his cause and the glaring miscarriage of justice toward the native people by the Macdonald regime and the Eastern establishment.

Riel has continued to be an inspiration to his people over the years. This is true today more than ever before, as a new awareness and understanding of their history and culture is instilled in our people. If we are to once again take our rightful place in Western Canadian society as founders of western economy and culture, and if we are to participate fully in the social, political and economic life of the area, it is important to nurture this awareness so that the people's sense of pride and their belief in themselves can be strengthened. We will, as a people, only be able to throw off the bonds of our poverty if we once again feel responsible for our own destiny and if we are given the opportunity to exercise our rights. An important way in which the Canadian government can recognize the wrongs of the past and help our people build their strength for the future is to remove the blot of "criminal" from the otherwise unblemished record of this gentle and just man who has become the personification of leadership and inspiration among our people.

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[142]Dhand, Hunt and Goshawk, *Louis Riel, An Annotated Bibliography*, 1972. Although this booklet does not represent all the material, it includes a wide variety up to 1972.

VIII.

Pardon: A Royal Prerogative

> Error is possible in all judgments. In every other case of judicial error, compensation can be made to the injured person. Death admits of no compensation.
>
> Jeremy Bentham.[143]

A. HISTORICAL ASPECT

The Crown enjoys the exclusive right of granting pardons, a privilege which cannot be claimed by any other person either by grant or prescription. Throughout the Middle Ages the English kings had to contend, like their continental counterparts, with the rival powers of the feudal lords. This contest ended in the 16th century with the revival of supreme royal power, including the sole power of the Crown to pardon or remit any treason or felony.

Later, as Parliament grew stronger, this pardon authority was shared; the power of the Crown did not prevent pardons from being granted by Acts of Parliament. Today in England, the Crown's power is exercised for the royal sovereign by the Home Secretary.[144] In countries like Canada, this power is usually delegated to colonial governors and to Governors-General, although in doing so, the sovereign does not entirely divest herself of the prerogative.[145]

The Crown's authority to grant pardons was one aspect of a more general power to determine what punishment should be imposed for a particular category of offences and to remit or commute the prescribed penalty in individual cases.[146] All civilized countries make use of some form of the pardon power to give flexibility to the administration of justice in criminal cases.[147]

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[143]Calvert, *Capital Punishment in the Twentieth Century*, 1971.
[144]Rubin, *Law of Criminal Correction*, 1973, at 673.
[145]8 Halsbury (4th, at 949).
[146]Hurnard, *The King's Pardon for Homicide, before A.D. 1307*, 1969, at 1.
[147]Newman, *Source Book on Probation. Parole and Pardons*, 1968, at 56.

B. PURPOSE AND EFFECT

There are basically two kinds of pardons: (1) Free pardons which are granted on the grounds of innocence established and admitted by the Crown; and (2) ordinary pardons which are granted on special consideration. Both kinds of pardon proceed from the same source as an act of grace, but the first is an act of grace to which the recipient is morally entitled, while the second is a pure act of grace.

A free pardon says, in effect, that the person to whom it is granted did not commit the offence of which he was convicted; that is, there has been a total miscarriage of justice.

In the case of ordinary pardons, the question of the guilt of the applicant for relief is not in issue. The possibility of a doubt as to guilt may, however, as a result of the inquiry, be found to exist. The special considerations upon which the service recommends an ordinary pardon are of various types depending on the facts.

The greatest number of applications received by the service for ordinary pardons is from persons who are prohibited from entering, remaining in or re-entering other countries because of past convictions. The conviction may have been long-standing and the applicant may have led, since the conviction, a consistently law-abiding and respectable life.[148]

The Crown's pardon, if general in its purport and sufficient in other respects, obliterates every stain which the law attached to the offender. Generally speaking, it puts him in the same situation as that in which he stood before he committed the pardoned offence and frees him from the penalties and forfeitures to which the law subjected his person and property. Though a pardon cannot wash away those doubts with which the evidence of one who has committed a serious offence will be received, yet, in point of law, a legal pardon implies a removal of the stigma, restores a man to credit and enables him to bring an action against anyone who scandalizes him in respect of the crime pardoned.[149]

C. PROVISIONS FOR PARDONS AND PROCEDURE

From the same principle that gave to a subject the right of discharging an appeal he had brought before a court of justice, the

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[148]McGrath, *Crime and its Treatment in Canada*, 1965 at 102.
[149]Chitty, *Prerogatives of the Crown*, 1968, at 102.

lawyers have derived the prerogative of mercy enjoyed by the Crown. As representative of the state, the Sovereign may frustrate by his pardon an indictment prosecuted in his name. In every crime that affects the public he is the injured person in the eye of the law, and may therefore, it is said, pardon an offence which is held to have been committed against himself.[150]

S.683 of the Criminal Code of Canada states:[151]

s. 683 (1) Her Majesty may extend the royal mercy to a person who is sentenced to imprisonment under the authority of an Act of the parliament of Canada, even if the person is imprisoned for failure to pay money to another person.

(2) The Governor-in-Council may grant a free pardon or a conditional pardon to any person who has been convicted of an offence.

(3) Where the Governor-in-Council grants a free pardon to a person, that person shall be deemed thereafter never to have committed the offence in respect of which the pardon is granted.

(4) No free pardon or conditional pardon prevents or mitigates the punishment to which the person might otherwise be lawfully sentenced on a subsequent conviction for an offence other than that for which the pardon was granted.

s.686 Nothing in this Act in any manner limits or affects Her Majesty's royal prerogative of mercy.

The *Criminal Code* authorizes the Governor-General-in-Council to grant relief from punishment to offenders. This can be done by remitting part of the sentence of imprisonment, by granting a free pardon or conditional pardon, or by remitting, in whole or in part, a pecuniary penalty, fine or forfeiture imposed under an Act of Parliament. However, as has been noted, nothing in the *Criminal Code* in any manner limits or affects Her Majesty's royal prerogative of mercy. The traditional practice in Canada has been for the Governor-General, acting on the advice of one member of the Cabinet, to exercise the royal prerogative of mercy where the punishment in respect of which it is sought is a punishment other than death.[152]

A pardon other than a pardon under statute must be specially pleaded at the first opportunity the defendant has of doing so. If he has obtained a pardon before arraignment and, instead of pleading it, pleads only the general issue, he is deemed to have waived the benefit of pardon. If a pardon is granted after the plea is pleaded, advantage

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[150]Allen, *The Royal Prerogative in England*, 1849, at 108.
[151]R.S.C. 1970, c. C-34, s.s. 683 and 686.
[152]*Supra*, note 148, at 102-103.

of it may be taken at any time after verdict in arrest of judgment, and after judgment in arrest of execution.[153]

A proclamation promising pardon does not have the legal effect of a pardon but following such a proclamation the court will defer execution of sentence and so allow time for the prisoner to apply for a pardon.[154]

D. ERRORS OF JUSTICE — POSTHUMOUS PARDON

History is full of tragic stories in which innocent people have been condemned. The Adolf Beck case will be remembered by many as an extraordinary instance of wrongful conviction. He was sentenced in 1896 to seven years penal servitude for a series of robberies from women, was released after five years, and in 1904 was re-arrested and again convicted for further offences of a similar character. On the first occasion he was identified by no less than ten women, and at the second trial by five women, each of whom swore to his identity as the man who swindled her; a handwriting expert called by the prosecution at each trial testified on oath that letters written by the real culprit were in Beck's handwriting; two prison officials wrongly identified Beck as a previously convicted man — Smith — who was afterwards proved to be the real perpetrator of the crimes for which Beck was found guilty. Rarely has evidence been so overwhelming as it was in this case, yet Beck was subsequently discovered to be absolutely innocent. "There is no shadow of foundation," stated the official report, "for any of the charges made against Mr. Beck." The Home Office awarded him 5,000 pounds compensation. Yet it took Adolf Beck nine years to establish his innocence; had he been convicted of a capital offence and executed in consequence instead of imprisoned, the error would probably never have come to light. There is obviously far less chance of discovering a miscarriage of justice when a person is executed, since he is no longer able to prosecute his claim. Yet many people have been sent to the scaffold on evidence far less overwhelming than that upon which Beck was wrongfully convicted.

The importance of the Beck case is twofold. (1) The fact that evidence so overwhelming proved mistaken, should bring an element of doubt into nearly every trial and make the inflection of an

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[153]11 Halsbury (4th), at 240.
[154]*R.* v. *Rudd* (1775) 1 Leach 115.

irrevocable penalty unthinkable. (2) The fact that few errors of justice come to light in connection with capital offences should not lead us to suppose that such mistakes do not occur.[155]

Also in Lincolnshire in 1869, Priscilla Biggadyke was convicted of poisoning her husband, dragged to the scaffold and executed, protesting her innocence. Subsequently, a man on his death bed confessed that he had entered the kitchen and, unknown to Mrs. Biggadyke, put poison in the pudding she was making.[156]

Another striking example of a gross miscarriage of justice involved two men — Mr. Evans and Mr. Christie — and a large group of women, all of whom had been strangled.

In 1953, police found the remains of six female bodies in the garden and under the floorboards of a seedy tenement house at Number 10, Rillington Place in London. A former tenant of the house named John Reginald Halliday Christie confessed to having strangled the victims and buried their corpses. The press dubbed him, "The Monster of Rillington Place". He was tried, found guilty and sentenced to hang. There was an added aspect of the crime which set it apart from more commonplace murders. Christie had also confessed to having killed another former resident of the house, one Mrs. Evans. Unfortunately, her husband Timothy John Evans, had already been executed for that murder.

The case could not have been more bizarre. Evans was a virtually illiterate truck driver of very low intelligence who, one day in 1949, contacted police and confessed to the murder of his wife. Although he said he had stuffed the body into a drain, it was found in a wash house behind the house along with the body of Evans' only child. Both had died by strangling and a man's necktie was still in place around the child's neck. Evans later changed his story and alleged that Christie, who lived in the same house, had killed Mrs. Evans while performing an abortion on her. Christie denied any guilt in the matter and became the main witness for the prosecution. Evans' hanging followed an unsuccessful appeal.

Three years after Evans died, Christie strangled his own wife and chucked her body under the floorboards. His other victims were prostitutes whom he brought home, strangled, raped and buried.

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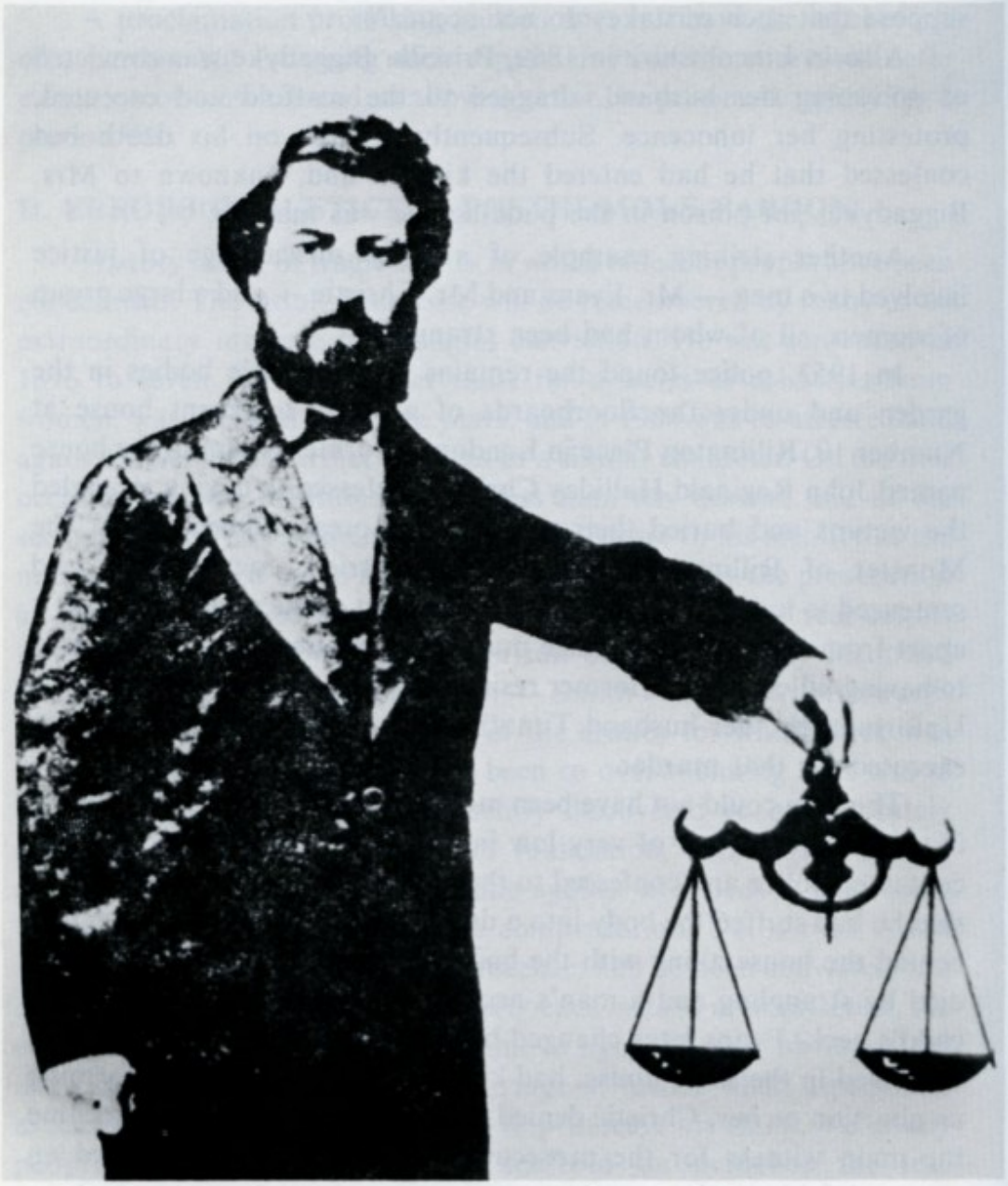
[155]*Supra*, note 143, at 121-122.
[156]*Ivid.*, at 125.



Riel holding the scales of justice — Composite photo — C. Bunnie.

Police found a collection of their hair swatches, which the murderer kept in a tobacco tin. He was diagnosed as a fetishist and a necrophiliac. He alleged that during the war he had killed twenty-two other women whose bodies he later deposited on bomb sites. Details of the Grisly case horrified and fascinated the public. The murder of the

Evans' child was never fully explained but belief in Timothy Evans' wrongful conviction and exposure of the efforts of officials to conceal evidence turned the case into a powerful argument against the death penalty, which was abolished in Great Britain in 1965. Evans, who was not in a position to benefit from clemency, *was granted a posthumous pardon.*[157]

Mr. Chuter Ede, universally respected as a humanitarian, considered the case of Timothy John Evans. The case, as then presented, suggested no question of doubt, no reason for clemency. The decision he made was inevitable; but he earned still greater respect and sympathy when, in February, 1955, he courageously declared:

> "I was the Home Secretary who wrote on Evans' papers, 'The law must take its course.' I never said, in 1948, that a mistake was impossible. I think Evans' case shows, in spite of all that has been done since, that a mistake was possible. And that, in the form in which the verdict was actually given on a particular case, a mistake was made."[158]

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[157]Horwitz, *Capital Punishment*, U.S.A., 1973, at 169-70. (Emphasis added)
[158]*Supra*, note 120, at 5.

IX.

A Pardon is in Order

We, therefore, request on behalf of all the Métis people and on behalf of others who look to Riel's example for inspiration, that the Canadian Government act immediately by exercising the Royal Prerogative of mercy and by conveying to the Métis organization a grant of pardon for Riel. As outlined under heading VIII, the government clearly has the authority to take such action. Although we know of no historical precedent in Canada for a posthumous pardon, the Imperial Parliament of Britain has provided the mechanism for it. The arguments in favour of such action are strong.

a) Riel acted out of the conviction that he was right in International Law to advocate the recognition of the rights of his people;

b) Riel did not act for reasons of personal gain or to enhance his own reputation;

c) Riel himself committed no illegal act either at the Red River or at Batoche;

d) Riel did not advocate war or armed resistance and only armed his people to enable them to protect themselves in the face of what they believed were hostile intentions toward them by the government;

e) The government could have avoided the violence and destruction by having indicated some preparedness to recognize the legitimate rights of the people and to negotiate a settlement;

f) When the violence did occur, it happened more by accident than as a result of any deliberate plan by Riel to have his people rise in armed revolt;

g) Riel consistently avoided using available military strategy to take advantage of government police and troops;

h) Riel did not receive a fair trial because of bias and prejudice toward him from many quarters;

i) The government ignored the jury's recommendation of mercy;

j) The government by such action today could renew the faith of the Métis people in the possibility of just treatment for themselves within Canadian society. This is especially important during the current movement for National Unity.

The granting of a posthumous pardon at this time will acknowledge the words of Riel, directed to the jury before they retired to consider their verdict, and officially accord him his rightful position in the development of the Canadian Nation.

> I am glad the Crown have proved that I am the leader of the half-breeds in the Northwest. I will perhaps be one day acknowledged as more than a leader of the half-breeds, and if I am, I will have an opportunity of being acknowledged *as a leader of good in this great country.*[159]

[159]*Supra*, note 3, at 321. (Emphasis added)

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