

## ***“Murder in Late Nineteenth-Century Picton: A Case Study of Wrongful Conviction and Capital Punishment”***

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At about 10 pm on 21 December 1883, Peter Lazier was shot in the heart at Gilbert and Margaret Jones’ farm near Bloomfield in Ontario’s Prince Edward County. Concerned neighbours eagerly responded to an immediate hue and cry to search for culprits. Early the next morning, Joseph Thomset and David Lowder<sup>1</sup> were arrested at their homes near West Lake, some five miles from the scene of the crime. By noon, David’s brother George was also apprehended. All three suspects were charged with murder.

The legal process moved with remarkable dispatch. A coroner’s inquest was convened within hours of Lazier’s death his body had been removed from the Jones farm house. Committal proceedings began six days later on 28 December 1883. The three accused were tried before a judge and jury at the Prince Edward County Court House in Picton in early May 1884, less than five months after the murder.

The prosecution’s theory was that the murderers had intended to rob Gilbert Jones, a devout Quaker, of \$555 he had been paid at the Bloomfield station for a load of hops earlier on the day of the murder. Lazier, an overnight visitor at the Jones farm, had simply been in the wrong place at the wrong time.

Margaret Jones saw Lazier’s two assailants on the night of the crime but could not identify any of the three accused as perpetrators of the crime, nor could Gilbert Jones who had seen the man who fired the fatal shot. The evidence against the accused consisted of little more than footprints in the snow near the Jones farm, near their own homes and at various points in between.

The trial judge, Mr. Justice Christopher Patterson, was an English-born lawyer who had briefly practiced law in Picton, and who would later sit on the Supreme Court of Canada. Patterson was a Court of Appeal judge but as there was a lack of work at the appellate level, he regularly sat on assizes. Up to the moment the trial began, all three accused were represented by Nehemiah Gilbert, a Picton lawyer who had never handled a case of this magnitude. At the last minute, Gilbert arranged for the retainer of more experienced counsel. Thomset was represented by the eminent Dalton McCarthy, Q.C., a Member of Parliament, an outstanding trial counsel and a man touted as a possible future Conservative leader. The Lowders were defended by George D. Dickson Q.C. from Belleville, while Roger Clute, a rising star of the bar and a future judge, prosecuted.

Justice Patterson directed the jury to acquit David Lowder, whose boot-size was obviously smaller than the footprints in the snow. The jury took little time to reach its verdict of guilty against Joseph Thomset and George Lowder, with a recommendation of mercy. As the law required, Justice Patterson sentenced both men to death by hanging.

Despite their lowly social status, the condemned men had considerable support from influential members of the local community. A petition pleading for mercy bore the

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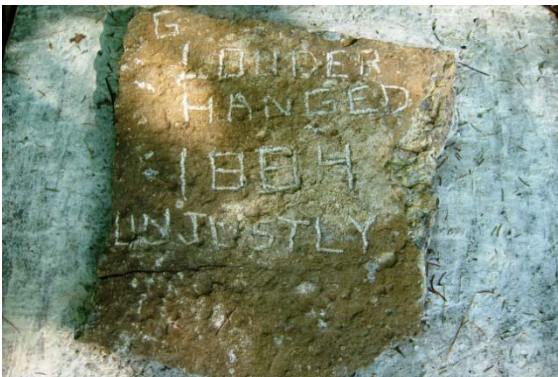
<sup>1</sup> The contemporary records and newspaper reports contain various spellings of these names – “Thomsett” and “Lauder” are common. I have used the spellings that are used in the court documents and the Capital Cases File.

signatures of hundreds of concerned citizens, including some who had testified for the prosecution. Two Picton clergymen who had spent hours with the condemned men became convinced that there had been a miscarriage of justice. Edwards Merrill, Picton's mayor, a prominent lawyer, and soon to be named a judge, observed the trial and wrote to Prime Minister Sir John A. Macdonald to explain why he thought the trial had been unfair and to plead for the condemned men's lives. Prince Edward County's recently defeated Tory Member of Parliament urged Justice Minister Alexander Campbell to commute the sentence.

The Prime Minister, the Justice Minister and their cabinet colleagues considered these pleas for clemency but decided that "the law should be allowed to take its course". Protesting their innocence to the last, Thomset and Lowder were hanged back to back on a double gallows at the Picton Jail on 10 June 1884. The hangings were bungled. Both condemned men dangled for several minutes at the end of the rope before meeting their death. They were ignominiously buried in unmarked graves in the jail yard.

Was justice done in the Lazier murder case? The prevailing view of the legal establishment and the media at the time was that both men were properly convicted. However, the local community was sharply divided. At the time of the murder, the community was out for blood. As soon as they were arrested, Joseph Thomset and George Lowder were presumed to be guilty. That opinion had not abated by the time of the trial, but as the trial proceeded and especially after the death sentence was passed, public opinion began to shift. Many Prince Edward County residents became convinced that at least one and possibly both of the executed men were innocent. Twenty years after the Lazier murder trial, prosecutor Roger Clute failed to persuade a Picton jury to convict another accused murderer despite strong evidence of guilt. The acquittal was attributed in part to misgivings about Clute's success in convicting Thomset and Lowder and the doubt as to their guilt that lingered in the community.

The Thomset-Lowder case has never been forgotten. Until recently, the cells where Thomset and Lowder were held in the old Picton jail housed the Prince Edward County Archives. Exhibits from the 1884 trial could be viewed in a display only a few metres from the spot where Thomset and Lowder met their death. The double-gallows still stand adjacent to the cells, hovering over the trap door that was sprung in front of the invited witnesses who watched in horror as Joseph Thomset and George Lowder meet their painful death by strangulation in a badly bungled hanging. The gallows were never used again – Thomset and Lowder were the last men to face the executioner in Prince Edward County. The archival display is a chilling reminder of the fragility of the criminal trial process and of the terrible finality of the sentence that was carried out on 10 June 1884.



A crudely handcrafted grave stone was recently uncovered in the pauper's corner of Picton's Glenwood cemetery, likely placed by George Lowder's friends and family distressed by his execution and by the Sheriff's insistence that he be buried in an unmarked grave in the jail yard.

The circumstances surrounding the trial and execution of Joseph Thomset and George Lowder provide a window on

criminal justice in late nineteenth century Canada, the brutality of capital punishment and the enduring problem of possible miscarriages of justice.

My presentation for this conference will focus on the post-conviction review of the case. The law did not afford Thomset and Lowder a right of appeal against their convictions for murder or the sentences of death. A convicted person could only ask the trial judge to “reserve the case” if it raised a difficult legal point. If the trial judge agreed that there was a contentious point of law, he could refer the question to a panel of judges for consideration. There is no indication that any of the three defence counsel thought the case against Thomset and Lowder raised a point of law that would merit a request to Justice Paterson that he reserve the case. Any complaint the prisoners had with their convictions related to the facts and that did not amount to a point that could have been appealed to a higher court.

Condemned prisoners like Thomset and Lowder were not, however, left to await their death with no hope of reprieve. The Governor General in Council - the cabinet - reviewed all capital sentence cases. The trial judge prepared a report of the case giving his assessment of the evidence and the soundness of the verdict, a full transcript of the evidence was prepared, and anyone, including the prisoners or their lawyers, could make written submissions to plead for mercy.

In keeping with this practice, Justice Patterson prepared a detailed handwritten report on the case for the Secretary of State so that the Minister of Justice and the rest of the Cabinet would have the benefit of his opinion when considering whether to commute the death sentences. The jury’s recommendation of mercy carried no weight with Justice Patterson and his report certainly did not help the efforts mounted to gain a reprieve. He was entirely satisfied with the jury’s verdict and convinced that the convictions of both men were well founded both on the evidence and in law. Against the weight of his opinion, the efforts of those who wrote letters, organized and signed petitions and the advocacy of Dalton McCarthy, who presented the petition to the cabinet, were to no avail.

During his 14 year career as an Ontario judge, Christopher Patterson passed the death sentence on nine other men. Several of Patterson’s capital cases involved convictions that raised contentious legal or factual issues and often attracted considerable public attention. Patterson wrote detailed reports in all these cases to facilitate review by the Minister of Justice and the cabinet. Of the eleven men Patterson condemned to death, only three were hanged. One escaped and the seven others were reprieved, given life sentences and were eventually released.

Across Canada in 1884, in addition to Thomset and Lowder, nine men and one woman were sentenced to death. Of those, six were executed. Collectively, Patterson’s eleven cases, considered together with the other ten capital cases from 1884 and the general pattern of post conviction review in the early years of Confederation, provide a snapshot of the factors that determined the outcome of capital cases in 19<sup>th</sup> century Canada.

Many factors influenced exercise of executive clemency – the personal views of the Minister and cabinet, the race and gender of the condemned, the jury’s recommendation for mercy and the happenstance of political mood and exigency. My review of these files suggests that the trial judge’s report was frequently a crucial factor and that the entire process often filled significant gaps in the law. Justice Patterson, like

many of his contemporary colleagues, regularly gained a sympathetic ear when urging the reprieve of condemned individuals in cases where the letter of law failed to take into account facts bearing upon moral culpability such as intoxication, insanity and the harsh application of the felony-murder rule. On the other hand, Justice Patterson was reticent about questioning a jury verdict and executive clemency offered an uncertain and unreliable way to uncover or correct errors in the trial process itself.

The fate of Thomset and Lowder was effectively sealed by the lack of any effective post-conviction remedy and by the cold efficiency of the legal process which sent them to the gallows less than six months after the murder of Peter Lazier, just as public opinion was beginning to swell in their favour.