

Judicial Crisis In Post-Confederation New Brunswick

D.G. Bell*

I.

IN THE CRUDE, DEMOCRATIC NEW BRUNSWICK of the 1860s, reported the newly-arrived lieutenant governor Arthur Gordon, a house or public building constructed of stone was the certain mark of the work of an earlier generation - a generation before Responsible Government.¹ Despite his penchant for Romantic excess, Gordon voiced a perception that became commonplace in the last three decades of the 19th century. New Brunswick's greatness was pronounced a thing of the past. The economy was troubled by the dislocations of National Policy and agricultural depression, public men were epigones of the giants of former days, and the province's youth was migrating to the United States in alarming numbers. Scholarship from T.W. Acheson on industrialization under the National Policy and the Maritime History Group on shipping and shipbuilding has done much to displace the historiographical myth that the Maritime economy declined irreversibly from the day after Confederation.² Late 19th-

* David G. Bell teaches in the Faculty of Law, University of New Brunswick. His graduate degrees are in history and law. A student of pre-Confederation Maritime culture, he is the author of *Early Loyalist Saint John* (1983), *Guide to the Legal Manuscripts at the New Brunswick Museum* (1990) and many essays and articles on historical and legal themes. The author acknowledges gratefully the facilitation of the Centre of Criminology, University of Toronto, where much of the research for this essay was carried on.

¹ W.S. MacNutt, *New Brunswick: A History, 1784-1867* (Toronto: Macmillan of Canada, 1963) 404.

² See, e.g., T.W. Acheson, "The National Policy and the Industrialization of the Maritimes, 1880-1910" (1972) 1:2 *Acadiensis* 3; E.W. Sager & L.R. Fischer, *Shipping and Shipbuilding in Atlantic Canada, 1820-1914* (Ottawa: Canadian Historical Association, 1986). The Federal death-blow to the Maritime economy is now said to have come not in the 1880s but in the 1910s: see T.W. Acheson, "The Maritimes and 'Empire Canada'" in D.J. Bercuson, ed., *Canada and the Burden of Unity* (Toronto: Macmillan of Canada, 1977) at 87; E.R. Forbes, "Misguided Symmetry: The Destruction of Regional

century New Brunswick was, however, permeated by perceptions of upheaval, loss of verity and declension.

One reflection of this loss of collective self-confidence is a sense - perceptible in both the press and the bar - of a state of crisis and decline in the province's senior judiciary. By some indices there is reason to think that the New Brunswick Supreme Court may indeed have suffered lapses in technical craft and political neutrality in the last decades of the century. Whether this was literally true, however, is less interesting than the widespread perception that it was so. Moreover, most factors contributing to falling judicial prestige at the close of the 19th century were not unique to New Brunswick. The late-Victorian period was a low point in popular attitudes towards Canadian 'public men' generally.³ Hence, many of the themes highlighted here, though cast in New Brunswick terms, are of more or less general application: the transition from old to new-style patronage; the politicization of the judicial appointment process; and, conversely, the heightened rhetorical emphasis on separating the judging process from politics. In one important respect, however, the falling prestige of New Brunswick's judiciary is understood best in terms unique to that province. For late 19th-century New Brunswickers, the notion of judicial crisis served as a sort of parable for the perceived decline of provincial society generally.

II.

PUBLIC ESTIMATION OF NEW BRUNSWICK JUDICIARY varied markedly over the course of the 19th century. From the 1780s to the 1820s Supreme Court judges were at the centre of the province's governing elite - Chief Justice Ludlow was referred to as Governor Carleton's

Transportation Policy for the Maritimes" in Bercuson, *supra* at 60.

³ See, e.g., J.G. Snell & F. Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: Osgoode Society, 1985) c. 2, 3; H. Foster, "The Struggle for the Supreme Court: Law and Politics in British Columbia, 1871-1885" in L.A. Knafla, ed., *Law & Justice in a New Land: Essays in Western Canadian Legal History* (Toronto: Carswell, 1986) at 167; D. & L. Gibson, *Substantial Justice: Law and Lawyers in Manitoba, 1670-1970* (Winnipeg: Peguis, 1972) at 126-27, 136-39; C. Berger, *The Sense of Power: Studies in the Ideas of Canadian Imperialism, 1867-1914* (Toronto: University of Toronto Press, 1970) at 52, 68-73.

“prime Minister” - and their prestige rose and fell accordingly.⁴ But between the accession of Ward Chipman Jr. to the chief justiceship in 1834 and the death of Chief Justice Robert Parker in 1865, the public and professional standing of the bench rose even higher. During this period the judiciary was removed from the realm of formal politics, enjoyed stability of personnel, and drew prestige from the increasing complexity of commercial litigation. To later generations this was the ‘golden age’ of the New Brunswick judiciary.⁵

Eighteen sixty-five was the year in which the serpent of Confederation entered the New Brunswick Eden. It was in that year, also, that the Anti-confederate Judge William J. Ritchie was promoted to the chief justiceship over the head of the aggressively Unionist Lemuel A. Wilmot. This affront to Judge Wilmot, based explicitly on his politics, was seized on by the Unionist press as unprecedented, and was made bitterly controversial.⁶ Contemporaries might have dismissed this development, taken within the context of the struggle against union with Canada, as an aberration. But with the transfer of superior court appointments into the hands of Sir John Macdonald in 1867, judicial patronage in New Brunswick became unmistakably one of the principal spoils of office, to be distributed within a system of partisan rewards and punishments. Strictly speaking, politicization of the judiciary - use of judicial appointment as a vehicle of party patronage - was an incident of Responsible Government and the needs of the party system, rather than of Confederation itself. As early as 1854, the year the province’s first Reform/Liberal government was formed, it was acknowledged that in future judicial vacancies would “often be filled by men chosen probably more from regard to their political than their

⁴ Letter from J. Bliss to S.S. Blowers (17 March 1786), Public Archives of Nova Scotia [hereinafter PANS], Bliss Papers, vol. 1603, F5; D.G. Bell, “The Reception Question and the Constitutional Crisis of the 1790s in New Brunswick” (1980) 29 *U.N.B.L.J.* 157 at 169-170; MacNutt, *supra*, note 1 at 189, 191, 196-97.

⁵ See, e.g., [*Saint John*] *Morning Journal* (27 November 1865); [*Fredericton*] *Colonial Farmer* (2 October 1868); [*Saint John*] *Telegraph* (12 August 1869, 23 December 1892); D.S. Kerr, *Review of the Judgment of the Supreme Court in The Queen vs. Joseph Chasson* (Saint John, 1876) 33; W.K. Reynolds, “Sir John Campbell Allen” (1898) 1:5 *New Brunswick Magazine* 233 at 234-35.

⁶ See, e.g., [*Saint John*] *Morning Journal* (4 December 1865); [*Fredericton*] *Colonial Farmer* (19 February 1866); *Journal of the House of Assembly of the Province of New Brunswick* (1st Session, 1866) 10.

professional standing and character".⁷ However, as Phillip Buckner observes, in no sphere of New Brunswick public life did the mores of the original Loyalist gentry persist longer than in bench and bar. As a matter of chronological happenstance, arising in part from judicial longevity, it was not until the 1860s that the old notion of legal patronage as a ratification of social standing was challenged.⁸ Only when responsibility shifted to the federal government in 1867 was the appointment process brought unmistakably within a system of partisan reward. Not until the last three decades of the 19th century was this decisive change in the kind of qualification that led to judicial appointment understood generally and criticized actively in terms of legal competence and partisan bias.

III.

THERE WERE TWELVE APPOINTMENTS to the New Brunswick Supreme Court between 1867 and 1896. All but one fell to the Liberal-Conservative regime of John A. Macdonald and his successors. Macdonald was not merely a skilled 19th-century patronage craftsman; he was its Canadian archetype. Yet even he was not without ambivalence. In a curious passage in the record of the Quebec Conference Macdonald is revealed as praising the Confederate States of America for legislating against politicization of public employment.⁹ On one occasion he went so far as to assert that:

In making Judicial app'ts our aim always has been to get the best legal talents attainable, and as the responsibility rests with us, we don't allow political considerations to interfere. *Ceteris paribus*, a political friend is preferred but not otherwise. For instance I nominated both [Oliver] Mowat & Sam'l Blake as Judges purely on account of their legal fitness.¹⁰

⁷ "Second Report of the [Law Reform] Commissioners", SNB 1854-55, II, v at viii.

⁸ P.A. Buckner, "Ward Chipman" in *Dictionary of Canadian Biography* [hereinafter DCB], vol. 8 (Toronto: University of Toronto Press, 1985) 149 at 153. Old-style 'connectional' patronage is explored in D.G. Bell, "Paths to the Law in the Maritimes, 1810-1825: The Bliss Brothers and their Circle" (1988) 8:2 N.S. Hist. Rev. 6.

⁹ G.P. Browne, *Documents on the Confederation of British North America* (Toronto: McClelland & Stewart, 1969) 97.

¹⁰ Letter from J.A. Macdonald to J. Robson (30 May 1888), National Archives of Canada, [hereinafter NAC], Macdonald Transcriptions, vol. 586.

Hence we have Sir Joseph Pope's pious assertion that in "select[ing] a man for the judicial office" Macdonald "knew neither Friend nor Foe".¹¹ But Macdonald's actual practice was very different. While his judicial patronage still cries out for comprehensive study, Gordon Stewart's examination of the Ontario appointments concludes that "partisan work over a number of years was an essential prerequisite before a lawyer could hope to be raised to the bench".¹² If this was so for Ontario, where Macdonald had extensive personal knowledge of the field, it is the more likely true of appointments in the Lower Provinces, where he relied on advice from political allies. Not surprisingly, the eleven New Brunswick judicial appointments made by the Conservatives between 1867 and 1896 went entirely to political supporters. The twelfth appointment, made by the Mackenzie Liberals, went accordingly.

The first level of critique attracted by the new economy of appointment was that those raised to the bench were not well qualified in learning or character. The most incisive analysis from this perspective was offered by Jeremiah Travis, the Harvard-educated Saint John lawyer and law treatise writer. Writing to Sir Leonard Tilley in 1882 Travis denounced the bench left in the wake of Chief Justice Ritchie's translation to Ottawa as a set of "abject incapables".¹³ Best of the lot was the "kindly" Chief Justice John Allen, who was merely a "fair lawyer". John Weldon, an octogenarian, was "grossly ignorant of the law".¹⁴ Charles Fisher was almost proverbially unlearned and stood even lower than Weldon in professional estimation.¹⁵ The "grossly

¹¹ Quoted in G. Stewart, "John A. Macdonald's Greatest Triumph" (1982) 63:1 *Can. Hist. Rev.* 3 at 25.

¹² Stewart, *supra*, note 11; G. Stewart, *Origins of Canadian Politics: A Comparative Approach* (Vancouver: University of British Columbia Press, 1986) 78.

¹³ Letter from J. Travis to S.L. Tilley (3 August 1882), NAC, Tilley Papers, vol. 21; J. Travis, *A Law Treatise on the Constitutional Powers of Parliament, and of the Local Legislatures, under the British North America Act, 1867* (Saint John, 1884). In justice one must note that Travis was himself removed from the bench for overbearing behaviour: M. Foran, "The 'Travis Affair'" (1971) 19:4 *Alta. Hist. Rev.* 1.

¹⁴ To much the same effect, [*Saint John*] *Penny Dip* (16 March 1878). Weldon, like Allen, was a surviving pre-Confederation appointee.

¹⁵ To the same effect, journal of I.A. Jack (17 January 1871), New Brunswick Museum [hereinafter NBM], A20.

and shamelessly dishonest" Rainsford Wetmore was "the worst Judge that has ever disgraced the bench of our province".¹⁶ Charles Duff, though of "fair intelligence", was nearly insane from "years of debauchery". Acalus Palmer was a competent "general lawyer" but so involved in shady financial transactions that "no one has any reliance whatever on his integrity".¹⁷ Here, at least, Travis was a prophet, for in 1894 Palmer was forced from the bench under threat of impeachment for nepotism and accepting bribes.¹⁸

Later appointments were hardly more impressive. Pierre-Amand Landry, reported another of Tilley's correspondents, was not a strong lawyer;¹⁹ he was appointed chiefly because he was Acadian. And, as noted below, both James J. Fraser and William H. Tuck were accused publicly of political partisanship in their handling of cases. Fraser was also accused of intoxication on the bench.²⁰ Of all the judges in late 19th-century New Brunswick only George King, later a judge of the Supreme Court of Canada, won unqualified admiration. If evidence from private correspondence is necessarily impressionistic, another estimation of the court's ability is afforded by its reversal rate in the Supreme Court of Canada. James Snell has calculated that during the whole period from 1875 to 1903, the New Brunswick court was reversed 42% of the time, the worst record of any jurisdiction.²¹

Several of these reversals came in conspicuous constitutional cases, and it must be acknowledged that some of the dissatisfaction with the New Brunswick court may have arisen from its handling of the

¹⁶ To much the same effect, [*Saint John*] *Freeman* (4 June 1870).

¹⁷ To the same effect, letter from M.H. Tuck to J.S.D. Thompson (6 January 1893), NAC, Thompson Papers, vol. 172.

¹⁸ [*Saint John*] *Globe* (10 June 1893, 8 March 1894). Since Confederation no Canadian superior court judge has been impeached successfully. In two of the four late-19th-century cases (LaFontaine and Palmer) the Conservatives engineered resignation with pension; the other impeachments (Loranger and Wood) were not proceeded with: [*Saint John*] *Progress* (4 November 1893).

¹⁹ Letter from G.E. Foster to S.L. Tilley (20 September 1893), NBM, Tilley Papers, Box 9, F2, No. 52.

²⁰ [*Saint John*] *Globe* (16 May, 12 & 18 June 1888).

²¹ J.G. Snell, "Relations between the Maritimes and the Supreme Court of Canada: The Patterns of the Early Years" in P.B. Waite, et al., eds., *Law in a Colonial Society: The Nova Scotia Experience* (Toronto: Carswell, 1984) 143 at 163. For a statistic which makes the reversal record seem even worse see [*Saint John*] *Globe* (16 May 1888).

delphic constitutional document. The current notion that judicial review came effortlessly to Canadian courts after 1867 is the product of mild historiographic amnesia;²² at least, it did not come effortlessly in New Brunswick. The provincial Supreme Court's 1868 decision in *R. v. Chandler: In re Hazelton*,²³ striking down insolvency legislation, voiced a principle of judicial review that became accepted by all Canadian appellate courts, but it was not acquiesced in by the New Brunswick legislature. In the wake of *Chandler* New Brunswick passed a second version of the insolvency law, in direct defiance of the court. When a Supreme Court judge granted an injunction to forbid the sheriff of Saint John from releasing a debtor under this new (and presumably unconstitutional) legislation, the Assembly responded with a fierce debate on judicial usurpation of the constitution and passed an act to indemnify anyone acting under its legislation, thereby disarming the injunction. With great publicity the sheriff of Saint John took the hint and freed his debtor in disobedience to the injunction.²⁴ The court was not called on to take further notice of the matter, so the sheriff acted with impunity; but even counsel for the liberated debtor conceded in the privacy of his diary that this parliamentary assault on the Supreme Court was "the most damnable legislation ever perpetrated in this province, perhaps any part of the empire".²⁵ Again, in 1873, the Assembly debated the legitimacy of judicial review and went so far as to publish the opinion of a New Brunswick county court judge arguing that judicial review was unconstitutional.²⁶

²² P.C. Weiler, "The Supreme Court of Canada and Canadian Federalism" in J.S. Ziegel, ed., *Law and Social Change* (Toronto, 1973) 39 at 49; B.L. Strayer, *Judicial Review of Legislation in Canada* (Toronto, 1968) at 21.

²³ (1869) 1 Hann. 556; 12 N.B.R. 556.

²⁴ This little-known episode in the birth of Canadian judicial review is explored further in G. Bale, *Chief Justice William Johnstone Ritchie: Responsible Government and Judicial Review* (Ottawa: Carleton University Press, 1991) c. 10.

²⁵ Journal of I.A. Jack, *supra*, note 15 (8 April 1870).

²⁶ [Fredericton] *Colonial Farmer* (10 March 1873); J. Steadman, *Opinion of Judge Steadman, of the York County Court, Delivered in 1868, upon the Power of the Judiciary to Determine the Constitutionality of a Law Enacted by the Parliament of Canada or a Provincial Legislature, with His Reasons therefor. Also - Observations upon Two Cases Involving the Same Question since Determined by the Supreme Court of New Brunswick*

The post-Confederation years also brought the Court the bitterly troublesome New Brunswick Schools question.²⁷ When an incident in the enforcement of the Schools law led to murder convictions, which were then overturned on appeal, one of the province's most eminent lawyers published a pamphlet subjecting the judgement to an excoriating root-and-branch critique.²⁸ But its most publicized, most embarrassing constitutional decisions were in the vexatious area of temperance. On this delicate subject the court managed, with superficial inconsistency, to strike down both provincial regulation as trenching on federal powers and federal regulation as trenching on provincial powers.²⁹ By pronouncing against the *Scott Act* the court had again stirred the ire of that busy scribbler Jeremiah Travis, who produced "two lengthy articles ... mercilessly exposing the utter, absolute nonsense which the judgments contained".³⁰ Not one to let matters rest, in 1884 Travis brought forth the young nation's first constitutional law treatise, a principal focus of which was the "absurd" jurisprudence of the New Brunswick Supreme Court.³¹ In part, then, the battered prestige of the provincial judiciary in the late-Victorian period may be a simple reflection of the fact that the Court was being presented with questions of an unprecedented political character, several of which were, by happenstance, cases of constitutional first

(Fredericton: Queen's Printer, 1873) esp. at 10-11.

²⁷ *Ex parte Renaud and Others* (1873), 1 Pugs. 273; 14 N.B.R. 273; G.F.G. Stanley, "The Caraquet Riots of 1875" (1972) 2:1 *Acadiensis* 21.

²⁸ Kerr, *supra*, note 5.

²⁹ *R. v. Justices of Kings: Ex parte McManus* (1875), 2 Pugs. 535; 15 N.B.R. 535; *Canada Temperance Act. Judgement of the Supreme Court of New Brunswick. Trinity Term, 1879. Ex parte Grieves* [Fredericton?, 1879]; *R. on the Prosecution of Thomas Barker v. Mayor of Fredericton* (1879), 3 Pugs. & B. 139; 19 N.B.R. 139.

³⁰ Letter from Travis to Tilley, *supra*, note 13.

³¹ Travis, *supra*, note 13; compare W. Lahey, "Constitutional Adjudication, Provincial Rights, and the Structure of Legal Thought in late Nineteenth-Century New Brunswick" (1990) 39 *U.N.B.L.J.* 185; R.C.B. Risk, "Canadian Courts under the Influence" (1990) 40 *U.T.L.J.* 687.

impression. Moreover, after 1875 its decisions could for the first time practically be appealed and overturned.³²

The most arresting institutional characteristic of the post-Confederation judiciary is not, however, a perception of declining competence and respectability of personnel but politicization of the appointment process itself. Assimilation of appointments to the needs of party politics produced politicization in public - or at least journalistic - perception. Two episodes in particular achieved the status of contemporary sensation and gave focus to the debate over the fallen state of the New Brunswick bench. In 1888 and again in 1893, prominent newspaper editors were imprisoned for scandalizing the Supreme Court.³³ Both contempt prosecutions arose in the wake of the bitter federal election law changes of 1885 - strengthening governmental control over returning officers³⁴ - and the hotly-contested general election which followed in 1887. In one case Judge J.J. Fraser repeatedly postponed trial of a controverted election petition that would have unseated the Conservative in Westmorland County on a theory that the limitation period was not yet running; then he reversed himself and joined a full Supreme Court bench in dismissing the petition on the ground that time for hearing had now expired. For this turn-about the Moncton *Transcript*, in an allusion to the current rage for Gilbert & Sullivan, labelled Fraser the "Judicial Pooh-Bah". Pointedly editor John T. Hawke referred to the Supreme Court as "mainly comprised of defeated Tory candidates" and denounced the proceedings as "the most disgraceful judicial scandal the details of

³² Though appeals from British American courts to the Privy Council had always been possible, this route was taken only rarely before the late 19th century. Contrary to what is often supposed - e.g., P.W. Hogg, *Constitutional Law of Canada* (Agincourt, Ont.: Carswell, 1985) at 165 - failure to create a Supreme Court for Canada in 1867 was not based on the assumption that it would be satisfactory for litigants to appeal from provincial tribunals to London but rather on the view that no appeal from provincial tribunals was practically necessary. Paradoxically, it was only after creation of the Supreme Court of Canada that appeals to the Privy Council became common.

³³ It may be noted that there were other prosecutions for contempt in the period and other imprisonments of newspaper editors for their publications, but none attained the *cause célèbre* status of the Fraser and Tuck cases: see, e.g., [*Saint John*] *Evening News* (23 April 1881) (prosecution of David Kerr); [*Saint John*] *Progress* (19 May, 9 June 1894) (prosecution of Bruce MacDougall).

³⁴ Stewart, *supra*, note 11.

which have ever stunk in the nostrils of a free people".³⁵ In convicting the editor for contempt, the majority of the court followed the curious reasoning that as "Pooh-Bah" in *The Mikado* had accepted bribes, then Judge Fraser, as a "Judicial Pooh-Bah", had been accused in effect of corruption. Sentenced to two months in gaol, Hawke served his time with all the publicity of a John Wilkes and was feted with banquets and a public subscription on his release. In the House of Commons debate on the case ran to 60,000 words.³⁶

The Hawke case was as nothing, however, compared with events resulting from the 1887 election contest in Queens County. Here the Conservative-appointed returning officer waited until Declaration Day to disqualify the successful Liberal candidate and turn the election over to the defeated Tory. The Liberals applied to a county court judge for a recount. The Conservatives then applied successfully to Supreme Court judge William H. Tuck for an order of prohibition against the county court judge. The partisan Liberal press was incensed. John V. Ellis, the much-respected editor of the Saint John *Globe* and former federal MP, denounced Tuck - who was well known as a personal friend of Sir John Macdonald - for "degrading the ermine", adding "[I]t is not justice that is wanted, and therefore Mr. Justice Tuck intervenes". These were the phrases seized on by the New Brunswick Supreme Court in convicting Ellis of scandalizing the court.³⁷ But the Ellis saga was only beginning. On one pretext and another the matter dragged on, through two appeals to the Supreme Court of Canada, for a further six years. The New Brunswick bench would probably have allowed it to remain dormant but for the fact that it was editor Ellis who in the summer of 1893 uncovered the \$5000 bribe of Judge Palmer that led the next year to his near impeachment and forced resignation. The court then revived the Tuck matter and Palmer had the satisfaction of still being on the bench to join in sentencing Ellis for the contempt of 1887. Like Hawke, Ellis chose to go to gaol, where again he was treated as a hero. Among his prison visitors were the lieutenant governor and the Anglican bishop. On release a crowd of 10,000 cheered him in Saint John. In the House of Commons debate on Ellis' sensational "state trial" lasted two days and ended with a

³⁵ [Moncton] Transcript (5 & 7 November 1887); *In re Hawke* (1889), 28 N.B.R. 391 (S.C.).

³⁶ Canada, *Debates of H.C.* (1888) vol. II, 1299-1331; H.B. Jefferson, "The Great Pooh-Bah Case" (1963) 54:1 Atlantic Advocate 45.

³⁷ *Ex parte Baird: In re Ellis* (1888), 27 N.B.R. 99 (S.C.).

recorded vote on whether the New Brunswick court's treatment of him had been "arbitrary, excessive, inimical to the public interest and deserving of censure".³⁸

With the Ellis affair, coming almost in tandem with the scandal involving Judge Palmer, the Supreme Court had never stood lower in the opinion of many journalists, politicians and lawyers. Politicization of the appointment process had exposed judges to assertions that they were a bench of defeated Tory candidates. Even the prospect of Palmer's removal did little to cheer those who knew that his vacancy would be used "to reward someone for political services, without regard to legal qualification".³⁹ Legislative reform had taken the trial of controverted elections out of the hands of the House of Commons and put it before these same judges. The political press, which reached its apogee in the last two decades of the 19th century,⁴⁰ was ready to denounce the allegedly partisan actions of the bench, and the House of Commons was prepared to debate the conduct of judges in some detail.

There is an important sense, therefore, in which late 19th-century judges were victims of their time. It was their misfortune to be the first generation of conspicuously partisan appointees to the bench. They were called on, for the first time in our legal tradition, to make necessarily controversial pronouncements in the constitutional field, and to resolve election disputes under a federal franchise law that positively invited partisan suspicions. Perhaps it is for this reason that one begins to notice, in late 19th-century New Brunswick, the first alarmed proclamations of the need to keep rigid the barrier between law and politics.⁴¹ Statements from the press deploring degradation of the ermine are common enough. More telling are statements revealing the perception of judges themselves. A county court judge, for example, feared the principle of judicial review

³⁸ Canada, *Debates of H.C.* (1894) vol. II, 3670-3764, 3767-3866; H.B. Jefferson, "The Ellis Case" (1964) 54:7 *Atlantic Advocate* 46.

³⁹ Letter from C.W. Weldon to L.H. Davies (14 February 1894), NBM, Weldon & McLean Papers, S 52, F 48-1.

⁴⁰ See B.P.N. Beaven, "Partisanship, Patronage, and the Press in Ontario, 1880-1914: Myths and Realities" (1983) 64:3 *Can. Hist. Rev.* 317 at 324.

⁴¹ For a parallel observation, grounded in a close study of the court's liquor jurisprudence, see Lahey, *supra*, note 30 at 205-08.

because it involved the judiciary in "question[s] of a political nature, growing out of a conflict between legislative authorities, and therefore not within the sphere of ordinary judicial inquiry or control".⁴² Similarly, a Supreme Court judge regretted Parliament's decision "to take the power to decide all matters concerning controverted elections from the House of Commons and place it in the ordinary Courts of Common Law". "[T]he wider the separation between political questions and judicial ones the better." "Courts", he added, "... have nothing to do with the policy of the law, or its justice or injustice; their duty is simply to obey and to administer it so far as they are authorized to do so; to do otherwise would be to abandon the office of Judges and take on that of legislators ..."⁴³ This insistent separation of law from politics may have been inspired as much by the old learning on parliamentary supremacy as the new learning on the 'rule of law', but judges would hardly have felt called on to articulate the distinction unless they felt that their aloofness from political questions was being eroded dangerously in the public eye. One suspects that the founding of the King's College (ie, University of New Brunswick) School of Law in Saint John in 1892, at which all six Supreme Court judges gave instruction, was in part a response to the perceived need to inculcate discipline and deference into a large and rowdy bar and, by extension, to shore up the respectability of the bench, through a process of group socialization.⁴⁴

IV.

PERCEPTIONS OF DECLINING PRESTIGE of the New Brunswick Supreme Court coincided with, and drew focus from, the Loyalist revival of the

⁴² Steadman, *supra*, note 26 at 15.

⁴³ *Supra*, note 37 at 122 & 120.

⁴⁴ The central role of the bench in the founding of the Saint John Law school is in notable contrast to the situation nine years earlier at Halifax. Only one judge was involved in the founding of the Dalhousie school: J. Willis, *History of Dalhousie Law School* (Toronto: University of Toronto Press, 1979) 28. It was also at this time that the bar rejected a move to address New Brunswick judges as "My Lord" rather than "Your Honour": [*Saint John*] *Progress* (16 February 1889). The New Brunswick bar grew dramatically in the last three decades of the century, when at least 360 attorneys were admitted as barristers, resulting in a lawyer/population ratio (1/1343 in 1881; 1/1066 in 1891) significantly higher than that for Ontario (1/1604 in 1881; 1/1412 in 1891).

1880s and the Saint John historical movement to which it gave rise.⁴⁵ Most of the first generation of New Brunswick historians were either lawyers themselves - William M. Jarvis, I. Allen Jack, A.A. Stockton, William K. Reynolds, James Hannay - or, in the case of Joseph W. Lawrence and W.O. Raymond, wrote judicial biography. Much of their work reflects dissatisfaction with post-Confederation New Brunswick through an uncritical nostalgia for the heroic Loyalty era and is cast in tacit 'then and now' terms. One of the most interesting, if least known, of these lawyer-historians was Isaac Allen Jack. Namesake and great-grandson of one of the original Supreme Court judges, Jack's most notable contribution to legal historiography was an article on "The Loyalists and Slavery in New Brunswick" which eulogized Ward Chipman Sr. and his four co-counsel for their role in an 1800 case testing the lawfulness of negro servitude in the province.⁴⁶ The moral implicit in Jack's slavery essay was made explicit in his "Canadian Aristocracy".⁴⁷ Lamenting the political corruption and social degradation that had accompanied the rise of Responsible Government and social egalitarianism, he mourned extravagantly the passing of New Brunswick's polished, Anglican legal-military elite of Odells, Saunderses and Chipmans. After saluting the virtues of Chief Justice Parker - who had died on the very eve of Confederation - as representative of all that was best in the genteel era before partisan politics became the only route to judicial appointment, Jack demanded rhetorically:

Of how few Judges in our Courts can it now be said, he never forsook his party in a self interested spirit; he never betrayed a political friend or colluded with a political foe, he never voted for a wrong measure for fear of injuring his prospects; he never bribed nor was he ever directly or indirectly the recipient of a bribe.

⁴⁵ See M.B. Taylor, *Promoters, Patriots, and Partisans: Historiography in Nineteenth-Century English Canada* (Toronto: University of Toronto Press, 1989) 214, 222-23, 270; D.G. Bell, "Introduction" in J.W. Lawrence, *Judges of New Brunswick and their Times*, 2d ed. (Fredericton: Acadiensis Press, 1985) v; M. Barkley, "The Loyalist Tradition in New Brunswick: The Growth and Evolution of an Historical Myth, 1825-1914" (1975) 4:2 Acadiensis 3.

⁴⁶ I.A. Jack, "The Loyalists and Slavery in New Brunswick" in *Transactions of the Royal Society of Canada*, 2d Ser., vol. 4, s. 2, (1898) 137.

⁴⁷ I.A. Jack, "Canadian Aristocracy" (1874) 4:1 Maritime Monthly 65.

It was such lawyer-politicians, compromised by the mores of electoral politics, who were now the exclusive class eligible for appointment to the bench.⁴⁸

Jack was an anti-Confederate, a provincial Tory and - in virtuous opposition to the patronage-based politics of the Macdonald Conservatives - a federal Liberal, as most of the late 19th-century lawyer-historian seem to have been.⁴⁹ But even a warm Macdonald supporter like James Hannay, writing in the midst of the Ellis affair, could mourn nostalgically for the "giants" who had dominated New Brunswick legal culture when he himself was called to the bar before Confederation. "Now", he added, "a judge is regarded as human like the rest of us".⁵⁰ It was Joseph Lawrence who offered the most impressive reflection of the perceived altered circumstances of the judiciary. His *Judges of New Brunswick and their Times* was a 500-page tribute to the twenty men appointed to the bench between 1784 and 1867.⁵¹ Post-Confederation appointees were excluded from treatment and, indeed, scarcely mentioned.

Fittingly, *Judges* concluded with the biography of Chief Justice Sir John C. Allen, the last survivor of the pre-Confederation bench. Such a structure of presentation reflects contemporary perception that Allen's retirement in 1896 after 32 years on the bench had severed the last link with New Brunswick's distinct colonial era. A tribute to Allen by William Reynolds also depicted his career in romantic, end-of-era terms. Carefully emphasizing that Allen "was made a judge because he was worthy to be one", Reynolds famously concluded that "it is something for those who come after us to remember that, whatever

⁴⁸ [*Saint John*] *Daily Tribune* (15 January 1872).

⁴⁹ The Liberal-Conservative dichotomy of New Brunswick provincial politics did not parallel the same nomenclature in federal politics: see I.A. Jack, "New Brunswick" [*Toronto*] *Nation* (6 August 1874); J. Hannay, "The Premiers of New Brunswick since Confederation" (July 1897) *Canada Magazine* 213, esp. at 213, 219-20. Federal Liberals attracted die-hard Tory support in New Brunswick because they resisted government by wholesale patronage: see P.B. Waite, *Canada, 1874-1896: Arduous Destiny* (Toronto: McClelland & Stewart, 1971) 19. One of the most vehement denunciations of Macdonald's tactics of government by patronage is Jack's pseudonymous novella *Memoirs of a Canadian Secretary: A Posthumous Paper* [Montreal: Dawson, 1880].

⁵⁰ [*Saint John*] *Telegraph* (23 December 1892).

⁵¹ *Supra*, note 45. Begun in the 1870s and composed principally in the 1880s, the work was completed by A.A. Stockton and W.O. Raymond and first appeared in book form in 1907.

may be the stamp of men who sit upon the bench in future years, we have at least had such jurists as Chipman, Parker, Carter, Ritchie and Allen as chief justices of New Brunswick".⁵² With Allen's passing that patrician succession had come to an end and the province's judiciary was perceived as delivered into the hands of a bench of political partisans who could never regain the popular deference accorded their predecessors in the lost golden era before Confederation.

⁵² *Supra*, note 5.