

V

Maritime Legal Institutions under the *Ancien Régime*, 1710–1850

D. G. BELL

IN THE HISTORY OF THE MARITIME PROVINCES, the long period between the fall of Port-Royal in 1710 and Britain's concession of responsible government to its remaining American colonies in the 1840s presents a sometimes bewildering spectacle of war, treaty, experiment and reformation. In 1710 *Acadie*/Nova Scotia was still a faultline between clashing French and British empires; its European inhabitants consisted only of 2,000 Acadians settled on the shores of the Bay of Fundy and governed by the law of military occupation. A long century later the region's half million people were divided amongst three self-consciously loyal British colonies, pioneering a constitution under which elected representatives of the people were the dominant influence in government.

In approaching these 140 years it is a mistake to assume that small, adjacent colonies must have had similar histories. These were the years in which Nova Scotia, Prince Edward Island and New Brunswick were most distinct demographically and in political culture. Particularities were significant even within individual colonies, as geographical isolation permitted settlement groups to retain old world ethnicities. Some aspects of diversity actually increased over time. In 1850, even more than in 1800, there were Maritime communities in which the prevailing language was German, Welsh, Passamaquoddy or Gaelic rather than French or English. In 1800 the population of Saint John was largely North American-born; by mid-century a solid majority in the region's largest city was from the United Kingdom. At the opening of the nineteenth century, residual Acadian influence in the Maritimes was slight; three generations later the French presence was again pronounced.

Despite diversities of terrain and people, however, the legal institutions of the Maritime colonies in their formative era were markedly similar. Constitutional arrangements imposed by the imperial government addressed one obsessive concern: how were the colonies to be retained within the empire, safeguarded from both internal rebellion and French or American conquest? This perceived need to bolster colonial 'loyalty' was the grand premise from which all subsidiary features of the colonial constitution theoretically derived. Hence, despite particularities of terrain and peoples, most of the colonies remaining to Britain after the American Revolution were alike in structure of government. Moreover, whatever the formal machinery, all pre-democratic colonial régimes faced similar domestic challenges: how to maintain civil peace in a society without police or even the discipline of common schooling, when large numbers of subjects, notably Roman Catholics, Aboriginal peoples, and women, were virtually barred from voting and holding public office; how to bring the machinery of civil and criminal justice out from the colonial capital into the hinterland; how to administer localities in the absence of village or county

councils; how to conduct the ordinary legal transactions of life, such as deeding land, selling slaves, collecting debts and settling property on offspring, when most people lived far from a lawyer; how to foster an “honourable and learned” legal profession?

The resulting constellation of ideas and arrangements for safeguarding loyalty and preserving order in the Maritime colonies in the eighteenth and early nineteenth centuries was one in which authority to govern flowed downwards, through the sovereign’s local viceroy, rather than upwards, from elected representatives of the governed. It was a system in which the rudimentary formal machinery of governance was enhanced by a pervasive ideology of deference and dependence, in which personal and dynastic influences were of fundamental importance, with no sharp distinction between public and private interests. This system of pre-responsible government, sometimes labelled pejoratively as “tory oligarchy” or “family compact,” was the Maritime colonies’ *ancien régime*.¹ This survey of constitutional and legal institutions between 1710 and the 1840s explores particular implications of this principle.

I. The Military and the Constitution

Governors and their staffs, admirals and their squadrons, generals and their régiments, come and go [Haliburton, *Old Judge*, 303]

Although England had a claim in international law to lands which became the Maritime provinces based on fifteenth-century ‘discoveries’ by Giovanni Caboto, it was not until the French capitulation at Port-Royal on 2 October 1710, confirmed by the Treaty of Utrecht (1713), that the peninsular part of what is now Nova Scotia came under permanent British rule. It was a further half century before France surrendered the rest of *Acadie*, including present Prince Edward Island, Cape Breton and New Brunswick, by the Treaty of Paris (1763). Throughout most of the 1710-60 period the British conquerors were in the awkward position of ruling a colony populated solely by Acadian and Native peoples, both allied sympathetically and often actively with France.

In the eighteenth century, and in a sense for most of the period before systematisation of Aboriginal reserves in the 1830s and 1840s, the semi-nomadic Miikmaq and Maliseets were virtually states within a state. At its highest, this special status evidenced British willingness to label the two tribes as ‘nations’ and govern their mutual relations through treaties, ritual compacts of friendship unparalleled in

¹ No edition of “Canadian” constitutional documents affords significant coverage to the Maritime colonies, but of some use is F. Madden, ed., *Imperial Reconstruction, 1763-1840: The Evolution of Alternative Systems of Colonial Government* (New York: Greenwood Press, 1987). The best general history of the region during this period is P.A. Buckner & J.G. Reid, eds., *The Atlantic Region to Confederation: A History* (Fredericton: Acadiensis Press, 1994), although W.S. MacNutt’s *The Atlantic Provinces: The Emergence of Colonial Society, 1712-1857* (Toronto: McClelland and Stewart, 1965) remains important. Also helpful is M.B. Taylor, ed., *Canadian History A Reader’s Guide: Beginnings to Confederation* (Toronto: University of Toronto Press, 1994), especially the bibliographic essays of B.M. Moody, I.R. Robertson and J.M. Bumsted. For a contemporary insider’s witty and intimate guide to the constitutional/legal tapestry of the Maritimes’ *ancien régime* in the era of its decay, T.C. Haliburton’s comic masterpiece, *The Old Judge; or, Life in a Colony* (London: Hurst and Blackett, [1849]) [CIHM=Canadian Institute for Historical Microreproductions 29046] cannot be bettered.

governmental dealings with other population groups.² For the most part these treaties, entered into between 1722 and 1786, amounted to British promises that Natives might go about their lives without interference, in return for undertakings to comport themselves peacefully. Sometimes they also recorded Natives as pledging to submit disputes with Europeans to “be tried in his majesty’s courts of Civil Judicature, where the Indians shall have the same benefits, advantages and Privileges as any others of His Majesty’s Subjects.”³ But though government saw a need to regulate the mutual relations of settlers and Natives, the British had no real interest in attempting to regulate the Natives’ internal criminal and civil affairs. The same remained true later, in the period after the close of the American Revolution, when Natives ceased to figure in the military equation. Mi’kmaq and Maliseets continued largely outside the practicalities of the colonising power’s legal system because it considered them marginal and best ignored.⁴

By contrast, the Acadians—prolific, sedentary and without the Natives’ self-evident claim to special status—could in the end be neither courted nor ignored. The British conquest of 1710 left them under what in constitutional terms was a sort of military dictatorship. Under this régime, centred initially on the fort at Annapolis Royal, military officers ruled Nova Scotia as both governors and judges for a half century, without benefit of representative institutions or common lawyers. Despite the incongruity of few officers and not many soldiers, supplemented by a tiny number of English-speaking civilians, governing a large and dispersed French population, the Annapolis régime showed ingenuity in accommodating to routine needs. In a colony under constant military threat, and with practically no Protestant inhabitants, there could be no question of an elected legislature. Government carried on through decrees of the governor and his council; but an informal system evolved in which the British communicated their grand concerns to the populace through Acadian “deputies,” elected annually on the king’s birthday. Acadian *notaires* recorded marriage contracts, land transactions and other legal incidentals of daily life, while government so far ignored religious impediments as to make at least one Acadian a justice of the peace. All of the few crimes to come before the colony’s only judiciary, the governor and council sitting as a common law court, were tried as misdemean-

² An overview of relations between Natives and government in the period is provided by L.S.F. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867* (Vancouver: University of British Columbia Press, 1979). There is no comprehensive legal-historical analysis of treaties and treaty making in the Maritime context and no reliable edition of the documents themselves, but a solid start is made by W.C. Wicken, “The Mi’kmaq and Wuastukwick [i.e., Maliseet] Treaties” (1994) 43 *University of New Brunswick Law Journal* 241 and S.E. Patterson, “Indian-White Relations in Nova Scotia: A Study in Political Interaction” (1993) 23 *Acadiensis* 23.

³ *Treaty, or, Articles of Peace and Friendship renewed ...* (Halifax: John Bushell, 1753) at 3-4; there was a similar treaty promise as early as 1725. A possibly unique European attempt to interfere systematically in criminal justice *within* Mi’kmaq society is discussed in D.L. Schmidt and B.A. Balcom, “The Règlements of 1739: A Note on Micmac Law and Literacy” (1993) 23 *Acadiensis* 110.

⁴ In the early twentieth century Mi’kmaq were still widely of the view that their eighteenth-century treaties took precedence over provincial game laws and, consequently, laid down communal rules concerning the harvest: see W.C. Wicken, “‘Heard It from our Grandfathers’: Mi’kmaq Treaty Tradition and the Syliboy Case of 1928” (1995) 44 *University of New Brunswick Law Journal* 145. Only in the 1980s did Canadian courts become receptive to this analysis.

ours, because the number of “gentlemen” required at common law for convening a grand jury put trial of felonies beyond practicality. Civil disputes among Acadians, when not settled informally by priests, elders and the deputies, were handled by this Court of Governor and Council with sometimes surprising subtlety. It willingly adjudged property and succession disputes by resort to what it knew of the tenets of the *droit civil*. In complicated matters this might be bolstered by drawing on Acadian oral tradition for understanding, or misunderstanding, of the relevant *coutume*, as when in deciding a 1732 property dispute the court enquired of Prudane Robichaud “What the Custom of the French Inhabitants was in Such Cases,” and then gave judgment accordingly.⁵

Although it provided its French-speaking subjects with the legal necessities, the military succession at Annapolis never won the complete allegiance of Acadians; and as long as mistrusted Acadians and Natives dominated Nova Scotia, and the influence of this “mock Government” failed to extend “beyond cannon reach” of the fort, the British could never attract Protestant settlers to counterbalance their influence. Not even the founding of Halifax in 1749 as the new colonial capital and counterweight to Louisbourg altered the equation decisively. Only after deportation of most Acadians, beginning in 1755, the fall of Quebec in 1759, and formal surrender of France’s empire in North America in the peace of 1763, was the colony secure enough to attract northward thousands of New Englanders to vacated Acadian farms and convenient fishing ports. This influx brought Nova Scotia a new beginning, the constitutional capstone of which was the convening of an elected House of Assembly in 1758, the first in what is now Canada.

With inauguration of representative institutions, Nova Scotia’s predicament as a “Military and almost an Arbitrary Government” began to meliorate.⁶ Yet for many reasons, notably two wars with the Americans and four with France, all between 1775 and 1815, the military continued a highly visible presence in the region until well into the nineteenth century. The constitutional complacency with which Maritimers accepted this “standing army” in their midst was one of their most notable cultural differences from the newly independent states to the south. From 1710 to 1848 the British appointed only military veterans, with but one exception, as governors of the Maritime colonies. From the 1830s until Confederation, the senior British military officer in the colony became administrator of the province automatically in the lieutenant-governor’s absence; in Nova Scotia from 1808 onwards the governor was also the general officer commanding the military district. Imperial concern for colonial defence prompted generous inducements at the close of succes-

⁵ A.M. MacMechan, ed., *Original Minutes of His Majesty’s Council at Annapolis Royal, 1720–1739* (Halifax: McAlpine, 1908) at 237–38; N.E.S. Griffiths, *Contexts of Acadian History, 1686–1784* (Montreal: McGill-Queen’s University Press, 1992) at 42; J. Vanderlinden, “À la rencontre de l’histoire du droit en Acadie avant le dérangement: premières impressions d’un nouveau-venu” (1995) 28(1) *Revue de l’Université de Moncton* at 47, printed *infra* at p. 86 in slightly revised form; T.G. Barnes, “‘The Dayly Cry for Justice’: The Juridical Failure of the Annapolis Royal Regime, 1713–1749” in P.V. Girard and J.R. Phillips, eds., *Essays in the History of Canadian Law: Nova Scotia* (Toronto: University of Toronto Press, 1990) at 10.

⁶ This characterisation was in a petition of Josiah Throop, 29 May 1777: vol. 142 (69), Massachusetts Archives. (I am grateful to Ernest Clarke for this reference.)

sive wars for redundant soldiers to become settlers. At one or other point in the nineteenth century at least ten forts in the three colonies were garrisoned by British regulars, with Halifax the most important military installation on the Atlantic coast of America. Only in 1906 did the British withdraw. The military's presence amounted to more than deterrence to invaders and a guarantee against any second American Revolution. It was on call to mayors and governors to quell religious and election riots, intimidate railway strikers and guard property after disastrous fires.⁷ In Halifax's notorious "soldiertown" and in every other garrison, soldiers and sailors participated disproportionately in crime, a source of perennial tension with the larger community. Serious offences against civilians were tried in the regular court system, but the military had a parallel machinery of trial and punishments which seemed the preferred route for minor infractions within that community and for desertion.⁸ For their part, while civilian courts proved sympathetic to farmers trying to save sons from military impressment, they also commonly respited sentences for serious crime on condition that the offender join the king's service; and no factor weighed more heavily in saving capital offenders from the hangman than membership in the military.⁹ The upshot was a sometimes uncertain line between military and civilian authority which remained an important, if often elusive, feature of the colonial constitution for much of the nineteenth century.

II. The *Ancien Régime* Perfected

[T]he attempt to adapt the machinery of a large empire to the government of a small colony present[s] many objects for ridicule or satire [Haliburton, *Old Judge*, iv].

New Englanders arriving in the 1760s to take up farms lately cleared of Acadians were but the first of several large waves of immigrants to reach the region in the last decades of the eighteenth century. Of the others, the most numerous were Scots, who settled Prince Edward Island, Cape Breton and the Northumberland Strait shores of the mainland, and American Loyalists, the largest number of whom settled at Shelburne and in the St John, St Croix and Annapolis river valleys. Even Acadians were allowed to return after the peace of 1763, although now consigned to the region's geographical margins.

The advent of Protestant settlers and the heightened attention directed to Britain's remaining North American colonies in the wake of loss of the American Revolutionary war triggered a general reorganisation of the region. In 1769 Prince Edward

⁷ The British military was called in aid of the civil power in the environs of Charlottetown (rent resistance riots) as late as 1865 and at Saint John (preventing looting) as late as the Great Fire of 1877.

⁸ Although there is no historical account of the military presence in the Maritimes or of its parallel system of justice, useful particulars can be gleaned from J. Fingard, *The Dark Side of Life in Victorian Halifax* (Potters Lake, NS: Pottersfield Press, 1989) and J.R. Phillips, "Women, Crime, and Criminal Justice in Early Halifax, 1750-1800" in Phillips, *et al.*, eds., *Essays in the History of Canadian Law: Crime and Criminal Justice* (Toronto: University of Toronto Press, 1994) at 174.

⁹ J.R. Phillips, "Operation of the Royal Pardon in Nova Scotia, 1749-1815," (1992) 42 *University of Toronto Law Journal* 401 at 439-43.

Island was separated from Nova Scotia; the erection of New Brunswick and Cape Breton as distinct colonies followed in 1784.¹⁰ The Island of St John was re-named for Prince Edward in 1799.

The structure of colonial government emerging from the 1780s was the one that endured until the peaceful revolution of the 1840s. In fashioning governments for the Maritime colonies the great object of imperial authorities was to prevent the rise of a spirit of independence. Although London foreswore its general right to legislate directly the internal affairs of colonies with an elected assembly, nonetheless the colonial constitution weighed heavily towards the appointed executive rather than the partly elected legislative branch.¹¹

From 1786 onwards all remaining North American colonies were in theory ruled by a governor-general, headquartered at Quebec, whose local deputies within individual colonies had the status of lieutenant-governors. These lieutenant-governors, chosen from London and almost always Britons rather than colonials, were the centrepiece of colonial administration, so much so that in the Maritime colonies they acted without much reference to their nominal superior at Quebec. All major and many lesser officials, from chief justice down to justice of the peace, were appointed either by the lieutenant-governor or directly by London. The lieutenant-governor headed the militia, presided over the highest court, and had access to sufficient "casual and territorial" revenues to run government, if need be, without co-operation from the legislature. Assisting the governor in executive functions was a council, its members named by London on the governor's advice. It functioned more as a privy council than a cabinet, in the sense that there was no requirement that the great officers of administration, such as the provincial secretary and attorney-general, be members; and there was no principle of collective responsibility. When the colonial legislature, styled the General Assembly, was in session this council doubled as the upper legislative chamber. No measure could become law unless it passed both the

¹⁰ During the period of its separation Cape Breton was never granted an elected assembly; laws were framed as ordinances of the lieutenant-governor and council. Although the colony was given a supreme court, a general sessions of the peace and an inferior court of common pleas, little is known of how the legal machine ran in practice. After Chief Justice Archibald Dodd ruled that a number of Cape Breton's ordinances were invalid and cast doubt on the lawfulness of the remainder, the colony was, in 1820, re-annexed to Nova Scotia. Important documentation on the legal structure is provided in E.H. Cameron, "A Study of Imperial Policy in Cape Breton, 1784-1795" (M.A. thesis, Acadia University, 1952); other particulars can be gleaned from R. Brown, *History of the Island of Cape Breton* (London: Sampson Low, 1869) at 386-442. In eighteenth-century America the terms 'colony' and 'province' were used interchangeably, although the latter prevailed in formal contexts. In the first half of the nineteenth century 'colony' became the prevailing usage, supplanted by 'province' only after Confederation. By the mid-nineteenth century, when writers felt the need to refer to the three colonies as a collective, the term 'Lower Provinces' came into use. It was probably about that time, also, that the 'Maritime' terminology began, but the rise to popularity of that expression has apparently never been investigated.

¹¹ The most extended contemporary account of the unreformed colonial constitution is B. Murdoch, *Epitome of the Laws of Nova-Scotia*, vol. I (Halifax: Joseph Howe, 1832) at 57-107 [CIHM 59436]. Useful descriptions of individual colonies are found in J. Stewart, *Account of Prince Edward Island* (London: W. Winchester, 1806), [P. Fisher], *Sketches of New-Brunswick* (Saint John: Chubb & Sears, 1825) [CIHM 37396], and T.C. Haliburton, *Historical and Statistical Account of Nova-Scotia*, vol. II (Halifax: Joseph Howe, 1829) [CIHM 35689].

elected House of Assembly and the appointed council sitting in its parliamentary capacity and then received the governor's approval. Over internal affairs of the colony, the jurisdiction of the General Assembly was practically supreme, though London reserved to itself trade, defence, foreign affairs and related matters.¹²

To the modern eye, accustomed in every province to a judicial structure which has at its apex a court of appeal with almost plenary jurisdiction, the colonial legal system laid down at the end of the eighteenth century is dismayingly irrational. Confusion is compounded by use of varied labels for the same function. After the close of the era of military rule from Annapolis, the principal court in each colony was a Supreme Court of Judicature, but its jurisdiction before the middle of the nineteenth century was neither plenary nor supreme. Constituted by royal prerogative rather than legislation, its chief justice and two or three *puisné*, also styled "assistant," judges held core jurisdiction equivalent to that of the three common law courts sitting at Westminster Hall, i.e., King's/Queen's Bench, Common Pleas, Exchequer.¹³ As such, its domain was crimes, apart from some committed in the military or on water, revenue offences, review of the work of inferior courts, and civil causes generally excepting those within the jurisdiction of a specialised superior court.

A colonial supreme court functioned in two ways. Several times in the year the judges sat collectively as a bench (*en banc*) at the capital to hear causes brought from inferior courts and to settle points of objection encountered by the judges in their individual capacities. It was not labelled a court of appeal, but the function of this Supreme Court *en banc* was in effect appellate, though it also had trial jurisdiction. However, most work of the Supreme Court was performed not as a full bench but by individual judges (or, in Nova Scotia until 1834, pairs) going out from the capital to county shiretowns to hold what were known commonly as circuit courts.¹⁴ When

¹² A clear exposition of these principles is offered in J.M. Beck, *Government of Nova Scotia* (Toronto: University of Toronto Press, 1957).

¹³ At least this was the case in Prince Edward Island and New Brunswick. There was apparently some belief that Nova Scotia judges were not invested with Exchequer jurisdiction: J.B. Cahill, "James Monk's 'Observations on the Courts of Law in Nova Scotia,' 1775" (1987) 36 *University of New Brunswick Law Journal* 131 at 133, 144; but see Haliburton, *supra* note 11, vol. II at 331. In New Brunswick there were four supreme court judges from the constitution of the court in 1784 until the reforms of 1854 added a fifth. In Nova Scotia the fourth judge was appointed in 1810; an "associate circuit Judge" was added for limited purposes in 1816, though the position ended in 1836. In eighteenth-century Prince Edward Island there were three supreme court judges, but in 1848 the number may have fallen effectively to two, until expanded again in 1859. A fourth position was created in 1922, though not filled until 1960: F. MacKinnon, *Government of Prince Edward Island* (Toronto: University of Toronto Press, 1951) at 56–60, 188–89, 271–73; C.R. MacQuade, *Without Benefit of Clergy: The Colonial Chief Justices and the Temper of Their Times* ([Charlottetown]: The Author, 1987) at 33.

¹⁴ In Nova Scotia circuits began by statute in 1775: Cahill, *supra* note 13 at 138. W.S. MacNutt's suggestion that New Brunswick supreme court judges refused to go on circuit confuses voluntary perambulation (which they undertook) with statutory circuits (which they resisted without financial compensation): *New Brunswick: A History, 1784–1867* (Toronto: MacMillan, 1963) at 99, 115, 201; [E. Winslow], *Substance of the Debates, in the Young Robin Hood Society ...* [Saint John, 1795] at 10–12. In Prince Edward Island a circuit system was not implemented until 1835: J. Hornby, "Capital Punishment in Prince Edward Island, 1792–1941" (1995, unpublished) at 10–11.

attending to litigation the supreme court on circuit was often referred to, in New Brunswick especially, as a court of *nisi prius*; hence, that ubiquitous nineteenth-century eulogium that lawyer X was “a great *nisi prius* lawyer” was a euphemistic hint that his forensic talent lay in haranguing country juries. When judges held criminal trials on circuit, referred to occasionally as “assizes,” they did so, speaking strictly, under authority of a commission of “oyer and terminer and general gaol delivery.” Such commissions were issued *ad hoc* for every criminal circuit, whether a regular one or a special sitting held to deal at once with some notorious crime.¹⁵

As in England, the arrival of a supreme court judge in a county town on circuit was an occasion. The presence of a judge attracted a flock of lawyers, either with cases to be tried or in hopes of being hired by litigants on the spot. Depending on the area visited, judge and lawyers might travel together and share a boarding house. At the courthouse they were met by the sheriff, the county constables carrying staves of office embellished with a gold crown, and the prisoners awaiting trial.¹⁶ The sheriff would already have summoned twenty-four of the most respectable white land-owners of the county to constitute a grand jury, together with a swarm of lesser “men” (occasionally Blacks,¹⁷ never women) as potential petty, i.e., trial jurors. Sometimes a special sermon preached by a local divine before the opening of court brought further solemnity to the occasion.¹⁸ After a reading of the commission of oyer and terminer came the judge’s charge to the grand jury, a secular homily in which it was

¹⁵ Occasionally one notices a commission of oyer and terminer directed to a queen’s counsel or even the attorney-general rather than a judge: D.C. Harvey & C.B. Fergusson, eds., *Diary of Simeon Perkins, 1780–1789* (Toronto: Champlain Society, 1958) at 315–16. Although commissions might couple the name of the supreme court judge intended to preside with those of two or more senior justices of the peace for the county in question, and though these latter would literally share the bench with the judge, it was usually understood that their role was to be seen rather than heard: J.W. Lawrence, *Judges of New Brunswick and Their Times* (1907), ed. by D.G. Bell (Fredericton: Acadisens Press, [1985]) at 387; J. Hornby, *supra* note 14 at 13–14.

¹⁶ Sheriffs and their deputies are the most neglected officials of pre-Confederation government. They called and often chaired public meetings, conducted elections, selected grand and petty jury panels, supervised service of civil process and headed the *posse comitatis*. See Murdoch, *supra* note 11 at 339; *Letters from Nova Scotia and New Brunswick, Illustrative of their Moral, Religious, and Physical Circumstances ...* (Edinburgh: Waugh and Innes, 1829) at 152 [CIHM 48436]; for a vivid fictional account of the world of sheriff, constable, gaoler and prisoner, see McCulloch, *infra* note 45.

¹⁷ Noted in an 1850 traveller’s account of Halifax, quoted in G. Wynn, “Ideology, Society, and the State in the Maritime Colonies of British North America, 1840–1860” in A. Greer and I. Radforth, eds., *Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada* (Toronto: University of Toronto Press, 1992) 284 at 300.

¹⁸ Court day is described in C.B. Fergusson, *Diary of Simeon Perkins, 1790–1796* (Toronto: Champlain Society, 1961) at 237–38; Haliburton, *supra* note 1 at 8–26 and Cahill, *supra* note 13 at 137–38. Specifications for crown-emblazoned constables’ staves are in W.O. Raymond’s notes from minutes of the King’s County [NB] General Sessions of the Peace for 5 March 1812: Lawrence Collection, MG 23, D1, vol. LXXIII, NAC=National Archives of Canada; a sermon preached on the opening of Kent County circuit is noted as late as 1829 in *New-Brunswick Religious and Literary Journal* [Saint John] (4 April 1829); travel on circuit in eastern Nova Scotia ca. 1805 is recalled colourfully in J.G. Marshall, *Brief History of Public Proceedings and Events ...* (Halifax: The Author, [1879]) [CIHM 09920] at 5–6.

“usual ... to enter into a disquisition of the Nature and Ends of Government,” the “Sanctions to Obedience” and the role of jurors as consciences of the community.¹⁹

In criminal cases there was no appeal beyond the supreme court. If, notwithstanding the court’s ruling on any point of law and a jury’s unanimous verdict for conviction, doubt remained on a question of law or fact favourable to the prisoner, justice could be done by flexible sentencing or, if the prescribed punishment was death, by the lieutenant-governor granting conditional or absolute pardon. Over half of those sentenced to death in Nova Scotia between 1749 and 1815 secured pardons.²⁰ In civil litigation, however, appeals were possible. Where the amount in issue was over £300, supreme court rulings could be appealed to governor and council sitting in its judicial capacity, known sometimes as the Court of Error. Where the amount in issue was above £500, there might be further appeal to the Judicial Committee of the Privy Council in London.²¹ Such recourse, though uncommon in the Maritimes, was not unknown.

The supreme court was a forum where “law” was pleaded. In the Maritime colonies jurisdiction over “equity” was in the lieutenant-governors by virtue of custody of the “great seal” of their province.²² Accordingly, matters of partnership accounts, foreclosure of mortgages, custody of minors and special remedies like injunctions, which in England came within the purview of the Lord Chancellor and the Court of Chancery, were adjudicated in the colonies by busy ex-military officers whose acquaintance with the subtleties of equity was apt to be slight. “Ours is an unexceptionable Military officer,” wrote judge Edward Winslow in 1809 of a New Brunswick governor, “but he is wonderfully out of his element in a Chancery Court.”²³ This awkward arrangement, so slapdash that lawyers might lodge equity petitions simply by handing them to the governor personally²⁴ and then find a governor who knew nothing of equity and, informally, on supreme court judges who

¹⁹ T.B. Vincent, “Jonathan Belcher: Charge to the Grand Jury, Michaelmas Term, 1754” (1977) 7 *Acadiensis* 103 at 105–06.

²⁰ Phillips, *supra* note 9 at 431.

²¹ H.T. Holman, “The Court of Chancery in Prince Edward Island” (1981, unpublished) at 80–81; W.M. Jarvis, “Royal Instructions to Thomas Carleton” (1905) 6 *Collections of the New Brunswick Historical Society* 404 at 415–16; Cahill, *supra* note 13 at 141.

²² On Maritime Chancery courts see Holman, *supra* note 21; J.B. Cahill, “Bleak House Revisited: The Records and Papers of the Court of Chancery of Nova Scotia, 1751–1855” (1989–90) 29 *Archivaria* 149; J. Cruickshank, “The Chancery Court of Nova Scotia: Jurisdiction and Procedure, 1751–1855” (1992) 1 *Dalhousie Journal of Legal Studies* 27; P.V. Girard, “Married Women’s Property, Chancery Abolition, and Insolvency Law: Law Reform in Nova Scotia, 1820–1867” in Girard and Phillips, *supra* note 5 at 80; Lawrence, *supra* note 15 at 379–81, 386–87, 469–74, 476–77. As with judgments of the supreme court, final appeal in chancery matters was to the Privy Council.

²³ E. Winslow to E. Winslow, jr., 3 August 1809; W.O. Raymond, ed., *Winslow Papers* (Saint John: New Brunswick Historical Society, 1901) at 637–38; Haliburton, *supra* note 11, vol. II at 328–330; Beck, *supra* note 12 at 70.

²⁴ E.W. Head to N. Parker MR, 17 June 1848: Head Papers, MG 24, A 20, vol. III, National Archives of Canada [hereinafter NAC]: “Mr Edward Miller has brought me [i.e., the lieutenant-governor] the enclosed petition. He says that this has been the usual course of application to the Chancellor.”

might know little more, led naturally in Nova Scotia (1782, 1825), New Brunswick (1838) and Prince Edward Island (1848) to designation of a master of the rolls to hear equity cases, although in the latter two provinces the possibility of appeal to the governor as chancellor remained.²⁵ At mid-century the great wave of law reform associated with the advent of responsible government rationalised the system further, by conferring the administration of both equity and law on a transformed "Supreme Court" and, in Prince Edward Island and New Brunswick, ending the governor's substantive role.

The colonial lieutenant-governor's function as chancellor and as president of the Court of Error were not his only judicial capacities. As head of the probate court system he had charge, through "surrogates," of routine matters of property succession on death. The Court of Escheats and Forfeitures, which governors also headed, performed the narrow but critical function of revoking crown land grants where the grantee had not complied with some condition, such as clearing a set number of acres or cultivating hemp for the navy.²⁶ As well, legislation in Nova Scotia (1758), New Brunswick (1791), and Prince Edward Island (1833) conferred on the Court of Governor and Council jurisdiction to grant divorces and annulments. In the two larger colonies this court did a surprising volume of business, earning New Brunswick the sobriquet "divorce capital of Canada," though most activity was generated after mid-century, when jurisdiction was taken from the council and conferred on a professional judge.²⁷

In all colonies there was also a court of vice-admiralty.²⁸ Its jurisdiction extended from matters as trifling as seamen's wages to the legal consequences of collisions at

²⁵ Some idea of how appeal worked from the master of the rolls to the governor as chancellor can be gleaned from E. W. Head to N. Parker, 6 December 1852: Head Papers, MG 24, A 20, vol. III, NAC.

²⁶ Murdoch, *supra* note 11, vol. IV at 94–96. The escheat jurisdiction proved crucial in allowing Nova Scotia and New Brunswick to create room for the Loyalists. The imperial government's refusal to allow Prince Edward Island to escheat that colony's underdeveloped townships was an enormous hindrance to development.

²⁷ In Nova Scotia the governor and council were granting divorces even prior to the statute. In all colonies the original divorce legislation ran into difficulties and had to be amended or replaced almost immediately. See C. Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: University of Toronto Press, 1991) at 177–99; W. Owen and J.M. Bumsted, "Divorce in a Small Province: A History of Divorce on Prince Edward Island from 1833" (1991) 20 *Acadiensis* 86; K.S. Maynard, "Divorce in Nova Scotia, 1750-1890" in Girard and Phillips, *supra* note 5 at 232; A. Crandall, "Divorce in 19th-Century New Brunswick: A Social Dilemma" (1988, unpublished).

²⁸ A.J. Stone, "The Admiralty Court in Colonial Nova Scotia" in (1994) 17 *Dalhousie Law Journal* 363; B.C. Cuthbertson, *The Old Attorney General: A Biography of Richard John Uniacke* (Halifax: Nimbus, 1980) at 61-62; Murdoch, *supra* note 11, vol. IV at 168–69. During brief periods in the eighteenth century, Halifax was also the seat of a special imperial admiralty court with multi-colony jurisdiction. Quite apart from the admiralty jurisdiction, the governor of every colony, along with members of the council and the regular judiciary, were constituted by an imperial statute of 1700 as a distinct court for trial and punishment of piracy. Particulars on this obscure jurisdiction can be gleaned from Stone at 398; Haliburton, *supra* note 11, vol. II at 341–43; D.G. Bell and E.C. Rosevear, *Guide to the Legal Manuscripts in the New Brunswick Museum* (Saint John: New Brunswick Museum, 1990) at 54 (434) [hereinafter NBM].

sea, salvage and murder committed while afloat.²⁹ The lieutenant-governor himself held the title of “vice admiral” of his colony, but in practice the jurisdiction was exercised by a distinct official. At some periods the appointment was not especially lucrative, though fees levied at various stages of legal process were ritually condemned as exorbitant by litigants and colonial legislatures. In times of war, however, when the court spent its days condemning captured enemy vessels, it generated such substantial fees that the judge and the advocate-general, as the crown attorney was called, might make fortunes. In Nova Scotia beginning in 1821, the admiralty judge was designated from men already on the bench, but in New Brunswick the position continued to be held until the 1860s by a senior practising lawyer.

Although a basic colonial constitution thus included upwards of a half dozen superior courts, the great majority of criminal complaints and civil causes were disposed of not in these forums but in ‘inferior’ tribunals staffed by legal amateurs, remunerated solely through fees paid by the parties themselves, where lawyers were rarely present. New Brunswick’s system may be taken as a pattern to which those of the other colonies can then be compared. Almost all criminal cases fell within the jurisdiction of a county court called the General Sessions of the Peace. Consisting of all justices of the peace (“magistrates”) resident in the county, the sessions met twice or more yearly to try petty criminal and quasi-criminal cases, such as assault and bastardy, thought insufficiently grave to reserve for full-dress trial before a supreme court judge.³⁰ It was often this court which sentenced offenders to be pilloried and whipped in the manner so thrilling to writers of local history.³¹ Except in the cities of Saint John (incorporated 1785) and Fredericton (1848), the General Sessions also performed the functions of local government prior to the mid-century creation, in the mainland colonies, of the first county councils. In this role the JPs, acting collectively, appointed county and parish officers for the year, approved accounts, licensed taverns, regulated ferries, and so on.³²

²⁹ The admiralty court also asserted jurisdiction over revenue offences, a claim which might reach well inland: Murdoch, *supra* note 11, vol. IV at 108–10. In New Brunswick claims of this nature led to repeated clashes between attorneys-general and advocates-general, as to proper judicial forum and prosecuting officer. See J. Bliss to S.S. Blowers, 6 June 1787: Bliss Papers, MG 1, vol. 1603, Provincial Archives of Nova Scotia [hereinafter PANS]; Bell and Rosevear, *supra* note 28 at 139(1317), 141(1344); Lawrence, *supra* note 15 at 157–57; Beck, *supra* note 12 at 69–70.

³⁰ The often elusive distinction between what the sessions felt competent to try and what was thought properly reserved for a court of oyer and terminer is canvassed usefully in J.B. Palmer, *Charge Delivered to the Grand Jury of Queens County ... at the Commencement of the General Quarter Sessions ...* (Charlottetown: The Author, [ca 1807]) at 7–8.

³¹ One of the better exemplars of the “work house, whipping posts and pillory” genre of historical writing on the sessions is M. Robertson, *King’s Bounty: A History of Early Shelburne* (Halifax: Nova Scotia Museum, 1983) at 138–69. These duties were performed by JPs acting in their collective capacity as a court. Individually, each JP had the power to receive complaints from victims of crime and on that basis issue warrants for search, arrest or committal to gaol, to put alleged law breakers and key witnesses on recognisance for appearance at trial, and to put objects of complaint on recognisance to keep the peace. As well, provincial statutes conferred on JPs a host of miscellaneous functions, from atesting veterans’ eligibility for pensions to distinguishing bear from raccoon snouts in certifying entitlement to the bear bounty.

³² H. Whalen, *Development of Local Government in New Brunswick* (Fredericton: Queen’s

The principal court for small civil claims in the county was the Inferior Court of Common Pleas. In this court which, though a distinct body, usually met in conjunction with the General Sessions, the judges consisted of two or three of the most senior and knowledgeable magistrates. For this reason, appointments to the Common Pleas were coveted greatly. In New Brunswick resentment of the Supreme Court judges' refusal to go on regular circuits prompted the General Assembly in 1802 to fix the exclusive monetary jurisdiction of the Common Pleas at £20, a sum said to comprehend 19/20ths of all litigation.³³ Smaller claims, up to £5, could be adjudicated before any justice of the peace. Indeed, the principal judicial importance of most country JPs was not in gathering at the court-house at set intervals for the collective work of the General Sessions but, as individuals, in adjudging small money claims for neighbours.³⁴ "Jobbing" justices were said to make a business of debt collecting for merchants.³⁵ A sense of how important the inferior civil jurisdiction was compared with the Supreme Court's local presence is afforded by statistics from Kings County. Over a five-year period straddling 1830, the local Common Pleas decided 304 cases and, in three of those years, JPs acting in their personal capacity tried an additional 2,500 cases of amounts up to £5, exclusive of default judgments. During this same period the Supreme Court on circuit to this populous New Brunswick county tried just four civil cases.³⁶

Owing to its relatively small extent and population, Prince Edward Island's version of the *ancien régime* boasted neither a Court of General Sessions of the Peace for lesser criminal matters nor an Inferior Court of Common Pleas for small money claims.³⁷ This departure from the typical colonial pattern placed an extraordinary burden of petty responsibilities on the Supreme Court. An 1820 complaint asserted that:

Printer, 1963) at 11–25; J.M. Beck, *Evolution of Municipal Government in Nova Scotia, 1749–1973* (Halifax: Queen's Printer, 1973) at 7–14.

³³ W. Chipman to J. Odell, 10 March 1802: Lawrence Collection, MG 23, D 1, vol. 6, NAC.

³⁴ Some justices of the peace also acted extensively as substitute solicitors and scribes, drawing and certifying quit claims, bills of sale, land petitions and the like.

³⁵ One sees this theme in literature as early as T.C. Haliburton's Justice Pettifog in *The Clock-maker* (London: R. Bentley, 1837) [CIHM 35710]. The original of Pettifog was probably Thomas Tupper of Kings County (Nova Scotia), of whom it was complained that "his thirst for money is so great that he will undertake any thing for gain" R.A. Davies, ed., *Letters of Thomas Chandler Haliburton* (Toronto: University of Toronto Press, 1988) at 83–84. Similarly, it was said in the New Brunswick legislature that "Some of them [magistrates] make a business of it and keep a couple of runners hunting up business for them, and get just such Juries as they like": New Brunswick, House of Assembly, *Reports of the Debates* (27 May 1865) at 98.

³⁶ *Report ... by the Commissioners to Inquire into the Judicial Institutions of the Province* (Fredericton: King's Printer, 1833), Appendix.

³⁷ While there are stray statutory references to a General Sessions on the Island and while J.B. Palmer's 1807 address to a "General Quarter Sessions" [*supra* at note 30] was possibly an attempt to put such an institution in motion, thereby reducing the role of the supreme court, it appears that no such court existed. (I am grateful to H.T. Holman for his views on this curious point.)

We see the Chief Justice ... now trying a murder, then an appeal from an eighteen-penny summons, now the right to a Township, or a ship, now a slap in the face, now engaged with a mandamus,³⁸ now reading the *Lumber Act*, now partitioning a proprietor's estate, now choosing a constable

Even prior to the incorporation of Charlottetown (1855) and creation of its police court, however, there was provision for trial of petty breaches of the peace by JPs, either singly or in groups. Similarly, from 1773 onwards debts up to £5 could be recovered before a local tribunal.

Apart from Halifax (incorporated 1841), late-eighteenth and early-nineteenth-century Nova Scotia's local court and governmental arrangements were similar in principle to those described for New Brunswick, with one important exception.³⁹ In 1824 the General Assembly, either impelled by democratic zeal for "Equal Administration of Justice" or manipulated by place-seeking lawyers, divided the mainland counties outside Halifax into large judicial divisions and provided for appointment of an experienced lawyer to preside as stipendiary "first-justice" over the various county courts of General Sessions and Common Pleas within each; such a system existed already in Cape Breton and was added eleven years later for Halifax.⁴⁰ This sensible but costly experiment at finding a middle path between the professionalised Supreme Court and amateur inferior courts anticipated the county courts created in all Maritime colonies at Confederation but was short-lived. In 1841 the legislature, bowing to a cry of too many judgeships for the colony's tory élite and too little work for its overpaid Supreme Court, swept away the first-justices and their divisions and abolished the Common Pleas, forcing Supreme Court judges to further perambulations of the shires.⁴¹ General Sessions of the Peace for the various counties remained, but only for their role in local government.

No survey of legal institutions in the colonial era could omit notice of dispute resolution outside the judicial system. In an age when most crimes were prosecuted, if at all, by and at the expense of the victim, in which cash was so scarce that almost everyone lived off the ledger and was liable to be sued and pressed to reside with the sheriff at a moment's notice, when the legal system was regarded widely as an engine to generate fees for judges and lawyers, much emphasis was placed on

³⁸ Quoted in J. Hornby, "Historical Status of Inferior Courts and Young Offenders in Prince Edward Island" (1988, unpublished) at 6. The reference to judicial appointment of constables reflects the fact that, lacking a general sessions, Prince Edward Island apportioned among its judiciary, governor-in-council, grand juries and Assembly much local decision-making which, in other colonies, was performed by magistrates in their collective capacity.

³⁹ Here, as elsewhere in this essay, the focus of description is legal institutions in the wake of the American revolutionary crisis. Earlier, in the previous two decades, local government and justice in Nova Scotia differed significantly in both form and ideology: J.B. Brebner, *Neutral Yankees of Nova Scotia: A Marginal Colony during the Revolutionary Years* (Toronto: McClelland & Stewart, 1969) at 180-211; Cahill, *supra* note 13.

⁴⁰ Murdoch, *supra* note 11, vol. III at 58-61. One of the first-justices was the celebrated humorist Thomas Haliburton, whose persona as the "old judge" of the brilliant 1849 volume of that name reflected his adventures circuiting the Middle Division: *supra* note 1; Haliburton, *supra* note 11, vol. II at 334-36; Davies, *supra* note 35 at 49-114.

⁴¹ S.E. Oxner, "The Evolution of the Lower Court of Nova Scotia" in P.B. Waite, *et al.*, eds., *Law in a Colonial Society: The Nova Scotia Experience* (Toronto: Carswell, 1984) 59 at 73-76.

resolving quarrels privately. Among “gentlemen,” especially lawyers and even judges, settlement of disputes of ‘honour’ through the ritual of challenging, negotiating and fighting duels was surprisingly common between the 1790s and the 1820s.⁴² At the other end of the social spectrum, radical Protestants at Barrington affirmed in their church articles that:

altho’ it may be lawfull & right to Sue a wicked man that Does withhold from his neighbour that which is his just Due: yet Bretheren in christ that have covenanted to walk in all the rules ... of the gospel⁴³ ought not to go to law with another: but all their Differences ought to be Desided by the Brethren.

Similarly, post-exilic Acadians shunned the alien values of their conqueror’s legal system, instead submitting disputes to resolution by elders and priests.⁴⁴

Some justices of the peace saw their duty not merely to try civil cases or bind over reputed offenders for criminal process but to reconcile the disputants, even where the grievance was a crime. One such figure, the “Squire Worthy” of Pictou schoolmaster Thomas McCulloch’s *Stepsure Letters*,

was the peace maker of the town. When neighbours quarrelled and threatened to sue each other, Squire Worthy, instead of sending the constable, used to get upon his horse and visit them; and somehow ... he generally prevailed upon them to cease from strife.⁴⁵

For most folk the principal means of dispute resolution outside of the legal system was arbitration. In towns, merchants preferred to arbitrate claims not only to avoid the expensive morass of chancery or save legal fees generally but also, as a New Brunswick supreme court judge cautioned in 1823, because:

the party who offers & is anxious for arbitration always makes a strong argument of it in his favor before a Jury, & no argument is more likely to prejudice them against the party who declines that method of settling the dispute.⁴⁶

Arbitration was a mechanism so simple and versatile that it could also be employed in country neighbourhoods, far from lawyers, to locate a fence line, settle the amount the putative father of a bastard child owed parish overseers of the poor, or resolve child custody disputes between separating spouses.⁴⁷ Though anyone might act as

⁴² For duelling by members of the legal profession see MacQuade, *supra* note 13 at 67; *Manners, Morals & Mayhem* (Fredericton: Public Legal Information Services, 1985) at 20-24; Cuthbertson, *supra* note 28 at 26, 36, 76; B.C. Cuthbertson, *Johnny Bluenose at the Polls: Epic Nova Scotian Election Battles, 1758-1848* (Halifax: Formac, 1994) at 154, 265.

⁴³ F.C. Burnett, “Henry Alline’s ‘Articles & Covenant of a Gospel Church’ ” (1984) 4 *Nova Scotia Historical Review* 13 at 21.

⁴⁴ Fisher, *supra* note 11 at 53; “Peter Pivot,” “Letters from New Brunswick” (1837) 7 *United Service Journal* 514 at 515; E. Ward, *Account of the River St. John*, 2nd ed. (Fredericton: Sentinel, 1841) at 87 [CIHM 49831].

⁴⁵ T. McCulloch, *Mephibosheth Stepsure Letters* (1821), ed. by G. Davies (Ottawa: Carleton University Press, 1990) at 86. Lest McCulloch’s character seem incredible, it may be noted that the detailed journal of a New Brunswick JP of the same period suggested that he too engaged in resolving civil and criminal disputes for his neighbours: Benjamin Crawford Diary, Archives of Ontario. Note also Bell and Rosevear, *supra* note 28 at 90 (804).

⁴⁶ E.J. Jarvis to W. Jarvis, 13 November 1823: Jarvis Papers, F5, P3(9), NBM.

⁴⁷ Murdoch, *supra* note 11, vol. IV at 36-41; D.G. Bell, “A Perspective on Legal Pluralism in

arbitrator, diaries of the period reveal that even JPs, who earned fees from deciding lawsuits, were willing nonetheless to tackle neighbourhood disputes as arbitrators.

III. Influence and Connection, Deference and Dependence

They admit that they have conferred several important appointments of late upon their own relatives, but entreat ... [the governor] to believe that affinity never entered into their consideration; for, as they are the best qualified themselves to form an administration, so are their connexions the most suitable for public offices [Haliburton, *Old Judge*, 30].

In colonies transfixed by the notion of loyalty, where the inhabitants, mostly British and Irish-born or self-styled American “Loyalist” exiles, lived under active or passive threat from the United States, a lieutenant-governor embodied the prestige of the monarch and security of the British connection. By concentrating in one office executive, legislative, judicial and military powers the imperial government sought to ensure that the democratic voice in the colony, its elected House of Assembly, would always be weak and that the colonies would be inhospitable soil for the levelling, free-thinking nostrums of the age. From this ideology of loyalty few Maritimers dissented. Although for a period after the American Revolution governing élites, thrown off balance by rising local oppositions, sometimes panicked into equating political or religious dissent with disloyalty to the monarch,⁴⁸ it was soon evident to all but the obdurate that the Maritimes were the most loyal of Britain’s colonies.

Yet any view of the colonial constitution as a monolith, presided over by an imperial appointee exercising dictatorial powers and vigilant to subdue centres of power not aligned with the state, would be misconceived. In part it was a question of the impossibility of governing oppressively in a society in which even cities lacked police and where the number of stipendiary civil servants did not exceed twenty in any colony before 1850. But it was also a question of attitude. Under the *ancien régime* the disjuncture between theory and practice, and the toleration of the unsystematic and anomalous, were often startling. The *ad hoc* and inefficient multiplicity of superior court jurisdictions noted earlier exemplified this, as did the great discrepancy between the number of felons sentenced to death and the number actually hanged. Oath requirements barred New Brunswick’s Roman Catholics, in

19th-Century New Brunswick” (1988) 37 University of New Brunswick Law Journal 86 at 90–92. On JPs as arbitrators see P. Stubs, *The New-Brunswick Manual; A Compilation of Forms and Information, Designed for the Use of Justices of the Peace, Merchants, Mechanics, &c* (Saint John: D. M’Millan, 1841) at 32–33 [CIHM 49074].

⁴⁸ N. MacKinnon, *This Unfriendly Soil: The Loyalist Experience in Nova Scotia, 1783–1791* (McGill-Queen’s University Press: Montreal, 1986) at 127–35; J.M. Beck, *Politics of Nova Scotia, 1710–1896* (Tantallon, NS: Four East, 1985) at 56–67; F.W.P. Bolger, “Land and Politics, 1787–1824” in Bolger, ed., *Canada’s Smallest Province: A History of Prince Edward Island* (Charlottetown: Centennial Commission, 1973) 66; D.G. Bell, “Sedition among the Loyalists: The Case of Saint John, 1784–1786” (1995) 44 University of New Brunswick Law Journal 163; MacNutt, *supra* note 14 at 94–117.

theory, from participation in any branch of public life; yet in practice they held commissions as both magistrates and militia officers.⁴⁹ All three colonies had statutes notionally 'establishing' the Church of England. Yet religious dissent was not only allowed but, by the first decade of the nineteenth century, had begun to flourish.⁵⁰ The pre-liberal mindset was sufficiently unsystematic and local in orientation to tolerate even occasional instances of women voting.⁵¹

One notable disjuncture between theory and practice related to official tenure. Virtually all public appointees, from attorney-general to justice of the peace, held office "during pleasure." They could be suspended, and in most cases dismissed, with no reason assigned. Officials in this vulnerable position, so theory went, dared not oppose the interests of the crown or its local governor. Colonial reality was very different. Appointment to a salaried position was said to create "an estate, virtually for life, in the office, with its emoluments and advantages." Tenure in such offices was "not a question of *contract* but of *title*."⁵² It was a fact, and to reformers a notorious fact, that officials once appointed were removable only for egregious misbehaviour which went well beyond incompetence, dereliction of duty or conflict of interest.

Within this general context the situation of the colonial judiciary was peculiarly delicate. In unhappy contrast to English judges, whose "independence" in tenure and stipend was one of the boasted hallmarks of the constitution, Maritime judges did not differ from other officials in their insecurity. In Nova Scotia and Prince Edward Island, moreover, the *puisné* judges depended for their salary on annual legislative votes,⁵³ which meant that in the former their income was liable to be, and was,⁵⁴ altered at the pleasure of local politicians, and that in the latter they had no salary at all.⁵⁵ The result was a theoretical insecurity of tenure which opened judges to the charge of being creatures of the executive. Hence the cry raised against the New

⁴⁹ R. Brun, *Pionnier de la nouvelle Acadie: Joseph Gueguen, 1742–1825* (Moncton: Éditions d'Acadie, 1984) at 70–71; MacNutt, *supra* note 14 at 81–82; J. Garner, *Franchise and Politics in British North America, 1755–1867* (Toronto: University of Toronto Press, 1969) at 136–43.

⁵⁰ See, for example, D.G. Bell, "Religious Liberty and Protestant Dissent in Loyalist New Brunswick" (1987) 36 *University of New Brunswick Law Journal* 146.

⁵¹ On Nova Scotia see Murdoch, *supra* note 11, vol. I at 68 ("has not been agitated whether females may vote or sit"); Cuthbertson, *supra* note 42 at 9 (elections in 1793, 1806). On New Brunswick see the *New Brunswick Courier* [Saint John] (5 Mar. 1831) ("Questions had arisen, as to the qualifications of female voters. Such questions were hitherto undecided, as it appears by the law at present, that females may vote."); E. Tulloch, *We, the Undersigned: A Historical Overview of New Brunswick Women's Political and Legal Status, 1784–1984* (Moncton: New Brunswick Advisory Council on the Status of Women, 1985) at 3 (election in 1830).

⁵² N. Parker, *Letter from the Master of the Rolls, New-Brunswick, to His Grace the Duke of Newcastle ...* (Saint John: J. and A. McMillan, 1854) at 3–4 [CIHM 49670].

⁵³ J.B. Cahill, "Henry Dundas' Plan for Reforming the Judicature of British North America, 1792" (1990) 39 *University of New Brunswick Law Journal* 158.

⁵⁴ C. Greco, "The Superior Court Judiciary of Nova Scotia, 1754–1900: A Collective Biography" in Girard and Phillips, *supra* note 5, 42 at 62, though in Nova Scotia the salaries of the *puisnés* were ostensibly made permanent in 1789.

⁵⁵ Prince Edward Island did not have a second salaried judge until 1848.

Brunswick bench at the height of the “reception date” controversy of the 1790s was that they were “much more dependent for their daily bread on the Ministers of the Crown than any menial Servant in the Province is on his Master.”⁵⁶ Except in Prince Edward Island before it achieved judicial stability beginning in 1828, however, and in the colony of Cape Breton during its unhappy period of independence from Nova Scotia, no Maritime judge was suspended or removed from office by the crown in the entire history of the region.⁵⁷

As a practical matter, colonial government was in more danger from the judges than were the judges from government. As they were generally among the best educated and most influential members of local society, it followed almost invariably that they were appointed to the colonial council.⁵⁸ This body’s function, as both executive committee of advice to the governor and, for a couple of months each year, upper house of the General Assembly, meant that judges had a role in the executive and legislative branches as well as in the judiciary. If in the course of litigation their interpretation as judges of a statute which they as members of Council had legislated and perhaps even drafted,⁵⁹ were challenged by appeal to the Court of Governor and Council, the appellant would encounter the same judges as members of Council present and ready to explain to the governor and lay councillors whether their decision below should now be overruled. As one complainant put it, this was appeal from the “Chief Justice and Assistant Judges to the Chief Justice and Assistant Judges.”⁶⁰ In a world in which it was commonplace for trial judges to sit on *de facto* appeals from their own rulings, or try suits in which a close relative appeared as

⁵⁶ Quoted in D.G. Bell, “The Reception Question and the Constitutional Crisis of the 1790s in New Brunswick” (1980) 29 *University of New Brunswick Law Journal* 157 at 170. “Reception” involves the fundamental issue of down to what date a new colony is deemed to have inherited, i.e., received, applicable English statutes. In New Brunswick the Supreme Court adopted quickly the defensible but implausibly early date of 1660, thereby excluding from the province’s constitution, at least symbolically, the libertarian guarantees of the Glorious Revolution. In the 1790s attempts to legislate a mid-eighteenth-century reception date were unsuccessful. Compare with J.B. Cahill, “‘How Far English Laws Are in Force Here’: Nova Scotia’s First Century of Reception Law Jurisprudence” (1993) 42 *University of New Brunswick Law Journal* at 113.

⁵⁷ Chief Justice Richard Gibbons of Cape Breton was suspended from office by the governor but reinstated by the Privy Council. Two early Prince Edward Island chief justices were suspended from office, for politics rather than their undoubted incompetence. Note that these comments relate to control of judicial personnel by the crown; the possibility of impeachment by the Assembly is mentioned below.

⁵⁸ Appointment to the Council did not follow automatically from appointment as judge, but it followed in the ordinary course of events. While New Brunswick judge John Saunders awaited a Council seat he was elected to the House of Assembly in 1791; George Monk sat in the Nova Scotia assembly for five years following his supreme court appointment in 1801; when Charles Fairbanks was appointed master of the rolls in the 1830s it took a legislative act to force him from his seat in the Nova Scotia House of Assembly.

⁵⁹ Scattered evidence from several of the North American colonies suggests that it was thought natural that measures connected with technical law reform, especially criminal law, would be drafted by the judges and introduced first into the Council.

⁶⁰ Quoted in J.M. Bumsted, *Land, Settlement, and Politics on Eighteenth-Century Prince Edward Island* (Montreal: McGill-Queen’s University Press, 1987) at 177.

counsel, such a combination of distinct functions in a single person was not without ready analogues.⁶¹

Judges were not just ordinary members of the Council. Often they were its mainstays. Living in or near the capital, they were usually the councillors who could attend its deliberations most conveniently. And because colonial judges tended to be appointed at younger ages than would be the case after responsible government, serving practically for life, and because governors themselves were relatively short-tenured strangers in a colony, whereas judges were local fixtures, a judge could hold enormous political power. The upshot was confusion in roles and functions, as newly-arrived Chief Justice Robert Thorp of Prince Edward Island recognised in 1803:

My situation is very critical. I have much to do with the Law, the Politics, and the internal arrangement of the Island, with the views, the interest, and the parties; I have much to say and much to detect and prevent: all must be done without any insinuation or partiality.⁶²

In New Brunswick, especially, there were several cases of a judge, in his capacity as longest-serving member of council when a governor died, succeeding to the administration of the province. After this happened twice in the mid-1820s the practice was banned.⁶³

Their central role in the executive of the province gave judges opportunities to insinuate family connections into the most lucrative situations in the gift of government, so that the number of relations by blood or marriage in the colonial governing élite never failed to impress observers.⁶⁴ In a world lacking merit tests for advancing the young and pension plans for supporting the elderly, nepotism was the universally accepted means of building dynastic security for old age while launching careers for dependants. In colonies in which the only secure wealth came from government, the ‘politics of place’ was, for sons and nephews of élite patrons, the only alternative to emigration.⁶⁵ For his skill in securing glittering appointments for himself, his heir and his innumerable connections, Judge Ward Chipman was accounted “one of the deepest, most artful & most skilful politicians in existence.” His successor as administrator of New Brunswick, Judge Murray Bliss, was the hub of a family

⁶¹ Only at the end of the nineteenth century, as legal “etiquette” gave way to legal “ethics,” did such practices come under adverse scrutiny: G. Bale, *Chief Justice William Johnstone Ritchie: Responsible Government and Judicial Review* (Ottawa: Carleton University Press, 1991; for the Supreme Court of Canada Historical Society, vol. I) at 213–31.

⁶² Quoted in Holman, *supra* note 21 at 42.

⁶³ Lawrence, *supra* note 15 at 253; MacNutt, *supra* note 14 at 192, 196, 222. In one concession to separation of powers, judges who succeeded to the administration of a province under the old régime suspended their judicial functions temporarily. At some much later point judges were again allowed to become administrators of the province in the absence of the lieutenant-governor, though not by virtue of seniority in the council: see MacKinnon, *supra* note 13 at 91–92.

⁶⁴ P.A. Buckner, *The Transition to Responsible Government: British Policy in British North America, 1815–1850* (Westport: Greenwood Press, 1985) at 53–55; MacKinnon, *supra* note 13 at 37–38; Bumsted, *supra* note 60 at 177; Beck, *supra* note 12 at 37, 39, 63, 70–71.

⁶⁵ See D.G. Bell, “Paths to the Law in the Maritimes, 1810–1825: The Bliss Brothers and Their Circle” (1988) 8 *Nova Scotia Historical Review* 6 at 36–37.

connection so powerful that even the lieutenant-governor trembled to disturb them.⁶⁶

By the 1830s the colonial judiciary's now controversial "triple power" and consequent "monstrous association" with political questions prompted decisive steps to isolate the judges from executive and legislative functions.⁶⁷ As early as 1809 and 1824 the Nova Scotia assembly had legislated to prevent their sitting in the lower house. Then, in 1830, shortly after London's ruling that no judge should succeed to administration of a colony, came word that *puisné* judges were to be excluded thereafter from the Council. The chief justice (and, in Nova Scotia, master of the rolls) continued as members, however, and on division of that body into distinct Executive and Legislative Councils, a former master of the rolls remained for a decade as president of the latter.⁶⁸ Though the judges' isolation from politics was not viewed by all of them with favour, it made easier the argument that their independence should be enhanced by making their salaries immune from the annual legislative appropriation process.⁶⁹ This occurred when, by compact with the imperial government, judicial stipends were placed on local civil lists in 1837 (New Brunswick), 1848 (Nova Scotia) and 1851 (Prince Edward Island), and assumed by the new federal government at Confederation.

IV. Gentlemen and Professionals

He abounds in anecdote; is remarkably well informed for a lawyer, for their libraries necessarily contain more heavy reading than light learning [Haliburton, *Old Judge*, 6]

When William Spry took up appointment in 1764 as judge of vice-admiralty over all America, a newspaper described the novel Halifax scene:

[T]he Right Worshipful William Spry, Doctor of Laws, in his scarlet Robes, attended by his Lordship Jonathan Belcher, Esq. Chief Justice of His Majesty's Supreme Court, &c. likewise in his scarlet Robes, [and] the Gentlemen of the Law in their Gowns and Bands, went in Procession to the Court House where His Majesty's Commission ... was read & published⁷⁰

Despite scarlet robes, solemn procession and the "very genteel cold Collation" which followed, Nova Scotia's legal hierarchy was beset, in the period from the

⁶⁶ E.J. Jarvis to R.F. Hazen, 7 September 1823: Jarvis Papers, Box 2, F12, NBM; MacNutt, *supra* note 14 at 196.

⁶⁷ *New Brunswick Courier* [Saint John], 26 March 1831; Cuthbertson, *supra* note 42 at 65.

⁶⁸ Madden, *supra* note 1 at 588, 593, 635; MacNutt, *supra* note 14 at 228; Beck, *supra* note 12 at 71; MacKinnon, *supra* note 13 at 65. The colonial councils were divided in 1832–33 (New Brunswick), 1838 (Nova Scotia) and 1839 (Prince Edward Island). In Prince Edward Island it was a non-stipendiary assistant judge who became president of the Legislative Council rather than Chief Justice Edward Jarvis, possibly because the latter, nearly blind and the Island's only real judge, was too busy to attend to duties as speaker. In Nova Scotia the chief justice and master of the rolls were excluded from the council at the division of 1838. In New Brunswick the judicial presence in the legislative branch ended in 1842.

⁶⁹ MacNutt, *supra* note 14 at 341; Greco, *supra* note 54 at 62.

⁷⁰ *Boston Gazette*, 19 November 1764.

founding of Halifax until the coming of the Loyalists, by the scrambling precariousness characteristic of colonial infancies. Although its chief justice was always a trained lawyer, this was not so of the *puisnés*; and, when the end of the American Revolution drove northward a small army of place-seekers from the ex-colonies, the state of the pre-Loyalist supreme court became the focus of intense criticism. Following the 1785 death of Chief Justice Bryan Finucane, the “Depravity or Incompetence” of the two assistant judges, one of whom was a layman, led a Loyalist-dominated House of Assembly to impeach both for “high Crimes and Misdemeanors.” Though acquitting them of misbehaviour, even the Privy Council acknowledged a want of “Men of sufficient Learning in the Law” on the colonial bench.⁷¹ For Nova Scotia judicial stability came only at the end of the century, when the distinguished Massachusetts Loyalist Sampson Blowers replaced as chief justice the last imported English judge. But although the polished and long tenured Blowers led the bench into an era of comparative respectability (1797–1833), his successor, Sir Brenton Halliburton, served too long (1833–1860) and was identified, both generationally and politically, too closely with *ancien régime* toriyism to provide leadership to the profession in a time of intense change.

Eighteenth-century Prince Edward Island shared early Nova Scotia’s predicament as a small, obscure colony in judicial infancy, but this condition persisted longer. For most of the period from 1769 to 1824, there was no jurist on the Island trained in English law.⁷² The only members of the judiciary to give promise of competence, Thomas Cochran and Robert Thorp, were soon promoted to the marginally less primitive Upper Canada. The longer-tenured chief justices, Peter Stewart, Caesar Colclough and Thomas Tremlett, squandered their modest usefulness by miring themselves in local politics. However, what propelled institutional inadequacy into a realm of judicial chaos and scandal “that never before appeared in any English judicature” was brazen misuse of their chancery court jurisdiction by a succession of Island governors to harass political enemies.⁷³ In 1798 it was complained that:

if it should so happen that a jury, more inclined to do justice than our Chief Justice [Stewart], should give a verdict to one obnoxious to the [governor’s] party, the case is immediately hung up in Chancery, the Governor being Chancellor, where the known partiality, and great expense of the court, frighten them from justice.⁷⁴

For ten years beginning in 1813 Chief Justice Tremlett and Chancellor (Governor) Charles Smith operated their courts with a sometimes aggressive political rivalry which made the Coke-Bacon contentions of two centuries earlier seem high-minded. In 1824 the British government sought in desperation to rescue the Island from

⁷¹ J. Sterns and W. Taylor, *Collection of All the Publications Relating to the Impeachment of the Judges of His Majesty’s Supreme Court of the Province of Nova Scotia* [Halifax, 1788] at iii; Cahill, *supra* note 53 at 163.

⁷² Chief Justice Peter Stewart (1776–1800) was trained in Scottish law; Chief Justice Thomas Tremlett (1813–1824) had no legal training.

⁷³ Quoted in J.M. Bumsted, “The Origins of the Land Question on Prince Edward Island, 1767–1805” (1981) 11 *Acadiensis* 43 at 54.

⁷⁴ Quoted in Holman, *supra* note 21 at 35.

decades of official incompetence and misconduct by appointing the solicitor-general of Nova Scotia as a non-resident chief justice. A more satisfactory solution was reached four years later when he was replaced by former New Brunswick Supreme Court judge Edward Jarvis, during whose long tenure (1828–52) the Island made the transition to conventional judicial and professional respectability.

Because the Loyalist influx of 1783 included many lawyers from advanced professional cultures in colonial America, New Brunswick's judiciary was spared the growing pains characteristic of its neighbours. At the new colony's separation from Nova Scotia four distinguished lawyers were appointed to its Supreme Court. Like stipendiary judges in Nova Scotia and Prince Edward Island, all appointments between the founding of the colony and the 1830s were secured by pulling strings in London. For the remainder of the period prior to responsible government, factors such as professional eminence, especially status as attorney- or solicitor-general, and the favour of the lieutenant-governor, played more of a role. The politics of judicial patronage worked unusually well for colonial New Brunswick. Apart perhaps from the second and third decades of the nineteenth century, the personnel and work of the Supreme Court were accorded a level of respect commanded by no other institution. Probably the zenith of influence was reached in the chief justiceship of Ward Chipman Jr (1834–50), when even a partisan of republican ways could observe, in 1838, that:

If there is one thing that this country surpasses us in it is their Judiciary. It would be an honour to any Country. ... [T]hey have an independence and self respect which gives to the judicial station the consideration and respect which ought to be attached to it everywhere.⁷⁵

Among Chipman's achievements was the fostering of statute revision and law reporting. Legal culture was a print culture. In terms of volume of pages, imprints of a broadly legal character dominated the production of Maritime presses from the inauguration of "Canadian" printing at Halifax in 1751 until the 1830s.⁷⁶ Most of this output was statutory, but there were specimens of gallows literature, murder trials and a surprising three offerings on an 1820 Halifax suit for seducing the plaintiff's wife. The most popular imprint of the period was a New Brunswick sheriff's account of the captivity of a remarkable horse thief. Published in England and the United States as well as Charlottetown, Saint John and Halifax, it went through at least nine impressions beginning in 1817.⁷⁷ If the fact of published law

⁷⁵ Quoted in D.G. Bell, *Legal Education in New Brunswick: A History* (Fredericton: University of New Brunswick, 1992) at 16. This was said despite the notorious fact that Maritime judges were paid far more handsomely than U.S. counterparts. In 1830, for example, the salary of Chief Justice Blowers exceeded that of the chief justice of the United States, and Nova Scotia's judicial establishment was more costly than that of New York: Beck, *supra* note 12 at 128.

⁷⁶ M. Tremaine, *Bibliography of Canadian Imprints, 1751–1800* (Toronto: University of Toronto Press, 1952); P.L. Fleming, *Atlantic Canadian Imprints, 1801–1820: A Bibliography* (Toronto: University of Toronto Press, 1991).

⁷⁷ On the publication history of Walter Bates' *Mysterious Stranger; or, The Memoirs of Henry More Smith* [CIHM 32186] see W.G. MacFarlane, *New Brunswick Bibliography ...* (Saint John: Sun Printing, 1895) at 8–9 [CIHM 09418]. *Mysterious Stranger* is a wonderful read. To legal historians it offers a rare glimpse of how the early nineteenth-century legal system dealt with the issue of insanity.

reports was a true indication, then the most distinguished Maritime jurist of the colonial period must have been the formidable Alexander Croke, judge of Nova Scotia's vice-admiralty court during the Napoleonic wars. Five at least of Croke's judgments appeared as occasional pamphlets "at the particular request of the gentlemen of the profession," and Solicitor-General James Stewart's one-volume 1814 compilation of Crokiana is the earliest venture at law reporting in the common law provinces.⁷⁸

Regular reporting of supreme court decisions was inaugurated by George Berton for New Brunswick in 1835, under the active aegis of the chief justice. Alexander James followed twenty years later for Nova Scotia; but, apart from extended case notices in newspapers, Prince Edward Island's law reports began only in 1872.⁷⁹ The founder of the *New Brunswick Reports* was the same young practitioner who, with Chipman's painstaking assistance, produced a masterful edition of the first half century of New Brunswick statute law in 1838. Berton's project brings inevitably to mind comparison with Richard Uniacke's landmark 1805 compilation for Nova Scotia.⁸⁰ To Attorney-General Uniacke, issuing an edition of colonial laws at a time of world upheaval was a mobilising political act. He rose to the occasion by prefacing the *Statutes at Large* with perhaps the most arrestingly eloquent assertion of tory principles and exhortation to submit to just laws in the canon of Canadian political literature.⁸¹ Berton's work of thirty years later, by contrast, was elaborately sedulous, apolitical and "professional." His editorial correspondence suggests that now the highest gratification of authorial ambition was favourable notice in *American Jurist*.⁸²

In terms of lawyerly literary achievement in the Maritimes, the apogee for the whole nineteenth century was publication of John Saunders' two-volume digest of *Pleading and Evidence in Civil Cases* (1828) and, especially, of Halifax lawyer Beamish Murdoch's *Epitome of the Laws of Nova-Scotia* (1832–33).⁸³ Although

⁷⁸ J. Stewart, *Reports of Cases, Argued and Determined in the Court of Vice-Admiralty, at Halifax ...* (London: J. Butterworth, 1814) at ix [CIHM 59872].

⁷⁹ J. Nedelsky and D. Long, *Law Reporting in the Maritime Provinces: History and Development* ([Ottawa]: Canadian Law Information Council, 1981). The self-conscious care taken in preparing the early report volumes is impressive. Counsels' arguments to the court are usefully summarised, to the point of capturing exchanges with the bench. The reporters' prefaces to the early volumes of the *New Brunswick Reports* are well worth the attention of students of emergent legal professionalism, especially the work of Berton's successor, David Kerr. Both the *New Brunswick Reports* and *Nova Scotia Reports* were begun with legislative subsidies. In 1810 William Roubel of Prince Edward Island advertised a pamphlet on a sensational 1792 rape case and a collection of law reports, but no copies are extant.

⁸⁰ *Acts of the General Assembly of Her Majesty's Province of New Brunswick ...* (Fredericton: Queen's Printer, 1838); R.J. Uniacke, *Statutes at Large Passed in the Several General Assemblies Held in His Majesty's Province of Nova Scotia ...* (Halifax: John Howe, 1805) [CIHM 29056].

⁸¹ On this remarkable but little-known document see D. Desserud, "Nova Scotia and the American Revolution: A Study of Neutrality and Moderation in the Eighteenth Century" in M. Conrad, ed., *Making Adjustments: Change and Continuity in Planter Nova Scotia, 1759–1800* (Fredericton: Acadiensis Press, 1991) at 89.

⁸² "George Frederick Street Berton" in *Dictionary of Canadian Biography*, vol. VII (Toronto: University of Toronto Press, 1988) 73.

Murdoch's four-volume amalgam of précis, commentary and critique lacked the sustained audacity of Blackstone's paean to English law or the spacious learning of Chancellor Kent's *Commentaries*, Murdoch's chart of Nova Scotia's legal pedigree ranks with Judge Haliburton's literary effusions, as impressive evidence of emergent self-confidence in the region.

Murdoch's supposition that *Epitome* would supply the needs of an intelligent laity, and not merely of lawyers and legislators, was more than mere authorial optimism. Although by his day Nova Scotia statutes were no longer "publis[h]ed by Beat of Drum," Murdoch was of an era, albeit at its close, in which what would now be considered specialised legal knowledge was still diffused in the community rather widely.⁸⁴ The same assumption underpinned production in the mainland colonies of three manuals for the use of JPs and officers of local government.⁸⁵ It was even a matter of comment that Maritimers of New England extraction schooled their children in "where they may have an action and where a remedy, where they can have a plea of trespass and where they may recover damages." "[I]n no region of the earth," wrote another startled observer, "does litigation form a more prominent concern of life."⁸⁶ In an age when all local administration and many aspects of the justice system were in the hands of unpaid legal amateurs, with an economy in which 'on demand' indebtedness was pervasive, knowledge of everyday legal procedures and formularies was a requisite to full citizenship.

Murdoch, Saunders, Berton and the three lawyers who authored JP manuals all published their work within a dozen years centred on the 1830s. Apart from Uniacke's statute edition of 1805, this fillip of legal writing marked a stage in Maritime legal development without prior parallel. Both Nova Scotia, in the era of the founding of Halifax, and eighteenth-century Prince Edward Island had resort to the usual colonial expedient of licensing laymen to act as lawyers.⁸⁷ Only after the Loyalist influx of the 1780s trebled the number of lawyers did Nova Scotia have a sizeable bar and practitioners of formidable reputation. Professional cohesion may

⁸³ J.S. Saunders, *Law of Pleading and Evidence in Civil Actions ...* (London: S. Sweet, 1828). Although the work also went through four U.S. editions before 1844, an American reviewer thought that "its execution is miserable, the author being as dull a man as could be wished": quoted in J.G. Marvin, *Legal Bibliography ...* (Philadelphia: T. and J.W. Johnson, 1847) at 629. Fredericton lawyer John Saunders was a son of the supreme court judge of the same name. A thoughtful analysis of Murdoch's uneven but, for legal historians, invaluable work is offered in P.V. Girard, "Themes and Variations in Early Canadian Legal Culture: Beamish Murdoch and his *Epitome of the Laws of Nova-Scotia*" (1993) 11 *Law and History Review* at 101.

⁸⁴ Murdoch, *supra* note 11, vol. 1 at 1–3. Engrossed originals of early Nova Scotia statutes are endorsed as published by drumbeat.

⁸⁵ J.G. Marshall, *The Justice of the Peace, and County and Township Officer ...* (Halifax: Gossip & Coade, 1837) [CIHM 36869]; D. Dickson, *Guide to Town Officers ... According to the Laws of the Province* (Pictou: Bee, 1837) [CIHM 37452]; Stubs, *supra* note 47. Marshall's manual concentrates on the official duties of the JP; Stubs' focus is the JP's opportunities for solicitorial work.

⁸⁶ Quoted in A.A. Calabresi, "Letters Home: The Experience of an Emigrant in 18th Century Nova Scotia" (B.A. thesis: Yale University, 1986) at Letter 16; "Pivot" *supra* note 44, 75 at 76.

⁸⁷ J.B. Cahill, "The 'Judges Affair': An Eighteenth Century Nova Scotian *Cause Célèbre*" (1986) at 19–20 [unpublished]; H.T. Holman, "The Bar of Prince Edward Island, 1769–1852" (1992) 41 *University of New Brunswick Law Journal* 197 at 203.

have been retarded rather than advanced, however, as Loyalist lawyers led the campaign that culminated in impeachment of the *puisé* judges of the supreme court, resulting in disbarment of two of the judges' leading critics. From this perspective the promulgation of a rule of court in 1799 fixing a minimum four years' clerkship prior to admission as an attorney was equivocal. Did the professional consciousness it reflected signify collective maturation or the pressing need for formalisation of standards?⁸⁸ Only after the peace of 1815 was there clear indication that the bar was flourishing, not only at Halifax but in rising county towns like Liverpool, Lunenburg, Truro and Amherst.⁸⁹

By 1825 Halifax lawyers were sufficiently numerous and self-conscious to form a "Society of Nova Scotia Barristers." As with all such organisations, membership was voluntary, indeed tending towards exclusiveness, and blended the gentlemanly and fraternal (dinners, association with judges) with the professional (improving legal dress, promulgating a tariff of fees). A primary concern was maintenance of a common library, building presumably on the nucleus donated by former Chief Justice Thomas Strange. Another concern was regulation of articling students, whose background and character were to be vetted carefully and who were to be admitted to clerkship only on paying 100 guineas.⁹⁰ One next hears of an organised bar only in 1844, with an unsuccessful attempt at legislative incorporation. Although it is probable, therefore, that the Barristers' Society of 1825 lost its visibility, the bar did not lack capacity for collective action when occasion warranted. Thus, at the end of the 1830s, when a high-handed admiralty judge overstepped himself in suspending and gaoling a leading advocate for contempt, a "meeting of the Gentlemen of the Bar" convened to investigate and intercede.⁹¹

Prince Edward Island's bar, like its judiciary, took longer than its Nova Scotia counterpart to assume the attributes of professional learning and stability. Lieutenant-Governor J.F.W. DesBarres' willingness to "throw open the bar, that all inclined might try their skill and merit have its reward" reflected the fact that, as late as 1808, there were only three lawyers in the province, including the attorney-general. Two years later the governor offered that, "The Profits of the Profession of Law will not maintain a Gentleman."⁹² Of only seventy-five men called to the bar between 1789

⁸⁸ J.B. Cahill, "The Origin and Evolution of the Attorney and Solicitor in the Legal Profession of Nova Scotia" (1991) 14 *Dalhousie Law Journal* 277 at 283. Cahill's article, which is broader in scope than the title suggests, points up the theoretically distinct admission procedures for the supreme, chancery and indeed admiralty courts; see also Stone, *supra* note 28 at 372–73. Clerkship was raised to the English norm of five years by statute in 1811; in 1818 a one-year reduction was provided for boys with a college degree. This remained the professional entry requirement for the rest of the colonial period. Requirements were similar in Prince Edward Island and New Brunswick.

⁸⁹ Detailed assessments of the state of the profession in Nova Scotia are offered in J.W. Nutting to E.J. Jarvis, 7 September 1816 and 13 August 1818: Jarvis Papers, MG 24, B 13, vol. I, NAC. The geographical spread of lawyers is also described well in Cuthbertson, *supra* note 42 at 12–13.

⁹⁰ *Rules of the Society of Nova Scotia Barristers* (Halifax: Edmund Ward, 1825) at 8–10 [CIHM 64913]. Barristers could take on students gratuitously, however. Material on Maritime law students in this period is collected in Bell, *supra* note 65.

⁹¹ Stone, *supra* note 28, at 407–09. (I am grateful to Mr. Justice Stone, Federal Court of Canada, for sharing documentation.)

and 1852, H.T. Holman has calculated that nearly one-third were non-resident lawyers, especially from Pictou and Miramichi, who did not intend to stay on the Island, and that, of the remainder, a considerable number emigrated. So it was that even though Prince Edward Island's admission requirements were nearly the same as those of its neighbours, its bar long remained small. Only in 1876 was a law society formed.⁹³

In one respect, however, Prince Edward Island was in the colonial vanguard. No New Brunswick lawyer is known to have been disciplined before 1850, and in Nova Scotia only the three cases mentioned earlier have been found. In Prince Edward Island four lawyers were struck from the rolls or suspended from practice between 1791 and 1835. As with discipline cases on the mainland, most were occasioned by collision with a judge; in no case were dealings with clients under scrutiny. The first such case came after a lawyer was charged with, among other irregularities, assault on the high sheriff, common barratry and speaking contemptuously of the legal establishment. Another was disciplined for complaining of a judge's political activities. A third was struck from both supreme court and chancery rolls for "blatantly political" reasons. In the fourth case, Chief Justice Jarvis punished a lawyer for shielding himself from creditors by invoking repeatedly the practitioners' exemption from arrest for debt. Appeal for restoration to the Privy Council gave Jarvis occasion to make explicit his determination to raise the Island's bar into conventional respectability. Fittingly, at the end of his long tenure in 1852, he was succeeded by the first locally-formed lawyer to become a judge.

The histories of the Nova Scotia and Prince Edward Island bars in the colonial period are of transition upwards from an unsatisfactory state in the eighteenth century towards some of the indicia of modern professionalism. The story of the colonial New Brunswick bar is quite different. Even more so than Nova Scotia, New Brunswick received a dramatic influx of Loyalist lawyers in the 1780s, but they were spared the necessity of jostling with an already-established legal profession. Instead, many of these lawyers were immediately given roles in governing what they regarded as a model Loyalist colony. This sense of common adventure, and the urge to vindicate principles of monarchical government for which they saw themselves martyrs, infused a perceptible *élan* into the bar, countering to some degree the impact of professional overcrowding and economic stagnation. This was reflected in the sophisticated approach to nurturing law students. As early as 1786 Saint John articling clerks, under the encouragement of Solicitor-General Chipman, formed an elaborate "Förensick Society" to hone analytical and rhetorical skills. The judges, so one proud neophyte reported, permitted Society members to "wear an attorney[']s badge pendant from the left breast by a velvet ribband."⁹⁴ The same *esprit de corps*

⁹² Quoted in Holman, *supra* note 87 at 203, 205. This whole section is drawn from Holman's useful essay.

⁹³ Typically the most pressing impetus to formal professional organisation is support of a law library, but research has yet to uncover evidence of this concern among Island lawyers. As late as 1810 the lieutenant-governor thought that, "One hundred pounds would purchase ... a better selection of Law books than the joint stock of all the lawyers and judges on the Island would exhibit": quoted in Bolger, *supra* note 48 at 81.

was reflected in litigation of the colony's first slave test case in 1800. The two counsel appearing on behalf of the slave broke lances with the attorney-general and four young lawyers for the master, both sides producing set-piece factums for the occasion.⁹⁵ Professional ambition was also evident in elaborate three-year reading programs framed for several law students in the second decade of the nineteenth century, designed to introduce young 'gentlemen' systematically to works of history and politics, as well as pleading and conveyancing. The three-year programs, although a genre of instruction apparently unique to New Brunswick, were a culmination of the advanced professionalism of pre-revolutionary Massachusetts and New York. The American Revolution may have shattered elite legal culture in the old colonies but its values were carried northward and reached their highest form amid the rocks and stumps of exile.

As an approach to legal education, the reading programs bespoke a self-conscious determination that the first generation of New Brunswick-trained lawyers would not fall beneath the standard of their mentors. But they presupposed a student with access to an extensive law library and leisure for study. They would have had no value to the articulated clerk at Halifax whose professional formation consisted of "copying old Parchments, writing Pleas, filling up Writs, and, at my leisure Hours, I was directed to read and study three works, Blackstone's Commentaries, Coke upon Littleton and Tidd's Practice."⁹⁶ The assumption of privilege underlying the reading programs reflects the extraordinary extent to which the early New Brunswick bar consisted of relatives of the elite. Of fifty-one lawyers and judges comprising the profession between 1785 and 1820, eleven were father/son combinations, to say nothing of the host of less proximate kinships. Economic hardship had winnowed the Loyalist bar dramatically, but those who remained did so precisely because they were sons and nephews of privilege.

In the 1820s, however, the bar's dynamic shifted perceptibly as the gentlemanly constraints of the eighteenth-century legal patriarchs were supplanted by "professional" values that could command the allegiance of new lawyers from the middling classes, lacking the polish of a college degree. The event which signalled the need for soul-searching was a fatal 1821 duel over words spoken in court between young lawyers from two of the leading legal dynasties. The culture of gentlemanly honour had led to a rupture which the constraints of patriarchal control had been powerless to contain. Almost immediately the legal community adopted a different dynamic of group control. In 1823 came formal rules of court governing professional admission. In 1825 a 'Law Society' was founded at Fredericton. Just as at Halifax,

⁹⁴ Quoted in Bell, *supra* note 75 at 2, on which this whole section is based.

⁹⁵ On the legal aspects of slavery in the Maritimes see [J. Aplin], *Opinions of Several Gentlemen of the Law, on the Subject of Negro Servitude, in the Province of Nova-Scotia* (Saint John: King's Printer, 1802); J.B. Cahill, "Slavery and the Judges of Loyalist Nova Scotia" (1994) 43 *University of New Brunswick Law Journal* at 73; D.G. Bell, "Slavery and the Judges of Loyalist New Brunswick" (1982) 31 *University of New Brunswick Law Journal* at 9; H.T. Holman, "Slaves and Servants on Prince Edward Island: The Case of Jupiter Wise" (1982) 12 *Acadiensis* at 100.

⁹⁶ W.E. Myatt, ed., *Autobiography of Oliver Goldsmith: A Chapter in Canada's Literary History* (Hantsport: Lancelot Press, 1985) at 34.

its concern beyond group socialisation was support for a collective law library for the many new recruits who could not afford books.⁹⁷ Another project was a Barristers' Inn at Fredericton for lodging and collective dining during term time; beds were allocated with due deference to hierarchy. By 1828 a "Law Students' Society" at the capital was organising moots.

The last definite evidence of this Law Society's existence dated from 1834. As with its Nova Scotia counterpart, the usefulness of organisation was clear but the collective will to sustain continuous visibility was lacking. Only in the economic crisis decade of the 1840s did the bar again take a decisive step, with incorporation of the Barristers' Society of New Brunswick in 1846. Though membership remained voluntary until 1903, the Barristers' Society had none of the private club atmosphere of the Law Society of 1825. Moreover, in 1847 the Supreme Court judges handed it *de facto* control over professional admission. The promise of more effective gatekeeping occasioned predictable palpitations in the student breast. "I would gladly postpone it [attorney examination], feeling as I do my want of legal knowledge," wrote one of the first candidates under the new order.⁹⁸ But such worries soon proved without foundation. Paradoxically, the benchmark assumption of control over admissions served only to highlight the organised bar's ineptitude and irresolution in matters of professional formation, leading to demands beginning in the 1860s, for classroom-based legal instruction in the Maritimes.

V. Decay of the Old Order

[M]odern philosophy ... teaches us to abandon the past, and despise the present, in the sure and certain hope that free-trade and new and untried theories of government will make us all "healthy, wealthy, and wise" [Haliburton, *Old Judge*, 317].

In the Maritimes the *ancien régime* never attained the seamless authenticity of its Georgian original. Chief Justice Belcher might explain that "Every Individual stands oblig'd to move and act in the Order assign'd to him by Providence, and in that Subordination necessary to the Being and Ends of Government"; Bishop Charles Inglis might warn that religious dissenters were "impatient under civil restraint" and "Democrats to a man"; Attorney-General Uniacke might execrate "the horrid and sanguinary actions of the apostles of liberty and equality"; the "Old Judge" might satirise bumpkin reformers, whose notion of the constitution was distilled "with infinite industry and research, from the notes of an American edition of 'Blackstone's Commentaries'": but in a world of free land, at least in New Brunswick and Nova Scotia, religious pluralism, and a *de facto* open frontier with the United States, the ideology of deference, dependence and hierarchy was always under challenge.⁹⁹

⁹⁷ See L.S. Hansen, "On Foot Forthwith: A Brief History of the Creation and Development of Fredericton's Law Library" in E.L. Swanick, ed., *Hardiness, Perseverance and Faith: New Brunswick Library History* (Halifax: Dalhousie University, 1991); *Catalogue of Books Belonging to the Law Society of New Brunswick* (Fredericton: King's Printer, 1834).

⁹⁸ Quoted in Bell, *supra* note 75 at 35.

⁹⁹ Vincent, *supra* note 19 at 108; quoted in G.A. Rawlyk, *New Light Letters and Spiritual Songs*,

An observer attuned to signs of incompleteness and decay in the colonial constitution finds instances at every turn. Theoretically all-powerful, the lieutenant-governor was, in practice, less imperial proconsul than party leader.¹⁰⁰ Magistrates, the backbone of the constitution in rural England, were more apt in the colonies to be village postmasters than country gentry.¹⁰¹ Maritimers might be thrown "into epileptic and sometimes into convulsion fits at the very sight of the ... Republican flag of stars and stripes;" but hereditary disdain for things American did not preclude local grandees from routine smuggling across "the lines."¹⁰² Signs of change in the political climate were evident already in the 1830s, though they lacked the focus which came with creation of the office of premier after responsible government.¹⁰³ Following imperial leads all three colonies abolished residual disabilities on Roman Catholics, and consolidated and reformed their criminal laws.¹⁰⁴ The penitentiary, an institution designed to reform rather than merely punish prisoners, replaced the primitive bridewell.¹⁰⁵ When ethnic tensions in the 1840s led to a series of riots which proved utterly beyond the power of nightwatch and constabulary to contain, specialised urban policing developed.¹⁰⁶ Electoral reform in Prince Edward Island (1836) and New Brunswick (1843) "corrected" the ambiguity that had allowed some women to vote; Nova Scotia followed in 1851.¹⁰⁷

It was imperial adoption of free trade, between the 1820s and the 1840s, which disposed the British to accede to demands for a colonial executive responsible to the elected House of Assembly, thereby sealing the downfall of colonial oligarchies who personified the *ancien régime*. Within the colonies themselves, however, the engine of change was the currency given political issues by the enormous growth of journalism in the 1830s and 1840s.¹⁰⁸ Audacious newspaper libels against chancery

1778–1793 (Hantsport, NS: Lancelot Press, 1983) at 312; Uniacke, *supra* note 80 at v; Haliburton, *supra* note 1 at 30.

¹⁰⁰ Burnsted, *supra* note 60 at 128.

¹⁰¹ J. Howe, *Western and Eastern Rambles: Travel Sketches of Nova Scotia*, M.G. Parks, ed., (Toronto: University of Toronto Press, 1973) at 60–61, 188.

¹⁰² Haliburton, *supra* note 1 at 310–11. On the prevalence of smuggling see McCulloch, *supra* note 45 at 30–33; Cuthbertson, *supra* note 42 at 114–16.

¹⁰³ Tory reform has yet to receive the study it probably deserves. See MacNutt, *supra* note 14 at 282–85; and see P.V. Girard, "Married Women's Property, Chancery Abolition, and Insolvency Law: Law Reform in Nova Scotia, 1820–1867" in Girard and Phillips, *supra* note 5 at 80.

¹⁰⁴ Garner, *supra* note 49 at 136–43, and as discussed *infra* in the essay by P.V. Girard.

¹⁰⁵ R. Baehre, "Prison as Factory, Convict as Worker: A Study of the Mid-Victorian St John Penitentiary, 1841–1880" in Phillips, *supra* note 8 at 439; Bell and Rosevear, *supra* note 28 at 67 (560, 564); R. Baehre, "From Bridewell to Federal Penitentiary: Prisons and Punishment in Nova Scotia before 1880" in Girard and Phillips, *supra* note 5 at 163.

¹⁰⁶ T.W. Acheson, *Saint John: The Making of a Colonial Urban Community* (Toronto: University of Toronto Press, 1985) at 221–3, 226; S.W. See, *Riots in New Brunswick: Orange Nativism and Social Violence in the 1840s* (Toronto: University of Toronto Press, 1993); G. Marquis, "The History of Policing in the Maritime Provinces: Themes and Prospects" (1990) 19 *Urban History Review* 84 at 88.

¹⁰⁷ Garner, *supra* note 49 at 155.

¹⁰⁸ For example, in the 1820s ten newspapers were begun in New Brunswick, in the 1830s the number rose to twenty-eight, and in the 1840s it was an amazing fifty-eight: H.C. Craig, *New Bruns-*

court officials in Prince Edward Island (1823, 1829), against the administration of justice in New Brunswick (1830) and, most famously, by Joseph Howe against the magistrates of Halifax (1835), ended in unequivocal defeats for the régimes.¹⁰⁹ The language of liberty employed by the reformers was that of British whigs and reformers rather than American republicans. It was the imagery of Magna Carta, protestantism, the Glorious Revolution and the Great Reform Act rather than of colonial independence and a paper constitution.¹¹⁰ If anything, the self-conscious loyalty of the Maritime colonies grew more strident towards the end of the colonial period, perhaps in instinctive reaction against the powerful pull of the republic to the south. Paradoxically, then, the rhetoric of British liberty was simultaneously both vehicle for making the case for colonial autonomy and means for cementing heartfelt attachment to empire.

With imperial concession of responsible government to Nova Scotia and New Brunswick in 1848 and Prince Edward Island in 1851, the *ancien régime* came to its bedraggled end. Though lingering traces of old toryism were detectable still as one strain of anti-confederate sentiment in the 1860s, by the time of "Loyalist Revival" of the 1880s the old régime endured only as a golden-age myth.¹¹¹ Now the great offices of administration were held on a political basis, connectational politics was supplanted by party, and judicial appointments were one of the principal spoils of office. Lawyers were at the core of the new régime in a way never true of the old. Already by the 1820s it was clear that the route to colonial preferment was no longer the influence of a patron in London but a seat in the House of Assembly. At the Nova Scotia general election of 1820, for example, an unprecedented eleven lawyers were elected; by 1843, fifteen of the fifty-one seats were filled by members of the bar.¹¹² In a political discourse which, from the 1830s to the 1860s, focused on reform of laws and institutions and two profound reworkings of the constitution, who could shape the course of events better than lawyers? So closely was the reform project connected with manipulation of the law that, for more than a century after the coming of responsible government, the position of attorney-general was virtually synonymous with that of premier.¹¹³ Home rule in the Maritimes was rule by lawyers.

wick Newspaper Directory, 1783–1988 (Fredericton: University of New Brunswick, 1989) at 206–09.

¹⁰⁹ J.M. Bumsted, "Liberty of the Press in Early Prince Edward Island, 1823–1829" [unpublished]; MacNutt, *supra* note 14 at 223–24; J.M. Beck, *Joseph Howe: Conservative Reformer, 1804–1848* (Montreal: McGill-Queen's University Press, 1982) at 143–41. An even earlier instance is discussed in J.B. Cahill, "Sedition in Nova Scotia: *R. v. Wilkie* (1820) and the Incontestable Illegality of Seditious Libel before *R. v. Howe* (1835)" (1994) 17 Dalhousie Law Journal at 458.

¹¹⁰ G. Marquis, "In Defence of Liberty: 17th-Century England and 19th-Century Maritime Political Culture" (1993) 42 University of New Brunswick Law Journal at 69.

¹¹¹ See D.G. Bell, "Judicial Crisis in Post-Confederation New Brunswick" (1991) 20 Manitoba Law Journal at 181; P.V. Girard, "The Supreme Court of Nova Scotia, Responsible Government, and the Quest for Legitimacy, 1850–1920" (1994) 17 Dalhousie Law Journal at 430.

¹¹² Cuthbertson, *supra* note 42 at 12–13.

¹¹³ J.M. Beck, "Rise and Fall of Nova Scotia's Attorney General, 1749–1983" in P.B. Waite, *supra* note 41 at 125.