XIII

The Maritime Provinces, 1850–1939: Lawyers and Legal Institutions

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I. Responsible Government and the Populist Era, 1850–67

THE ACHIEVEMENT OF RESPONSIBLE GOVERNMENT in the Maritimes created possibilities for significant change in their legal cultures. Whether those possibilities were actualised is a matter of some debate, closely linked to a major theme in Maritime historiography: the meaning of responsible government. An older literature, echoing much contemporary opinion, celebrated the triumph of the reformers as an unqualified good. Careers would open to talents, government would be rendered more accountable, and the humble yeoman would be able to participate actively in a more democratic form of government. In recent decades historians have taken a more jaundiced view of the achievements of responsible government. They have stressed continuity rather than change, suggesting that older élites retained most of their economic and political power. At worst, all that the transition to responsible government involved was replacement of a system based on imperial patronage to one based on partisan allegiance.[1]

Legal history has the potential to add much to this debate, since legislation was one of the primary tools which reformers used to attempt to alter society. As David Bell has observed, "the dramatic political watershed of the 1850s has obscured the law reform revolution that accompanied it."[2] "Populist" was the word which captured the dominant ethos of that "revolution" in the two or three decades after 1850. Examination of changes in statute law, court structures, the machinery of government, municipal and provincial, and the legal profession will illustrate the double-sided nature of the constitutional changes experienced at mid-century. If the recent historiography has exaggerated the continuities from the pre-1850 régime, it is clear that the older, more optimistic outlook cannot be resurrected without qualification.

The roots of developments at mid-century can be traced to the emergence of the reform movement a few decades earlier. The first stirrings of political reform had seen some significant steps towards an overhaul of statute law. Significant reform of the criminal law, for example, occurred in New Brunswick in 1831, Prince Edward

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1 For the older view, see G. Patterson, *Studies in Nova Scotian History* (Halifax: Imperial Publishing, 1940) at 34–46. More recently, see J.M. Beck, *The Politics of Nova Scotia*, vol. I (Tantallon, N.S.: Four East, 1985) at 266–72.

2 D.G. Bell, *Legal Education in New Brunswick: A History* (Fredericton: University of New Brunswick, 1992) at 36.

Island in 1836 and Nova Scotia in 1841. Benefit of clergy was abolished, the number of capital offences reduced, criminal procedure rationalised, and in Nova Scotia whipping and the pillory abolished.[3] In 1842 these reforms were capped by the opening of New Brunswick's first provincial penitentiary in Saint John, followed two years later by one in Halifax.[4] Lord Falkland's coalition ministry in Nova Scotia (1841) also saw a package of reforms in the civil law and court structure, which included abolition of the Inferior Court of Common Pleas and modernisation of the divorce and probate courts.[5]

These developments reached their logical culmination in the *Revised Statutes of Nova Scotia 1851*, modelled closely on the Massachusetts revision of 1828, the first such revision promulgated within the British tradition. New Brunswick followed quickly, producing its first "consolidation" in 1854; Prince Edward Island's came in 1862.[6] Stylishly produced and thematically organised, these revisions represented the best of the legal culture of the pre-responsible government era, but packaged in a way which respected the new ideals of brevity, accessibility and efficiency. The New Brunswick commissioners declared proudly that they had "compressed the language of the Acts [into] one fourth, or often one sixth, the bulk of their former size."[7] The revised statutes amended as well as conserved the law, limiting the maximum period of imprisonment for debt to one year in Nova Scotia, adding the first interpretation act to the New Brunswick statute book, and abolishing entails in both provinces.[8]

A variety of legislative reform campaigns in the field of private law occupied the ensuing decades. These reforms were meant to be iconoclastic, to break with an older tradition now castigated as self-serving and non-égalitarian. Charles Fisher's New Brunswick Liberals, who came to power in 1856, were not called "the Smashers" for nothing. The feudal doctrine of the unity of legal personality of husband and wife—the fiction by which marriage subsumed two natural persons in

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3 S.N.B. 1831, c. 14–18; S.P.E.I. 1836, c. 21, 22; S.N.S. 1841, c. 4–8.

4 R. Baehre, "Prison as Factory, Convict as Worker: A Study of the Mid-Victorian St John Penitentiary, 1841–1880" in J. Phillips, T. Loo & S. Lewthwaite, eds., *Essays in the History of Canadian Law*, vol. V (Toronto: The Osgoode Society, 1994); and his "From Bridewell to Federal Penitentiary: Prisons and Punishment in Nova Scotia before 1880" in P. Girard & J. Phillips, eds., *Essays in the History of Canadian Law*, vol. III (Toronto: The Osgoode Society, 1990).

5 *An Act to improve the Administration of the Law, and to reduce the number of Courts of Justice* ..., S.N.S. 1841, chapter 3. *An Act relating to the Courts of Probate* ..., S.N.S. 1842, chapter 22. *An Act concerning the Court of Marriage and Divorce*, S.N.S. 1841, c. 13. New Brunswick had altered its divorce court in 1834, although it did not formally exclude the lieutenant-governor from the court, as did Nova Scotia: S.N.B. 1834, c. 30.

6 Prince Edward Island's was not a "revision" on the model of the others. In 1862 the government published two volumes (1773–1852, and 1853–62) which contained in chronological order all the statutes in force on the Island, with repealed statutes noted by title only.

7 *Consolidated Statutes of New Brunswick*, 1854 at ix.

8 The entail, a device used by the English aristocracy to ensure the perpetual succession of family estates in the male line, was abolished in most American states at the time of the Revolution. Its continuance in Prince Edward Island, where it exists to this day, suggests the hold which the English landlord mentality continued to exert, even after responsible government.

one legal person—was breached in all three Maritime provinces. New Brunswick led the way in 1851 by declaring that the wife's property would no longer be responsible for the husband's debts. Prince Edward Island enacted in 1860 that deserting husbands would no longer be able to assert claims to property acquired by the wife after desertion, a measure adopted in Nova Scotia in 1866.[9] Imprisonment for debt was subjected to a variety of restrictions, but not abolished until later in the century. The eldest son's double share disappeared from succession law in Nova Scotia in 1842, New Brunswick in 1858, and 1873 in Prince Edward Island, reflecting the more égalitarian ethos which emerged at mid-century.[10] The most intractable problem was the land question on Prince Edward Island,which was of course not just a problem of 'private' law but one fraught with immense political significance. Tenants saw some amelioration in their status over the period, but the issue was not finally resolved until after the province joined Confederation.[11]

The appropriate stance of the state toward the religious heterogeneity of the colonies continued to be debated and to inspire legislative change. The residual privileges of the Church of England were abolished, and a formally non-sectarian public education system set up in all three provinces. Both New Brunswick and Prince Edward Island succeeded in establishing a provincial university, the University of New Brunswick (1859) and Prince of Wales College (1860), respectively. Officially non-sectarian Dalhousie University in Halifax did not succeed in drawing under its aegis the numerous denominational colleges, however, and in 1850 the Nova Scotia government stopped funding all colleges in the name of equality.

Court reform in the decades after 1850 was a much debated topic, as reformers sought to bring court structures into line with the new gospel of efficiency and simplicity. The expence of the judicial establishment had been a perennial source of

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9 *An Act to Secure to Married Women Real and Personal Property held in their own right*, S.N.B. 1851, c. 24; *An Act to Protect the Rights of Married Women, in certain cases*, S.P.E.I. 1860, c. 35; *An Act for the Protection of Married Women in certain cases*, S.N.S. 1866, c. 33. See generally, P. Girard, "Married Women's Property, Chancery Abolition and Insolvency Law: Law Reform in Nova Scotia, 1820–1867" in Girard & Phillips, *supra* note 4; P. Girard and R. Veinott, "Married Women's Property Law in Nova Scotia, 1850–1910" in J. Guildford and S. Morton, eds., *Separate Spheres: Women's Worlds in the 19th-Century Maritimes* (Fredericton: Acadiensis Press, 1994); C. Backhouse, "Married Women's Property Law in Nineteenth-Century Canada" (1988) 6 Law and History Review 211 at 217–21. These laws did not give married women full control over their property, but they did at least impose some restraints on marital control.

10 *An Act concerning the Courts of Probate...*, S.N.S. 1842, c. 22; *An Act to amend the Act relating to Intestate Estates*, S.N.B. 1858, c. 26; *An Act to amend the Law of Inheritance, and to regulate the distribution of the Estates of Intestates*, S.P.E.I. 1873, c. 23; The Maritimes had broken early with the English tradition of primogeniture. All had provided, following Massachusetts, that the property of an intestate would descend to his or her children equally, except that the eldest son would receive a double share (Deuteronomy 22:17). At a time when most people died intestate, these provisions had a significant impact.

11 The land question loomed large in the historiography of pre-Confederation Prince Edward Island. For some insights about specifically legal aspects of this question, see I. R. Robertson, "Reform, Literacy, and the Lease: The Prince Edward Island Free Education Act of 1852" (1990) 20 Acadiensis 52 at 58–69; and his edition of the report of *The Prince Edward Island Land Commission of 1860* (Fredericton: Acadiensis Press, 1988). See also the Terms of Union, reproduced in R.S.C. 1906, vol. IV.

complaint in earlier decades, to which the reformers added a concern for speed and accessibility.[12] In both New Brunswick and Nova Scotia, one of the first targets of the new governments was the courts of chancery, which could be portrayed as embodying the worst flaws of earlier times: privilege, inaccessibility (the court never ventured outside the capital), delay, expense and obscurity.[13] Empirical evidence suggests that these criticisms may not all have been valid, but few rose to defend the court.[14] New Brunswick abolished theirs in 1854, transferring its jurisdiction, along with its incumbent judge to its Supreme Court, Equity side. Nova Scotia's abolition in the following year saw a thorough attempt to reconcile common law and equity procedure, following models from jurisdictions as far afield as Ohio and New York.[15] The politics of court reform were amply illustrated by the chancery abolition campaign in Nova Scotia. Rather than add the incumbent master of the rolls to the Supreme Court, which was the logical sequel to the reform, the Reform government felt compelled to pension off Alexander Stewart, a vocal symbol of the old order, in a particularly humiliating way. With the return of the Conservatives to power in 1863, a new "judge in equity" position was added the next year to the Supreme Court, supposedly to remedy problems created by the fusion of 1855. The occupant was none other than J.W. Johnston, a former premier and long-time rival of William Young, the reform politician who had managed to appoint himself as chief justice upon the death of Sir Brenton Halliburton in 1860. Johnston's appointment marked the first augmentation of the court since 1841, when it had increased to five judges, but Johnston was soon joined by yet another addition in 1870. Thereafter the complement of the court stabilised at seven until 1966. New Brunswick had increased its Supreme Court to five in 1854, and a sixth judge was added in 1879.[16]

New Brunswick was initially spared much of the turmoil and ill will which accompanied the shift to partisan patronage in judicial appointments in Nova Scotia, but mainly as a result of longevity. When the anti-confederate William Johnstone Ritchie was promoted to the position of chief justice ahead of the more senior, but unionist Lemuel Wilmot, partisan considerations had infiltrated the judicial appointments process in New Brunswick as well.[17] These squabbles contributed to a marked decline in the legitimacy of the judiciary and inspired a certain cynicism about the whole legal and political order.

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12 P. Burroughs, "The Search for Economy: Imperial Administration of Nova Scotia in the 1830s" (1968) 49 Canadian Historical Review 1.

13 Girard, in Girard & Phillips, *supra* note 4 at 106–13.

14 J. Cruickshank, "The Chancery Court of Nova Scotia, 1751–1855" (1992) 1 Dalhousie Journal of Legal Studies 27.

15 *An Act relating to the Administration of Justice in Equity*, S.N.B. 1854, c. 18; *An Act for abolishing the Court of Chancery, and conferring Equity Jurisdiction on the Supreme Court*, S.N.S. 1855, c.23.

16 S.N.B. 1879, c. 7. For Prince Edward Island, see the essay by Bell, *supra* at 103.

17 D.G. Bell, "Judicial Crisis in Post-Confederation New Brunswick" (1991) 20 Manitoba Law Journal 181, and in D. Gibson and W.W. Pue, eds., *Glimpses of Canadian Legal History* (Winnipeg: Legal Research Institute, 1991); G. Bale, *Chief Justice William Johnstone Ritchie*,vol. I: Supreme Court of Canada Historical Society (Ottawa: Carleton University Press, 1991) at 91–96.

Composition of the divorce courts of New Brunswick and Nova Scotia was altered in 1860 and 1866 respectively, in response to strong hints from London that they should be brought into line with the new court of divorce and matrimonial causes which had been created in England in 1857. Members of the executive council were dropped and the jurisdiction was vested in a sole judge of the Supreme Court until 1938 in New Brunswick and 1948 in Nova Scotia, when all supreme court judges were enabled to hear divorce cases.[18] Prince Edward Island's divorce court heard few cases and there was little pressure for change. Its composition remained unchanged, although it was effectively superseded when a 1949 statute provided for transfer of divorce petitions to the Island's Supreme Court.[19]

The Jacksonian call from the U.S. for an elected judiciary made no headway within the hallowed halls of Maritime supreme courts, but some cities did flirt with elective municipal courts during this period, based in part on British models of borough governance. Halifax (1841) and Charlottetown (1855) abandoned the appointed grand jury in favour of an elected aldermanic model of governance. Saint John's charter (1785) still provided for sharing of governance between an elected Common Council and an appointed grand jury.[20] The "mayor's courts" in these cities exercised both civil and criminal jurisdiction in a wide range of matters, with the mayor presiding and aldermen assisting on a rota basis. These courts and their successors appear sometimes as responsive "people's courts" in the literature, and at other times as instruments of social control employed by a middle class fearful of the "deviant, disruptive force" represented by the vagrant.[21] All agreed that public order and substantial justice were their primary concerns, rather than the niceties of legal principle or pleading.[22] Blacks were over-represented as defendants in these

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18 *An Act to amend the Law relating to Divorce and Matrimonial causes*, S.N.B. 1860, c. 37; *An Act to amend the Laws relating to Divorce and Matrimonial Causes*, S.N.S. 1866, c. 13; *An Act to amend [the Act] respecting the Court of Divorce and Matrimonial Causes*, S.N.B. 1938, c. 33; *An Act to Amend the Statute Law relating to the Court for Divorce and Matrimonial Causes*, S.N.S. 1948, c. 8.

19 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; and their "Canadian Divorce Before Reform: the Case of Prince Edward Island, 1946–67" (1993) 8 Canadian Journal of Law and Society 1.

20 A detailed discussion of municipal reforms in Saint John in the 1840s and 1850s can be found in T.W. Acheson, *Saint John: The Making of a Colonial Urban Community* (Toronto: University of Toronto Press, 1985), chapter 9.

21 J. Fingard, "Jailbirds in Mid-Victorian Halifax" in P.B Waite, *et al.*, eds., *Law in a Colonial Society: The Nova Scotia Experience* (Toronto: Carswell, 1984); *The Dark Side of Life in Victorian Halifax* (Porters Lake, NS: Pottersfield Press, 1989); G. Marquis, "The Contours of Canadian Urban Justice, 1830–1875" (1987) 15 Urban History Review 269; Marquis, "State or Community?: Criminal Justice in Halifax, 1815–1867" (paper delivered at the Atlantic Law & History Workshop II, Dalhousie Law School, 3–4 March 1995 [hereinafter ALHW II paper, 1995]; and J. Phillips, "Poverty, Unemployment, and the Criminal Law: Vagrancy Laws in Halifax, 1864–1890" in Girard & Phillips, *supra* note 4.

22 P. Girard, "The Rise and Fall of Urban Justice in Halifax, 1815-1886" (1988) 8 Nova Scotia Historical Review 57. The extent of legal representation in these courts is unclear: D.G. Bell has suggested that in the Saint John City Court articling clerks represented litigants fairly frequently: *Legal Education in New Brunswick: A History* (Fredericton: University of New Brunswick, 1992) at 37–8.

courts and highly visible in newspaper accounts of their proceedings.[23] Native people were very much under-represented in both urban and rural courts during this period, and magistrates seemed to have treated them leniently provided they returned to their own communities.[24]

The unelected and unsalaried justice of the peace remained the workhorse of the legal system. There were calls for elected JPs in the 1850s, which were heeded indirectly. It became fairly common in Nova Scotia for commissions to be revoked after a change in government, with new blood of a more congenial political orientation added. In New Brunswick new appointees were simply added to the existing roster, which swelled from dozens in 1840 to over 1,000 by the 1860s. This indirect election did not seem to have improved their legitimacy, as anti-justice of the peace sentiment continued to grow as the century wore on.[25]

The institutions of government did not change immediately after the adoption of responsible government, but the franchise attracted much attention. A movement to make the Legislative Council elective—fomented by the Conservatives in a sudden shift to populism while on the opposition benches—petered out except in Prince Edward Island, where it succeeded in 1862. The legislatures became formally more representative with the extension of the franchise in Nova Scotia (1854), New Brunswick (1855), and Prince Edward Island (1853). Zeal for universal male suffrage was tempered by respect for property, however, and an assessment qualification remained in the two larger provinces until well after Confederation; Prince Edward Island adopted a universal male franchise in fact, if not in theory, by giving the vote to all men liable to perform statute labour, including those who would have been liable but for an exemption based on office or occupation.[26]

Blacks meeting these qualifications were not formally excluded from the franchise; and they seemed to have exercised it, if the extent of campaigning in Nova Scotia Black communities is any indication.[27] Women were formally excluded from the franchise as part of the agitation leading to responsible government[28], confirming that the dominant tendency of the period was "to render state privileges more accessible to the average (white male) citizen."[29]

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23 B. Jane Price, " 'Raised in Rockhead. Died in the Poor House': Female Petty Criminals in Halifax, 1864–1890" in Girard & Phillips, *supra* note 4 at 215–16; Phillips, *supra* note 21 at 137.

24 L.F.S. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713–1867* (Vancouver: University of British Columbia Press, 1979), 148; Price, *supra* note 23 at 215.

25 D.G. Bell, "A Perspective on Legal Pluralism in 19th Century New Brunswick" (1988) 37 University of New Brunswick Law Journal 86 at 93.

26 J. Garner, *The Franchise and Politics in British North America 1755–1867* (Toronto: University of Toronto Press, 1969) at 48. Nova Scotia did adopt "universal" manhood suffrage in 1854, which nonetheless excluded Natives and paupers, but restored the assessment-based franchise in 1863. Some Mîkmaq did own small farms in fee simple in Nova Scotia, and may in theory have been enfranchised if they did not accept government aid, which was a condition of disqualification under the 1863 *Act*.

27 B. Cuthbertson, *Johnny Bluenose at the Polls. Epic Nova Scotian Election Battles 1758–1848* (Halifax: Formac Publishing, 1994) at 75, 81, 87–90.

28 Women were specifically disenfranchised in Prince Edward Island in 1836, in New Brunswick in 1843, and in Nova Scotia in 1851: *ibid.* at 155.

The colonial Maritime states lost no time in seeking to re-shape civil society, as witnessed by the rapid expansion of state intervention in education, railway-building, resource development and even private behaviour. Nova Scotia's orgy of railway construction has been called "one of the first large scale efforts at state capitalism on the North American continent,"[30] while 1858 saw the end of the General Mining Association's monopoly on coal and other mineral resources. In New Brunswick too the public debt rose dramatically to finance railway construction. Meanwhile, one year after the achievement of responsible government, Prince Edward Island became "the first place in the British dominions, in which a complete system of free education was established." The Island's *Free Education Act* of 1852 funded the new system from the central treasury rather than by local assessment, which was the route chosen by Nova Scotia in 1864 and New Brunswick in 1871.[31] Perhaps the most stunning use of state power was the legislative adoption of prohibition in New Brunswick in 1852 and 1855. Its repeal, in 1854 and again (finally) in 1856, however, demonstrated not only the administrative weakness of the fledgling colonial state, with enforcement virtually impossible, but the increasing acceptance of the idea of a secularised state.

The colonial state used its legislative authority to enter these fields, but the administrative machinery of government developed only fitfully and reactively in response to such new responsibilities.[32] Nova Scotia's gold rush attracted some state regulation in 1864, but the fishery was everywhere left almost entirely to market forces until after Confederation, in spite of its fundamental importance for the Maritime economy.[33] Here the limits of populist rhetoric were painfully obvious, as there was no one to speak for the impoverished outport fishing families when it might involve some alteration in the circumstances of the great urban fish merchants.

Governmental ineptness combined with societal inertia and hostility to imperil the integrity of the reserves set up in the 1840s for the Native population. Squatting by white settlers was common, and both New Brunswick (1849) and Nova Scotia (1859) provided that they had either to pay for their lands and receive title, or quit them. The funds were to be held in trust for the Natives, but most white settlers stayed and refused to pay: Nova Scotia had collected only $1531 by 1867, New Brunswick some $11,000. Prince Edward Island had been parcelled out in 1767 as if the Mîkmaq

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29 Bell, *supra* note 22 at 36.

30 R. Langhout, "Developing Nova Scotia: Railways and Public Accounts, 1848–1867" (1985) 14 Acadiensis 3.

31 Robertson, *supra* note 11. The quote by George Coles, leader of Prince Edward Island's first administration under responsible government, is at 52. *An Act for the Encouragement of Education ...*, S.P.E.I. 1851, c. 13. K.F.C. MacNaughton, *The Development of the Theory and Practice of Education in New Brunswick, 1784–1900* (Fredericton: University of New Brunswick, 1947).

32 G. Wynn, "Ideology, Society, and the State in the Maritime Colonies of British North America, 1840–1860" in A. Greer & I. Radforth, eds., *Colonial Leviathan: State Formation in Mid-Nineteenth Century Canada* (Toronto: University of Toronto Press, 1992).

33 *An Act relating to the Gold Fields*, S.N.S. 1862, c. 1.; and J. Gwyn, "Golden Age or Bronze Moment? Wealth and Poverty in Nova Scotia: the 1850s and 1860s" in *Canadian Papers in Rural History*, vol. VIII (Gananoque: Langdale Press, 1992) at 218–23.

did not exist. The one place which they had continued to occupy successfully, Lennox Island, was finally purchased on their behalf from its "proprietor," David Bruce Stewart, in 1870: by the Aborigines' Protection Society of London, England.

A further barrier to the marshaling of state power was the failure to develop effective instruments of local government. The appointed courts of sessions were not finally supplanted by elected county councils until 1877 in New Brunswick and 1879 in Nova Scotia, and members of the provincial legislature tended to be the main centres of power and patronage in each locality. This pattern arguably prevented "the development of a coherent political ideology at the centre and its implementation on the periphery."[34] The failure to develop more effective instruments of local government may well be the most significant difference between the emergent state structures of the Maritimes and the Canadas during this period,[35] although the governance of the many towns granted incorporation during this period (e.g., Charlottetown and Moncton 1855, Woodstock 1856) has not been studied intensively.

Changes in the legal profession reflected the counter-currents which run through this period. Partly as a result of a rising tide of anti-lawyer and anti-legal sentiment, partly because of overcrowding, especially in New Brunswick, and the increasing attractiveness of careers in business, recruitment to the bar bottomed out in the 1850s and did not really recover until the mid-1860s. In Nova Scotia, for example, there were only five more lawyers in the entire province in 1861 than the 155 listed in 1851. In New Brunswick too, the early 1850s were "the least propitious period for setting out to become a lawyer" between 1815 and 1929,[36] while in Prince Edward Island only six lawyers were called to the bar in the entire decade of the 1850s, half the total for the previous and subsequent decades. By the later 1860s the numbers of lawyers rose again in all three provinces, to 204 in 1871 and 248 in 1881, in Nova Scotia, for example. This increase was not called for by a simple increase in population, as the lawyer:population ratio increased fairly significantly by the end of this period. After remaining virtually unchanged at 1:3450 (outside Halifax) between 1835 and 1861, the ratio rose to 1:3000 in 1871. By contrast, New Brunswick was heavily over-supplied, its ratio rising from 1:2000 in 1824 to 1:1053 in 1851.[37] These figures concealed vast disparities within the region, however;

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34 Wynn, *supra* note 32 at 314.

35 On local government generally, see H.J. Whalen, *The Development of Local Government in New Brunswick* (Fredericton: University of New Brunswick, 1963); J.M. Beck, *The Evolution of Municipal Government in Nova Scotia 1749–1973* (Halifax: Institute of Public Affairs, 1973); and D. Baldwin, "The Charlottetown Political Elite: Control from Elsewhere" in D. Baldwin and T. Spira, eds., *Gaslights, Epidemics and Vagabond Cows: Charlottetown in the Victorian Era* (Charlottetown: Ragweed Press, 1988), who argues that even after incorporation in 1855, effective municipal government in the capital was impeded by serious restrictions in the city's charter, a product of the desires of the "provincial" élite to retain control of municipal affairs in the Assembly.

36 Bell, *supra* note 22 at 34. On anti-lawyer sentiment, see G. Marquis, "Anti-Lawyer Sentiment in Mid-Victorian New Brunswick" (1987) 36 University of New Brunswick Law Journal [hereinafter U.N.B.L.J.] 163.

37 Bell, *supra* note 22 at 34.

whereas Halifax could boast one lawyer for every 400 citizens, in the Acadian areas of New Brunswick the ratio was in the order of 1:22,000 as late as 1900.[38]

Articling for four or five years remained the sole mode of entry to the status of "attorney" (i.e., solicitor), followed by a rather perfunctory examination one or two years later leading to the call to the bar. The screening of candidates for articles was carried out by barristers under pre-1850 statutes in Prince Edward Island and New Brunswick and by judges in Nova Scotia after 1864. In none of the provinces did the barristers collectively provide enough guidance or effective tuition to ensure that the formal hurdles provided any real form of quality control. Any movement toward enhanced standards tended to be blocked by "the perceived need to curb the profession's abuse of its *de facto* monopoly over admissions and [to] make law more accessible to those clamouring for a ticket into the middle class."[39]

Partly in response to the "irresolute and inept" attempts of the provincial bars to remedy the "dreadful" state of legal education, small but growing numbers of Maritimers began to explore the possibilities for university legal education in the United States. In 1846 James Thomson and Samuel Cunard West of Halifax enrolled in the Harvard Law School, followed by George Gilbert of Saint John (1847) and Augustine Ralph McDonald of Prince Edward Island (1848). The experiment proved fruitful: some 100 Maritimers had attended Harvard Law School alone by the time the Dalhousie Law School opened its doors in 1883, offering the first university degree in common law in the British Empire. So popular did this route become that the New Brunswick legislature forced the Barristers' Society to give credit towards the articling period for a Harvard LL.B.[40]

One should not generalise too quickly from this trend, however. The profession remained fractured in important ways throughout this period, and only began to coalesce into today's autonomous, self-governing entity later in the 1870s in Nova Scotia and later yet in New Brunswick and Prince Edward Island. As in the days prior to responsible government, only the social élite of the profession drew together in provincial barristers' societies,[41] and it was mainly for this group that an American university law school replaced London's inns of court as a legal finishing school after 1850. Increasingly recruitment to the profession came from the lower ranks of society, who often made impressive sacrifices to survive the long, officially unsalaried period of apprenticeship.[42] Inevitably such men remained preoccupied with

38 For Nova Scotia, see P. Girard, "The Roots of a Professional Renaissance, 1850–1910" (1991) 20 Manitoba Law Journal 148 at 154 (Table 1); also found in Gibson and Pue, *supra* note 17. Lawyer:population ratios for Nova Scotia are calculated using the lists of practicing lawyers provided in *Belcher's Farmer's Almanack* (Halifax, annual). The Acadian ratio is from J.P. Couturier, " 'Point de fort pour la loi?' La justice civile dans la société acadienne de 1873 a 1899" (1991) 45 Revue d'histoire de l'Amérique française 179 at 186.

39 Bell, *supra* note 22 at 36. See generally B. Cahill, "The Origin and Evolution of the Attorney and Solicitor in the Legal Profession of Nova Scotia" (1991) 14 Dalhousie Law Journal 277.

40 S.N.B. 1867, c. 7.

41 This is not literally true for Prince Edward Island, where the Law Society was founded only in 1876 (S.P.E.I. 1876, c. 24). It deemed all existing barristers as members, and provided that future barristers could join at their option. Presumably the small numbers of élite lawyers in earlier days obviated any type of formal organisation.

financial matters long after their call to the bar. Sons of the gentry seemed not to exhibit the same patriotic idealism which had resulted in an impressive flowering in regional legal literature in the 1830s and 1840s. The ensuing two decades represented a notable trough in the production of such literature, which would only be re-stimulated by the advent of Confederation.[43]

Undoubtedly the "spoils system" itself contributed to this etiolation in the region's legal culture. Election to political office, rather than professional distinction, was quickly perceived as the sure route to advancement in the era of responsible government. In Nova Scotia at least, a certain bifurcation was evident, with sons of the gentry tending to eschew the rough and tumble of politics in favour of migration, credentialism or careers in business, while the non-élite recruits of the post-1850 years entered politics with gusto.[44]

The quarter-century after responsible government shows us a society struggling with the reversal of the fluvial metaphor employed by Professor Bell: no longer was authority to flow only "downwards, through the sovereign's local representative, rather than upwards, from elected representatives of the governed." The region's population was happy enough to allow the new colonial state to pursue economic development through the subsidising of education, transportation and resource exploitation, but unprepared for the lack of accountability which resulted when rival parties adopted similar strategies when in power. The same period which saw a proliferation of constitutional amendments restricting state borrowing powers south of the border, had no parallel in British North America. Without a constitutionally based theory of popular sovereignty, Maritimers, like other Canadians, fell back on an idealised notion of "British justice" which they used to measure the legitimacy of state action, judicial decisions, and private behaviour. However appealing the notion of "British justice" might have been politically, as "an attempt to form a consensus in the face of religious and ethnic rivalries," it was amorphous as a legal standard and provided little basis for resistance to the positivist tendencies which emerged in later nineteenth century Canadian legal thought.[45]

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42 Bell, *supra* note 22 at 37–43 suggests that many impecunious articling clerks did in fact take remunerative employment during their period of apprenticeship.

43 The origins (in Nova Scotia and Prince Edward Island) and persistence (in New Brunswick) of published law reports in this period do deserve mention, however: J. Nedelsky and D. Long, *Law Reporting in the Maritime Provinces: History and Development* (Ottawa: CLIC, 1981).

44 A similar process has been documented for New Haven, Connecticut after the toppling of the municipal oligarchy by wealthy entrepreneurs from humble backgrounds in 1842: R.A. Dahl, *Who Governs? Democracy and Power in an American City* (New Haven: Yale University Press, 1961).

45 G. Marquis, "In Defense of Liberty: 17th-Century England and 19th-Century Maritime Political Culture" (1993) 42 University of New Brunswick Law Journal 69 at 93; and see his "Doing Justice to 'British Justice': Law, Ideology and Canadian Historiography" in W.W. Pue and B. Wright, *Canadian Perspectives on Law & Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988). On the triumph of positivism in New Brunswick constitutional thought, see W. Lahey, "Constitutional Adjudication, Provincial Rights and the Structure of Legal Thought in Late 19th-century New Brunswick" (1990) 39 University of New Brunswick Law Journal 185.

II. Confederation and the New Professionalism, 1867–1920

The debate over Confederation was a profoundly divisive one in the Maritimes, reflecting the seriousness of the economic choices which faced the region. Broadly speaking, the choice lay between continuing the older, marine-based, internationalist economy which had achieved a certain amount of success in the 1850s and '60s, or plunging into a land-based, continentally oriented economy by joining the Canadas. The relative prosperity of the middle decades of the century meant that large sections of the population were content to maintain the effectively independent status which they had achieved.[46]

These views seemed to be confirmed by the economic depression of the 1870s. The National Policy, however, stimulated an industrial revolution in the Maritimes and accelerated the region's economic integration into the new Dominion. Against this theme of political and economic integration and industrial development must be played a counterpoint of fragmentation and dislocation, neatly summed up in the title of Judith Fingard's account of the 1880s, "Paradoxes of Progress."[47] These developments will be examined in this section through two themes: the new professionalism and modernisation of the legal order.

"The new professionalism" is a term used to denote a new conception of the professions as autonomous occupational groups possessing expertise derived from specialised, usually university-based, education. The older professional was a gentleman who might be useful. The new professional's utility was the source of his gentlemanly, or middle-class, status. Once lawyers had re-invented themselves in this way in the last quarter of the century, their influence began to be felt in new ways and in virtually all areas of regional life. Whether supplanting justices of the peace as rural solicitors, acting as mayors, recorders or stipendiary magistrates in the new towns, advocating the causes of the new labour movement or articulating the Black community's demand for racial integration in education, serving as *de facto* chief executive officers of the new business corporations, or representing the *beau idéal* of the middle class, the fate of lawyers was intimately connected to the pulse of regional life. For that reason, much of this section concentrates on the legal profession, for whom this period might well be thought a Golden Age.

The professional classes, including lawyers, were no more united on the issue of Confederation than any other group in Maritime society. In New Brunswick, Chief Justice William Johnstone Ritchie firmly opposed union with the Canadas, while his Nova Scotian brother John W. Ritchie was one of the Fathers of Confederation. Lawyers could be found on either side of the debate when secessionist sentiments flared in Nova Scotia in 1868–69 and again in 1886–87. Yet once the decision to join Canada had been made in 1867 (1873 in Prince Edward Island), lawyers fairly

46 The best recent overviews of the Confederation issue in the Maritimes are found in P.A. Buckner, "The 1860s: An End and a Beginning" in P.A. Buckner and J.G. Reid, eds., *The Atlantic Region to Confederation* (Toronto: University of Toronto Press, 1994); D.A. Muise, "The 1860s: Forging the Bonds of Union" in E.R. Forbes and D.A. Muise, eds., *The Atlantic Provinces in Confederation* (Toronto: University of Toronto Press, 1993); and J.G. Reid, *Six Crucial Decades: Times of Change in the History of the Maritimes* (Halifax: Nimbus, 1987) at 93–126.

47 In Forbes & Muise, *supra* note 46.

rapidly accommodated themselves to the new order. Optimism about new opportunities in Ottawa and elsewhere in the new Dominion was tempered by the realisation that competition would be stiff. The Ontario and Quebec bars were proudly self-conscious, vigorous, and confident in corporatist traditions which made the class-divided, weakly organised Maritime bars appear decidedly anemic by comparison. A Charlottetown lawyer expressed his concern to John Thompson in 1884 that "Confederation and the Supreme Court of Canada bring our Maritime Bars in contact with the lawyers of the Upper Provinces, & to hold their own, our young men require better legal training than can be got (picked up) in an attorney's office."[48]

Maritime lawyers lost no time putting their shoulders to the wheel. The 1870s and '80s saw the remarkable coalescence of a formerly stratified group around new professional norms of autonomy, unity and higher educational standards, a process which was also occurring in other professions in the region, notably medicine. The post-Confederation generation banished judges almost completely from the discipline and professional entry processes, ensured that provincial barristers' societies represented all lawyers,[49] not just the social élite, and founded university law schools at Dalhousie (1883)[50] and Saint John (1892).[51] Once "home" legal education was introduced, the appetite for it proved to be well-nigh insatiable. A law faculty for Charlottetown was seriously mooted in the 1890s, and virtually all the Maritime universities offered law courses pursuant to an affiliation agreement with Dalhousie. Under this arrangement, a student could take a number of law courses at, say, Acadia, while pursuing a B.A. degree, and then complete the LL.B. in two years instead of three.[52] The Saint John Law School offered lectures at hours which allowed students to combine paid employment with the pursuit of a law degree, but Dalhousie discontinued this practice by 1886.

The initial impetus behind these efforts was democratic, and in the early years both institutions welcomed a large number of non-degree students. At Saint John, "bank clerks, newspaper reporters, shippers [and] practising lawyers" are recorded, in keeping with "the original vision that a law school was to be a resource for the whole community."[53] A certain openness was also apparent in the presence of women in the early law classes in Saint John and the admission of Black lawyers to the bars of New Brunswick (1882) and Nova Scotia (1900) respectively. Abraham Walker of Saint John had obtained an LL.B. from the National University in Washington,

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48 National Archives of Canada [hereinafter NAC], Sir John Thompson Papers, MG 26 D, vol 30 (15 February 1884).

49 The change came first in Nova Scotia: S.N.S. 1884, c. 16, later in New Brunswick (S.N.B. 1903, c. 68). Membership in the Law Society of Prince Edward Island was not compulsory until 1930: see S.P.E.I. 1930, c. 14, which also gave full disciplinary powers to the Society for the first time.

50 John Willis, *A History of Dalhousie Law School* (Toronto: University of Toronto Press, 1979).

51 The law school at Saint John was originally founded in connection with King's College, Windsor, Nova Scotia, and only amalgamated with the University of New Brunswick in 1923, when the destruction by fire of the Windsor campus led King's to move to Halifax. The move to Fredericton came later yet, in 1959. Bell, *supra* note 22.

52 Willis, *supra* note 50 at 87–88.

53 Bell, *supra* note 22 at 93.

D.C. and became the first Afro-Canadian lawyer, a distinction hitherto wrongly conferred on Delos Davis of Ontario.[54] James Robinson Johnston of Halifax had obtained a Bachelor of Letters degree from Dalhousie before graduating LL.B. in 1898; he met with a success which eluded Walker, serving the Black community and specialising in criminal and military law.[55] Pierre-Amand Landry became the first Acadian lawyer (1870), the first Acadian named to a county court judgeship (1890) as well as the first Acadian and the first Roman Catholic to be named to the New Brunswick Supreme Court (1893).[56]

Legal literature flowered once more, as Maritime authors wrote on topics ranging from the corporation to the constitution.[57] This was also the golden age of law reporting in the Maritimes, with the barristers' societies in the two larger provinces statutorily accorded total control over the process.[58] The theme of national economic integration can be seen as early as 1886 in Nova Scotia, when the government contracted with the Carswell firm of Toronto to publish the *Nova Scotia Reports*. In New Brunswick the printing was done in Toronto after 1910, although Carswell had already been acting as publisher for some time.[59] The hegemony of case law was revealed by the enormous effort local lawyers put into exhaustive and elaborate digests of judicial precedents.[60]

Maritime lawyers became agents of national integration both by emigrating, especially to Ottawa and the west, where a number rose rapidly to positions of influence in politics, business,[61] the civil service and the judiciary; and by staying at home, where they benefited from federal patronage by accepting judgeships in the new county courts established in the wake of Confederation,[62] and by doing legal work for the Dominion government (especially by securing the lucrative and coveted

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54 Women were not admitted to Dalhousie Law School until 1915, and the first woman called to the bar in Nova Scotia was Frances Fish in 1918: L.K. Kernaghan, "The Madonna of the Legal Profession" (1991) 16 Hearsay 26. In Prince Edward Island, enabling legislation was passed in 1918, which led to the first woman lawyer in that province a few years later: K. Fisher, "Roma Stewart Blackburn, P.E.I.'s First Woman Lawyer" (1995) ALHW II paper. The second did not follow until 1975. On Walker, see J.B. Cahill, "Walker, Abraham Beverley", vol. VIII, *Dictionary of Canadian Biography* (Toronto: University of Toronto Press, 1994). Walker was conspicuously excluded from a dinner for the Saint John bar in 1885, which led to a controversy over the "colour bar."

55 Barry Cahill, "The 'Colored Barrister': The Short Life and Tragic Death of James Robinson Johnston, 1876–1915" (1992) 15 Dalhousie Law Journal 6.

56 D.M. Stanley, *A Man for Two Peoples: Pierre-Amand Landry* (Fredericton: Law Society of New Brunswick, 1988).

57 A preliminary listing can be found in Girard, *supra* note 38 at note 8.

58 S.N.S. 1899, c. 27; S.N.B. 1898, c.14, 1914, c. 14.

59 See generally Nedelsky and Long, *supra* note 43.

60 J.G. Stevens, *Analytical Digest of the Decisions of the Supreme Court of Judicature of the Province of New Brunswick* (Toronto: Carswell, 1880); F.T. Congdon, *A Digest of the Nova Scotia Common Law, Equity, Vice-Admiralty and Election Reports* ... (Toronto: Carswell, 1890).

61 A theme explored with reference to a later period by J.B. Cahill and G.P. Marchildon, "Big Business and Corporate Law from an Atlantic Canadian Perspective" (1995) ALHW II paper.

62 S.N.B. 1867, c. 10, which also abolished the inferior courts of common pleas; S.P.E.I. 1873, c. 3; S.N.S. 1874, c. 18.

position of local agent for the Minister of Justice), and acted as conduits for federal patronage in the province (especially on the railways). Appointments to the provincial supreme courts were vested in the national government after 1867, providing another link binding national and local élites. Halifax lawyers repeatedly tried to establish a Dominion bar association in the last quarter of the century, but failed because of central Canadian resistance.[63]

Sir John Thompson, Sir Robert Borden and Viscount Bennett were only the most prominent of the Maritimers of this upwardly mobile group. Others such as George Burbidge, Robert Sedgewick and E.L. Newcombe became deputy ministers of justice. Burbidge and Sedgwick fathered the *Criminal Code* of 1892 and the *Bills of Exchange Act* 1890,[64] and all three became judges in Ottawa. Burbidge became the first president of the Exchequer Court, while the others went to the Supreme Court of Canada.[65] Sedgewick was joined there in 1901 by Sir Louis H. Davies of Charlottetown. Sir John Bourinot, although not a lawyer, was Canada's best-known and most prolific constitutionalist of the day. Solomon Hart Green of Saint John became the first Jew admitted to a Maritime bar (New Brunswick 1906) and the first elected to public office in the Canadian west (Winnipeg 1908). Another Saint John native, Mabel Penery French, was the first woman admitted to a bar outside Ontario (New Brunswick 1907). In 1910 she left the "sleepy old town in New Brunswick" to head west, where she became the first woman admitted to the British Columbia bar (1912); both distinctions were achieved after court battles and enabling legislation. Nor, though they originated in an earlier era, should one forget Sir William Johnstone Ritchie's effective leadership as the second chief justice of Canada (1879–1892), or Sir Adams G. Archibald's role in shaping the legal system of the new province of Manitoba as its first lieutenant-governor. The career of John Hamilton Gray, a premier of Prince Edward Island who ended his days on the bench of the Supreme Court of British Columbia, illustrated the mobility characteristic of the ambitious post-Confederation Maritime lawyer.[66]

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63 Philip Girard, " 'His whole life was one of continual warfare': John Thomas Bulmer, Lawyer, Librarian and Social Reformer"(1990) 13 Dalhousie Law Journal 376 at 405, 379, 396.

64 D.H. Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto: The Osgoode Society, 1989) chap. 6.

65 It was the Exchequer Court which succeeded in 1891 to the jurisdiction of the old colonial courts of vice-admiralty, established under imperial legislation: A.J. Stone, "The Admiralty Court in Colonial Nova Scotia" (1994) 17 Dalhousie Law Journal 363 at 417–27. The judges holding such appointments in 1891 remained in office and were styled judges of "the Nova Scotia [New Brunswick, etc.] Admiralty District of the Exchequer Court."

66 Aside from the standard biographies of Thompson and Borden by Waite and Craig respectively, *Dictionary of Canadian Biography* entries provide convenient points of departure for studies of the careers of these men. D.H. Brown, "Burbidge, George Wheelock" vol. VIII *ibid*(Toronto: University of Toronto Press, 1994); P. Girard, "Sedgewick, Robert" *ibid.*; M.A. Banks, "Bourinot, John George" *ibid.*; K.G. Pryke, "Archibald, Sir Adams George" vol. VII (Toronto: University of Toronto Press, 1990); G. Bale and E.B. Mellett, "Ritchie, Sir William Johnstone" *ibid*, as well as Bale, *supra* note 17. On S. Hart Green, see Bell, *supra* note 22 at 94. On French, see L.K. Yorke, "Mabel Penery French (1881–1955): A Life Re-Created" (1993) 42 U.N.B.L.J. 3.

National integration occurred in other ways as well. One of the most significant decisions made by the new Supreme Court of Canada was that in *Kelly* v. *Sulivan*, which upheld a decision made by commissioners appointed under a Prince Edward Island statute which provided for the expropriation of large estates held mainly by non-resident British landlords.[67] The Supreme Court of Prince Edward Island, often sympathetic to landowners, had overturned the award, which was reinstated in the Supreme Court of Canada. It has been suggested that the Court was highly sensitive to the political dimension of the appeal and did not wish to risk alienating the Island population who had only recently joined Canada.[68]

By the end of the nineteenth century, patterns in both judicial decisions and legislation in the Maritimes showed an increasing reliance on Ontario models. The English model continued to reign supreme and was probably enhanced by the increasing presence of Maritime lawyers arguing Privy Council appeals, but "Ontario largely replaced the United States (in particular Massachusetts) as the [Nova Scotia Supreme] Court's secondary legal metropolis."[69]

The new professionalism transformed the role of lawyers in society. Those who had achieved prominence in the middle decades of the century had tended to be politicians first and lawyers second. Increasingly, lawyers could rely on their "expertise" as the source of their legitimacy and prominence, without also holding elected office. This shift did not happen overnight, and partisan patronage remained a basic fact of life across Canada, but the roots of this change may be traced to this period. Nor is it accurate to suggest that lawyers were either corporate experts or political fixers, because most often the two roles enhanced each other. Yet as large corporations became more active and obvious presences in the region, lawyers' association with them did provide a new basis for status, qualitatively different from the older lawyer-statesman model, a process perhaps best illustrated by the early career of Robert Borden.

With burgeoning industrial development and an enhanced demand for investment opportunities both inside and outside the region, the need for corporate advisers grew significantly after adoption of the National Policy. Probably because Nova Scotia initially profited more from the National Policy than New Brunswick, the highest concentration of corporate lawyers was in Halifax. Lawyers such as Charles Cahan, Almon Lovett, Robert Harris, and Robert Borden became highly sought corporate counsel, managers and promoters. Their firms broke the mould of the two-man partnership and by the 1890s there were five-man firms in Halifax, complete with the distinction between partners and associates, a development that was not replicated in the other two provinces until after the Second World War. Harris and Cahan, along with businessman J.F. Stairs, created Canada's second wholesale bond house, the Royal Securities Corporation in 1903. It soon became one of the most dynamic investment banks in Canada, financing utility and street railway ventures throughout

67 *Land Purchase Act*, S.P.E.I. 1875, c. 32.

68 (1876) 1 S.C.R. 3. See generally M.E. McCallum and R. Bittermann, "*Kelly* v. *Sulivan* (1876): Resisting a Compulsory Resolution of the PEI Land Question" (1995) ALHW II paper.

69 B.J. Hibbitts, "Her Majesty's Yankees: American Authority in the Supreme Court of Victorian Nova Scotia, 1837–1901" (1995) ALHW II paper at 51.

the Caribbean and Mexico. Halifax lawyers also advised Max Aitken, later Lord Beaverbrook, on how to engineer the three largest industrial consolidations of the first Canadian merger wave: Canada Cement, Canada Car and Foundry, and the Steel Company of Canada. The group then fractured over what was likely the first hostile takeover bid in Canadian history, which occurred in the struggle for control of Nova Scotia Coal and Steel in 1910. Lawyers had slipped virtually without opposition into the highest echelons of the new corporate world.[70] In turn, these powerful and prestigious positions enabled the corporate bar to establish its hegemony over the legal profession. After 1895, the president of the Nova Scotia Barristers' Society was almost invariably a corporate lawyer. The 1918 appointment of corporate czar Robert E. Harris, whose wizardry had fended off the hostile takeover bid just mentioned, as chief justice of Nova Scotia, illustrated the shifting ideals of the legal profession.

The role of lawyers in law reform also changed, enabling them to become true architects of their society. Their role in legislative drafting became more that of the expert technocrat than the custodian of values, and consequently more difficult to challenge.[71] The revised statutes themselves told the story eloquently. Between the *Revised Statutes of Nova Scotia* 1868 and those of 1884 there is a profound gulf. Not only did the statutes double in volume over this period—they tripled in New Brunswick between 1877 and 1903—but the prolixity and technicality of the latter revision was quite formidable when compared to the earlier one. Reforms to married women's property legislation which completed the transition to full separation of property between spouses, swelled the act from 15 sections to 99. The *Judicature Act*, which completed the chancery abolition campaign of thirty years earlier, tripled in length. This *Act* did represent an enormous step forward in the rationalisation of civil litigation, by abolishing all technical forms of pleading and confirming the existence of a unitary court structure where both "law" and "equity" would be administered by all judges of the Supreme Court. New Brunswick followed in 1903. That which represented "simplicity" and "reform" to lawyers in the 1880s and 1890s, however, would not have been recognised as such by mid-century reformers, for whom the comprehensibility of statutory language by the laity remained an important point of principle. The new professionalism also had an impact on the judiciary of the inferior and superior courts, directly with regard to appointments and indirectly with regard to the development of the requirements of natural justice and of judicial ethics. The latter point became most contested by the bar in the context of the "double sitting." The supreme courts in the Maritimes had no formal separation between trial and appeal "divisions," and appeals were normally heard by the full court (or bench,

70 G.P. Marchildon, "Promotion, Finance and Merger in the Canadian Manufacturing Industry, 1885–1918" (Ph.D. thesis, London School of Economics and Political Science, 1990); Marchildon, "International Corporate Law from a Maritime Base: the Halifax Firm of Harris, Henry, and Cahan" in C. Wilton, ed., *Beyond the Law: Lawyers and Business in Canada 1830 to 1930* (Toronto: The Osgoode Society, 1990); Marchildon, "The Role of Lawyers in Corporate Promotion and Management: A Canadian Case Study and Theoretical Speculations" (1990) Business and Economic History, 2nd ed., 19 at 193.

71 This can only be inferred rather than proved at present, in view of the paucity of evidence on who actually drafted statutes. In the absence of an official drafter, the process was necessarily *ad hoc*.

thus the phrases "*in banco* appeal," "appeal *en banc*"). The original trial judge sometimes sat with the full bench in such cases, on the theory that his "advice" would be useful to the others, yet he could and did vote on the disposition of the appeal.[72] The practice elicited little criticism until after the turn of the century, when pressure from the bar resulted in a 1909 amendment to New Brunswick's *Judicature Act* prohibiting the practice. The Nova Scotia Barristers' Society pressed for a similar change, which came in 1919.[73]

Changes in the lower courts also occurred as lawyers' concerns about due process were disseminated more widely. The most noticeable change came in cities and towns, where mayors' courts were all dismantled in the 1860s and '70s, to be replaced by stipendiary (Nova Scotia, Prince Edward Island) or police (New Brunswick) magistrates possessing both civil and criminal jurisdiction: they were usually barristers.[74] The initial impetus for this change arose out of concerns that the mayors' courts were too lenient on offenders, and perhaps even corrupt, rather than from any demand for adjudication by legal professionals as such. As lawyers tended to appear more frequently for defendants in both civil and criminal matters in these courts, however, their ethos and procedures began to change. Gradually the inquisitorial model was abandoned and the magistrate began to assume a role of impartial arbiter between rights-bearing subjects, although he often remained in charge of the urban police force. It would still be a long time, however, before all magistrates in the non-metropolitan areas would be required to be lawyers.[75] The police forces became more visible and more efficient, and largely replaced the JPs as the main bulwark of law and order in Maritime cities after Confederation. Their own growing professionalism and corporate ethos was evident in the first provincial statute regulating the police, that of Nova Scotia in 1888.[76]

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72 Judges sometimes reversed their own decisions on appeal: see Longley J. in *Chisholm* v. *Chisholm* (1907) 45 N.S.R. 288.

73 S.N.B. 1909, c. 5, s. 7(2); *Morning Herald* (Halifax), 25 March 1912. In Nova Scotia the rule was not enshrined in legislation but in an order of its supreme court made under the authority of the *Judicature Act*, S.N.S. 1919, c. 32 (Order 58, rule 9). The rule provided for an exception if the trial judge was "requested by a majority of the judges" to sit on the appeal. For a good review of the development of judicial ethics in Canada in the later nineteenth century, see Bale, *supra* note 17, chapter 15.

74 At least this was the case in Nova Scotia, where the *Town Incorporation Act*, S.N.S. 1888, c. 1 required that the recorder of the town be a barrister of two years' standing, and conspicuously stated that there was no impediment to his being named stipendiary magistrate for the town—which was in any case a cabinet appointment after 1895. In New Brunswick the parallel statute (1896, c. 44) did not require legal credentials directly or indirectly for the post of police magistrate. In rural areas, New Brunswick had established in 1876 a new set of parish courts with civil jurisdiction up to $40, to be staffed by "commissioners" who were required to be justices of the peace but not lawyers. As for Prince Edward Island, see *infra*, text accompanying note 100. See generally G. Marquis, " 'A Machine of Oppression Under the Guise of Law': The Saint John Police Establishment" (1986) 16 Acadiensis 58.

75 Girard, *supra* note 22. R.E. Kimball, *The Bench: The History of Nova Scotia's Provincial Courts* (Halifax: Province of Nova Scotia, 1989), chapter 1. When New Brunswick created a new tier of "parish courts" with civil jurisdiction up to $40 in 1876, the statute required its "commissioners" to be justices of the peace, not lawyers. It is not clear whether their creation reflected dissatisfaction with the new county courts.

Recognition of the new professionalism appeared unevenly in the field of superior court appointments. The rules of the game were well known to the players, as future chief justice of Nova Scotia Charles Townshend revealed in writing to his friend John Thompson in 1882: "My tastes and ambition have been to excel in the profession ... for politics I care nothing and only went into them with a view to the Bench."[77] Certainly the decades after 1867 witnessed a marked decline in the prestige and deference afforded the judiciary of superior courts in the Maritimes.[78] Yet in Nova Scotia at least, the end of the Victorian era and the early twentieth century witnessed attempts to restore lustre to the Supreme Court, through a slow suppression of the more obvious forms of patronage and an increased emphasis on the educational and professional attainments of judges. A study of supreme court appointments in Nova Scotia between 1880 and 1920 has shown that the new professionalism became an important factor under the Conservatives until 1896, declined somewhat during the Laurier years, and was confirmed as a dominant factor under Borden. By the second decade of the twentieth century, a career in corporate law and a Dalhousie LL.B. were more important than service in the House of Assembly, in securing appointment to the bench in Nova Scotia.[79]

The fate of alternate forms of dispute resolution provided a useful barometer of modernisation during this period, but much research remains to be done. The hypothesis would be that the slow but steady decline of "community" and "religion," and the increasing impersonality of social relations especially in urban areas, would result in increased recourse to more formal means of dispute resolution. Certainly there were glimpses of this. The Acadian presence in civil litigation increased significantly in the last quarter of the nineteenth century, reflecting their "*intégration subtile mais bien réelle ... à la société néo-brunswickoise.*"[80] Even the most marginalised group in Maritime society sought out the formal legal system to resolve a most intimate dispute, when a Mikmaq husband from Dartmouth applied for a divorce in 1908 to the Nova Scotia Court of Divorce and Matrimonial Causes.[81]

Further evidence of this theme might be sought in the increasing tendency of historically disadvantaged groups to articulate, or have articulated for them, their claims in the language of law and rights, rather than resorting to communal action or other forms of redress, although these strategies were not mutually exclusive. Radical lawyer John Thomas Bulmer (socialist, feminist, anti-racist, prohibitionist) advised both the Halifax black community in its struggle to secure racially integrated schools and the fledgling labour movement, which grew up around the Nova Scotia

76 G. Marquis, "Enforcing the Law: the Charlottetown Police Force" in Baldwin and Spira, *supra* note 35; Phillips, *supra* note 21 at 147–48.

77 C.J. Townshend to J.S. Thompson, 11 July 1882, *supra* note 48 at no. 2867.

78 Bell, *supra* note 22.

79 P. Girard, "The Supreme Court of Nova Scotia, Responsible Government, and the Quest for Legitimacy, 1850–1920" (1994) 17 Dalhousie Law Journal 430 at 436–40. From 1916, all appointments except one went to holders of Dalhousie LL.B.s.

80 Couturier, *supra* note 38 at 205.

81 *Halifax Daily Echo*, 22 July 1908. The co-respondent was also a Mikmaq. The newspaper believed this to be the first divorce application from a Mikmaq couple.

Provincial Workmen's Association, founded in 1879.[82] Yet traditions of solidarity, including practices of local ordering, remained strong in the coal mine, the lumber camp and on the sailing ship; and new forms of dispute resolution, particularly in the workplace, might have emerged, about which we know nothing.[83] Yet again, a simple distinction between 'state' and 'community' forms of ordering would describe the work of organisations, such as the Nova Scotia Society for the Prevention of Cruelty, which occupied an ambiguous space "between the private and the public" in late Victorian Halifax and did much to assist abused women and children in their struggle for peaceful survival.[84]

Within the formal legal order, institutional modernisation most often meant the displacement of private litigation by administrative tribunals of some sort, thus working against the interests of lawyers by abolishing certain types of claims (workmen's compensation) or relying on different kinds of professionals (town planning).[85] The motivations for this change varied: sometimes the simple invocation of "efficiency" was sufficient (municipal experiments with commission government),[86] at other times the state wished to contain class conflict on a more predictable terrain (workmen's compensation or compulsory arbitration[87]), and at still other times populist rhetoric was used to justify state regulation of corporate activity "in the public interest" (Nova Scotia's Water Power Commission).[88] Modernisation finally reached into the legislature itself, as New Brunswick abolished its Legislative Council in 1891 and Prince Edward Island followed suit in 1893.[89]

Yet this story of professional reform and modernisation is only partial: important areas of the legal system remained untouched by new ideas. The administration of

82 Girard, *supra* note 63.

83 Bell, *supra* note 25.

84 J. Fingard, "The Prevention of Cruelty, Marriage Breakdown and the Rights of Wives in Nova Scotia, 1880–1900" in Guildford and Morton, eds., *supra* note 9.

85 The workers' compensation statutes were S.N.S. 1915, c. 37 and S.N.B. 1918, c. 1; town planning, S.N.B. 1912, c. 182 and S.N.S. 1915, c. 3.

86 H. Roper, "The Halifax Board of Control: The Failure of Municipal Reform, 1906-1919" (1985) 14 Acadiensis 50.

87 M.E. McCallum, "The *Mines Arbitration Act*, 1888: Compulsory Arbitration in Context" in Girard & Phillips, *supra* note 4.

88 Nova Scotia's *Water Act*, S.N.S. 1919, c. 5 expropriated all riparian rights and vested all regulatory authority over provincial water resources in an independent commission. See J. Nedelsky, "From Private Property to Public Resource: The Emergence of Administrative Control of Water in Nova Scotia" in Girard & Phillips, *supra* note 4.

89 S.N.B. 1891, c. 9. Michael Gordon, "The Andrew G. Blair Administration and the Abolition of the Legislative Council of New Brunswick, 1882–1892" (MA thesis, University of New Brunswick 1964) S.P.E.I. 1893, c. 1. Frank Mackinnon, *The Government of Prince Edward Island* (Toronto: University of Toronto, 1951) at 210-17. Prince Edward Island amalgamated its two chambers into a unicameral legislature with two-member constituencies, one "councillor" and one "assemblyman" being returned for each. A property qualification for electors of councillors remained until after the Second World War; dual constituencies remain to this day, as a way of providing Protestant and Roman Catholic representation in each riding. Nova Scotia would wait until 1928 to do away with its upper chamber, when it disappeared "unwept, unhonoured, and unsung," in the words of J.M. Beck, *The Government of Nova Scotia* (Toronto: University of Toronto Press, 1957) 252.

criminal justice, for example, changed little until well into the twentieth century. Unlike Ontario, where the *Crown Attorneys Act* (1857) had put a state official in each county in charge of all criminal prosecutions, the Maritimes continued to rely on a combination of grand jury and local private practitioners paid piecemeal.[90] It is difficult to know whether maintenance of this practice represented simple adherence to tradition, a rational economic decision in relatively thinly populated jurisdictions, or a genuine fear of the loss of local control. The latter seemed to have motivated the maintenance of the grand jury, for example, even in the face of stinging rebukes by reform-minded judges.[91]

Changes in penal institutions and poor relief came slowly as well. After a spate of penitentiary construction in the 1860s, interest waned and carceral conditions and policies changed little, as the federal government took on a major role with construction of the Dorchester penitentiary in New Brunswick in 1880.[92] Poor relief on the Elizabethan model remained little changed in spite of increasingly widespread beliefs about its inadequacy. In rural areas the maintenance of paupers was contracted out by the overseers of the poor to the lowest bidder as late as 1880, when a particularly grisly murder trial in Nova Scotia reminded polite society of their existence. On 8 February 1881, Joseph Thibault was hanged for the murder of Charlotte Hill, a pauper in his charge. Mother of one illegitimate infant and six months pregnant at her death, Hill had been burned alive on a lonely country road one night. A mob of 700 men, women and children, enraged at the new practice of private executions, battered down the enclosure of Annapolis jail in order to witness Thibault's last moments.[93]

Within the legal profession, there were signs that the aspirations unleashed by the professional reform movement in the last quarter of the nineteenth century could not be fulfilled in the region. When William Bruce Almon Ritchie, *doyen* of the Nova Scotia bar and president of the Barristers' Society in 1905–06, emigrated to Vancouver in 1911, it was clear that not even those at the pinnacle of the profession saw sufficient challenge or remuneration to keep them down east.[94] Younger lawyers had been emigrating in increasing numbers to central and western Canada and right across the United States since the 1880s, but as capital and head offices began to migrate west, even senior lawyers accompanied them. When the Canadian Bar

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90 P.B. Waite, *The Man from Halifax: Sir John Thompson, Prime Minister* (Toronto: University of Toronto Press, 1985) at 91–93 describes the system in Nova Scotia.

91 *Evening Mail* (Halifax), 20 June 1895. The jury, grand and petit, remains a virtually unknown institution in Maritime legal history, awaiting scholarly research.

92 Baehre, *supra* note 4.

93 Both Waite, *supra* note 90 at 92–95 and Fingard, *supra* note 84 at 109 describe the trial, but neither notes the unusual circumstances of the execution. See (Halifax) *Morning Chronicle*, 9 February 1881.

94 P. Girard, "Ritchie, William Bruce Almon" in vol. XIV, *Dictionary of Canadian Biography*(Toronto: University of Toronto Press) [forthcoming]. Ritchie was admitted to the B.C. bar on the same day as the benchers decided that Mabel French could not be admitted because the statute did not permit women: Archives and Records Services of British Columbia, Law Society of B.C. fonds, Add. MSS. 948, vol. 5 at 183, 3 July 1911.

Association was finally established in 1914, it was from the west that the initiative came, not from the east as it had twenty years before. Likewise, when Robert Sedgewick died in 1906, his replacement on the Supreme Court of Canada, Lyman Duff, came from British Columbia; never again would the Maritimes have more than a single representative on the court.[95]

Maritimes progressives, whether of the middle or working classes, responded to the changes in their society by seeking the same kinds of state regulation which they knew existed elsewhere on the continent and in Britain. Yet the institutions which they created to deal with new social problems sometimes presented more shadow than substance. Take child welfare, for example, a field which the state entered with some fanfare in the 1880s and '90s, after confining itself to the regulation of pauper children, orphans and child apprentices for over a century. The 1880s and 1890s witnessed a boom in child-specific legislation in Nova Scotia, reflected in New Brunswick and to a much lesser extent in Prince Edward Island: acts were passed authorising the Society for the Prevention of Cruelty to carry on child protection proceedings (1880), for the maintenance and reform of juvenile offenders (1890), preventing the use of tobacco and opium by minors (1892), limiting the father's custody rights (1893), restricting children's working hours to twelve per day (1895), permitting adoption for the first time (1896), and for licencing boarding houses for infants (1897). Yet the juvenile offender legislation relied on a form of indirect rule which simply committed young persons to reform schools run by religious organisations, and the enforcement apparatus for the working hours and narcotic control legislation was virtually nil. Thirty years later, the maternity home licensing legislation was flouted for over a decade by William and Lila Young at their Ideal Maternity Home in East Chester.[96] When bureaucrats intervened more directly in child protection matters in 1906, their efforts were arguably less effective than those of the supplanted community organisations.[97] Only the *Custody Act*, which depended on judges rather than bureaucrats for its implementation, seemed to have been applied in an effective manner.[98]

Yet in spite of these inadequacies, one should emphasise that Maritimers were attempting to use the state and the legal order to alter their society in response to major economic and social changes, real and perceived. As late as the end of the Great War, there was still a sense of optimism, a sense that in spite of vested interests,

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95 J.G. Snell, "Relations between the Maritimes and the Supreme Court of Canada: The Patterns of the Early Years" in P.B. Waite, *et al.*, eds. *Law in a Colonial Society: The Nova Scotia Experience* (Toronto: Carswell, 1984) at 159. Duff, in fact, was born in Meaford, Ontario, lived his early boyhood in Nova Scotia, returned at age ten to Ontario and entered the Unversity of Toronto in 1881, completing his LL.B. in 1889, obtaining his call to the Upper Canada bar in 1893, and arriving in Victoria, B.C., in July 1894: David Ricardo Williams, *Duff: A Life in the Law* (Vancouver: University of British Columbia Press, 1984) at 4–21.

96 B. Cahill, *Butterbox Babies* (Toronto, 1992). Although not presented as such, this book is a fascinating study of the politics of administrative law in Nova Scotia in the 1920s and '30s.

97 B.M. Dubinsky, "Rescued: Early Child Protection Legislation in Nova Scotia" (M.S.W. thesis, Dalhousie University, 1995) chapter 6.

98 R.E. Veinott, "Child Custody and Divorce: A Nova Scotia Study, 1866–1910" in Girard and Phillips, *supra* note 4.

inertia, and constrained resources, "material and moral improvement" was attainable through the effective deployment of state power. When legislated prohibition appeared in Prince Edward Island in 1901, Nova Scotia in 1910 and New Brunswick in 1917, after a decades long reform campaign, it appeared as if those hopes had finally been realised.[99]

III. The Traumatic Period, 1920–39

In central Canada the interwar period has been remembered as schizophrenic, split between the Roaring Twenties and the Dirty Thirties. In the east, the period had a bleak and poignant unity. Retrenchment after the end of World War I was swift and brutal, as excess industrial capacity translated into staggering job losses in the Maritimes. Over 40% of the region's manufacturing jobs disappeared between 1920 and 1926, and out-migration was the solution adopted by as much as one-fifth of the region's population. New investment was not forthcoming, and the region's economic position stagnated for some two decades. Prior to the Great War differences in living standards between the region and central Canada had been relatively modest, but the 1920s would engrave the region's "have-not" image on the national psyche for the rest of the century.[100]

Insofar as legal change in the twentieth century has been largely associated with state initiatives, the growth of a public policy "industry," legislative law reform and the expansion of regulatory law administered by state-appointed tribunals, the Maritimes were bound to be out of step with the rest of the country after the Great War. In the period before the large federal transfers of the post-1945 era, these three small provincial governments were chronically underfunded, with little or no money for policy advice, law reform research or creation of an administrative infrastructure appropriate to modern needs. Nonetheless it would be a mistake to see this period as one of total inactivity. Legislative stasis in the private law and a certain cult of nostalgia were the dominant characteristics of the legal culture of the period. Yet this period also saw the emergence of an increasingly assertive state, which relied on both the army and new police forces to control class conflict and protect its few sources of revenue.

It was not long before some of the accomplishments of the Progressive Era were "rolled back." Prince Edward Island provided a good example. In 1894 legislation had provided for a stipendiary magistrate for each county who would be a barrister of at least five years' standing, who would hold office "during good behaviour." By 1912 the threshold was set at two years, with the appointment expressed to be held "during pleasure"—retroactively! In 1917 came the *coup de grace*: repeal of the 1894 *Act* and a return to the voluntarist system of justices of the peace. A similar rollback occurred in Nova Scotia. In response to the Workman's Compensation Board's financial crisis, precipitated by the loss of the Lunenburg fishing fleet in 1926, the province simply moved to remove fishermen from the ambit of the *Act*.[101]

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99 See generally, I. McKay, "The 1910s: The Stillborn Triumph of Progressive Reform" in Forbes and Muise, *supra* note 46 on this theme.

100 J.G. Reid, *supra* note 46 at 161-85.

Private law remained almost untouched by legislative reform during this period. Once a leader in the field of succession law, for example, the Maritimes now lagged far behind. One of the last bastions of liberalism, freedom of testation, survived unimpaired in the Maritimes until the 1950s. Meanwhile, dependents' relief legislation based on New Zealand's 1900 *Act* had spread throughout the Empire, including Ontario and western canada, in the 1910s and 1920s, allowing judges to vary the terms of a will if the testator had not made adequate provision for the proper support of dependents. Preferential shares for widows and widowers upon intestate succession, allowing them to inherit all assets in the case of smaller estates, also encountered similar delays.

Nor did family law fare any better. The pioneering work, in Nova Scotia, at least, of the lay Society for the Prevention of Cruelty in preventing and redressing wife abuse seemed not to have survived in a professionalising era, or to have had any larger educative value. A study of the doctrine of marital cruelty in the Nova Scotia divorce court, 1900–1939, shows a judiciary quite unresponsive to the new ideals and conditions of married life which characterised the postwar period. In their unwillingness to recognise all but the most appalling kinds of wife abuse, the judges refused to follow more humane precedents from England and the United States and remained wedded to the patriarchal ideals of the pre-Victorian family.[102] In the field of custody law, Prince Edward Island waited to abolish fathers' common law rights until 1968, when the federal *Divorce Act* made the change virtually inevitable. Direct policing of families by state agencies increased, however, with the growth of a child welfare bureaucracy. A spectacular example was the removal of hundreds of Mîkmaq children from their families and their internment in the residential school established by the federal government at Shubenacadie, Nova Scotia in 1929.[103]

Nor was it an auspicious time for court reform. Even stipendiary magistrates continued to be remunerated, at least in part, by fees from litigants, and few were lawyers outside the cities. Many were described as "having no more conception of the law than an ordinary schoolboy."[104] It may well be that a long-standing resistance

101 F. Winsor, " 'Solving a Problem': Privatizing Workers' Compensation for Nova Scotia's Offshore Fishermen, 1926–1928" in M. Earle, ed., *Workers and the State in Twentieth Century Nova Scotia* (Fredericton: Acadiensis Press, 1989).

102 J.G. Snell, "Marital Cruelty: Women and the Nova Scotia Divorce Court, 1900–1939" (1988) 18 Acadiensis 1. The last judicially-inspired reform had occurred in 1908, when it was decided that in cases which did not quite meet the stringent test of physical cruelty required for divorce, a judicial separation might be granted.

103 New Brunswick adopted preferential shares for widows relatively early (1927), compared to Prince Edward Island (1944) and Nova Scotia (1966). Dependents' relief did not come until 1959 in New Brunswick, 1966 in Nova Scotia, and 1974 in Prince Edward Island. Nova Scotia provided for its first Superintendent of Neglected and Dependent Children in 1911 (c. 15), New Brunswick in 1919 (c. 6), Prince Edward Island not until 1940 (c. 12). Nova Scotia had exercised the powers granted to it under the federal *Juvenile Delinquents Act* of 1908 to create a juvenile court in 1910 (c. 8), but gave the jurisdiction to county court judges rather than create a new court. New Brunswick seems not to have done so, but all provincial judges had the power to enforce a whole variety of child-specific legislation.

104 Speech by R.W.E. Landry, M.L.A. for Yarmouth, in the House of Assembly, March 1916, quoted in Kimball, *supra* note 75 at 3.

to putting any resources into rural justice nourished a tradition of self-help and vigilanteeism, of which one sometimes sees signs in the records. Not until 1938 did the province of Nova Scotia take steps to phase out the fee system, require all provincial magistrates to be barristers of three years standing, and thus lay the foundation for the emergence of a provincial court system. Even then, subsequent developments up to 1987 might be labelled as "gradual change and little progress."[105]

In spite of the enormous economic problems of the period, the welfare state continued, haltingly, to emerge. Mothers' allowances were recommended by commissions in both New Brunswick and Nova Scotia in the early 1920s, but not implemented until 1943 and 1930 respectively, while Prince Edward Island waited until 1949. If the Maritimes had had any political clout in Confederation, an unemployment insurance scheme should have emerged in the 1920s; but relative prosperity in the rest of Canada meant that it was not considered urgent. The federal *Old Age Pensions Act* (1927), based on a 50-50 cost-sharing formula, was eagerly taken up west of Quebec, but the Maritimes had to await a 1931 amendment which increased the federal contribution to 75%.[106]

In some areas not requiring direct government expenditure, the Maritimes could still lead the way. The 1937 *Trade Union Act* of Nova Scotia was the first of its kind in Canada, requiring employers to bargain with any union supported by a majority of employees, and providing for compulsory check-off of dues.[107] This development confirmed the view that "most of the elements of industrial legality [in Canada] were first articulated in ... the Nova Scotia coalfields."[108] Once again, the circumscribed nature of such accomplishments was revealed by a comparison with the fishery. In 1939 the provincial government assisted in the defeat of a fishermen's union in Lockeport, as it had done in Halifax the previous year. The direct dependence of the Nova Scotia government on coal royalties meant that no legislative effort was spared to keep the industry in as productive a state as possible. In the fishery, exactly the opposite occurred, as the federal parliament prohibited the use of large trawlers and thus froze the productivity of the industry.[109]

Coal's centrality was such in Nova Scotia that naked force was used in the Cape Breton coalfields against striking miners, and the law of seditious libel was resurrected for use against radical union leader J.B. McLachlan. Law could merge with force and could be used as an instrument of class power. Yet one is struck by the exceptional nature of these responses. In general, the provinces much preferred to work within "the ideological limits imposed by notions of fundamental human rights."[110]

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105 *Ibid.* at 21.

106 K. Bryden, *Old Age Pensions and Policy-Making in Canada* (Montreal: McGill-Queen's, 1974).

107 K. Abbott, "The Coal Miners and the Law in Nova Scotia: From the 1864 *Combination of Workmen Act* to the 1947 *Trade Union Act*" in Earle, *supra* note 101.

108 I. McKay, " 'By Wisdom, Wile or War:' The Provincial Workmen's Association and the Struggle for Working-Class Independence in Nova Scotia, 1879–97" (1986) 18 Labour/Le Travail 13.

109 S.C. 1932, c. 42, s. 56.

Provincial revenue also depended heavily on liquor sales, after the move from prohibition to government control in the late 1920s, and increasingly on tourist revenue, much of it derived from hunters visiting the region. Each of these sources of revenue presented a problem for which provincial policing seemed to be the answer: smuggling and boot-legging in the case of liquor sales, and the insistence of Native peoples of the region that they were not bound by provincial hunting laws adopted in the late nineteenth and early twentieth centuries. In the first case, the temperance inspectorate of the 1920s was succeeded by a provincial police force, which emerged briefly in Nova Scotia and New Brunswick before being supplanted by the R.C.M.P. in the early 1930s. In Nova Scotia at least, the main priority of the R.C.M.P. in the 1930s was enforcing the liquor control laws in an effort to channel more business through the government stores.[111] In the second case, an aggressive campaign against Mikmaq hunting out of season aimed to conserve more provincial game for out-of-province hunters, resulting in the landmark *Syliboy* case of 1928.[112]

Not all legal developments in the interwar period could be characterised as "traumatic," but the experience of sudden economic decline undoubtedly had a profound effect on the legal culture of the region. Much of the energy, vision and innovation which had characterised the pre-war decades dissipated, to be replaced by a resistance to change, a continuing immaturity in the development of appropriate regulatory mechanisms, and a certain cult of nostalgia. The minutes of the Nova Scotia Barristers' Society in the interwar years symbolised this shift all too well, amounting to little more than necrology. When the Society sponsored the publication of what would be the last of the case law digests in 1940, it appeared eleven years late and lost $800.[113]

Yet within the legal profession as a whole, significant changes occurred even as the cult of nostalgia deepened. The postwar period marked a definite break with earlier patterns of a relatively open legal profession and relatively accessible legal education. In response to pressure from the bar, Dalhousie demanded a year of university education as of 1915, which had to include Latin, English, mathematics, and French or German. In 1924 Dalhousie demanded two years, a standard which it

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110 M.E. McCallum, "The Acadia Coal Strike, 1934: Thinking about Law and the State" (1992) 41 U.N.B.L.J. 179 at 195; B. Cahill, "More 'Echoes from Labor's Wars': *Howe* (1835), *Russell* (1919) and *Dixon* (1920) in the Historiography of *R.* v. *McLachlan* (1923)" (1995) ALHW II paper.

111 J. Phyne, "Prohibition's Legacy: The Emergence of Provincial Policing in Nova Scotia, 1921–1932" (1992) 7 Canadian Journal of Law and Society 157; and his "Protecting Revenue: The Royal Canadian Mounted Police and the Nova Scotia Liquor Control Act, 1932–1939" (1995) ALHW II paper.

112 W.C. Wicken, " 'Heard It from our Grandfathers': Mi'kmaq Treaty Tradition and the *Syliboy* Case of 1928" (1995) 44 UNBLJ [forthcoming]. *R.* v. *Syliboy* (1928) 50 C.C.C. 390 (N.S.Co.Ct.), which denied the protection of the 1752 treaty to Cape Breton (and by extension, many other) Mikmaq, stood unchallenged until the 1980s; for which, see the essay *supra* by Henderson.

113 R.H. Graham, *A Digest of Cases in the Nova Scotia Reports 1907–1929* (Halifax: Nova Scotia Barristers' Society, 1940); Nedelsky and Long, *supra* note 43 at 41. The last true digest for New Brunswick appears to be H.A. Porter, *Digest of New Brunswick Case Law* (Toronto: Carswell, 1918). It was followed by the much inferior, anonymous *New Brunswick Reports, Table of Cases, Index-Digest* (n.p., n.d.), covering cases down to 1929.

soon succeeded in exporting to all Canadian law schools through Dean D.A. MacRae (1914–24) and the Canadian Bar Association. The dreaded Latin remained obligatory until the wave of returning veterans finally swept it away in 1949. Dalhousie also abolished the affiliated college system at this time, leaving aspirant lawyers to face a minimum of five years' post-secondary education. Apprenticeship remained an alternate route into the profession, but even there a move was afoot to raise educational attainments. As of 1926 the New Brunswick bar demanded a preliminary year of university education for those entering the profession through articling.[114]

Coincident with these changes was Dalhousie's adoption in 1915 of a new "cover-everything, professionally-oriented" curriculum, as John Willis called it. Pioneered by Dean MacRae, the new course of study revealed a clear shift in Dalhousie's orientation. "Gone was the balance ... between the cultural and professional subjects and between public and private law; the slant of the revised curriculum was clearly in favour of the general practitioner of private law." This "MacRae curriculum" would serve as the model for all Canadian law schools for nearly 50 years after its adoption by the Canadian Bar Association in 1920.[115]

Throughout North America after World War II there existed the same concern with restricting access to the legal profession, usually couched in terms of raising professional standards of education and ethics. New Brunswick lawyer John Baxter, a member of "the most visibly corrupt government in the history of the province," expatiated on this theme in the 1920s:

> the great corrective ... is to close the gate very firmly and very resolutely to a certain class of applicants to the Bar, who never can become, and never will become, ethical in any respect. Instead of letting a man pass his final examination the thing to do is to stop him at the outset.[116]

The concern in the Maritimes was not driven by anti-immigrant sentiment, as in the United States, but by a desire to enhance the image of the profession after a number of local scandals and to restrict competition at a time of great economic stringency. The lack of apparent opposition to these changes reflected the success that the ethos of the new professionalism had achieved in the public eye.

Neither Depression nor these changing currents in legal education disturbed the celebration of Dalhousie Law School's semi-centenary in 1933. Quite the contrary—the mood of the occasion was euphoric, even triumphalist. And why should it not be? In terms of the intellectual, judicial and political leadership which its graduates provided across Canada, the school was at its zenith. The editor and assistant editor of the *Canadian Bar Review* were, respectively, a member of the first graduating class ('85), and the dean. An alumnus sat on every supreme court in the country except Ontario, Quebec and Prince Edward Island. No graduate sat on the Supreme Court of Canada, but one was president of the Exchequer Court. Two provincial premiers were graduates (Nova Scotia, New Brunswick), as was the

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114 Willis, *supra* note 50 at 68, 72; Bell, *supra* note 22 at 125.

115 Willis, *supra* note 50 at 78–9. Bell, *supra* 22 at 129 discusses a similar shift at the University of New Brunswick, noting in particular the demise of courses in Roman law and Quebec civil law by 1927.

116 Cited in Bell, *supra* note 22 at 125.

premier of Newfoundland; and the recently deceased premier of British Columbia, Sir Richard McBride, had been an alumnus. Even the attorney-general of Hawaii was a graduate. Capping it all, the Prime Minister of Canada, R.B. Bennett, had been a member of the class of 1890. A whole galaxy of unenumerated lesser judicial and political lights completed this glittering constellation.

When Premier Angus L. Macdonald eulogised the founding dean, Richard Chapman Weldon, at the anniversary dinner on 30 October, he celebrated him for giving Dalhousie "not merely a law school but a breeding ground for public service and public men."[117] No one spoke of how "public service" had been translated into political success, or of how access to legal education and Weldon's own vision of that education had been significantly restricted after his retirement. Yet from another perspective, the anniversary dinner marked a different milestone. The professional project represented by Dalhousie Law School may be seen as the Maritimes' last significant legal export to the rest of Canada, one which aimed to fulfill post-Confederation dreams of the region as the new nation's New England.[118]

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117 Willis, *supra* note 50 at 112.

118 I am grateful to David Bell for making this suggestion.