

## Canada's Pre-Confederation Judiciary: Tory Judges and the Separation of Powers

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My paper is a small part of a larger study, on the history of the courts and judiciary in Canada. In turn that history will be a contribution to an even larger project, the legal history of Canada which I am writing with Philip Girard and Blake Brown. At this stage I am concentrating on the judiciary in the pre-Confederation period, and looking at such topics as judicial appointments, the rise of an indigenous (not appointed from the UK bar) judiciary, judicial tenure (at pleasure vs good behaviour appointments and methods of dismissal), and remuneration (fees and salaries, especially the abolition of the former). Each of these topics reveals considerable variation among the colonies which later made up Canada.

My presentation at the symposium will focus on another very significant aspect of this general topic, the involvement of judges in politics. I will discuss three issues. First, the extent to which judges were part of colonial governance structures. Here I will show that in all the British North American colonies prior to the 1830s judges were deeply embedded in governing institutions. In a few cases superior court judges actually sat in colonial assemblies, but this was not a significant practice. Much more common was judicial membership of colonial councils, although specific patterns did vary. In the eastern colonies there was just one council before the 1830s, which sat in both executive and legislative capacities, and judges sat on these in large numbers. Every single one of the twelve judges appointed to the New Brunswick Council between 1784 and 1830, for example, was also a councillor, all but one of them for the entire period they sat as judges. Nova Scotia saw slightly fewer judges on its council - twelve of the first fourteen judges appointed to the Nova Scotia Supreme Court as well as the master of the Rolls Simon Bradstreet Robie - and of those only eight, including Robie, were councillors throughout their tenure on the bench. In both these colonies the Chief Justice also presided as President of the Council. The two Canadas, Upper and Lower, had separate executive and legislative councils, and all seven Chief Justices before 1830 presided over both, as President of the Executive Council and Speaker of the Legislative. But unlike in the eastern colonies, council membership for puisne judges was relatively rare.

Having established the extent of council membership by judges, I will discuss the emergence of a reform critique of the practice. Everywhere this critique had two distinct but related elements. One might be termed constitutional - the idea that there was something inherently wrong in judges being so intimately involved with politics. There was a fundamental conflict, critics pointed out, in a judge being part of a body which proposed a law, then part of the body which passed it, and then being in a position to interpret it in court. Indeed there was often a further conflict, because in all colonies the final local court of appeal was the Governor and Council, so judges were involved in appeals from their own decisions as well.

The second critique of judicial involvement was more personal. For many an additional problem was the attitudes of the judges, invariably Tories who defended vested interests and the status quo. John Beverley Robinson of Upper Canada was, of course, a notorious member of the 'family compact,' but Brenton Halliburton, puisne judge of the Nova Scotia Supreme Court from 1807 to 1833, Chief Justice from 1833 to 1860, and a councillor from 1816 until 1838, was berated for similar reasons. Reform leader Joseph Howe condemned him as a man who 'mingled much and warmly in politics' and as 'the head of a party exclusive in its views and violent in its measures.' Howe was right. In his private correspondence Halliburton praised what he called 'sound sober conservatives' and 'monarchical institutions,' while insisting that those behind 'the pow wow about responsible government' were 'artful demagogues' and the idea itself a 'political monster' which would 'inevitably destroy all the Power of the Crown in the Colonies and sever us before long from the Mother Country.' *Sometime Nova Scotia Master of the Rolls Robie, though much more moderate in his earlier years as an Assemblyman, resisted moves towards responsible government, convinced that it would ultimately 'leave us a Pure Democracy if the word 'pure' can be applied with Truth to a Thing in its nature so the reverse of Purity.'*

There were of course defenders of the old colonial system, and they usually relied on the argument that judges were a valuable part of council deliberations because they provided legal advice of the drafting of laws. They played the role that we now ascribe to law officers of the crown. Sir John Colborne, Lieutenant-Governor of Upper Canada, went further than this, insisting that 'on many accounts it was desirable that the Chief Justice should retain his seat in the Executive Council.' Yet even he was attuned to the fact that 'there can be no doubt that occasionally he must, as a judge, be led too deeply into the political affairs of the colony.'

The third part of my presentation briefly examines the denouement of the practice of judges being so deeply formally involved in political institutions. This was largely a product of intervention from London, or perhaps it is fairer to say London's decisions to side with the colonial critics. The famous parliamentary committee report of 1828, the so-called Canada Committee, recommended among other things with reference to the Canadas that all judges except the Chief Justice should be excluded from both councils; the Chief Justices could stay in the Legislative Councils because their 'presence on particular occasions might be necessary.' This was presumably a reference only to statutory drafting, because the committee cautioned that CJs 'had better not be involved in the political business of the House.' The Colonial Office did not immediately act upon this recommendation, but by mid-1830 even the conservative administration of the Duke of Wellington had decided that Robinson should no longer sit in the executive council - although he stayed as Speaker of the Legislative Council until 1838.

Reform took a slightly different route in the eastern colonies, although it was again precipitated by London. The new Whig administration which came to power late in 1830 decreed in December of that year 'in future it is proposed that the Puisne Judges of the

province[s] should not be admitted to seats in the Council.' Although judges who were already on councils could remain, Ward Chipman Junior and John Murray Bliss, puisne judges of the New Brunswick Supreme Court, resigned. William Botsford of New Brunswick and Brenton Halliburton of Nova Scotia did not. A more important change occurred a little later in the 1830s, when the unitary councils of both colonies were abolished and replaced by separate Legislative and Executive councils. At the same time London decreed that, as in the Canadas, Chief Justices should not sit in the new executive councils. In New Brunswick, as in Upper Canada, the CJ stayed as Speaker of the Legislative Council, although Halliburton in Nova Scotia was replaced in this capacity also by Simon Robie, the former Master of the Rolls. Not until the 1840s did Chief Justice Ward Chipman Junior give up his place on the New Brunswick Legislative Council. He may have been the last British or American judge to sit in a legislature (further research is needed to confirm this) and the circumstances of his 1842 resignation show that old habits die hard. He resigned over a government proposal that he feared would *'change the whole frame work of [New Brunswickers'] Civil polity, and open the door to such agitation and political strife as would . . . weaken their attachment to Monarchical Institutions, and pave the way for Institutions altogether elective and Republican.'*