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I. Introduction

It is well known that “formal” judicial independence—appointment on good behavior rather than at pleasure—was established in Britain with the 1701 Act of Settlement,¹ and, like many other aspects of the English constitution, not exported to the colonies of either the First or the Second Empire. Its absence formed one of the allegations against the crown in the American Declaration of Independence, and the


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Constitution of the New Republic accordingly included a federal judicial independence provision.² British imperial policy in North America after the Revolution regarding judges continued as before, so that formal judicial independence was not established until 1834, and then only in Upper Canada (now Ontario). In the other three principal British North American colonies this was later still. What is now Quebec (Lower Canada) received good behavior appointments in 1843, and Nova Scotia in 1848. In the other colonies that joined the Canadian Confederation in 1867 (New Brunswick) or within a few years afterwards (British Columbia, Manitoba, and Prince Edward Island), good behavior appointments were introduced for the first time only when the colony joined Confederation.

Little is known about the history of judicial independence in British North America before the colonies joined together to create the Dominion of Canada. Indeed, the Supreme Court of Canada appears to believe that it has always been with us.³ This article Remedies that misunderstanding, tracing the movement for changes in the constitutional and political relationships among judiciary, executive, and legislatures in four colonies from the 1820s to Confederation.⁴ Its central argument is that judicial independence in British North America was about much more than good behavior tenure, which I have termed “formal” judicial independence to distinguish it from the other questions and controversies that animated contemporaries when they debated the place of the judiciary in their constitutions. The meaning that contemporaries gave to the term “judicial independence” varied from time to time and from place to place, as did the

². The Declaration of Independence states: “He [George III] has made Judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.” The judiciary clause is Article III, Section 1. The states were not bound by this good behavior clause, and a variety of regimes emerged after 1789, with many embracing life tenure on good behavior in the first half of the nineteenth century. The best account of the complex history of judicial independence in the United States is Jed Shugerman, The People’s Courts: Pursuing Judicial Independence in America (Cambridge, MA: Harvard University Press, 2012).

³. In Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, et al [1997] 3 S.C.R. 3 at para. 83, the then Chief Justice of Canada Antonio Lamer stated that “judicial independence is at root an unwritten constitutional principle,” one “whose origins can be traced to the Act of Settlement of 1701,” and that was not created but “recognized and affirmed” by the provisions for good behavior appointments in the British North America Act of 1867 that created the Dominion of Canada and laid out its constitution.

relative importance of its formal aspect. The literature on the history of judicial independence, in Canada and elsewhere, tends to largely concentrate on tenure. Tenure is important, then and now; however, questions about judicial involvement in other branches of the Constitution, about the appointment and removal process, and about financial security, engaged contemporaries at least as much as tenure.

In Upper Canada in the 1820s and 1830s, for example, the colony with which I begin, a local cause célèbre, the dismissal of King’s Bench Judge John Willis, made at pleasure appointment a major issue in colonial politics; reformers gave great weight to the constitutional principle that judges ought to be protected from arbitrary dismissal by the crown. Upper Canadian reformers, however, also connected the questions of judicial appointments and the separation of powers, the removal of judges from governing councils; both were aspects of judicial independence. Reformers also wanted imported, not local, judges, because locals were too wedded to the governing elite. Britain for its part would not extend this aspect of its constitution to the colony until the assembly agreed to guarantee judges’ salaries. Salaries could not be subject to annual votes by the colonial assemblies. A similar range of concerns animated Lower Canadian debates in the same period. In contrast, in neither of the principal Maritime colonies of Nova Scotia and New Brunswick was formal judicial independence much of a concern for reformers. There, the issue of judicial independence arose later, in the 1840s and 1850s, and was centered on other issues: the removal process for judges who did misbehave in Nova Scotia, and financial security in New Brunswick.

Judicial independence was a problem because British policy had long insisted that colonial superior court judges should be in the same position as all other colonial officials, from customs collectors to JPs to royal governors, holding their posts at pleasure. The crown wanted a Baconian judiciary, loyal and deferential to colonial governors. As the legal adviser to the Committee of the Privy Council for Trade and Plantations, William Selwyn K.C., noted somewhat obliquely in 1783, it was “thought most proper in point of policy” that colonial judges should be appointed only at pleasure; the “point of policy” was that judges were vital players in colonial governance, invariably sitting on legislative and executive councils,

and needed to not be independent. The London government’s attitude toward colonial judges had not changed 30 years later, at the time when this article begins. The 1828 Parliamentary Select Committee on the Government of the Canadas (about which more subsequently), questioned the chief government witness, James Stephen, Jr., long-time counsel to the Colonial Office, about good behavior appointments in the colonies. He thought the idea dangerous because the power of crown dismissal was needed to ensure judicial loyalty to colonial administrations. The problem, as he saw it, stemmed from the makeup of colonial benches. They needed to be staffed by English lawyers because colonial bars lacked sufficient competent men, but when making appointments to colonial benches, government could not persuade the best of the English bar to go. “The gentlemen of the bar who go out to the colonies as judges are of course seldom selected from the most successful members of the legal profession,” Stephen argued. “They are frequently young men, and ... they are seldom well known,” although he meant no disrespect by saying this. The problem with the appointment of the second rate, Stephen went on, was that “[t]hey go to a small society, where as a matter of course, ... they find violent feuds and parties.” They would be tempted to take sides, and “[i]f the judge were independent and irremovable, I fear he would too often become the ally of one or other of the local parties.” Judges would also be the only public servants in the colonies holding office on good behavior, and “with perfect independence, without any large society to check and control him, can you expect that he will not be a little intoxicated with that elevation, and that the judicial will not be gradually merged in the political character.”

British policy in this area applied throughout the Second Empire. Judges were appointed at pleasure in all the early Australian colonies founded in the nineteenth century, and in those acquired elsewhere in the world.

Upper Canada: A Poster Child for Good Behavior Tenure

Upper Canadian King’s Bench judges achieved good behavior appointments in 1834, in a local statute that also provided for their removal by

joint address of Assembly and Legislative Council to the lieutenant-governor. It was the second colony in the Empire to have good behavior appointments, after Cape Colony in 1827. To a large extent, the Upper Canadian story is a microcosm of the larger, and much written about, struggle that took place in the 1820s and 1830s between reformers and the Tory elite, the “family compact,” over the structure and nature of colonial government. Accounts of these developments in the last two decades or so have put legal history at the center. Historians have shown how important and pervasive were discontents about the administration of justice; reformers emphasized both particular instances of unequal administration of the law, and the broader structural problem of the intimate ties among the family compact, the colonial executive, and the superior court judiciary. The major aspect of that structural weakness, for both contemporaries and historians, was the presence of judges on the Executive and Legislative Councils. The struggle for good behavior appointments also played a key role, because constitutional ideology had resonance in London when made part of the reformers’ demands. At bottom, the reformers were asking for their rights as British subjects, for a right that was and is often portrayed as a centerpiece of Britain’s constitutional revolution of the late

9. An Act to Render the Judges of the Court of King’s Bench in this Province Independent of the Crown, Statutes of Upper Canada [hereafter SUC], 1834, c. 2.


seventeenth century. Two other aspects of judicial independence noted in the
Introduction—the power of initial appointment, and financial questions
—were also features of the prehistory of the 1834 Act; reformers demand-
ed that members of the English bar be appointed to the King’s Bench in
preference to locals embroiled in the family compact, whereas London in-
sisted that good behavior appointments could not be granted without secur-
ing the judges’ financial independence from the Assembly.

The first mention in the Upper Canadian Assembly of good behavior ap-
pointments came in 1826. The retirement of William Dummer Powell as
chief justice, a man who was widely considered to have exerted substantial
influence on Lieutenant-Governor Peregrine Maitland, led reformers to use
the occasion to seek reforms of two kinds. An Assembly resolution depre-
cated the presence of the chief justice in the Executive Council: “he has to
advise his Excellency upon executive measures, many of which bear an in-
timate relation to the judicial duties he may have thereupon to discharge.”
This was “highly inexpedient, tending to embarrass him in his judicial
functions and render the administration of justice less satisfactory, if not
less pure.” This resolution passed 23 to 14, and the Assembly also unan-
imously passed a resolution that “it is highly expedient that the judges
of the King’s Bench . . . should be as independent of the Crown and people
as are the judges of England.” A resulting address to the crown similarly
demanded “that the Judges in this Province may be rendered as indepen-
dent of the Crown and people as are the judges of England.”

Both demands were consistently renewed in subsequent years. London
initially resisted, asserting that “it is highly expedient that the Governor
should have the advice and assistance of the first Law authority of the
Province for his guidance in the administration of his Government.” The
campaign for both formal judicial independence and a separation of
powers grew stronger, however, especially when fueled by the Willis affair.
The story of John Walpole Willis’ short but turbulent stay in Upper Canada
is well known, but its principal features need to be noted here.

13. In 1828, for example, the Assembly passed a resolution on judges on councils that was
essentially the same as that of 1826 quoted immediately above: see UC Journals, March 15,
1828.
15. For the Willis affair see McLaren, Dewigged, Bothered, and Bewildered, 74–87; Leo
History 85 (1993): 141–66; and, on the Chancery Court question, John Weaver, “While
Equity Slumbered: Creditor Advantage, a Capitalist Land Market, and Upper Canada’s
Missing Court,” Osgoode Hall Law Journal 28 (1990): 871–914. See also Alan Wilson,
www.biographi.ca [hereafter DCB online]. Almost all of the individuals discussed in this
successful equity barrister and author, Willis came to Upper Canada in 1827 with an informal understanding that the colony would create a Court of Chancery in which he would be the presiding judge. In the interim, he was made the junior *puisne* judge of King’s Bench, joining Chief Justice William Campbell and *puisne* Judge Levius Peters Sherwood. On arrival, he found the colonial elite, including Maitland and Attorney-General John Beverly Robinson, unenthusiastic about establishing a Chancery Court. Exasperated at what he saw as unnecessary delays, Willis attached himself to the reformers; however, the shift in allegiance backfired, and the Chancery bill was lost in the Assembly when, for different reasons, Tories and some reformers opposed it.

Thereafter, relations between Willis and the Tory elite deteriorated quickly, as Willis showed open contempt for his fellow judges and the law officers of the crown. In June 1828, he delivered his most controversial ruling: that the 1794 King’s Bench Act, which provided that “His Majesty’s Chief Justice of this Province, together with two *puisne* judges, shall preside” in the Court,¹⁶ meant that all three judges had to be present for the court to be legally constituted. Chief Justice Campbell was out of the province on leave, and Willis’ decision not only signaled that little business would now be done, it also called into question the operation of King’s Bench since 1794. Many times in the previous three decades the court had sat without a full complement, and this had become accepted practice. The response of Maitland and his Executive Council was swift and decisive; having received advice from Sherwood and the law officers that the statute could be read differently, Maitland removed Willis from office and replaced him in the interim with Tory Christopher Hagerman. His dismissal was later overturned by the Privy Council in London, on the grounds that he had not been given an opportunity to defend himself. He was not restored to Upper Canada, however, although he received other colonial appointments.

Willis’ brief sojourn in Upper Canada significantly galvanized the reform movement, which used his dismissal to win the first Reform majority in the colony’s history in the 1828 election. It also cemented the independence of the judiciary from unilateral removal by the crown as a cornerstone of the reform program. London had rejected the demand in 1826, and did so again after the Willis affair.¹⁷ Colonial Secretary Sir George paper have an entry on *DCB online*, and all basic biographical information can be located there. Individual biographies are only referenced when they also deal with the substantive issues discussed in this article.

¹⁶. *An Act to establish a Superior Court of Civil and Criminal Jurisdiction*, *SUC* 1794, c. 2.

Murray’s response was that with a small and dispersed population, and the colony “so liable from its popular institutions to be divided into parties,” it would be very difficult to “provide any effective control over the conduct of a judge who was totally exempt from personal dependence.” Judges “actuated by an undue desire of popularity” or “ambitious of the unbecoming distinction . . . of figuring as the leader of a party,” would be uncontrollable. Having rejected the demand for good behavior appointments, however, Murray sought to mollify Assembly opinion by insisting that the judges’ “direct responsibility to the Crown” was “enforced only on the most serious occasion and never in respect to any act which can be properly considered judicial.” Obviously Willis’ exercise in statutory interpretation was not seen as a “judicial” act. Murray also held out some hope for the future, by referring to “postponing” any measure “for the present.”

In the meantime, the issue of colonial judges’ independence was discussed by the 1828 British House of Commons Select Committee on the Civil Government of Canada. Precipitated largely by complaints from Lower Canada, it was the first serious consideration given to the Canadas by the British Parliament since the 1791 Constitutional Act, which had established the two colonies of the Canadas. Its report tended to favor the colonial reformers’ demands on a broad swathe of issues. On judges on councils, it insisted that all judges except the chief justice should be excluded from them, with the latter confined to the Legislative Councils. On good behavior appointments, however, despite the Willis affair being known to the MPs on the committee before they wrote their report, it tersely noted that it was at present “inexpedient that the crown should be deprived of that power of removal.” It took this view for the reasons given by Stephen in his evidence to the committee, cited in the Introduction.18

Upper Canadian reformers were not deterred, and continued to push for good behavior appointments, with Willis as the poster boy for the campaign. An Assembly address of March 1829 made two related demands: good behavior appointments and judicial appointments made only from the English bar.19 The Assembly’s arguments for the former relied

381, 401. For what follows see Murray to Colborne, September 29, 1828, in Return to An Address of the House of Commons, 5 June 1829, for copies or extracts of any communications . . . in pursuance of the recommendations of the Canada Committee [hereafter Return to an Address], British Parliamentary Papers, Cd. No. 73, 1829, 16–17. This response was conveyed to the Assembly in January 1829: UC Journals, January 20, 1829.

18. Canada Committee Report, 7 (good behavior appointments and permanent salaries) and 8 (judges on councils).

19. For all this, see UC Journals, March 14, 1829. The address was forwarded to London in early April: see Murray to Colborne, May 20, 1829, in Calendar of State Papers addressed by the Secretaries of State for the Colonies to the Lieutenant-Governor or Other
primarily on the idea that it was asking for no more than what the English constitution provided. The people of England were fortunate to enjoy good behavior appointments, and, therefore, why was “a portion of Your Majesty’s free and glorious empire” not also “equally interested and entitled to have justice administered amongst us by independent judges, equally able to appreciate the value of so great a blessing and disposed with constitutional jealousy to watch over the judicial character.” Judicial independence was, therefore, part of the broader demand for a properly functioning English constitution in the colony. Political debate in the 1830s in Upper Canada saw both sides appeal to the mixed monarchy and the ancient constitution, and they were able to do so because the precise meaning of the constitution “was open to different interpretations.” Reformers were wont to complain that it was the Tories who were unfaithful to the proper balance.20

It was not enough that judges be formally independent. The Assembly agreed with Stephen that effective independence required that King’s Bench judges “for many years to come” should be “selected from the English bar.” Only outsiders would be “as free as possible from the entanglements of family connexions, the influence of local jealousies, and the contamination of provincial politics.” “Without such a change,” the address asserted, “justice never can in this country be administered with purity, or rise above suspicion.” The timing of this demand for judges appointed from outside Upper Canada is not surprising, because it came during a period when the Court of King’s Bench increasingly drew its members from the local bar, and, therefore, from those with close connections to the governing Tory elite.21

Officers administering the Government of the Province of Upper Canada, 1821–1835 (hereafter Calendar of State Papers) in Report of the Public Archives for the Year 1935 (Ottawa: King’s Printer, 1936), 233.


21. Of the fourteen men named to the court prior to 1829, five had been appointed directly from England or Ireland: in order they were William Osgoode, John Emsley, Henry Allcock, William Dummer Powell, and Willis. The first three were the first three chief justices of the colony, holding the office from 1792 to 1806. A further four were from Britain but had served formerly in a senior government position in a colony to which they had been appointed from Britain. In order they were Thomas Cochran, Robert Thorpe, Thomas Scott, and Sir William Campbell. Thorpe had been made chief justice of Prince Edward Island, from England, in 1802, and relocated to Upper Canada in 1805. Scott had been appointed from England as the colony’s attorney-general in 1800 and was made chief justice in 1806. Powell was a Bostonian who had qualified at the Inns of Court. I include Cochran in this list even though he was born in Nova Scotia. He was called to the bar of Lincoln’s Inn,
The address went on to deal with the contention that the crown never interfered with judges in the exercise of their judicial duties. That might be true in England, but it was not so in the colony, where there was “no sufficient or practical remedy against the abuse of Your Majesty’s Royal Prerogative by the Provincial Administration.” No better example of that abuse could be found than “the late violent, precipitate and unjustifiable removal” of Willis, which, it insisted, was as a result of a decision he made in his judicial capacity. The address then argued that Willis had been correct and that the problem he identified had gone unremedied with dangerous consequences. In the most recent Michaelmas term, it complained, Hagerman had presided alone, and confirmed his own judgment in a case in which Sherwood had been interested. In contrast to this corruption stood the behavior of Willis, who was “too conscientious for colonial rule.”

Willis continued to be lauded as a “martyr” and the victim of “cruel proceedings,” and the assembly went so far as to pass a local act in 1830 removing judges from councils, which was rejected by the Legislative Council,22 but decisive change came when local pressure was joined to a change of government in London that brought Earl Grey’s Whig administration to power in November 1830. Although Lieutenant-Governor Sir John Colborne argued that “on many accounts it was desirable that the Chief Justice should retain his seat in the Executive Council,” he also conceded that “there can be no doubt that occasionally he must, as a judge, be led too deeply into the political affairs of the colony.”23 Such sentiments were reflected in the new administration being prepared to listen to reformers’ demands and to accede to at least some of them, especially those relating to colonial judges. In mid-1830, London decided that colonial judges should no longer sit on Executive Councils, and Robinson, and served as chief justice of Prince Edward Island before getting an Upper Canada appointment as a puisne judge in 1803. Only five were in some significant sense “local,” but they included five of the seven men who served on the court between 1825 and 1835, and all five were stalwarts of the family compact, especially John Beverley Robinson. They were D’Arcy Boulton and Levius Sherwood, who had both qualified to practice in Upper Canada a few years after arriving from England and Quebec respectively; James Macaulay and Christopher Hagerman, who were both born in the colony and qualified there; and, Robinson, born in Quebec of a loyalist family and who was taken to Upper Canada as an infant. For all these individuals see the entries in *DCB online*.


23. Colborne to Murray, 16 February 1829, in *Copy or Extracts of the Answers of the Governors* [hereafter *Copy or Extracts*], House of Commons Parliamentary Papers, 1830, No 574, 7, and in *UC Journals*, 1835, Appendix A21, 107–108.
appointed chief justice of Upper Canada in 1829, was removed shortly thereafter from the Executive Council, although he remained the sole judge in the Legislative Council.24

The new government also changed tack on good behavior appointments, but there was a caveat. London needed them to be accompanied by the local Assembly being responsible for guaranteed judges’ salaries. Salaries could not be provided by annual votes; a permanent civil list was required, guaranteeing the salaries of judges and some other colonial officials. This demand illustrates the multifaceted nature of judicial independence: London did not want to see judges exchange constitutional dependence on the crown for financial dependence on the Assembly. Stephen had expressed that concern to the Canada Committee and the Committee had agreed with him.25 Hence when, in February 1831, Colonial Secretary Viscount Goderich noted that London “was desirous to secure” to Upper Canadians “the full enjoyment of those advantages which have been so largely derived in this Kingdom from the Independence of the Judicial Office,” he also insisted that it was an “essential condition” that “an adequate and permanent provision should be made for the Judges.”26 London’s demand was also part of a broader policy of achieving reductions in the annual parliamentary grant for the colonies. As things stood, Upper Canadian judges were not dependent on the Assembly for their salaries, because they were paid by London. but London had no intention of granting good behavior appointments and continuing to shoulder the financial burden. Similar demands for a civil list paid for by local assemblies were made elsewhere, even when not connected to judicial tenure.

Over the next 4 years, both the civil list question and that of good behavior appointments were settled in Upper Canada. In the 1830 election, the reformers lost their majority in the Assembly; therefore, a Conservative legislature negotiated the changes. Although this Conservative group was strongly opposed to the radical reformers, they were not mere tools of the family compact and on many matters took an independent position. At the same time, the reformers were a more cohesive group under the leadership of Marshall Spring Bidwell, and were able to influence events more than their numbers would suggest.27 The convergence between the

24. Copy or Extracts, 7; Romney, Mr Attorney, 151; Riddell, “Judges in Parliament,” 732.
26. Goderich to Colborne, February 8, 1831, in Calendar of State Papers, 257. See also Goderich to Colborne December 24, 1830, in ibid., 251–53.
27. This summary of Upper Canadian politics in the early 1830s is from Gerald Craig, “The 1830s,” in Colonists and Canadiens, 1760–1867, ed. Maurice Careless (Toronto: Macmillan, 1971); and Craig, Upper Canada: The Formative Years, 1784–1841 (Toronto: McClelland and Stewart, 1963). For more recent and detailed accounts, which confirm
two groups was also a product of the Conservatives’ willingness to marshal public opinion, defending their views of the Constitution rather than simply condemning the opposition. It was against this background that in January and February 1831 negotiations took place over how large the civil list was to be. The one agreed to provided £6,500 sterling, of which £3,300 was to meet the salaries of the King’s Bench judges: £1,500 for the chief justice and £900 each for the two puisne judges.\(^{28}\)

Despite the passage of the Civil List Act in March 1831, it took 3 more years to achieve good behavior appointments, for reasons that are not clear. As soon as the bill that became the Civil List Act had passed its first reading, the Assembly demanded from Colborne the quid pro quo of “a bill to secure the independency of the Judges,” but the Legislative Council would not support the resolution.\(^{29}\) London gave the go ahead to legislation at the end of 1831,\(^{30}\) however, it still took until 1834 for a good behavior bill to become law, although not without extensive debate in the Assembly and the Legislative Council.\(^{31}\) It is difficult to be certain exactly what the wrangling was about in 1831–34, because draft versions of bills have not survived, and because there is a dearth of information on the debates,\(^{32}\) but three things are clear.

First, the general principle of good behavior appointments was by this time supported by the Conservative majority in the Assembly. The principal sponsor of the 1834 bill was William Berczy, an Anglican merchant and large landowner from the Southwestern Region (he was the member of the Assembly for Kent County) who was clearly in the Conservative camp. Moreover, when divisions in the Assembly were recorded, the Conservatives always supported this general conclusion, see McNairn, *The Capacity to Judge*, esp. ch. 4, and James Johnson, *Becoming Prominent: Regional Leadership in Upper Canada, 1791–1841* (Montreal: McGill Queen’s University Press, 1989).

\(^{28}\) *Civil List Act, SUC*, 1831, c. 6.

\(^{29}\) Address of Assembly to the Crown, March 14, 1831, in *UC Journals*, March 14, 1831, and *Upper Canada Legislative Council Journals* (hereafter *UC Council Journals*), March 15, 1831. In addition to stating that it did not think that London had yet sanctioned a change in tenure, the Council said it was “persuaded” that as long as the judges “preserve a proper regard to the duties of their high office they are in fact perfectly independent” already.

\(^{30}\) See Opening Address of Colborne, November 17, 1831, and Message from Colborne to Assembly, November 30, 1831, both in *UC Journals*, November 17 and 30, 1831.

\(^{31}\) The Legislative Council discussed the bill extensively over many days, and made what were referred to as substantial amendments to it: *UC Council Journals*, December 11, 12, 15, 19, 23, 24, 30, and 31, 1833, and January 2, 9, and 10 and February 26, 1834.

\(^{32}\) The newspaper reports on the Assembly proceedings are very short and consist largely of procedural information available from the *Journals*: see *Kingston Chronicle*, October 29 and November 5, 1831, December 14, 1833, and February 8, 1834.
the bill in principle. Second, in the Assembly, it was the reformers who sought to delay and amend the legislation, not because they objected to it in principle but because they wanted to link it to questions other than tenure, especially the continued presence of Chief Justice Robinson on the Legislative Council. An amendment proposed by reformers prohibited even informal involvement in politics: “nor shall any Judge give counsel, advice or opinion, to His Majesty, Councillors, Law Officers, or others, touching any matter of Executive expediency or Legislative consideration, under the pain of forfeiture of office.” The amendment failed 22 to 14, on a strict party division, and the original bill passed without a dissenting vote. Some reformers also wanted to change the system of removing judges, to establish a new tribunal for this purpose, although the idea came to nothing. Third, and turning to attacks from the other side, legislative councilors wished to ensure both that judges had what they saw as ample due process in any removal. The result was an amendment to the bill in the Council, which gave the judges 6 months to appeal any local removal to the Privy Council.

The Judicial Independence Bill became law in March 1834. It was a short two section act, the first section of which provided for good behavior appointments and a method of removing judges that mirrored the Act of Settlement procedure. The second section gave the lieutenant-governor power to appoint a replacement for any judge who died, resigned, or

33. For the party designations, see the appendix on biographical data in Johnson, Becoming Prominent. An example of the party split is discussed immediately below, in the vote on adding an amendment to bar all judges from councils.
34. UC Journals, December 11, 1833; Christian Guardian, December 18, 1833; and Colonial Advocate, December 21, 1833. Only one Conservative, John Clark, voted for the amendment, and only one reformer, Hugh Thomson, voted against it.
35. This idea surfaced in 1832 before the Assembly’s Select Committee on Grievances, initially established on November 22, 1831 to consider a large number of petitions sent in from various localities dealing with a range of issues, including judicial independence. The first report of the committee, including Minutes of Evidence, is in the Appendix to the 1831 UC Journals, 95 et seq. The committee stated that independence required agreeing on a “mode of impeachment,” and that this meant some kind of special tribunal; however, it could not suggest what kind: “The establishment of a Court of so high a nature, requires more deliberation and care than can well be given by your committee during the present Session”: UC Journals, 1831–32, Appendix, 198. A provision for a local tribunal likely appeared in a very early draft of the bill authored by Berczy in December 1833; however, it disappeared by the time the bill was introduced. On December 12, 1833, Berczy gave notice that he would “tomorrow” bring in a good behavior bill that would also include a provision “for the appointment of a tribunal, wherein [the judges] may be impeached,” but no such provision was included in the bill introduced the next day: for all this see also UC Journals, November 22, 1831 and December 12 and 29, 1832.
36. See UC Council Journals, December 31, 1833. This had formed the basis of a Legislative Council resolution in 1831: see ibid., March 15, 1831.
was removed by this procedure, with that replacement being temporary until London confirmed it. The 1834 Act did not bring an end entirely to local arguments about the status of judges, because reformers in the later 1830s continued to raise complaints about judicial pensions, and about the power of appointment being outside Assembly control, but the major issue of the constitutional status of the judges was resolved with the granting of good behavior appointments in 1834. Upper Canada was the first British North American colony in which judges were freed from arbitrary removal by the crown, because Upper Canada was also the first colony to put the intimate links between crown and judiciary at the center of its movement.

37. An Act to Render the Judges of the Court of King’s Bench in this Province Independent of the Crown, SUC 1834, c. 2.

38. Of even greater significance than appointments, if the amount of space devoted to it in the 1835 Seventh Report from the Assembly Committee on Grievances is any gauge, were the financial ties that continued to bind King’s Bench judges to the executive. Ironically, it turned out that the 1831 Civil List Act had provided a floor for judicial remuneration, not a ceiling. There were two aspects of this, each captured in the Report’s succinct statement that the judges “are dependent on the crown for such retiring pensions as it may see fit to award them,” and that the judges looked to government for “the enjoyment of other offices and situations within its [the crown’s] gift, by themselves and their families.” The former was a reference to the fact that judicial pensions were discretionary and, therefore, operated to make the judiciary quiescent. The latter was aimed particularly at Robinson, and the £400 salary he received as speaker of the Legislative Council in addition to his judicial salary. According to the committee, “as long as these pecuniary inducements can be held out to those occupying the judiciary we cannot consider it practically in a better or safer condition than it used to be.” The executive was using its financial resources to “exercise undue influence on the judiciary … derogatory from its presumed independence and purity.” UC Journals, 1835, Appendix A-21, quotations at 2 and 12.

39. Much of the famous 1835 Seventh Report was taken up with judicial issues. This committee was chaired by William Lyon Mackenzie and, with reformers back in the majority after the October 1834 election, the committee launched a general assault on the system of colonial government. In the area of judicial independence, it offered quite familiar arguments, adverting to concerns that David Lemmings has shown worried eighteenth century English critics concerned about a Baconian judiciary long after the Act of Settlement: Lemmings, “Independence of the Judiciary.” The Report repeated the previous demands for judges to be appointed from England: see UC Journals 1835, Appendix A21, especially at 2 and 85. How long and how assiduously the reformers pushed this idea is not known, but it had very little practical effect. The next three judges appointed to the King’s Bench—Archibald MacLean and Jonas Jones when Kings Bench was expanded to five judges in 1837, and Christopher Hagerman in 1840 to replace Sherwood—had all been born in North America and qualified for the bar in Upper Canada. A fourth, William Henry Draper, appointed in 1847, was English born, but had emigrated to Upper Canada at 19 years of age and did his legal training there. The only exception to the move to a wholly indigenous judiciary was the appointment of Robert Sympson Jameson as vice-chancellor of the newly created Court of Chancery in 1837. He was typical of an earlier age, English born and trained, chief justice of Dominica from 1829 to 1833, and made attorney-general of Upper Canada from England in 1833.
for broader reform of colonial governance. The campaign drew inspiration and energy from playing on Willis’s fate as a martyr, and from reformers’ consequent success in appealing not to any new constitutional doctrines but to the British constitution itself. The reformers also had timing and a willingness to compromise on their side. It proved crucial that the new Whig government took office in London just when local agitation reached a crescendo, and equally crucial that the colonial opposition raised no sustained objection to the civil list or to Robinson’s continued presence on the Legislative Council. As will be discussed, Lower Canadians were much less willing to compromise.

**Lower Canada: Sound and Fury Signifying Little**

There were both considerable similarities and substantial differences in the struggle for judicial independence between Lower and Upper Canada. In Lower Canada in the 1820s and 1830s, the *patriote* party, roughly equivalent to the Upper Canadian reformers, campaigned for good behavior appointments, but like their Upper Canadian counterparts, they always linked the issue to what they saw as an equally important aspect of judicial non-independence: the presence of the colony’s leading judges on the Executive and Legislative Councils. In Lower Canada, more so than in the upper colony, discussion of formal judicial independence also raised questions about how, if judges were to be independent of the crown, they could nonetheless be dismissed if they did misbehave. Constitutional questions were also linked to the provision of a permanent civil list to pay judges’ salaries. But whereas the civil list question was resolved in Upper Canada, the Lower Canadian Assembly never agreed to the executive’s demands for one, and, therefore, the judges did not receive good behavior appointments in the 1830s. The rebellion crisis of 1837–38 pushed the issue firmly into obscurity for a few years, and not until 1843, after the Union of the Canadas, were judges in the eastern section of the united colony given what their western counterparts had enjoyed since 1834. The Lower Canadian story is, therefore, largely an account of why formal judicial independence was not legislated.

Judicial policy was an integral part of the politics of the period. Although there were disputes between the reform and conservative groups and between Assembly and executive in Upper Canada, they were nowhere near as intense or as sustained as those in Lower Canada, where politics was also shaped by ethno-linguistic distinctions. Lower Canadian politics

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40. What follows is drawn from a variety sources, and is necessarily a simplified version of a very complicated story. See, generally, Fernand Ouellet, *Lower Canada, 1791–1840: Social Change and Nationalism* (Toronto: McClelland and Stewart, 1980), and “Louis
were centered around two parties. The canadien party (termed patriote party after the late 1820s), which held a majority of the Assembly seats, was a largely middle-class, professional francophone group, whereas what was variously called the “English party” or the “chateau clique” held most of the seats in the Executive and Legislative Councils. The term “English party” is something of a misnomer, because it included a minority of seigneurs and francophone office holders and a group of merchants of Scottish origin. Until the 1820s, the canadiens were content to defend their local interests—religion, language, laws, and seigneurial tenure—within the broad umbrella of the British constitution. They criticized aspects of the way the constitution worked in the colony, such as the concentration of offices in the hands of the anglophone minority and the use of public funds to enrich those office holders, but not the basic structure of government, which they saw as needing reform, not remaking.

The 1820s saw the tenor and direction of politics change, especially after the English party had orchestrated an unsuccessful attempt in 1822 to pass a bill through the British House of Commons uniting Upper and Lower Canada. The bill would have made English the only official language and, after 15 years, banned the use of French in the Assembly. The episode slowly moved the canadien party, led from approximately 1815 by lawyer Louis Joseph Papineau, to stronger criticism of the administration. By the 1830s, politics entered a third phase, as the patriotes moved to a much more radical set of demands for a more democratic constitution, especially for an elected Legislative Council. This transition was the result of a growing split within the patriote party, with a radical wing led by Papineau coming to embrace a popular sovereignty approach to the Constitution, and, therefore, to reject the mixed and balanced English constitution. A second crucial feature of Lower Canadian politics, one that had a major effect on the judicial independence question, was that the Assembly’s principal weapon in its battles with the executive was financial. The Assembly took the view that it alone should receive and be responsible for the expenditure of all government revenues, from whatever source. The executive resisted this demand, even after the Canada Committee recommended that crown revenues should be surrendered to the Assembly in return for a civil list.

The arguments over judicial independence in Lower Canada to some extent track the broader political story outlined previously. From approximately 1825 to 1832, the Assembly majority sought to legislate reform, but was blocked by the Legislative Council and the executive, largely

because reform meant not only good behavior appointments but also the removal of all judges, including the chief justice, from both councils. By the early 1830s, the Assembly was prepared to agree to a compromise whereby the chief justice could stay on the Legislative Council only, but two other issues then came to the fore, and in their turn prevented a resolution: how were judges to be removed once they did get good behavior appointments, and how were their salaries to be guaranteed? On the first question, the Assembly had become dissatisfied with the suggestion that impeachments be tried in the Legislative Council, because it objected to the membership and constitution of that council. On the second, more crucial, question, the Assembly and Colonial Office took very different approaches to what it meant to guarantee judges’ salaries. The Assembly’s view was that it should receive and control all government revenues, and should be trusted to make judicial salaries a first charge on those revenues. London wanted a fund for paying judges that was not under the control of the Assembly.

Between 1826 and 1832, six bills on judicial independence were introduced in the Assembly, but none became law. Three (in 1826, 1831, and 1832) dealt with both good behavior tenure and the judicial presence on councils in one bill, two (in 1829 and 1830) concerned only judges on councils, and one (in 1830) dealt only with good behavior. All the bills that covered good behavior appointments also included removal, salary, and pension provisions. Four of these were lost in the Legislative Council, one was substantially amended there and failed to pass the Assembly when reintroduced, and only one, the 1832 bill, passed both houses, only to be refused royal assent in London. Because the fault lines between Assembly and Council were often the same from year to year, it makes sense here not to discuss each bill individually but to organize what follows thematically.

41. They were bills: “to secure the independence of the judges . . . and for other purposes therein mentioned: (1826); “to disqualified the judges . . . from sitting or voting in the Legislative Council and Executive Council” (1829 and 1830, same title; “to secure the independence of the Judges” (1830); “to incapacitate the judges . . . from sitting . . . in the Executive and Legislative Councils, [and] to secure the independence of the Judges” (1831 and 1832, same title). I only have full copies of two of these. The 1826 bill is available on Early Canadiana Online as a free-standing document, www.canadiana.org. 9_03542. The 1832 bill is reproduced in Fourth Report of the Standing Committee on Grievances, January 29, 1836 (hereafter Fourth Report), Lower Canada Assembly Journals (hereafter LC Journals) 1836, Appendix EE. The appendixes are unpaginated; the bill is at 554 of the pdf. The content, although not the wording, of the other bills can be worked out from the LC Journals and the Lower Canada Council Journals (hereafter LC Council Journals), the appendixes to both of which include correspondence with London, and the many newspaper reports of debates.
The least controversial aspect of the debates was the issue of judicial tenure. The Assembly, the Legislative Council, and the judges all supported the idea in principle. The judges had memorialized Governor Earl Dalhousie on the subject in 1824, arguing that their own experience and the growth of a sophisticated indigenous bar made the time ripe for good behavior appointments. The judges had another motive derived from their distrust of the popular branch. They wanted formal independence because of the Assembly’s not infrequent attacks on them, including a failed impeachment of Chief Justices Jonathan Sewell and James Monk in 1815.

For its part, the Assembly also consistently supported the principle of good behavior appointments. As in Upper Canada, the first mention of the issue came in 1825, with a series of resolutions supporting its introduction, and the first legislative initiative came a year later. The arguments offered in support of good behavior appointments were twofold. First, this was the status enjoyed by judges in Britain, and it was believed that the colonies ought to enjoy the same constitutional benefits. Therefore, the first bill to pass the Assembly, in 1826, stated that King’s Bench and provincial judges should hold office during good behavior, “in the same manner in which those Offices are held and possessed in England.” Second, judges who were not in constant fear of dismissal by the executive could be free to make their decisions based on their own view of the law and not on what they believed was the executive’s preference. In 1831, Denis-Benjamin Viger, a lawyer, constitutional expert, and one-time rival of Papineau for the leadership of the canadien party, invoked this aspect of Stuart despotism as a “system of iniquity” and contrasted it with

42. The memorial is at LC Journals, March 6, 1826, Appendix.

43. There were two chief justices because the court reforms of 1794 divided the Court of King’s Bench into two principal districts, Quebec and Montreal. The chief justice of the Quebec District was also chief justice of Lower Canada (Sewell) and Monk was chief justice of the Montreal District. For the court system, see Don Fyson, The Court Structure of Quebec and Lower Canada 1764–1860 (Montreal: Montreal History Group, 1994, periodically revised and available online at profs.hst.ulaval.ca/Dfyson/Courtstr). The ostensible cause of the impeachment was rules of practice that both had published for their respective courts, which were alleged to represent the introduction of English law and displace the French civil law. The Assembly also passed impeachment articles that were overtly political. The impeachment did not succeed in the Privy Council in England. The fullest account of it is Evelyn Kolish and James Lambert, “The Attempted Impeachment of the Lower Canadian Chief Justices, 1814–1815,” in Canadian State Trials Volume 1: Law, Politics and Security Measures, 1608–1837, eds. F Murray Greenwood and J. Barry Wright (Toronto: Osgoode Society for Canadian Legal History and University of Toronto Press, 1996), 450–86.

44. A 2 day debate on judicial independence produced four unanimous resolutions in support of it: LC Journals, March 9, 14 and 17, 1825.
judicial independence, which was “the highest wisdom.”

Two years later lawyer, businessman, and moderate patriote Frédéric-Auguste Quesnel insisted that no matter what differences there might be over the details of any bill, “it is in the interest of the country to have pure administration of justice ... which would not be achieved without ensuring their [the judges] independence.”

If opinion in the colony was unanimous, London went back and forth on the question. In 1825 Colonial Secretary Lord Bathurst approved the principle; however, as has been mentioned, the home government opposed the idea before the Canada Committee of 1828 and the Committee itself did not recommend it. The Whigs reversed this in 1831, with the new Colonial Secretary, Goderich, telling the new Governor, Lord Aylmer, that Lower Canadian judges as well as Upper Canadian ones should have the benefit of the English system.

The Assembly’s support of the principle of good behavior appointments, however, was always joined to two other demands. One was that any impeachment of a judge should be adjudicated by some body within the colony. Such a demand was made as early as 1821, before any independence bill had been introduced, and was motivated in part by the fact that the judges earlier impeached by the Assembly had been tried by the Privy Council in London. Hence the first judicial independence bill passed by the Assembly in 1826 included three clauses on removal of judges. Clause 7, the principal one, asserted that it was “desirable” that impeachments brought by the Assembly “against High Public Officers” should be “tried adjudged and determined” within the colony. The appropriate body for that was the Legislative Council, which was “constituted a Court of Competent Jurisdiction” to hear “all impeachments ... against any person or persons for any crime, misdemeanor or malversation in office.” To similar effect, Assembly representatives before the Canada Committee stressed

45. La Minerve, March 12, 1831. Quotations from La Minerve, here and in notes 46, 52, 69, 71, 92, and 93 below, are from translations supplied by Genevieve Ryan. Viger was later appointed to the Legislative Council as part of Governor Sir James Kempt’s efforts to diversify that body.

46. La Minerve, February 20, 1833.

47. See LC Journals, March 6, 1826, Appendix.

48. Goderich to Aylmer, February 8, 1831, in Fourth Report, 554. See also to the same effect Goderich to Aylmer, July 7, 1831, in ibid., 550, stating that Lower Canadian judges should be placed “in exactly the same position as that of the judges of the Supreme Court of Westminster.”

49. See “Bill for the trial of impeachments in this province,” LC Journals, January 22, 27, and 31, and February 17, 1821.

50. For the 1826 bill generally, see LC Journals, February 1, 8, 13, 14, and 15, and March 6, 1826.
that a local power of removal was necessary. In part this was an assertion
of the need for the people of Lower Canada to control their own affairs—
impeachment was “an inherent right of the inhabitants of the province,” the
leading patriote critic on colonial finances Austin Cuvilier asserted before
the Committee,51—and in the years that followed, debates over a local tri-
bunal also adverted frequently to the more practical difficulties of a refer-
ence to London, which included the time and expense of prosecuting a case
there.52

The 1826 bill was lost in the Legislative Council, mainly because of the
 provision it contained disqualifying judges from councils, discussed subse-
quently.53 The Council also probably objected to local impeachment,
because it certainly did so 4 years later when both by resolution and by
amendment to an Assembly bill it provided for removal by joint address
to the crown.54 The Council saw the provision as giving too much
power to the Assembly; the tribunal idea was a “mockery” that would
put the judges at the mercy of a vengeful Assembly.55

In both 1831 and 1832, the Assembly pressed the demand for a local
power of removal, and legislative councilors objected. Leader of the
Scottish merchants and a hard liner in opposing the patriotes, John
Richardson, argued that the 1831 bill was unconstitutional because such
proceedings had always been held before the Privy Council in London.56
The 1832 bill actually passed a differently constituted Legislative
Council, but was refused royal assent by London. The Council and the
governor objected to two aspects of the removal provisions: that there
was no appeal to the King and Privy Council in London, and that although
the provision was contained in a judicial independence bill, it was not

51. Canada Committee Report, 159, Evidence of Austin Cuvillier, June 12, 1828.
52. See, for example, the remarks of John Neilson in the Assembly, reported in La
Minerve, January 30, 1832. For Neilson see below.
53. LC Council Journals, March 21 and 22, 1826.
54. For the council’s resolution on this issue, see LC Council Journals, March 15, 1830,
and for the amendment see ibid., March 16, 1830. See also Montreal Gazette, March 22 and
25, 1830. I do not have a copy of what the Assembly bill said; however it is known that the
Council amended the bill by adding a clause that a judge “may be removed by His Majesty
in His Privy council upon the Address of both Houses of the Provincial Legislature.” The
Council was likely also influenced by the fact that the Colonial Office had spoken against
the idea to the Canada Committee. On that occasion, James Stephen argued that it might
theoretically be possible to have a satisfactory local tribunal, but only if it consisted of judges
“perfectly independent of the parties preferring the impeachment” and men “quite remote
from all the feuds and party feelings of the colony”: Canada Committee Report, Evidence
55. Montreal Gazette, February 18, 1830.
restricted to judges. It was to apply to any public official, and for this reason, and because of the judicial salary provisions discussed subsequently, London refused assent to the scheme. The Colonial Office would not countenance such a broad-ranging jurisdiction, allowing the Assembly to go after officials, especially as relations with the assembly were rapidly deteriorating. The Legislative Council’s role in removing judges was an issue again in 1833, which will be discussed later.

The impeachment question was, however, always of secondary importance in the debate over judicial independence. The central issue for the assemblymen was judges’ political involvements, especially their presence on governing councils. As in Upper Canada, many of the colony’s leading judges sat on either or both of the Legislative and Executive Councils. Chief Justices Sewell and Monk, and James Kerr, a puisne judge of the Quebec District King’s Bench, were all on both councils in this period, and other judges also served on one or the other. The canadien party had long been concerned about this, and the first independence bill passed by the Assembly, in 1826, joined a bar on council membership with good behavior tenure. Assembly representatives who appeared before the Canada Committee in 1828 also argued that exclusion from councils was the principal aspect of true independence, and the bills passed every year between 1829 and 1832 excluded the judges from councils.

The arguments marshalled in favor of this reform drew both on constitutional principle and on personality. The separation of powers was a fundamental aspect of the British constitution, argued reformers, and one that Lower Canada deserved to enjoy as much as the home country. In 1829, Andrew Stuart, for example, a supporter of the rights of the Assembly and one of the anglophones in the canadien party, railed against the “manifold and manifest inconvenience and irregularity” of combining the judicial and legislative functions, whereas for Papineau, the mix of judicial and legislative power was a “preposterous union” that led to “tyranny.” A number of witnesses before the Canada Committee offered similar arguments introduced to the Assembly did contain such an appeal provision, but it was struck out on a unanimous vote. Also defeated (37 to 13) was an amendment saying that the judgment of the impeachment tribunal would not be carried into effect until it had been submitted to London for approval. LC Journals, January 18, 1832; Montreal Gazette, January 31, 1832. Aylmer considered this issue ultimately irrelevant, as all were agreed that the royal prerogative of mercy could not be interfered with: see Aylmer to Goderich, January 26, 1832, in Fourth Report, 559.

57. The bill introduced to the Assembly did contain such an appeal provision, but it was struck out on a unanimous vote. Also defeated (37 to 13) was an amendment saying that the judgment of the impeachment tribunal would not be carried into effect until it had been submitted to London for approval. LC Journals, January 18, 1832; Montreal Gazette, January 31, 1832. Aylmer considered this issue ultimately irrelevant, as all were agreed that the royal prerogative of mercy could not be interfered with: see Aylmer to Goderich, January 26, 1832, in Fourth Report, 559.
58. Goderich to Aylmer, April 9, 1832, in Fourth Report, 562.
59. “A bill to secure the independence of the judges … and for other purposes therein mentioned,” LC Journals, February 13 and 14, 1826.
60. Canada Committee Report, Evidence of Austin Cuvillier, June 12, 1828, 159.
views. John Neilson, for example, the colony’s leading publisher and a moderate reformer, thought it obvious that when judges were on councils “it unavoidably mixes them up with politics, and they become, instead of judges, in some measure, political partisans.” Viger made the perhaps obvious point that there was a “contradiction” in judges “being in the morning at court, in the afternoon at the Executive Council, and on the same day at the Legislative Council, making the laws, ordering their execution, and then judging upon those very laws.”62 In 1831 in the Legislative Council, Viger went so far as to assert that this mix of judicial, executive, and legislative power was “monstrous and contradictory,” while in the Assembly the same year Papineau complained that the current arrangements gave judges unwarranted influence in politics: they could “whisper their [extra judicial opinions] into the ear of the Executive” while at the same time they were “servile dependants of Administration.”63

The campaign to remove the judges was also fueled by resentment of the judges who occupied seats in the councils, especially Sewell, Chief Justice since 1808. He was a man who exercised an influence over the Legislative Council “comparable to that of . . . Papineau in the Assembly.” Although his early anti-French sentiments had moderated substantially by the early to mid-1820s, he was still seen by some as an exemplar of assimilationism in the deteriorating ethnic relations of the 1820s.64 Whereas some speakers in the various Assembly debates claimed to have nothing against the judges, Papineau did not shrink from personal criticism of Sewell. He would “not abstain from objecting personally to the present Chief Justice,” whose “sentiments, whose feelings, and opinions were warped in a long political life.”65

Arguments in favor of a separation of powers received crucial support from the Canada Committee which, as has been mentioned, recommended that judges be largely removed from the Councils of both the Canadas. The committee insisted that the Legislative Councils in both colonies should generally be given “a more independent character;” that is, independent

62. Canada Committee Report, Evidence of John Neilson, June 7, 1828, and of Denis–Benjaim Viger, June 7, 1828, 134 and 142. See also Evidence of Austin Cuvilier, June 12, 1828, ibid., 159.
64. For Sewell, see, especially, Brian Young, The Politics of Codification: The Lower Canadian Civil Code of 1866 (Kingston and Montreal: McGill–Queen’s University Press and Osgoode Society, 1994), 25–28. Young provides a more nuanced account of Sewell’s politics than F. Murray Greenwood and James Lambert, “Jonathan Sewell,” DCB online, from whom the quotation is taken, while agreeing with the assessment that he was extremely influential.
65. Montreal Gazette, January 27, 1832.
of the executive, and that in particular there should not be a majority of members on the Council “holding offices at the pleasure of the crown.” This description included, although it was not limited to, the judges, and with regard to the judges the committee recommended that “with the exception only of the Chief Justice, whose presence on particular occasions might be necessary . . . they had better not be involved in the political business of the House.” Moreover, “upon similar grounds,” the committee advised that no judge at all should sit on an Executive Council.66

The Canada Committee report was received with general acclamation by the patriote party, with the result that bills excluding the judges from both councils were passed in 1829, 1830, and 1831. The general principle of exclusion received near unanimous support in the Assembly, although there was a split over whether to accept the Committee’s recommendation of retaining Sewell on the Legislative Council. The 1829 bill began as a measure to disqualify only puisne judges—and, therefore, not Sewell—from the Legislative Council, but was amended in committee to broaden its terms.67 A majority of assemblymen therefore thought the general principle of exclusion unassailable, and some went further, agreeing with John Neilson that the “meaning” of the Canada Committee report, if not its wording, was that judges should only concern themselves with the “multifarious business of the Courts of Justice.” Others, such as the bill’s sponsor Thomas Lee, were prepared to abide more literally by the Canada Committee report—an “imperishable monument” he called it—and have the chief justice there as legal advisor.68 The 1830 bill likewise initially included a partial exemption for Sewell, although it also probably stated, mirroring the language of the Canada Committee report, that he was to have only a “consultative voice.”69 Many of the patriote leaders, including Papineau and the second most prominent patriote Louis Bourdages, were prepared to support the exemption, largely because of the Canada Committee report, testament to its status at that time as a guiding light for the reformers.70 “We must not go against the sense of the Commons

66. Canada Committee Report, 8.
67. LC Journals, January 5 and 9, and February 25, 27, and 28, 1829. The bill’s title was changed from puisne judges to judges, on a 17 to 9 vote.
69. See Montreal Gazette, February 1, 1830: “A proviso giving the Chief Justice a consultative voice was struck out.” See also a number of references to “consultative voice” in the extensive report of the debates in the issue of February 4, 1830, and the reference to “voix consultative” in a report of a speech by Bourdages in February 1830: La Minerve, February 3, 1830.
70. See the report of the debate in committee of the whole on January 27, in Montreal Gazette, February 4, 1830. The remainder of this paragraph is from the same source unless otherwise stated. Bourdages was at one time a rival of Papineau’s for the patriote leadership,
of England expressed by their Committee,” argued Bourdages, and he also noted more pragmatically that “prudence et circonspection” were necessary “pour assurer le succès de la mesure.” Papineau also was prepared to accept the report even though he disagreed with that aspect of it, but other members insisted on the importance of the principle generally: the Canada Committee could say what it wished, asserted one speaker, but “[i]f the report be wrong we are not bound to follow it.” When the issue came up again, in early 1831, Bourdages and Papineau changed their position, withdrawing their support for an exemption for the chief justice, and an 1831 bill for full exclusion passed easily and without amendment.

Like its predecessors, it was lost in the Legislative Council.

The Council’s principal reason for its support of the status quo was highlighted by a memorial addressed to the crown in March 1829. It insisted that the judges were useful members of the Council; their “intelligence and assiduity . . . have afforded most important assistance in matters of the highest moment,” and their presence was necessary because the upper house, unlike the House of Lords, did not automatically have judicial members who could “give their advice and opinion on matters of law.” In addition, the Council insisted that only London could alter the composition of the Legislative Council. Under the Constitutional Act of 1791, the power to appoint to the Legislative Council was given to the crown. It was, therefore, improper for the Assembly to designate who could not be appointed.

The importance of this latter argument is shown by the Legislative Council proceedings of 1830. The Council deferred the Assembly bill on disqualification and passed, with amendments, another Assembly bill on good behavior appointments. More importantly, it also passed separately a series of resolutions on both issues, resolutions that reveal substantial agreement with the Assembly on the merits of the exclusion principle. One was that it was “expedient” that judges “do not assist in the affairs of the provincial parliament so long as they hold seats on the bench.” At the same time, it was similarly “expedient” that judges “have a consultative but not deliberative voice in the [Legislative] Council, on those matters in which their opinion may properly be required.”

but from circa 1830, he supported Papineau, having been unable to supplant him: see Richard Chabot, “Louis Bourdages,” DCB online.

71. *La Minerve*, February 3, 1830.
73. *LC Council Journals*, 1829, Appendix B. The address was also published in the *Montreal Gazette*, March 9, 1829.
74. See *LC Council Journals*, 1829, Appendix B, and *Montreal Gazette*, March 9 and 12 and April 4, 1829.
75. For these resolutions, see *LC Council Journals*, March 15, 1830.
largely conceded the principle of nonparticipation by judges. Although it passed the qualifier of a “consultative” voice on some matters, this was likely meant to reflect the essence of the Canada Committee’s own qualification that judges could and should provide legal advice on the drafting of legislation. However, and this is the key point, the Council would not pass a bill on this because a majority of its members believed that the provincial legislature did not have the right to legislate this kind of constitutional change. The same argument underpinned the Legislative Council’s rejection of the 1831 exclusion bill. Sewell, although he did not vote, made a long speech arguing that it was unconstitutional as an intrusion on the prerogative. A vigorous refutation of Sewell’s position was offered by Viger, a recent (1829) appointment to the Council, who insisted that the local legislature could determine its form of government. Viger was the only councilor to speak in favor of the bill, although two others voted for it, and nine voted against.

Shortly afterwards, London substantially conceded the exclusion principle. Colonial Secretary Goderich announced that henceforth no judge would be appointed to either Council, and that all judges on councils should voluntarily remove themselves. The one exception was the chief justice, who would keep his seat on the Legislative Council so that it could have the benefit of his advice in framing laws of a “general and permanent character.” At the same time, the chief justice should exercise “a cautious abstinence from all proceedings by which he might be involved in any political contentions of a party nature.” This, noted Goderich, tracked British practice; it was not unusual to give the chief justices of the common law courts peerages, and thus membership in the Lords, although they did not vote. As noted earlier, this edict was put into force for Upper Canada as well, and, indeed, for all British North American colonies. Sewell and Kerr complied with London’s instructions; both left the executive council and Kerr stayed away from Legislative Council meetings.

By the time the Assembly reconvened in the winter of 1831, therefore, it had most of what it wanted, but debates over judicial independence in 1832 show just how radicalized a group of Assemblymen had become. A bill introduced at the end of 1831 excluded all judges from all councils, going further than London. It was amended in committee by a 3 to 2 vote to

76. Ibid., February 12 and 21, 1831. The report of the debate that follows is from Montreal Gazette, February 22 and 25, 1831.
77. Goderich to Aylmer, February 8, 1831, in Fourth Report, 554.
78. See Goderich’s approval of the “laudable promptitude” with which the judges had removed themselves: Goderich to Aylmer, July 7, 1831, in Fourth Report, 550.
exempt Sewell. The committee report then occupied many days of debate, and “several warm discussions,” after which the exemption was removed on a 34 to 29 vote. A few weeks later, however, the exemption was reinstated, 34 to 24. The main argument for the exemption was that royal assent would be withheld otherwise; however, those against the compromise insisted on adhering to what they saw as the right principle, in part because Sewell himself was the problem. As a newspaper in the colony of Nova Scotia put it, a compromise might have been possible “had the Chief Justice, in times past, stood apart from the white heat of politics,” but he had been “for years the leader of the Government party in Lower Canada.” As long as he remained, “the Assembly fear his influence; and cannot be persuaded, that any mere instruction from the Home government would prevent him from intermeddling in politics—and counteracting the views of the Representative Body.”

The 1832 bill, with the exemption, was ultimately denied royal assent in London because of two issues. One was the impeachment tribunal issue, already discussed. The other, to which I now turn and which requires some background explanation, was the issue of guaranteeing judicial salaries.

When Colonial Secretary Bathurst had indicated London’s support for good behavior appointments in 1825, he had conditioned his approval on the Assembly providing adequately for salaries.

Clause 3 of the first, 1826, bill which passed the Assembly stated: “the salaries . . . paid to the said Judges shall be secured to them in a fixed and permanent manner.” This phrase, or some variant of it, appeared in all the subsequent judicial independence bills. How was this to be achieved? The 1826 bill went on to say, in Clause 6, that judicial salaries “shall be taken and paid out of the Funds already by Law appropriated generally for the administration of Justice and the support of the Civil Government.” This was a reference to two local statutes of 1795, which had imposed various license fees and customs duties and appropriated £5,000 to the executive to pay for the administration of justice and the support of colonial government. The Assembly’s bill thus did no more than state that existing government revenues set aside for the costs of government, including judicial salaries, be used for judicial salaries.

79. LC Journals, November 28 and December 5 and 28 1831; January 3, 11, 14, 16, 18, and 20 1832; Montreal Gazette, January 14, 21 and 27, 1832. There is a very long report of the debate in the last of these issues. See also Aylmer to Goderich, January 26, 1832, in Fourth Report, 558. The quotation is from Novascotian, May 5 1832, which ran a long article on the issue.

80. Novascotian, May 5, 1832.

81. Bathurst to Dalhousie, February 10, 1825, LC Journals, March 6, 1826, Appendix P.
This was not in accord with London’s view of what constituted fixed and permanent salaries. As in Upper Canada, a separate and distinct civil list was required: the Assembly should pass legislation creating a specific fund that would be a first charge on any revenue received by the Assembly and out of which the salaries of government officers, including judges, should be paid. Such legislation needed to be binding for future years, not dependent on annual votes in the Assembly. How many years was an issue that could be, and was, argued about, but the principle of no annual votes was not negotiable.82 There were similar problems with the bills passed by the Assembly in 1830, 1831, and 1832. They all included salary provisions other than a civil list. In 1830 and 1831, the form of words was that salaries would be paid from the revenues allocated for the costs of civil government, and in 1832, this was changed to a statement that judicial salaries and pensions “shall be taken and paid out of the proceeds of the Casual and Territorial revenue now appropriated by acts of the provincial parliament for defraying the charges of the administration of justice, and out of any other public revenue which may be or come into the hands of the Receiver-General.”83 However, none of this mattered to the Colonial Office, whose position was consistently that judicial salaries had to be the subject of “a distinct law.” Only then would the judges be put “beyond the temptation of betraying their sacred trust from deference to any authority.”84

The reference to the casual and territorial of the crown is significant, because throughout the 1820s the Assembly had consistently asserted its right to them, and at the end of the decade the Canada Committee recommended that they be turned over to the Assembly.85 London was prepared to do so, but only if a civil list was legislated locally. The patriote party used the 1832 Judicial Independence Bill to assert its long-standing claim to the revenues. As Papineau put it, the judicial independence bill was “a good opportunity … for asserting the right that they claimed to the whole of the Casual and Territorial Revenues.” Obtaining those

82. See LC Journals, 1829, Appendixes A and B. Although this statement came 3 years later, it was clearly a reference to the 1826 bill.
83. See LC Journals, January 18, 1832; the casual and territorial revenue provision passed 33 to 24.
84. Goderich to Aylmer, September 29, 1831, in Fourth Report, 554.
85. What follows is a necessarily brief summary of a complicated and protracted political struggle. It is drawn from the general sources on Quebec political history noted in note 40 above, and from Peter Burroughs, The Canadian Crisis and British Colonial Policy, 1828–1841 (London: Arnold, 1972); Helen T. Manning, “The Civil List of Lower Canada,” Canadian Historical Review 24 (1943): 24–47; and Donald Creighton, “The Struggle for Financial Control in Lower Canada,” Canadian Historical Review 12 (1931): 120–44. See also Fourth Report, 507–11, which provides a useful overview.
revenues would also guarantee judges’ salaries, at least in the view of the Assembly majority. To quote Papineau again, “if these permanent provisions be secured upon these specified revenues, there would be no dispute, and every *sou* of the Casual and Territorial Revenues would be secured to them.” He also argued that the bill had a backup mechanism for ensuring judicial salaries. The addition of the phrase “and out of any other public revenue which may be or come into the hands of the Receiver-General” meant that there would be money for the judges in the event that the casual revenues proved insufficient.86 The argument persuaded a majority of the Legislative Council, which passed the bill. It did not entirely persuade Governor-General Aylmer, who was not prepared to give it royal assent and referred the bill to London. He did, however, recommend that London assent for pragmatic reasons; although the payment provisions were “completely at variance” with London’s instructions, he also thought that no better deal could be reached.87

The Colonial Office found the bill unacceptable; Goderich went so far as to scold Aylmer for his support of it. He interpreted the payment provision as requiring an annual vote for judges’ salaries, and such a vote would bring “subservience” of the judges to the Assembly. Goderich contrasted the Assembly proposal to the English system, in which judicial salaries were paid from the Consolidated Fund, and as the first charge on it. Only after judges had been paid could Parliament choose to spend any of the rest of the money in the Fund. The colonial equivalent of this was a civil list; any other arrangement would mean that the judges would be placed in a condition of “entire dependence” on the Assembly, while removing them from the “comparatively unimportant dependence on His Majesty’s pleasure.”88

The salary imbroglio was never resolved before the rebellions, because the Assembly leaders continued to insist that their proposals were an adequate guarantee of salaries. Its position was explained to the 1834 Commons Select Committee on Lower Canada by Augustin-Norbert Morin, a moderate *patriote*, who along with Viger, presented the Assembly’s case to the British government.89 He acknowledged that the crown had long required that good behavior appointments required a quid pro quo of fixed salaries, and insisted that the Assembly had performed its part of the bargain. The judges had been given a “distinct

86. For all of this, see Papineau’s speech in *Montreal Gazette*, January 31, 1832.
87. Aylmer to Goderich, January 26, 1832, in Fourth Report, 562.
88. Goderich to Aylmer, April 11, 1832, in ibid., 564.
89. What follows is from the evidence taken before the select committee, reproduced in ibid., 589–91.
appropriation,” because “their salaries, as they existed, were voted to them.” More importantly, he asserted that the bill meant that when the government allocated funds at its disposal they “should be applied, in the first place,” to salaries. This latter phrase comes close to matching the English system; however, none of the Assembly’s bills said that the salaries were the “first charge.” Morin nonetheless confidently asserted that the judges would always be paid “even if the amount received [by the executive] from all sources had been equal only to their salaries.” The Assembly would not budge from this position, always refusing offers to surrender the revenues in return for a civil list, because, in its view, the revenues did not need to be surrendered. When in 1835 another Colonial Secretary, Lord Aberdeen, appointed a commissioner to try to resolve the Lower Canadian crisis, his instructions urged flexibility in trying to resolve the financial impasse with the Assembly, but also insisted that the problem was not simply money, but also principle: mainly the principle that judges and other major office holders needed to have their salaries secured.

1832 was a watershed year for the judicial independence saga in Lower Canada. By then, London had conceded the principle of good behavior appointments, and very largely agreed on the exclusion of judges from councils. In turn the Assembly, far from unanimously, was prepared to stomach Sewell’s continued presence on the Legislative Council, but the resolution that must have seemed so close when the 1832 bill passed both local houses and was recommended by Aylmer to London for approval never happened. It was derailed by the disagreement over how salaries should be guaranteed, and once derailed never got back on track. When another judicial independence bill was debated in 1833, the Papineau group persuaded a majority of members to vote down the exemption for Sewell to stay on the Legislative Council, and the bill was lost when, on Bourdages’ motion, the committee as a whole rose without reporting. In responding to an argument that good behavior appointments were still desirable even if many members did not agree with other aspects of the bill, Papineau attacked Sewell and others. “It is certain that altering a few words in the commission of judges will not change their dispositions,” he insisted: “With them will always exist the same faults.”

90. See Aberdeen to Aylmer, February 14, 1835, in LC Journals 1836, Appendix LL.
91. Colonial Office to Commissioner for Lower Canada, July 17, 1835, in LC Journals, February 13, 1836.
92. For the passage of the bill see LC Journals, January 16, 20, 29, and 30, and February 5 and 12, 1833. The final vote was fairly close: 27 to 19. For the long and heated debates in the Assembly see La Minerve, February 20 and 25, 1833, and Montreal Gazette, March 2, 1833.
93. La Minerve, February 25, 1833.
The clearest indication of the patriotes’ complete dissatisfaction with Sewell came a year later, in the evidence of Morin before the British House of Commons Select Committee. The Colonial Office’s insistence that Sewell should remain “to give explanations on legal points” and that he should exercise a “cautious abstinence” on political questions, were pointless, because Sewell had never heeded such instructions. In the previous 2 years he had “voted addresses of a political nature, and taken part in debates of a political nature.”

Although one more judicial independence bill was passed in 1834, London refused royal assent because of the salary provisions and because there was no exemption for Sewell. There was a brief discussion of judicial independence in the Assembly at the end of 1835, but no legislation was introduced. The year 1836 saw the issue raised in the context of the work of the Standing Committee on Grievances, which rehashed the battles of the previous few years. An address to the crown of February 1836 simply asserted the principle of good behavior appointments, and lamented that the Assembly’s efforts to achieve it had been “misunderstood.”

The commission sent to Lower Canada from Britain in 1835–36 to try to resolve the impasse between Assembly and lieutenant-governor recommended, and in 1837 the British House of Commons passed, a resolution that the casual and territorial revenues go to the Assembly if it passed a civil list. This would have paved the way for a good behavior bill, but there was no civil list arrangement put into place. By then it was too late, and from late 1837 on, the colony descended into rebellion and repression. Not only were judges on the Special Council that governed Lower Canada from 1838 reversing


95. This was a bill “for securing the dignity and independence of the Legislative Council and .. Executive Council...and of the judicial body.” It passed both Assembly (unanimously) and the Legislative Council (11 to 6), although there was a recorded dissent in the Council by three members who denied the Assembly’s right to legislate the composition of the upper house: see LC Journals, February 11, 12, 14 and 25, and March 18, 1834; LC Council Journals, February 14, 19, 21, and 22, and March 18, 1834; and Montreal Gazette, February 25 and 27, and March 4, 1834.

96. LC Journals, November 17, 21 and 27, 1835.

97. Ibid, February 26, 1836.

98. This was the Gosford Commission, named after its principal commissioner the Earl of Gosford. For its work see, inter alia, Philip Buckner, The Transition to Responsible Government: British Policy in British North America, 1815–1850 (Westport, CT: Greenwood Press, 1985), ch. 6.

99. James Stuart was appointed to the Special Council in April 1838 and then made chief justice when Sewell retired in October of that year. Two other judges also sat on the Special Council: Henry Black, Vice-Admiralty Judge, and Dominique Mondelet, the King’s Bench judge for the District of Trois Rivières. Jean-Roch Rolland and Vallières de St Réal, King’s
the 1831 reform, but three judges, who defied the government over its suspension of habeas corpus, were summarily suspended, laying bare the judges’ lack of independence from the crown.\(^{100}\)

Only when the rebellion crisis was over was the issue resolved. The *Durham Report* recommended that judges should have “the same tenure of office and security of income as exist in England,” and the quid pro quo of a civil list was passed by the Special Council in 1839.\(^{101}\) A civil list provision was included in the Union Act of 1840, and although debates over its terms continued in both sections of the new colony through the 1840s, its passage did clear the way for good behavior appointments to be legislated for what had been Lower Canada in 1843.\(^{102}\) Although the early 1840s saw nothing like the heat generated over the issue in the previous decade, it was still a controversial measure. A judicial independence bill passed the Province of Canada Assembly in 1841, but was rejected in the Legislative Council,\(^{103}\) and another one did not get through the Assembly in 1842.\(^{104}\) The reason assigned by the Council in 1841 was

Bench judges for the Montreal and Trois Rivières districts, were appointed to the Executive Council in 1838. For all of this see the respective entries on *DCB online*.

100. Philippe Panet and Elzéar Bédard, judges of the Court of King’s Bench for the Quebec district, and Vallières de Saint-Réal, the King’s Bench judge at Trois Rivières, were suspended but later reinstated. See Stephen Watt, “State Trial By Legislature: The Special Council of Lower Canada,” in *Canadian State Trials Volume II: Rebellion and Invasion in the Canadas, 1837–1839*, eds. F. Murray Greenwood and J. Barry Wright (Toronto: Osgoode Society for Canadian Legal History and University of Toronto Press, 2002), 258–59; and F. Murray Greenwood, “The General Court-Martial at Montreal, 1838–9: Legal and Constitutional Reflections,” in ibid., 326–29.


102. The Union Act is the *British North America Act, 1840*, UK, 3 and 4 Vict., c. 35; sect. 52 of that Act gave a civil list of £45,000 to the union government, of which more than £16,000 was to go for judicial salaries. For the arguments over the civil list in the 1840s see William G. Ormsby, “The Civil List Question in the Province of Canada,” *Canadian Historical Review* 35 (1954): 93–117.

103. For its passage through the Assembly see *Province of Canada Assembly Journals* (hereafter *PC Journals*), June 15 and 23, August 24, and September 6 and 7, 1841, and for the Legislative Council see *Province of Canada Legislative Council Journals* (hereafter *PC Council Journals*), September 7, 8, and 16, 1841. The bill was interestingly titled “An Act to for better Securing the Independence and Uprightness of the Judges.”

104. *PC Journals*, September 12 and 15, 1842. It was referred to a select committee on second reading but then disappears from the record. There is very little on the 1841 and 1842 judicial independence bills in the principal source of Province of Canada Assembly debates, Elizabeth Nish, ed. * Debates of the Legislative Assembly of United Canada* (Quebec: Presses de L’École des hautes études commerciales, both 1970), Vol. 1., 1841, 19, 126, 631, 834–35, and 838, reporting debates of June 15 and 19, August 24, and September 6 and 7; Vol. 2, 1842, 20 and 29, reporting debates of September 12 and 15.
that the court system was about to be reorganized, and it was better to wait until that had happened. The Legislative Council, it stated, “fully agree in the principle that the Judges... should be made independent.” There was some change in the court structure in 1841, and the delay was short lived. The 1843 Act eliminated the inconsistency of different forms of judicial tenure between the eastern and western halves of the new united colony. It was more or less a replica of that passed for Upper Canada in 1834, providing for removal by joint address of Council and Assembly to the crown, with an appeal to London against the removal, and excited no controversy.

This placid end to the tale of the Lower Canadian judges and judicial independence was a remarkable contrast to the furor that had marked debates over the colony’s judges from 1825. Like their Upper Canadian counterparts, Lower Canadian reformers began by demanding that their Constitution simply be brought into line with that of England. It took London a few years to concede this, but it did so, provided the colony would guarantee payment of the judges’ salaries on a civil list. But the civil list question proved intractable, not simply because of judicial salaries, but because increasingly radical reformers proved consistently unwilling to be dictated to on any aspect of colonial revenues and finances. They displayed a largely similar unwillingness to brook any role in colonial administration for Chief Justice Sewell. Therefore, whereas the judicial independence questions were resolved in Upper Canada in 1834, in the lower colony they were subsumed in the political and constitutional crises that dominated the 1830s.

**Nova Scotia: Judges Trembling Before the Popular Will**

Good behavior appointments came to Nova Scotia in 1848, more than a decade after they came to Upper Canada and 5 years after they came to

105. An Act to provide for the more easy and expeditious administration of Justice in Civil Causes, ... in that part of this Province heretofore Lower Canada, Statutes of the Province of Canada (hereafter SPC) 1841, c. 20, which established District Courts of limited civil jurisdiction and abolished what had been known as the inferior terms of the Court of Queen’s Bench.

106. An Act to render the Judges of the Court of King’s Bench, in that part of this Province heretofore Lower Canada, independent of the Crown, SPC 1843, c. 15. For its passage, see PC Assembly Journals, September 29, October 12 and 20, and November 16, 1843; PC Council Journals, October 15, 17, 18 and 19, and November 16, 1843. See also brief mentions in Montreal Gazette, October 20 and November 21, 1843. There is a short report of the debate of 1843: see Debates of the Legislative Assembly of United Canada, Vol. 3, 1843, 255, reporting a debate of October 12, 1843.
the lower colony. A local statute provided that a judge could be removed following a joint address of the Assembly and Legislative Council to the crown. An appeal to the Privy Council was provided, and a judge’s removal was not final until London had acceded. The Act contained a suspending clause, delaying implementation until approval from London, which was forthcoming. In many respects, formal judicial independence was uncontroversial in Nova Scotia. The colony had nothing like the history of demands for it that marked Upper and Lower Canada, nor was the enactment of the new regime hampered by arguments about control of the crown revenues; all judges, except the chief justice, had always had their salaries paid by the Assembly, from 1764 when the first assistant judges (puisnes) of the Supreme Court were appointed at the urging of the Assembly. In 1789, these salaries had been made permanent. The presence of judges on the Governor’s Council of Twelve (Nova Scotia had one unitary council until 1837) was an irritant to reformers, but was not a major cause of complaint, and all judges except the chief justice were removed from the Council in 1831 as part of the general policy change brought in that year by the home government, discussed previously. There was some agitation from the mid-1830s onwards as the increasingly powerful reform movement lobbied for the removal of the chief justice, Brenton Halliburton, from the Council, agitation that exploited resentment of the high Tory Halliburton personally and that drew on the fact that because the colony had a unitary Council, Halliburton continued to be involved in its executive as well as its legislative deliberations. This was a relatively short-lived issue, however, and disappeared when in 1837 the unitary Council was split into two, Legislative and Executive, Councils, and London ordered Halliburton removed from both.

107. An Act to render the Judges of the Supreme Court, and the Master of the Rolls, independent of the Crown, and to provide for their removal, Statutes on Nova Scotia (hereafter SNS) 1848, c. 21.


109. An Act for Provide for the Support of the Puisne Judges of His Majesty’s Supreme Court, SNS 1789, c. 12. See to similar effect An Act to Alter and Extend the Times of Holding the Supreme Court in Several of the Counties and Districts in this Province; and for Declaring the Qualifications of Persons Hereafter to Be Appointed Justices of the Said Court, Their Number and Salaries, ibid., 1809, c. 15.

When good behavior appointments were legislated in Nova Scotia, they were little more than an administrative arrangement consequent on the granting of responsible government to all eastern North American colonies in 1848. Responsible government meant that all positions in the Executive Council were filled by assemblymen, who displaced long-time office holders appointed by the lieutenant-governor. It also meant local control in a host of matters, including the appointment and removal of Supreme Court judges, but in marked contrast to the Canadas, Nova Scotia’s change to good behavior appointments came about despite strong and sustained objections from the judges themselves, aided by their allies in the Legislative Council. In what follows, I will first provide an account of the judges’ virulent, almost hysterical at times, opposition. I will then seek to explain why their objections were so strong, suggesting that the previous two decades of controversy over a variety of issues, mostly financial, made the bench intensely distrustful of the popular branch of the constitution.

The judges bill had an easy ride in the Assembly. It was introduced by long-time reform MHA and, since 1838, Executive Councillor Herbert Huntington of Yarmouth on March 3, and completed all stages unamended by March 15. The arguments made by government supporters in the debate were straightforward, stressing the importance of good behavior tenure to the principle of judicial independence; they also stressed that the local legislation on judicial removal mirrored English provisions in the Act of Settlement. Huntington, for example, pointed out that good behavior appointments and removal by joint address had long been the law of England and was also operative in the Canadas. In England people were “convinced” of its “necessity.” Attorney-General James Boyle Uniacke argued that formal independence meant that a judge “need not quail under the frown, nor tremble at the displeasure of those who sit in the highest places of the land—he will be independent alike, of the Sovereign and the subject,” as he was in England.

The bill passed unaltered, but there was opposition, and two amendments were put forward. One tried to impose a two-thirds majority requirement for any impeachment vote in both the Assembly and Legislative

Brenton Halliburton,” DCB online, and his correspondence in NSARM, Manuscript Group [hereafter MG] 1, Vols. 334 and 334A, Halliburton Papers, passim.

111. NS Journals, March 3, 7, 14 and 15, 1848.

112. This account is from the Novascotian, March 20, 1848. Speakers in favor of the bill were Huntington, speaker William Young, reform icon Joseph Howe, attorney-general and leader of the government James Boyle Uniacke, and William Alexander Henry, the liberal member for Sydney County and a future Supreme Court of Canada judge.
Council. It was lost 28 to 16. The other sought to add a rider that no address for removal could be effectual “unless some petition containing a specific charge or accusation against such judge verified by affidavit” was presented, and that the judge should have the opportunity to answer the complaint, including the right to appear before the Assembly. This also failed, 29 to 15, and the final vote on the unamended bill was 27 to 17.

These proposed amendments targeted related problems with the bill, as Conservatives saw it, and they both indicated deep distrust of the “popular” element of the Constitution. The debate about judicial independence was for them a debate about what they saw as the general abandonment of the mixed and balanced constitution in favor of a democratic one. The two-thirds proposal expressed concerns that a bare majority of elected representatives could get rid of a judge. The “specific charge” amendment adverted to the possibility that those elected representatives could do so on vague and general charges, motivated perhaps by personal and/or political disagreements. In short, the message was that one could not trust politicians to understand the lofty principles involved and the seriousness of removing a judge.

In an all-day debate on March 14, at least four Conservatives expanded on these themes. The principal speaker was former Attorney-General, and future Nova Scotia Supreme Court Judge, James W. Johnston, leader of the Conservative opposition. He stated that he supported the independence of the bench, but that the bill would not achieve that, but rather the opposite. His rhetoric against a principle that was supposedly a centerpiece of the rule of law is remarkable, and worth quoting at some length. The bill, “so far from making it [the bench] independent strikes a fatal blow at its liberty; instead of being a principle conferring Independence, it will have the effect of placing the minds of judges in a complete state of vassalage. If you pass this bill you may achieve a passing triumph but it will have the effect of removing every bulwark which guards personal liberty, the protection of property and the dearest rights and privileges of Englishmen.” It was not good behavior tenure that was the problem, Johnston explained—“theoretically, that principle may be correct”—but rather, giving the Assembly some power to remove a judge. The Assembly had many lawyer members, “the very men who are most likely to be brought into the collision with the Bench.” It was also now, with the advent of responsible government, a forum in which party politics

113. This paragraph and those that follow are from the report of the debate in the Novascotian, March 20, 1848, unless otherwise stated. The other three speakers against the bill were all lawyers and conservatives: James DeWolf Fraser of Windsor Township, John Clarke Hall of Kings County, and Charles Harrington of Richmond County.
determined policy. In this new order judges would be rightly fearful of politics, not principle, determining the fate of judges. They would “tremble” when “they take their seats to try those cases which arouse the feelings of party,” for fear that they would “call down the vengeance of those in power;” they would, again, “tremble lest some influential person may be offended and revenge some fancied wrong.” For Johnston, then, the issue was not about the judiciary at all, but about an excess of democracy. A little more than 10 years earlier he had vigorously defended the presence of Halliburton on the Council. To Johnston, it was acceptable for a Tory judge to take an active part in politics, but not for democratic legislators to exercise any role in judicial dismissals.

The Conservatives must have known that a major inconsistency in their arguments was that the bill replicated the English system, and, therefore, they were lauding the British tradition of judicial independence while simultaneously refuting the particular policies that guaranteed that independence. In supporting the call for a two-thirds majority on any impeachment vote, Conservative lawyer James DeWolfe Fraser of Windsor Township adverted directly to this problem. What was correct for Britain was not necessarily the right thing for the colony, because the upper house in each jurisdiction was differently constituted. The English House of Lords consisted of men of rank and accomplishment, and mostly men who held their seats on the hereditary principle, not because they had previously been ordinary elected politicians. Conversely, the Nova Scotia Legislative Council consisted of “persons ...selected from among ourselves—from the people—on account of their political standing.” Therefore, “in this country, vacancies must be filled by persons friendly to the party in power.” Given that state of affairs, he asserted, “there would be no safety for the Judge—he would be merely responsible to popular opinion.”

The bill’s supporters responded to these arguments with something close to ridicule. William Young, lawyer, future premier, and future chief justice, had, he said, “listened in astonishment” to Johnston, who either “did not clearly comprehend the nature and tendency of the bill” or “had indulged in a profusion of wilful misrepresentations.” Johnston, Young said, did not understand the issues, but he, Young, “had taken some pains to inform himself upon the subject, and could not but reiterate his astonishment at the volume of vituperative eloquence” coming from Johnston. Young pointed out that the bill was “word for word ... the law of the land in Canada ... the law of the land in England;” therefore, “why should it not be the law of the land in Nova Scotia?” Conversely the existing system

114. Fraser’s remarks are reported in the Novascotian, March 27, 1848.
was “anti-British.” Young also had harsh words for those who would question the integrity of assemblymen: “the Legislature of this province . . . [was] as pure and patriotic as any deliberative body of freemen on the face of the earth.” Future Supreme Court of Canada Judge William Alexander Henry also refuted Johnston. He was confident that no group of assemblymen and councilors “would be base enough to depose a judge on fictitious or unfounded charges.” There were parties in Nova Scotia, and that was a good thing, but “he did not believe that the feeling of factious opposition would be carried out with regard to the Bench.” Henry also noted that an appeal to the Privy Council was provided, a further and adequate safeguard.

The government easily won the day in the Assembly, but the Legislative Council was a different matter. It was not an elected body, and although vacancies were used in 1848 to increase the Reform contingent, Conservatives still had a plurality of 12 to 9. The opposition to the bill was led by the Council’s President and former Master of the Rolls Simon Bradstreet Robie. After receiving opinions from Chief Justice Halliburton and current Master of the Rolls Alexander Stewart, the Legislative Council passed an amended version of the Act, incorporating the Assembly Conservatives’ demand for a requirement that any joint address should include “in distinct terms” the “specific” charge against the judge, and also requiring that the evidence supporting any such charge should be included with the address. Another amendment was a provision that if the matter did go on appeal to the Privy Council, the prosecution could be on that charge only, with nothing new added. Rather surprisingly, the government members on the Council “acquiesced” in these amendments, although they thought that they “unnecessarily encumbered” the bill. They presumably were seeking to avoid a fight and believed that in the end the amendments did not materially alter the legislation. The partisan Novascotian thought differently, however, opining that “the object of the amendment is to render the whole Bill inoperative, should the time come when the removal of a Judge may be found necessary.”

115. J. Murray Beck, The Politics of Nova Scotia: Volume 1, 1710–1896 (Tantallon, Nova Scotia: Four East, 1985), 133. However, Beck also notes that the Reform government was generally able to get its way, because one member missed the entire session, and another, William Rudolf of Lunenburg, opted not to oppose the new arrangements.

116. For the Council’s handling of the bill as passed by the Assembly see Nova Scotia Legislative Council Journals (hereafter NS Council Journals), March 16, 21, 22, 24, and 25, 1848, and Appendix 29. The debate was also reported in the Novascotian, March 27, 1848.

117. Novascotian, March 27, 1848.
As noted, the Legislative Council sought the opinions of Halliburton and Stewart, and both judges shared the views propounded in the Assembly by Johnston.\textsuperscript{118} They were intensely distrustful of local politicians. The bill, said Halliburton, although it “professes to have the independence of the Judges for its object,” would “practically render them very dependent upon the Local Government.” In England, there was “no danger that such bodies as the Houses of Lords and Commons would ever be influenced by personal prejudices or private animosities” when dealing with judges, and any judge “whose conduct could rouse the Lords and Commons of England to unite in calling for his dismissal must be very deserving of such opprobium.” Conversely, in the colony, responsible government meant that “the reins of the Provincial Government are placed in the hands of those who can command a majority in the House of Assembly.” If a judge “should render himself obnoxious to the Local Government” it would be too easy to get a joint address for his dismissal. The only recourse would be a very expensive appeal to London.

Halliburton sought to support his argument by noting that the Legislative Council had twenty-one members, so that eleven constituted a majority, and that the Assembly had fifty-one members, so that twenty-six was a majority. Therefore, the votes of only thirty-seven people were needed to remove a judge. Lest such a notion be thought “chimerical,” Halliburton went on to note that a quarter of the Assembly members were lawyers, a group “who must continually be brought into collision with the judges.” A good number of other assemblmen were traders, “a class of men whose business frequently brings them into court, and who, when unsuccessful, are not unnaturally displeased with the judge who decides against them.” Lawyers and litigants were “often too apt to indulge feelings of personal dislike, and to attribute to prejudice what has proceeded from principle.” Halliburton also saw dangers in the patronage system, which would inevitably be a product of responsible government. Administrations wished to reward their friends, and the Bill provided a mechanism for getting rid of sitting judges to put supporters in their place. In short, Halliburton was opposed to what he saw as the evils of too much democracy, and defended the old system. It was, he said, “delusive” to think that one could remove the power of dismissal “from the Ministers of the Crown in England, whose influence they have never felt nor feared,” and place that power “in the hands of the Local

\textsuperscript{118} For these opinions see Brenton Halliburton, “Observations on a Bill, An Act to render the Judges of the Supreme Court, and the Master of the Rolls, independent of the Crown, and to provide for their removal, 22 March 1848,” and Alexander Stewart to Harvey, March 24, 1848, both in \textit{NS Council Journals}, 1848, Appendix 29.
legislature, with whose members they are brought into frequent collision.” Halliburton argued that if the judges were to be made independent of the crown, there had to be a different method of removing them for misconduct; not only should there be a requirement of specific charges, those charges needed to be brought before some tribunal dedicated to that purpose.

Master of the Rolls Stewart made many of the same points, arguing that the removal power would be used for party purposes. He professed to know that the bill had created “extravagant expectations” locally, and that it provided a measure by which “public opinion” could be brought to bear on the dismissal of a judge, “in the same manner as a vote of want of confidence operates on the Executive Government.” Too much democracy was not healthy: “the progress of popular sentiment is very rapid in a new Country, and small Communities are exposed to influences from which large ones are exempt.” Stewart also made the same points as Halliburton about the need for specific charges and the dangers of allowing lawyers and merchants, who were involved in the courts, to decide on a judge’s fate.

These arguments obviously influenced the Legislative Council, but the Assembly had already heard and rejected them. When the Council’s amended bill went back to the Assembly, it was rejected 28 to 17. The bill went back to the Council, which “after long debate” gave up its amendment on a 10 to 9 vote. A dissent was entered by ten members; the tenth signatory was Robie, who had not voted because he was president. The dissent essentially repeated the arguments already aired by the Conservatives. Thereafter, Robie took the only further action he could, and resigned from Council.119 When Lieutenant-Governor Sir John Harvey addressed the Assembly at the end of the session, he referred to the Act as “a proof of your anxiety to introduce the necessary guarantees for the due administration of the law.”120

The matter did not end there, because the judges carried their case to London.121 They were not supported by Harvey, who thought their objections “much exaggerated,” indeed “chimerical.”122 There were ample safeguards from political attacks in that there was to be no removal unless the

119. See NS Journals, March 25 and 28, 1848; and NS Council Journals, March 29 and 31, and April 3, 1848, and Appendix 29. After the Council’s climb down the bill received royal assent on April 3, the day that Robie resigned: NS Journals, March 31, and April 3, 1848.

120. NS Journals, April 11, 1848.

121. See Harvey to Grey, April 10, 1848, in NS Journals 1849, Appendix 7. Harvey included the judges’ letters already cited, as well as the Legislative Council protest, and additional letters from Robie and Stewart.

122. For the remainder of this paragraph see Harvey to Grey, April 10, 1848, in NS Journals 1849, Appendix 7.
crown or its representative concurred in the joint address, and the judges had an additional protection in the appeal to London. He also saw the demand for “specific charges” in any address as an attempt to establish “a new practice,” and, indeed, something that would “defeat the measure.” More importantly, he could not imagine that a judge would ever be “assailed . . . without ample and sufficient grounds,” and still less was there a chance that removal could be attempted “on Political or Party considerations.” A judge was as safe under the new arrangements as he had been under the old, “unless he should become so incompetent, or render himself so justly obnoxious to the great majority of the People, or the Legislature, that his removal would be a public benefit.” Harvey also noted that the Act was “an exact transcript” of the 1843 Canada East legislation, and that both statutes “derive their origin from the legislation of the Mother Country.” At pleasure judicial tenure had been “at variance with British usage,” and it was desirable, indeed “indispensable,” to “give to the bench a . . . more independent position.” Colonial Secretary Earl Grey was in full agreement with Harvey, and the Act received royal assent in August 1848.123

The coming of good behavior tenure to Nova Scotia was obviously a very different story from what happened in the Canadas. In Upper Canada, the Willis affair galvanized reformers and made them put the issue at the forefront of the reform campaign. In Lower Canada, formal judicial independence and the separation of powers had been inextricably linked to the power struggle between patriotes and the chateau clique. In Nova Scotia, there was no Willis and by 1848, the council issue had been long resolved; therefore, reformers saw the 1848 Act as simply one of a number of inevitable changes to be made if responsible government, local self-rule, was to mean anything. In neither of the Canadas did the judges themselves have much to say on the question; they certainly did not fight the kind of rear guard action mounted by Halliburton and his colleagues. There was a crucial difference between Upper and Lower Canada in the 1830s and Nova Scotia in 1848. In the former locations, the Legislative Council was an unelected body whose members were chosen wholly by the lieutenant-governor, and presumably the judges had no fear of democracy leading to unwarranted attempts to remove them. The Nova Scotia judges could see that very soon their Legislative Council, although unelected, would be filled with supporters of the party in power.

This fact helps to explain why ultimate democratic control was a real likelihood in 1848, but it does not tell us why it was so feared by the judges. Part of the answer is their ingrained belief systems. Halliburton made little

123. See Grey to Harvey, June 24 and August 18, 1848, in ibid. This Earl Grey was the son of the Earl Grey who had been British prime minister in the early 1830s.
attempt to hide his Toryism, and William Blowers Bliss, a puisne judge since 1834, was similarly contemptuous of politicians.124 In addition, however, the previous decade and a half had given the judges good reason to believe that they were resented by many in local society, and it is possible that their own experience of colonial politics reinforced any ideological presuppositions they had. Most of the attacks on the judges had concerned their financial status, and had not been personal in the sense of accusations of incompetence or impartiality on the bench, but criticisms of the judges had been virulent, and went so far as to accuse them of illegal behavior.

The story, which I have written about elsewhere and will only sketch here, goes back to the early 1830s, and two distinct disputes over judicial remuneration.125 One was precipitated by suggestions within the colony and from London that the salaries of the Supreme Court judges were, in the words of Colonial Secretary Goderich, inadequate “to the importance of the duties to be discharged.” Goderich wanted the Assembly to provide higher salaries for the judges. The Assembly would not concur, but what matters for current purposes is that the debate over judicial salaries exposed serious fault lines in local attitudes toward the judges. Their supporters linked increased salaries to independence, arguing that low salaries meant a lack of independence, in two senses. They made the judges potentially subject to temptation, and, more importantly, they prevented the judges from being able to live in a style that set them apart from their fellow citizens. As the colony’s most prominent legal author Beamish Murdoch put it in the Assembly, the judges’ salaries were too low for them to keep up the “establishment which, for the due performance of that duty and the maintenance of their ranks in society, it was necessary.” Arguments such as this brought the riposte that judges ought to cut their coats according to local standards of cloth, that they had no valid claim on living extravagant life styles. As John Young, a businessman politician who among his other causes espoused economy in public spending, put it, independence “may be attained, not so much by multiplying the means of indulgence as by restraining the desires.” That is, “the wants of nature are easily supplied, but the cravings of rank and luxury are insatiable and know

124. See his personal correspondence at NSARM, MG 1, Vols. 1598, 1599, and 1602, passim, William Blowers Bliss Papers.
125. For a full account see Phillips and Miller, “Too Many Courts and Too Much Law.” See also the same authors’ “‘Exactions made upon the most distressed part of His Majesty’s Subjects:’ The Public Debate over Judicial Fees in Nova Scotia in the 1830s,” in Justice et espaces publics en Occident, du moyen age à nos jours, eds. Pascal Bastien, Donald Fyson, Jean-Philippe Garneau, and Thierry Nootens (Quebec: Presses de l’Université du Québec, 2014), 299–314.
of no bounds. A man governed by reason and the rules of prudent economy is as effectually above all pecuniary difficulties.”

The judges did not appreciate the rough ride they received in the Assembly in the early 1830s, and even less did they like the way they were treated when judicial fees were debated between 1834 and 1838. Their taking of fees from litigants was the subject of at times heated invective and became one of the central planks of the reform campaign of the 1830s. It was not only the money, but the principle of legality, because reformers argued strenuously that there was no legislative authority for judicial fees and that therefore the collection of them was illegal. The fees were variously described as “exactions,” and as “unconstitutional and repugnant...to all just notions of liberty,” and a number of abolition bills passed the Assembly. Those bills were all blocked in the Council, which had as one of its members Halliburton, the principal recipient of litigants’ fees. For reformers, no better example could be found, Reform luminary Joseph Howe argued, of the “imperfect structure of the upper branch” of government than the fact that Halliburton had been able to use his seat in council to block abolition of “the illegal and unnecessary Fees taken by the Judges.” Howe did not mince his words: “when Bills abolishing the illegal exaction of One Thousand Pounds per annum taken by the Judges in the shape of fees, are year after year burked in the other end of the Building, by a Body over which presides a gentleman largely interested in that exaction, is it unfair to attribute to him some agency in their destruction, or to wish that he had not been placed in a situation where his public duty interferes so much with his private interests?”

The fees question was largely settled in 1838, when Colonial Secretary Lord Glenelg imposed a compromise; the fees would no longer be collected, and as compensation, the judges would each receive a salary supplement. This supplement was to be paid out of the casual and territorial revenues. However, that compromise created its own problems. As in other colonies, London looked in the 1830s and 1840s to get the Nova Scotia Assembly to agree to a civil list in return for surrender of the casual and territorial revenues. It took until 1849 to fashion a deal, because the

126. Quotations from the Novascotian, March 24, 1830.
127. NS Journals, February 27, 1837.
128. Novascotian, February 16, 1837.
129. See NS Journals, 1839–40, Appendix 45, and the public accounts reports of subsequent years.
Assembly did not wish to provide in the civil list for that part of the salaries that represented the compensation for fees no longer being collected, because compensation for the abolition of illegal emoluments was inappropriate. An address of April 1838 put the matter plainly: “the Commons of Nova Scotia have repeatedly endeavored to abolish” the fees, and “[h]aving declared them to be unconstitutional and illegal, they cannot recognise any right in the Judges founded on the mere fact of their reception.” 131 The matter was finally resolved in 1849, when the Assembly finally capitulated, perhaps because the only two judges remaining on the court from the fee dispute period were Halliburton and Bliss. 132

Therefore, when weighing their response to the 1848 judicial independence bill, the judges saw themselves as the victims of unwarranted attacks on their integrity, which often had had a personal element. In 1836, just as the anti-fee agitation was heating up, Bliss complained about being “slandered and abused in every shape by a set of low designing, artful scoundrels” who published “misstatements and false reasoning.” 133 A decade later, with the dispute still somewhat alive because the near annual debates over a civil list were still stymied by differences over judges’ salaries, he was equally dismayed that the Assembly was still at it, “abusing the Court,” with some members “declaring that we are party men who have neither the confidence of the Country nor of the bar.” 134

For all the vehemence of their concerns about legislative interference with the Supreme Court judges, the opposition of 1848 was wrong. No judge was ever removed, nor was any impeachment attempted. Ironically, the verdict of history has been much more critical of the other connection between responsible government and the judiciary: the appointment process became local, and a victim of party patronage. Historians have castigated the “appalling quality of many appointments” in the decades after 1848, and in addition, the scandal of Premier William Young appointing himself chief justice in 1860 certainly sullied the court’s reputation. The fallout from that affair had hardly died down when the Conservatives took their revenge, appointing their long-time leader Johnston to the court in 1864. 135

131. NS Journals, April 12, 1838.
132. Civil List Act, SNS 1849, c. 1.
133. William Blowers Bliss to Henry Bliss, November 14, 1836, MG 1, Vol. 1599, No 33.
Judicial independence in Nova Scotia invoked a debate very different from that in the Canadas. There was agitation over judges on the unitary council, but it arose primarily in the 1830s, after all but Halliburton had been excluded, and was resolved reasonably easily when the council was split into two. The civil list was controversial, not because it was linked to good behavior appointments as it had been in the Canadas, but because it involved compensation for fees abolished. Most importantly, when good behavior appointments were mooted, Nova Scotia provides the only example in the empire of the judges themselves being opposed to them. The depth of that opposition, and the reasons given for it, demonstrate the profound distrust of the bench for the winds of change blowing through colonial governance in the late 1840s. The judges wanted their fates to be entirely decided by the crown, as they always had been, and not in any way determined by the popular branch of the constitution. It was the last stand of the old order.

New Brunswick: Money is Everything

New Brunswick Supreme Court judges never received good behavior appointments in the colonial period; that came about only when the colony joined the Canadian Confederation in 1867, the British North America Act of that year providing for a common form of judicial tenure in all provinces. Tenure was raised in the colonial legislature on only two occasions. The lack of interest in the issue of judicial tenure also extended to other aspects of judicial independence that excited so much controversy elsewhere. Every New Brunswick Supreme Court judge served on the unitary Council between the founding of the colony in 1784 and 1830; however, there was little local agitation about it, and certainly nothing like the fierce arguments that


136. For reasons unknown, one New Brunswick judge, the master of the rolls, did have good behavior tenure. That position was created in 1838, and the person appointed was given good behavior: An Act to authorize the appointment of a Master of Rolls to the Court of Chancery in this Province, and to provide for such an Officer, Statutes of New Brunswick (hereafter SNB) 1838, c. 8, s. 1.

137. The first occasion was 1807, when Supreme Court judge Joshua Upham was depuitized by the Council and Assembly to go to London and present a series of requests, including ones for an increase in judicial salaries and good behavior appointments. Only the former was successful. See Ann Condon, “Joshua Upham,” DCB online. The second occasion was in 1851, and that also went nowhere, as explained later in this section.
embroiled the Canadas. Britain’s edict of 1831 removing judges from colonial councils applied to New Brunswick; as in Nova Scotia, only the Chief Justice, John Saunders, remained on the council, and he also stayed as president of the Legislative Council when the Council was split into legislative and executive bodies in 1833. In 1837, the civil list question was easily resolved, perhaps because it did not involve a dispute over judges’ salaries. There were only minor judicial controversies before midcentury. In 1834, 29-year-old James Carter was appointed to the Supreme Court bench directly from England. The elevation of Carter over well-qualified locals produced a vigorous protest from the colony’s legal profession, led by the attorney-general, and a promise that never again would an outsider be appointed to the bench. There were also occasional arguments over circuit traveling expenses, but overall, the Supreme Court evoked no serious criticism: “removed from the realm of formal politics, [it] enjoyed stability of personnel, and drew prestige from the increasing complexity of commercial litigation.” The uncontroversial nature of the judiciary was in large part a reflection of the non-ideological nature of New Brunswick politics, which were not fought on a party basis until well after responsible government had been established in 1848, although many individuals were recognized as being reformers or conservatives.

There was, nonetheless, a fierce controversy over judicial independence in the late 1840s and early 1850s, when the newly responsible colonial government sought to reduce judicial salaries, and to abolish judicial fees, as part of a broader scheme of financial retrenchment caused by an economic crisis. The judges were able to resist these measures by invoking the power of the Colonial Office not to assent to local legislation, and central to local and imperial objections to reductions in remuneration was the idea that such reductions for incumbents undermined judicial independence. Under the terms of the 1837 civil list deal, the salaries of the Supreme Court judges were set at £1,096 local currency (c. £980 sterling) for the chief justice and £750 currency (c. £675 sterling) for the puisne

138. An Act for the Support of the Civil Government in this Province, SNB 1837, c. 1, was originally to remain in force for 10 years but was made perpetual in 1838: ibid., 1838, c. 51.
judges. They also received fees, averaging well over £100 in local currency each, although the economic downtown of the later 1840s meant this was somewhat reduced. The master of the rolls, a position created in 1838, had a slightly higher salary than the puisne judges, £800 currency. Suggestions for salary reductions came as early as 1841, when the lowering of British preferential duties on timber triggered a severe economic downturn, and were repeated in 1843 and 1845. On each occasion, judicial salaries were included in proposed expenditure reductions, which were to be prospective only; no incumbents would have their salaries reduced. And on each occasion, London took the same position: it “would willingly consider any recommendation for prospective reductions of Salary, ... [but] cannot consent to” reductions for incumbents.

A much more serious assault on judicial remuneration came following the depression that resulted from the ending of imperial preferences in 1848. No colony was more affected than New Brunswick, which had built its considerable prosperity on supplying Britain with lumber and, to a lesser but still substantial extent, on shipbuilding and trade. A solution for many New Brunswickers was retrenchment in officials’ salaries. The judges were not the only officials who came under attack, but they are the ones with whom this article is concerned. Judicial remuneration was attacked on two fronts. First, and most importantly, measures were passed to reduce salaries. Second, and more latterly, legislation was introduced to eliminate fees. Although arguments for and against both types of reduction were varied, what matters is that retrenchment engaged questions of judicial independence. For some in the colony, and for the home government, reducing salaries meant that judges would become dependent on and subservient to politicians.

In 1849, with Attorney-General Lemuel Wilmot taking the lead, the Assembly overwhelmingly passed a salary reduction bill. It slashed the salary of any future chief justice by more than one third, from £1,096 to £700 currency, and those of the future puisne judges and masters of the rolls to £600 currency, cuts of 20 and 25%, respectively. The bill easily passed

142. The Civil List Act does not enumerate any salaries. For these sums, see the appendices to the New Brunswick Assembly Journals (hereafter NB Journals), 1838 and 1839, which includes a detailed table of the accounts, which includes salaries of the chief justice and puisne judges of the Supreme Court, clv–clvi.

143. NB Journals, 1839, clv–clvi; Report of the Commissioners of Judicial Inquiry, 1842, in ibid, 1842, Appendix, and ibid., March 24, 1848; and Master of the Rolls Act, s. 4.

144. Assembly Committee Report, February 25, 1841, Assembly Address to the Crown, 1843, and Assembly Address to the Crown, 12 April 1845, all in NB Journals, March 3, 1851. In 1841, the Assembly also voted for a commutation of judges’ fees for a fixed annual amount.

145. Colonial Secretary Lord Stanley to Lieutenant-Governor Sir William Colebrooke, October 1, 1843, and same to same July 28, 1845, in ibid.
both the Assembly—by a vote of 31 to 2—and the Legislative Council, but it had a rider that its operation would be suspended until London gave its assent. Some in the Assembly also tried to make the reductions apply to incumbents, but this failed, by a vote of 24 to 9. The act was confirmed by London in January 1850. Following an election in early 1850, new legislation extended the reductions to incumbents. The current chief justice’s salary was to be reduced to the £700 contemplated by the 1849 legislation, in two stages, on January 1, 1851 and January 1, 1852. The current puisne judges and the master of the rolls would have a similar two stage pay cut, to £600. The bills passed a third reading in a thin House, 13 to 4, but were lost in the Legislative Council because they were introduced there the day before prorogation and received only a first reading. Despite this, one “incumbent,” Carter, did see his salary reduced that year, because he moved from puisne judge to chief justice when Ward Chipman Junior retired late in 1850, and, therefore, received the future salary of the chief justice laid down in 1849. As he succinctly put it, his elevation meant “a reduced salary of £700 currency, being £50 less than the salary I was receiving as a judge, and nearly £400 a year less than my predecessor.”

London’s reaction was unequivocal; it would never consent to salary reductions for incumbent judges. Local politicians nonetheless continued the fight for reductions for incumbents, the Assembly passing a resolution that the Executive Council should proceed with them and that, to the extent that instructions from London got in the way, the Assembly should address the crown on the matter. No such address was forthcoming; however, in the same session, the Assembly also passed legislation abolishing fees without compensation, albeit with a suspending clause until

146. For the passage of the legislation see NB Journals, February 8, 9 and 22, and March 2, 3 and 13, 1849; New Brunswick Legislative Council Journals (hereafter NB Council Journals), March 5, 6, 9 and 12, 1849.
147. An Act for the Reduction of Judicial Salaries in this Province, SNB 1850, c. 76
148. NB Journals, April 22, 24, and 25, 1850. There were two bills, one to reduce Supreme Court judges’ salaries and one to reduce that of the master of the rolls. An amendment was proposed in the Assembly that would have reduced salaries even more: the chief justice’s to £600 and the puisnes’ and the master of the rolls’ to £500, but this was rejected. The amendment came from a Mr. Gilbert, and he was the only one who voted for it: ibid., April 24, 1850 and Saint John Morning News, April 25, 1850.
149. NB Council Journals, April 25, 1850; Head to Grey, May 1, 1850, in NB Journals, March 3, 1851.
150. Carter to Grey, May 8, 1851, in Lawrence, Judges of New Brunswick, 356.
152. NB Journals, April 18, 1851.
London’s views were known. The bill was reserved by Lieutenant-Governor Sir Edmund Walker Head and not confirmed by London. The Assembly tried again in 1852, and this time the Legislative Council killed the measure.

Proponents of salary reductions and fee abolition without compensation argued that they were justified by the exigencies of the time and by the pressing demands from other quarters on provincial revenues. Salaries, it was said, were a “shameful extravagance,” and “[a]lmost the whole Press of New Brunswick pours forth its...condemnation of a system which has contributed in a dreadful degree to our past and present calamities.” In an April 1850 debate in the Assembly, William End, a lawyer and the member for Gloucester County, made the point that money spent on salaries could be better spent elsewhere: “[A] great portion of the distress and embarrassment of the province is fairly attributable to the fact that for many years the salaries of all our public officers...have seen some of them double, and others treble what they ever should have been, thus soaking up from the revenues those funds which ought to have been expended in relieving our crippled trade and opening up the country and rendering it fit for man, by the establishment of roads, bridges, schools and works of public utility.”

Although there was near universal support for salary reductions, two reasons, one principled and the other pragmatic, led some to initially not advocate reductions for incumbents or fee abolition without commutation. The pragmatic reason was that London would not agree to either; and that therefore, there was no point in passing such measures. The principled reason

153. Ibid., March 31, and April 1, 2, 5, 10, and 11, 1851; “An Act to Abolish the Fees Now Received by the Judges of the Supreme Court,” in Head to Grey, May 24, 1851, in ibid., January 28, 1852; and New Brunswick Reporter, April 25, 1851. There had been a previous unsuccessful attempt in 1850 to abolish fees without compensation by a private members bill: “A Bill to reduce the costs of actions in the Supreme Court.” This was passed by the Assembly but defeated in the Legislative Council: see Supreme Court Judges to Grey, July 1850, in NB Journals, March 3, 1851; NB Journals, April 15, 16, 22, and 23, 1850, and NB Council Journals, April 23, 24, and 25, 1850.

154. Grey to Carter, July 3, 1851, in Lawrence, Judges of New Brunswick, 357; Head to Grey, February 5, 1852, in NB Journals, April 4, 1853; NB Journals, January 29 and 30, February 20 and 21, and March 3 and 4, 1852; NB Council Journals, February 27 and March 3, 1852; and Grey to Head, March 12, 1852, in NB Journals, April 4, 1853.

155. Fredericton Reporter, February 16, 1849.

156. Fredericton Head Quarters, May 13, 1850.

157. Attorney-General Wilmot, who presented the future reduction bill in 1849, made this argument. He asserted that the House had the right to specify whatever salary it wanted for any office, including his own, that he did not believe in vested rights, and that “[i]f the exigencies of the country demanded the reduction of his or any other salary, he would not oppose it,” but it had been London’s “settled policy” for “the last two hundred years” not to interfere with the salaries of incumbents: Fredericton Reporter, March 3, 1849; see also
was that salaries and fees were vested rights, reinforced in the former case by the civil list agreement, and that it was wrong to interfere with them. This reflected the period’s view of office as being akin to a property right. These arguments prevailed in 1849, but fell by the wayside a year later, when a majority of the Executive Council had come around to favor immediate reductions. By then, the majority view was that, first, nobody was above the will of the legislature, and, second, true responsible government meant that the local government should be supreme in matters of purely internal administration. Hence in the spring of 1850, on the same day that the salary reduction bill passed a third reading, a report from a committee of the Assembly asserted that “the salaries of public officers ought at all times to be subject to such modifications by the Legislature as the exigencies of the Province . . . may render necessary, irrespective of the tenure by which such Officers hold their appointments.”

Much more could be said about these arguments, but for current purposes, what matters is another aspect of the debate: the link many made to judicial independence. By the spring of 1850, it was clear that a majority were no longer persuaded by talk of vested rights or political expediency, and opponents of reductions for incumbents brought judicial independence into the equation. As Dr. William Wilson put it, such legislative measures “would place the Judiciary . . . continually under the control of the popular Assembly,” and that “would be regarded by the inhabitants of the country as one of the greatest misfortunes that could happen to them.” This had been the theme of a speech by Master of the Rolls Neville Parker, who had been allowed to address the Assembly in 1850. It was echoed by

ibid., March 9, 1849. A year later, Wilmot had changed tack, and argued that London had altered its views and would give the colony more leeway: see Fredericton Head Quarters, May 22, 1850.

158. See the speech of James Boyd, member for Charlotte County, in 1849: Fredericton Reporter, March 9, 1849. See also Dr William Wilson’s statement in April 1850 that “he could not consent to reductions which would involve a breach of public faith or violation of public contract”: Fredericton Head Quarters, May 13, 1850.

159. Head to Grey, May 1, 1850, in NB Journals, March 3, 1851.

160. John William Ritchie, reformer, Member for Saint John, and later a judge of both the New Brunswick Supreme Court and the Supreme Court of Canada, took this view in 1849, when it was the minority position (Fredericton Reporter, March 3, 1849), but by 1850, a majority of members had obviously decided that it was worth taking the fight to London.

161. NB Journals, April 25, 1850.

162. Fredericton Head Quarters, May 13, 1850. The Saint John Morning News, April 24 and 25, 1850, also carried brief reports of all the speeches made.

163. Fredericton Head Quarters, April 20, 1850. For his speech see ibid., April 26, 1850, Fredericton Head Quarters, May 13 and 22, 1850; and New Brunswick Reporter, April 26, 1850.
Conservative John Ambrose Street, Member for Northumberland and brother of Supreme Court Judge George Frederick Street, who deprecated any move that would place judicial salaries at the whim of the Assembly. The bill, he said, “would render the Judges of the land dependant for the amount of their salaries on an annual vote of the Assembly; for if they could bring in a Bill to reduce the salary of the present Chief Justice to £700 this year, what could prevent them from bringing in a Bill to reduce the same salary to £350 the following year?”

Of similar mind was Alexander Rankin, a leading businessman and a member for Northumberland, who departed from his usual reticence in the Assembly to have plenty to say on this issue. Reductions, he said, “must make the salaries of the Judiciary not permanent, but subject to be annually discussed. This must necessarily have a tendency to destroy the independence of the Bench.”

Rankin was the only member of the Executive Council to oppose the reductions for incumbents in 1850.

Independence was similarly featured when the issue came up again in 1851. John Ambrose Street, now the attorney-general (having replaced Wilmot after the latter’s elevation to the Supreme Court), insisted that the government could not press London on the question because “[t]he independence of the judiciary was a matter of the utmost importance” and that independence would be lost if the judges “were to be ... subjected to reductions, and to depend on the annual vote of that house for their salaries.”

Bliss Botsford, son of former Supreme Court judge William Botsford, who disliked judicial fees and was willing to abolish them in 1851, was of the same mind. Maintaining salaries was “the only safe principle for preserving the independence of judges.” Interestingly Botsford was the sponsor of the only New Brunswick bill on good behavior appointments introduced in this period, in January 1852, a bill that went nowhere.

Proponents of reductions for incumbents denied the connection to independence. Wilmot, when he was still attorney-general, insisted that he was...
as much concerned about “the importance of an independent judiciary as any hon gentleman in or out of that House,” and that the government “felt as great an interest in rendering the judges of the land independent of popular pressure on the one hand, and Executive influence on the other, as could possibly be felt.” An independent judiciary, he said, “was essential to the well being of every civilized community,” but he denied that the reduction would affect independence, which rested principally on the fact that British-descended people cherished it and would not allow it to be interfered with. Moreover, the integrity of the judges could be relied on; he was “well satisfied that the present judges would do their duty as well and as faithfully on the reduced salaries as they now performed them for their present incomes.”

The judges themselves apparently had no such confidence in their own integrity, and entered a protest against the salary reduction bill of 1850. They gave many reasons for opposing it, including its effect on judicial independence. It “will most seriously affect the independence of the judicial office . . . by making the income of a judge the subject of annual or constant discussion in the Legislature, and virtually dependent on the uncertain temper of a House of Assembly.” Their assertions about that “uncertain temper” are redolent of those used by the Nova Scotia judges against removal by joint address: “It frequently happens that the Members of Assembly are themselves suitors in the Courts of Justice, or the relations of suitors; and will the dependence of the judges on their votes . . . be likely to promote that independence of those who are entrusted with the administration of justice, which has ever been considered a paramount object in all parts of the world within the pale of the British Constitution.” They asserted that financial independence meant more than formal constitutional independence: “of what avail is a tenure of office, substantially during good behavior, . . . if the income from it can at any time be wholly or partially taken away?”

What ultimately mattered was London’s attitude, and the home government was firmly opposed to reductions. Not only were judicial salary reductions a “breach of public faith,” they were also a violation of judicial independence. Grey insisted on the equal importance of financial independence: “The independence of those officers of all sinister influence, is one of the chief safeguards of every free constitution. Their independence of the crown has long ago been secured by the established policy of this country, both at home and in all Her Colonies. But their independence of

169. Fredericton Head Quarters, May 22, 1850.
170. Supreme Court Judges and Master of the Rolls to Head, July 1850, in Head to Grey, August 2, 1850, in NB Journals, March 3, 1851.
popular influence . . . can only be secured . . . by maintaining the principle
that their Salaries shall be fixed by permanent appropriation, not provided
for by annual votes.” He took the same view on fee abolition. It could be
achieved only if accompanied by commutation and with the consent of the
judges.171 In taking this approach to New Brunswick in the 1850s, and to
the Canadas a decade and a half earlier, Britain was enforcing a consistent
imperial judicial policy. A number of disputes over judicial salaries arose
in the Australian colonies at midcentury, and London was adamant that in-
cumbents’ salaries there could never be reduced.172

As has been discussed, the salary issue did not immediately go away,
although it was temporarily eclipsed in public debate in 1851 by Head’s
appointment, without the agreement of the executive council, of James
Carter as chief justice.173 It was accepted locally by 1851 that London
would never consent to reductions for incumbents. Salaries could be re-
duced, opined one newspaper, but “when changes became necessary
they would be made prospectively, in order that the minds of Judges
might be relieved from all anxiety about the emoluments, while in the dis-
charge of their onerous duties.”174 From 1851 on, the efforts of those who
wished to cut back the judges’ emoluments focused on fee abolition, not
salary reductions. London’s attitude was very similar: no abolition without
a commutation agreement with the judges. It made this assertion based on
the idea that fees were an established right, not that they engaged judicial
independence.175 Two of the judges’ own protests were similarly
phrased,176 but George Frederick Street did make independence arguments
when he un-judicially waded into the debate. Fee abolition without com-
ensation would “depreciate the present high standing of our Supreme
Court, and shake that public confidence in the integrity and ability of the

171. Grey to Head, November 25, 1850, in ibid., February 15, 1851.
172. See, for example, An Act for the Better Government of Her Majesty’s Australian
Colonies, UK, 1850, 13 & 14 Vict., c. 59, which gave colonial legislatures the power to
set judicial salaries. Section 18 of that Act partly derogated from that power by prohibiting
reductions in salary for incumbents.
173. See MacNutt, New Brunswick, 341–42; and NB Journals, April 9, 12 and 25, 1851.
The problem was not so much the appointment of Carter, but his replacement as a puisne
judge by Wilmot, at a time when the Executive Council was considering a proposal to
achieve retrenchment by reducing the Supreme Court bench from four to three judges.
174. Gleaner, May 5, 1851. See also Courier, March 3, 1851.
175. Grey to Head, March 12, 1852, in NB Journals, April 4, 1853.
176. See Carter to Grey, May 8, 1851, and Wilmot to Grey, May 9, 1851, in ibid., January
28, 1852. All were forwarded in Head to Grey, May 24, 1851, ibid. Ironically Wilmot, who
had supported salary reductions for incumbents as attorney-general, succinctly noted on this
occasion that fee abolition would “cause a very considerable diminution from my present
income, to which I cannot give my consent.”
judges,” which was “necessary to the satisfactory administration of justice.” Any reduction in remuneration would make it harder to find people “duly qualified with integrity of character, independence of mind, and legal acquirements, to fill so important an office.” “The judges of the land,” he went on, “should never be left at the mercy of a popular Assembly.” He gave his own case as an example. Prior to his elevation to the bench he had had a “large and lucrative” private practice, and he would not have taken the job of judge for a lower remuneration. As it was, his salary, even with the fees, is “barely sufficient to meet the ordinary expenses of a family in this place, living in the rank a Judge of the Supreme Court is expected to maintain.”177 By 1853, fee abolition without commutation had gone the same way as salary reductions for incumbents.178

The movement for judicial salary reductions was short lived, and lost impetus as economic conditions improved with American trade reciprocity and railway building, but the few years in which judicial salaries were central to political debates in New Brunswick highlights the multiple meanings of judicial independence. In the eyes of those without a comfortable seat on the bench, judges had too much independence from the vicissitudes of the trade cycle. Conversely, neither the judges themselves nor anybody else seemed to care much about the great constitutional principle that had emerged from the final defeat of the Stuarts, and which had so engaged people in the Canadas in the 1830s. The judges were content to be vassals of the crown, and feared above all the perils of democratic cost cutting, just as their Nova Scotian counterparts worried about the danger that democratic involvement in judicial removal posed to their tenure.

### Conclusion

Good behavior appointments came to New Brunswick largely by default, when in 1867 several British North American colonies united to form the Dominion of Canada. Prior to that, judicial tenure was simply not important to New Brunswickers. They cared so little about the formal aspects of judicial independence that no serious proposal for a change in tenure was ever made. What mattered were public salaries. They mattered to colonial politicians dealing with a financial crisis, and they mattered to

177. George Street to Grey, May 5, 1851, in *NB Journals*, January 28, 1852.
178. In March 1853, John Thomas Williston, Member for Northumberland, brought in a bill for the commutation of the fees. Discussion occurred on a number of days, and included a request for documents regarding the fees, which was agreed to. Nothing appears thereafter in 1853. See *NB Journals*, March 21, 22, 26, 30, and 31, and April 4, 1853.
London, which saw retrenchment in salaries as an assault on judicial independence. That hallowed phrase, “judicial independence” therefore turned out to mean largely “financial independence” in New Brunswick.

That it had so limited a meaning in one colony provides a marked contrast to the other three principal British North American colonies, in which it had multiple and often overlapping meanings. Judicial independence was a portmanteau, which incorporated good behavior appointments, the separation of powers, financial security, and the question of how, if judges were not to be subject to arbitrary dismissal by the crown, they could be removed if they genuinely did misbehave. These different aspects of judicial independence varied in their importance from time to time and from place to place. Whereas Upper Canadians, for example, were consumed by the question of judicial dismissal in the 1820s and early 1830s, with reformers adamant that the colony needed a local Act of Settlement, Nova Scotians also debated dismissal in the late 1840s, but from a very different perspective, with the judges themselves strenuously opposed to the new arrangements. As with many aspects of nineteenth century colonial Canadian legal and political history, regional differences, especially the ethnic and linguistic conflicts in Quebec, are crucial to our understanding of major historical processes.