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Philip Girard*

The Supreme Court of Nova
Scotia, Responsible Government,
and the Quest for Legitimacy,
1850–1920**

The domination of the judicial appointment process by obvious considerations of partisan political patronage led to a noticeable diminution in the legitimacy of the Supreme Court of Nova Scotia after the achievement of responsible government. Slowly, however, the court began to repair its tarnished image. This paper examines the strategies of legitimation employed by the court and the legal profession in the post-1880 period. These centred on three major themes: the new professionalism, the new history of the Supreme Court, and the new imperialism of the fin-de-siècle. By the death of Chief Justice Sir Wallace Graham in 1917, the court had re-established its role as a pre-eminent provincial institution.

Wallace Graham was one of the ablest judges ever to sit on the Supreme Court of Nova Scotia. Born of humble Baptist parentage in Antigonish in 1848, the year Nova Scotia's first Reform government took office, he was truly one of the sons of responsible government: that group of non-élite, non-Halifax, non-Anglican men who left their stamp on the province's political order after mid-century. Appointed to the bench in 1889, he sat for twenty-six years as puisne judge and judge in equity before being named chief justice in 1915. Sadly, he occupied the post for only two years, dying suddenly in office in October 1917. Members of the Nova Scotia Barristers' Society attended his funeral "in a body", and wore mourning for a month afterward as a mark of respect. Graham was probably the last chief justice to receive this tribute.¹

It is a curious observation made in one of Graham's obituaries that encapsulates the theme of this paper. The late chief justice, wrote the *Halifax Morning Chronicle*, "[w]hile democratic in his tastes . . . was ever faithful to the customs and traditions of the Supreme Court and

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1. All biographical information on Graham comes from my entry on him in vol. XIV of the *Dictionary of Canadian Biography* [hereinafter DCB] (forthcoming), unless otherwise noted. "Baptist parentage" is slightly misleading: according to family tradition (see *infra* note 94) Graham's father was Presbyterian and his mother a Baptist, and they raised half their children in each faith. Graham himself remained a lifelong Baptist.

insistent upon all the observances that they called for.”² In this attempt to smooth over the democratic impulses of Graham (and his generation) with a reassuring reference to his respect for custom and tradition, we find a useful metaphor for Nova Scotians’ ambivalent reaction to seventy years of responsible government, and a clue to the ideological tools which were adopted to legitimate the existing legal and political order.

Responsible government has, it seems, been rediscovered as a topic of historical inquiry. After decades of concern with post-1867 nation-building, and subsequently with the relationship between regional identities and national identity, Canadian historians have begun to look with renewed interest at the consequences of the achievement of British North American home rule at mid-century. The United Canadas, that unique constitutional condominium, has attracted renewed interest as historians have become aware of the extent to which the development of infrastructures of public administration, transportation, communications and public education was crucial for post-Confederation history.³ Scholars interested in constitutional law and history have begun to analyze more closely the ideology and political culture of responsible government, and one has concluded that it has given Canadians the worst of both worlds, a political order lacking “both British self-restraint and American institutional checks.”⁴

Looking at lawyers, judges and legal culture is not the only way to examine the impact of responsible government in British North American society, but it is an important way. By rhetoric and example, lawyers and judges contributed to the wider political culture, and were in turn influenced by it. This paper looks at the impact of responsible government on the Supreme Court of Nova Scotia and at the methods which were adopted to deal with the legitimacy problems engendered by the events of 1848.

2. (13 October 1917).

3. A. Greer & I. Radforth, eds., *Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada* (Toronto: University of Toronto Press, 1992).

4. P. Romney, “From the Rule of Law to Responsible Government: Ontario Political Culture and the Origins of Canadian Statism” *Canadian Historical Association Historical Papers 1988*, 86 at 117; and “From Constitutionalism to Legalism: Trial by Jury, Responsible Government, and the Rule of Law in the Canadian Political Culture” (1989) 7 *Law and History Review* 121. See also P.A. Buckner, *The Transition to Responsible Government: British Policy in British North America, 1815–1850* (Westport, Conn.: Greenwood Press, 1985), and his “Whatever happened to the British Empire” (1993) 4 *Journal of the Canadian Historical Association* 3. G.B. Baker, “Law Practice and Statecraft in Mid-Nineteenth-Century Montreal: The Torrance-Morris Firm, 1848 to 1868” in C. Wilton, ed., *Essays in the History of Canadian Law*, vol. IV, *Beyond the Law: Lawyers and Business in Canada, 1830 to 1930* (Toronto: Osgoode Society, 1990) 45 provides a particularly suggestive look at the role of an influential firm in the construction of the post-Rebellion Québec state.

From the point of view of the Maritime élites, the achievement of responsible government represented a substantial and unsettling discontinuity. The traditional pillars of ancestral and imperial connection had been severely shaken, and a new class of men, often from non-élite, non-metropolitan and non-Anglican backgrounds, stood ready to remake the colonies in their own image.⁵ To the extent that one of the promises of responsible government was precisely to open up the machinery of the state to such men, it may be deemed a success, perhaps even more of a success in the Maritimes than in other parts of Canada. Yet the calibre of that leadership in the legal and political spheres in the first thirty or forty years of responsible government has often been seen as disappointing by historians.⁶ One does not have to agree with the standard account of nineteenth-century Maritime politics as peculiarly concerned with patronage and totally lacking in vision in order to observe that there was nonetheless a certain failure of leadership in the decades after 1848. A debate over the quality of political leadership in the field of provincial economic development is ongoing.⁷ In the legal field, one must set against a certain number of successful law reform endeavours⁸ the lack of initiative in the office of Attorney General,⁹ the poor quality of judicial appointments,¹⁰ and the weakness of the Nova Scotia bar during this period.¹¹

With regard to recruitment to the judiciary, historians have noted the appalling quality of many appointments to the Supreme Court of Nova

5. This point is well explored in D.G. Bell, "Judicial Crisis in Post-Confederation New Brunswick" (1991) 20 Man. L.J. 181, also found in D. Gibson & W.W. Pue, eds., *Glimpses of Canadian Legal History* (Winnipeg: Legal Research Institute, 1991) 189. This paper owes much to the themes raised by Professor Bell in that article.

6. J.M. Beck, *Politics of Nova Scotia*, vol. 1 (Tantallon, N.S.: Four East, 1985) at 131–56; P.B. Waite, *The Man from Halifax: Sir John Thompson, Prime Minister* (Toronto: University of Toronto Press, 1985) at 84–90.

7. P.A. Buckner, "The 1860s: An End and a Beginning" in P.A. Buckner & J.G. Reid, eds., *The Atlantic Region to Confederation: A History* (Toronto: University of Toronto Press, 1994) 360 at 366–67.

8. P. Girard, "Married Women's Property, Chancery Abolition, and Insolvency Law: Law Reform in Nova Scotia, 1820–1867" in P. Girard & J. Phillips, eds., *Essays in the History of Canadian Law*, vol. III, *Nova Scotia* (Toronto: Osgoode Society, 1990), 80.

9. J.M. Beck, "Rise and Fall of Nova Scotia's Attorney General: 1749–1983" in P.B. Waite et al., eds., *Law in a Colonial Society: The Nova Scotia Experience* (Toronto: Carswell, 1984) 125.

10. Waite, *supra* note 6 at 52–53, 117–18; J.M. Beck, "Young, Sir William", DCB, vol. XI (Toronto: University of Toronto Press, 1982) 943; J.M. Beck, *The Government of Nova Scotia* (Toronto: University of Toronto Press, 1957) at 287–88.

11. P. Girard, "The Roots of a Professional Renaissance: Lawyers in Nova Scotia, 1850–1910" (1991) 20 Man. L.J. 148.

Scotia in the first three or four decades after responsible government.¹² Yet, by the early twentieth century the court and its judges had regained a certain credibility and status in provincial society. This article argues that the central dilemma of the court was overcoming the trauma of responsible government, and investigates the means by which this feat was accomplished. Some appreciation of the pre-responsible government system is necessary to understand what this “trauma” entailed.

Prior to 1848, the chief justice was an imperial appointee, paid from the imperial purse, while the “assistant judges” were appointed locally, subject to confirmation in London.¹³ Their salaries were voted by the Assembly and their offices held at the royal pleasure. Judicial appointments tended to be made from within the professional-office-holding élite, who benefitted from a certain amount of automatic prestige in a deferential society. There was no party system as such, with the result that judicial appointments were seen, in some sense, as rewards for public service rather than partisan activity. When William Blowers Bliss was appointed to the bench in 1834, Joseph Howe was prepared to overlook the “stain of toryism upon him” because Bliss’s conduct in the Assembly was “manly and consistent throughout, [and] aided by his eloquence and varied knowledge.”¹⁴ Indeed, after a certain amount of discontent with the state of the judicature in the eighteenth century, culminating in the “judges’ affair” of 1787–90,¹⁵ it is difficult to find any substantial complaint about the quality or competence of the judges before the 1830s. There was always grumbling about the expense of the judicial establishment, but that is another matter.

The first serious concern over what might appear to be an issue of judicial ethics arose over Charles Fairbanks’ refusal to vacate his seat in the Assembly after being named Master of the Rolls in 1834.¹⁶ Yet this controversy, which resulted in Fairbanks’ exclusion from the Assembly

12. *Supra* note 10. Appointments after 1867 were of course made by the federal government, but on the responsible government model: i.e., judicial appointments favoured men who had supported the party in power. The lack of clear distinction between the federal and provincial wings of political parties means that Confederation is not a crucial watershed for my purposes. On the previous political careers of Supreme Court of Nova Scotia judges, see C. Greco, “The Superior Court Judiciary of Nova Scotia, 1754–1900: A Collective Biography” in Girard & Phillips, eds., *supra* note 8, 42.

13. See generally Greco, *ibid.* at 44.

14. (Halifax) *Novascotian* (16 April 1834).

15. A brief account of this imbroglio may be found in Beck, *Politics of Nova Scotia*, *supra* n. 6 at 46–50. For a full study see J.B. Cahill, “The Judges’ Affair: An Eighteenth-Century Nova Scotia Cause Célèbre” (unpublished monograph).

16. D.A. Sutherland, “Fairbanks, Charles Rufus” DCB, vol. VII (Toronto: University of Toronto Press, 1988) 278 at 279.

by statute, did not really put the legitimacy of the judiciary as such into question.¹⁷ It was generated by a quite recent perception that it was inappropriate to vest legislative functions in judges. When confined to their “proper sphere”, the legitimacy of the judges was not seriously in doubt.¹⁸

Responsible government changed this state of affairs in several ways. *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*¹⁹ directed that the tenure of the judges should, henceforth, be “during their good behaviour.” *An Act to commute the Crown Revenues of Nova-Scotia, and to provide for the Civil List thereof*²⁰ required that the salaries of all the judges, including the chief justice, be paid by the province. Most importantly, the new political system inaugurated in 1848 meant that neither the governor nor the Secretary of State in London could decline to appoint a judicial nominee recommended by a government holding a majority of seats in the House of Assembly.

It is true that 1848 did not result in a dramatic change in the formal appointment process for assistant judges. They had been in substance “local” appointments before, and local appointments they remained after the achievement of responsible government. Yet the environment in which they were made had changed. Colonial society was becoming less deferential after mid-century, more willing to criticize official pronouncements and appointments.²¹ The new, more obviously political, nature of the appointment process also meant that the veil of imperial mystique which had shrouded the pre-1848 appointments was forever rent. Even relatively well-informed observers such as Joseph Howe had not been clear on the mechanics of the appointments process for assistant judges under the old system.²² After 1848, the conclusive influence of partisan politics was laid bare for all to see.

Of the first ten appointments to the court after the achievement of responsible government, nine went to men who had sat in the House of

17. *An Act respecting the Offices of Master of the Rolls and Judge of the Court of Vice-Admiralty*, S.N.S. 1834–35, c. 26.

18. In 1830 the Colonial Office secretly instructed the Lieutenant Governor not to admit any more puisne judges to the Council: Beck, *Government of Nova Scotia*, *supra* note 10 at 71. All judges were excluded from the Council in 1838.

19. S.N.S. 1848, c. 21.

20. S.N.S. 1848, c. 24.

21. A good example of this is the abolition of the Court of Chancery and the forced resignation of the Master of the Rolls: Girard, *supra* note 8.

22. In the (Halifax) *Novascotian* (16 April 1834), Howe observed, “Of the legal etiquette which is understood to govern such selections we know but little.”

Assembly or the Legislative Council.²³ The full implications of responsible government became clear in 1860 when the Liberal politician William Young appointed himself Chief Justice since he was lucky enough to occupy the premier's office when the incumbent, Sir Brenton Halliburton, died in 1860.²⁴ The news was greeted with outrage, and the court's legitimacy suffered a blow from which it would take decades to recover. The appointment of two distinguished candidates, James William Johnston (1864–1873) and John William Ritchie (1870–1882), could not overcome the image problem which afflicted the court. Johnston's appointment provides a good example of the different light in which judges were viewed after 1848. Had Johnston been appointed before 1848, it is likely that his nomination would have been greeted with acclaim as a reward for his long record of public service. His actual appointment in 1864 was greeted with suspicion and derision, as the culmination of his long rivalry with Young.²⁵

The poor public image of the Young court (1860–1881) has been documented with sufficient frequency by historians that it does not need further elaboration here.²⁶ The appointment of James McDonald (1881–1904) as Young's successor appeared to offer nothing that would disturb that image.²⁷ McDonald was John A. Macdonald's Attorney General in 1881 and had had the unenviable task of defending the government during the Pacific Scandal; his appointment thus followed the usual conventions of patronage. He had a certain reputation as a litigator in Nova Scotia, but as a judge he left little mark. Yet it was during his tenure as chief justice (though owing nothing to him) that the rehabilitation of the Supreme Court of Nova Scotia began to occur. The attempt to restore the image of the court involved three main strategies: a greater insistence on the professional attainments of aspirant judges and a slow suppression of the more obvious manifestations of patronage; the creation of an "official"

23. The most convenient place to follow the careers of Supreme Court judges is *The Supreme Court of Nova Scotia and Its Judges 1754–1978* (Halifax: Nova Scotia Barristers' Society, 1978), which is a more recent edition of a work by R.V. Harris, *Catalogue of Portraits of The Judges of the Supreme Court of Nova Scotia and Other Portraits*, originally published in 1929. The work contains a number of inaccuracies, however, and information is best verified from another source such as *The Canadian Parliamentary Guide, 1862–1912* [microform] (Toronto: Micromedia, 1973) or S.B. Elliott, *The Legislative Assembly of Nova Scotia, 1758–1983: a biographical directory* (Halifax: Province of Nova Scotia, 1984).

24. Beck, DCB, *supra* note 10 at 948.

25. (Halifax) *Citizen* (21 April 1864).

26. See *supra* note 10.

27. I am grateful to Professor P.B. Waite for allowing me to peruse his entry on Chief Justice McDonald for the forthcoming vol. XIV of the DCB in manuscript form. I have relied on it for the information in this paragraph.

history for the court and its judges; and an emphasis on imperial linkages in the form of knighthoods, lifestyle, and imagery.

I. *Strategies of Legitimation*

1. *The New Professionalism*

I have examined elsewhere the “professional renaissance” which characterized the Nova Scotia bar in the last quarter of the nineteenth century. A vigorous movement of educational reform, coupled with the growing utility of lawyers to business corporations during Nova Scotia’s industrial revolution, went far to enhance the prestige of the legal profession.²⁸ To many lawyers, the condition of the Supreme Court was a reproach to the ideals of the new professionalism. Wallace Graham was merciless in his descriptions of judicial incompetence, going so far as to label Alexander James “a hindrance to the administration of justice.”²⁹ The correspondence of Graham and John Thompson, two of the key figures in the spread of newer professional ideals and practices, reveals their preoccupation with improving the quality of the bench.³⁰

The calibre of men appointed subsequent to McDonald did mark a new departure. The appointment of Samuel Rigby (1881–86) was widely applauded, although his premature death cut short any lasting contribution he might have made.³¹ John Thompson himself occupied the bench for three years before being called to Ottawa (1882–85).³² When named Minister of Justice, he was in a position to do something about the state of the Supreme Court of Nova Scotia. He filled his own vacant spot with J. Norman Ritchie (1885–1904), who was perhaps not as distinguished as

28. Girard, *supra* note 11.

29. W. Graham to J. Thompson (24 January 1888), Sir John Thompson Papers, National Archives of Canada, no. 7138 [hereinafter Thompson Papers]. The full quote reads “I think Judge James has about broken down because he cannot work. He says . . . that Drs. Parker and Cunningham have forbidden him from working on account of Diabetes . . . He announced this from the bench and he says he is going to get 6 months leave and go south and put in the time until the salaries and superannuation allowances are increased. I do not know much about his diabetes failings but I think the appeals from him which are being heard this term (four in 1 suit with both sides appealing from 1 order) indicate a hindrance to the administration of justice which even the doctors cannot remedy . . . The Doctors getting him to stop work is very rich — he has not had a dozen cases before him and has not finally disposed of half a dozen during the whole year and everything appealable has been appealed.” James had been one of Mackenzie’s appointments in 1877.

30. *Ibid.*, nos. 3249, 3713.

31. Even Benjamin Russell, a Liberal (Rigby was a Conservative), attested to Rigby’s competence: *Autobiography of Benjamin Russell* (Halifax: Royal Print & Litho., 1932) at 290–91.

32. His judicial career is examined in Waite, *supra* note 11 at 116–33.

his brother John W. Ritchie but a sound judge nonetheless. The next two vacancies after his arrival in Ottawa Thompson filled with men who would both in turn become Chief Justice: Charles Townshend (1887–1915), a long-time political colleague who had served as both M.L.A. and M.P. for Cumberland; and Wallace Graham (1889–1917), a partner in Thompson's old law firm.

Both these men will play larger roles later in this paper, but for the moment it will suffice to observe that Townshend was perhaps not a very effective politician but he was an excellent lawyer and a good candidate for a bench in need of reinvigoration. Graham had resisted the offer of his former law partner, Sir John Thompson, to come to Ottawa as deputy minister of justice, preferring to remain in Halifax and await promotion to the bench.³³ When Mr. Justice James died in the fall of 1889, Thompson lost no time in appointing Graham to the vacancy. Graham's stature was such that, although known by that point as a Conservative, even the Liberal Halifax *Morning Chronicle* looked forward to a "large degree of judicial impartiality"³⁴ from him. Thompson's next appointment, that of Nicholas Meagher (1890–1916), was less well received, but it is difficult to assess Meagher fairly since his Catholicism meant he was often the target of adverse comment. Hugh Henry (1893–1904) was Thompson's final appointment, and a fine example of the new professionalism. Henry had spent a year at Harvard Law School, and taught medical jurisprudence at the Halifax Medical College and shipping law at the new Dalhousie Law School. Throughout the reforming 1880s he had been actively involved in the governance of the Nova Scotia Barristers' Society, serving as president from 1889 to 1893. Of the seven appointments which followed that of Chief Justice McDonald, only two (Thompson himself and Townshend) placed on the court men who had sat in the House of Assembly. This was a noticeable departure from previous practice.³⁵

The Laurier government reverted to the earlier pattern, which was probably inevitable given the long period during which the Liberals had been out of power. Four of Sir Wilfrid's five appointees had sat either in

33. W. Graham to J. Thompson (30 September 1887), Thompson Papers, *supra* note 29, no. 6702.

34. (25 September 1889). Graham had been known as a Liberal in the 1870s. When Sir John A. Macdonald's government decided that Graham's firm could keep the appointment as agent to the Minister of Justice after Thompson went to the bench, this action provoked an angry petition from Conservative Halifax lawyers who alleged that Graham was a Liberal. Graham soon gravitated to the Conservatives, however, and was identified as one when he was appointed to the bench: *supra* note 1.

35. For sources containing the information in this paragraph, see *supra* note 23.

the House of Assembly, the House of Commons or both, while the fifth, Duncan Cameron Fraser (1904–1906), had sat in the province’s upper house for four years before representing Guysborough in the House of Commons.³⁶ The Laurier judges were not as distinguished a group as the Conservative appointees that preceded them, but even Laurier was compelled to recognize the increased emphasis on professional credentials. The name of Benjamin Russell (1904–1924) was synonymous with Dalhousie Law School, where he would continue teaching until he was eighty years old. James Wilberforce Longley (1905–1922) had attended Osgoode Hall after earning an M.A. degree from Acadia, and had served as Nova Scotia’s Attorney General for nearly twenty years. Arthur Drysdale (1907–1921) had only been Attorney-General for two years at his elevation, but he had been president of the Nova Scotia Barristers’ Society in 1904.

Counterbalancing to some extent this renewed emphasis on elective office as a condition precedent to judicial preferment was the treatment by the Laurier government of the office of chief justice. Sir Wilfrid resisted the temptation to repeat Sir John A. Macdonald’s action when James McDonald resigned as Chief Justice in 1904; he promoted the senior judge, Robert Weatherbe (admittedly, a Liberal appointee (1878) from the Mackenzie era), to the post. Upon Weatherbe’s retirement in 1907 Sir Wilfrid again promoted the senior puisne judge, Charles Townshend, in spite of his Conservative background.³⁷ The pattern of promoting the senior puisne would not hold under Borden, but a chief

36. A.C. Dunlop, “Fraser, Duncan Cameron” DCB, vol. XIII (Toronto: University of Toronto Press, 1994) 356 at 356–57. Fraser was not at all suited to the bench, and resigned after two years as a result of complaints about his performance. He was then appointed lieutenant governor, a position which he held until his death in 1910.

Benjamin Russell sat in the House of Commons from 1896 to 1904. James Wilberforce Longley represented Annapolis County in the House of Assembly from 1882 to 1905, while Arthur Drysdale sat for Hants County from 1891 to 1907. Frederick Andrew Lawrence sat in the House of Assembly from 1886 to 1904 and in the House of Commons from 1904 to 1907.

37. Although Wallace Graham was appointed two years after Townshend, there is a possible argument that he was “senior” in law if not in time. As judge in equity, he had precedence next after the chief justice according to the statute creating the office: *An Act to provide for the Appointment of an Equity Judge*, S.N.S. 1864, c. 10.

E.M. Macdonald, *Recollections Political and Personal* (Toronto: Ryerson Press, 1938) at 128–29 states that Laurier was receiving conflicting advice from his two Nova Scotia ministers, W.S. Fielding and Sir Frederick Borden. Fielding wanted Arthur Drysdale to be appointed chief justice, with Frederick Lawrence named to the vacancy. Borden preferred the promotion of Townshend and the elevation of W.E. Roscoe to the vacancy. Macdonald reports that Laurier “was a strong believer in the wisdom of promoting the senior Judge on a Court to the position of Chief Justice when a vacancy occurred, provided that there was no question about his qualifications.” Another vacancy that year enabled Laurier to appoint both Drysdale and Lawrence as puisne judges that year, but Roscoe never did get his appointment.

justice would not be parachuted on to the court again until 1973.³⁸ In refusing to treat the office of chief justice as just another patronage plum, the governments of Laurier and his successors were deferring to broader societal tendencies favouring professional hierarchies, as well as affording a greater degree of autonomy to the judicial branch.

The Borden years saw a return to the pattern which the Conservatives had followed after 1881. All of his four appointees were politically active but none had held elected office at the provincial or federal level. They held impressive professional credentials: all but one (Harris) held a university law degree at a time when they were quite uncommon; and all but one (Chisholm) had been president of the Nova Scotia Barristers' Society. James J. Ritchie (1912–1925) had received a Harvard LL.B. He was recognized as one of the best lawyers of his day, but his three forays into electoral politics had all proved unsuccessful.³⁹ Robert E. Harris (1915–1931) was an enormously successful corporate lawyer who had served as president of the Nova Scotia Steel and Coal Company and Eastern Trust, among other companies.⁴⁰ Joseph A. Chisholm (1916–1950) was in the second class to graduate from Dalhousie Law School (1886). He was the first Dalhousie law alumnus to sit on the Supreme Court bench, but since his appointment every member of the court but one has been one until very recent times.⁴¹ Chisholm did hold elected office, serving as mayor of Halifax from 1909 to 1911, but the municipal arena was not officially identified with partisan politics. Borden's last appointee, Humphrey Mellish (1918–1937), had graduated from Dalhousie in 1890 and practised law with a prominent corporate firm, Drysdale and McInnes.

The new professionalism became an important factor in Supreme Court appointments under the Conservatives between 1881 and 1896, declined somewhat in significance during the Laurier years, but was confirmed as a dominant factor in the appointment process under Borden.

38. The next chief justice, Robert Harris, had only been on the bench three years and was the second most junior judge at the time of his elevation. Chisholm was the senior judge when appointed chief justice in 1931. His successor as chief justice, however, the Rt. Hon. J.L. Ilesley, had been on the court less than a year when promoted to the top job in 1950.

39. Ritchie had contested the Halifax seat in the House of Commons and seats in Shelburne and Queens for the House of Assembly: H.J. Morgan, ed., *The Canadian Men and Women of the Time*, 2d ed. (Toronto: William Briggs, 1912) at 944. The high opinion of Ritchie's talents is expressed by R.H. Graham, Public Archives of Nova Scotia [hereinafter PANS], MG 100, vol. 213, no. 42.

40. Harris's career as a corporate lawyer is examined in G.P. Marchildon, "International Corporate Law from a Maritime Base: The Halifax Firm of Harris, Henry, and Cahan" in Wilton, ed., *supra* note 4, 201 at 206–227.

41. The one exception was Daniel Duncan McKenzie, who was appointed in 1923 and died in 1927.

Political activity was still important and known by the public to be important, but a new layer of legitimacy was being added to the court in ensuring that its judges had received the most advanced type of professional education available. What is striking, too, under Borden in particular, is the recruitment of corporate lawyers to the bench.⁴² During this formative era for the private business corporation and corporate law in eastern Canada, corporate lawyers were perceived as being at the “cutting edge” of law and business, and in return they were accorded an elevated status commensurate with that role. Borden himself was the best example of the doors which might be opened by a successful career in corporate law. The translation to the bench of men like him could only assist in rehabilitating the image of the court.

2. *The New History*

Better appointments alone could only work slowly to restore the court’s fallen prestige, since some of the older appointees would continue to serve for many years. A more direct strategy of legitimation was undertaken late in the century, in the form of an outpouring of writing on the history of the Supreme Court and its judges. Much of this was accomplished by Charles Townshend, who was that rare creature, a scion of the pre-responsible government élite who managed to play by the new rules and succeed. A colleague of John Thompson in provincial politics from 1878 to 1884, he then served as an M.P. until his appointment to the bench in 1887. His maternal grandfather was Alexander Stewart, the last Master of the Rolls in the province, whose court and judgeship were abolished out from under him by William Young’s Reform administration in 1855. Yet neither Townshend’s ancestry nor his legal talent would have secured him a position on the bench without his political connections, as he was fully aware. He wrote to John Thompson in 1882: “My tastes and ambition have been to excel in the profession [;] outside of it — for politics I care nothing and only went into them with a view to the Bench.”⁴³ Townshend remained on the bench for twenty-eight years, the last eight as chief justice, and through his extensive historical writings we may think of him as the court’s chief ideologist during this period.

The reading and writing of history enjoyed a surge in popularity in the *fin-de-siècle* Maritimes, as it did across Canada. As the region’s industrial revolution changed the face of Nova Scotia and New Brunswick in

42. James Ritchie, while not a corporate lawyer on the model of Harris or Mellish, was nonetheless well known for his involvement with corporate clients.

43. C. Townshend to J. Thompson (11 July 1882), Thompson Papers, *supra* note 29, no. 2867.

particular, it was inevitable that people would begin to turn to the past as a source of nostalgia, (supposed) stability, or both. The Nova Scotia Historical Society was founded in 1877 and the New Brunswick Historical Society in the following year, both at the instigation of a radical Halifax lawyer, John Thomas Bulmer.⁴⁴ Bulmer did not find much time for writing but, as self-appointed “national” librarian of the Maritimes, he managed to collect and preserve an impressive array of regional imprints for other historians to use. His progressive political views remind us that this renewed interest in history had some general appeal and was not just the preserve of a conservative élite. However, the actual writing of history by judges and lawyers during this period was characterized by a strong sense of nostalgia for the pre-responsible government days and a desire to justify contemporary legal and judicial institutions by linking them to the more distant past.⁴⁵

Before the rise of professional historians in the twentieth century, lawyers and judges were among the principal architects of history in British North America. Naturally enough, legal and political matters were their primary preoccupation. For the *fin-de-siècle* lawyer-historian, however, especially those concerned with judicial biography or court history, responsible government was a thorny problem. Most often, it was simply avoided. As David Bell has pointed out in the New Brunswick context, J.W. Lawrence, in *The Judges of New Brunswick and their Times*,⁴⁶ chose to end his narrative in 1867 which, because of the longevity of earlier appointees, meant that he did not have to consider any appointments to the New Brunswick Supreme Court during the pre-Confederation period of responsible government.⁴⁷ It is instructive to examine how Townshend dealt with this problem in his own work.

44. P. Girard, “‘His whole life was one of continual warfare’: John Thomas Bulmer, Lawyer, Librarian and Social Reformer” (1990) 13 Dal. L.J. 376 at 383.

45. Cf. P.A. Buckner, “The 1870s: Political Integration” in E.R. Forbes & D.A. Muise, eds., *The Atlantic Provinces in Confederation* (Toronto: University of Toronto Press, 1993) 48 at 70–71. Buckner states that members of these societies were drawn largely from the ranks of the older colonial elites, but in Nova Scotia at least the new responsible government men were very prominent, and lawyers and judges seem to have been the single largest occupational group represented. Between 1878 and 1904, there were only three years when the Nova Scotia Historical Society president was not a judge or a lawyer. Judges became even more prominent when the number of vice-presidents was increased to three in 1890. Between 1891 and 1920, there were only three years when no judge was a vice-president, and often there were two. The judges in question were mostly from the Supreme Court (Weatherbe, Townshend, Longley, Chisholm and Russell), but two were from the county court (A. Savary and George Patterson).

46. 2d ed. (Fredericton: Acadiensis Press, 1985). The “Introduction” by D.G. Bell has a good account of the activities of the “Saint John School” of lawyer-journalist-historians.

47. In fact, in 1865 there was a bitter controversy over the elevation, for purely political reasons, of the Anti-Confederate William Johnstone Ritchie to the position of chief justice of

Townshend turned his hand to institutional history as well as biography, writing accounts of both the Nova Scotia Chancery Court and the Supreme Court which appeared together in book form in the year 1900.⁴⁸ He could hardly discuss the former without crossing the Rubicon of responsible government, and indeed he does follow the story to its ignominious close, defending his grandfather's memory all the way. Yet the first fifty years of the Supreme Court under responsible government are passed over in a single concluding page of the sixty he had devoted to the court's history. His account of the first century of the court is by no means to be shunned. Based largely on original documents rather than anecdote, it approaches professional standards of quality. Yet the controversies and disappointments of the period of responsible government were still too much alive to be discussed and, indeed, their open discussion would have interfered with Townshend's project, which was clearly an attempt to counteract the sense of decline which had come to characterize the court. This book can be seen as the first serious attempt to legitimate the Supreme Court by creating a pedigree for it.

In 1911, Townshend published both a book-length study of his grandfather Alexander Stewart⁴⁹ and read his "Memoir of the life of the Honourable William Blowers Bliss," a puisne judge of the court from 1834 to 1869, before the Nova Scotia Historical Society.⁵⁰ In 1914, there followed an account of the first Chief Justice of Nova Scotia, Jonathan Belcher, who was appointed in 1754.⁵¹ The opening paragraph of his memoir of Bliss gives a clear indication of Townshend's goals:

The pure, and efficient administration of justice is one of the most essential features of good government. The Province of Nova Scotia from the first settlement has been very fortunate in the ability, learning, and integrity of the men who from time to time have occupied seats on the Supreme Court Bench. Jonathan Belcher, the first Chief Justice, was a man of exceptional ability and force of character. He not only inaugurated with great dignity our Supreme Court, and regulated its procedure, but by his assistance, and

New Brunswick ahead of the senior, but Unionist, Lemuel Wilmot. However, Lawrence chose to ignore it: Bell, *supra* note 5, at 183.

48. This book is misleadingly entitled a *History of the Court of Chancery in Nova Scotia* (Toronto: Carswell, 1900); it also contains a "Historical Account of the Courts of Judicature in Nova Scotia" (restricted to the Inferior Court of Common Pleas and the Supreme Court). Each of these pieces had been published in instalments by Carswell in the *Canadian Law Times* 19 (1899) at 25, 58, 87, 142 and 20 (1900) at 14, 37, 74, 105. Carswell clearly cobbled the two pieces together for publication as a book without realizing that the title page for the Chancery piece was now inappropriate for the title of the book as a whole.

49. *Life of Honorable Alexander Stewart, C.B.* (Halifax?, 1911?). His life of Stewart also appeared in (1911) 15 *Nova Scotia Historical Society Collections* [hereinafter *Collections*] 1.

50. It was published in (1913) 17 *Collections* 23.

51. "Jonathan Belcher, First Chief Justice of Nova Scotia" (1914) 18 *Collections* 25.

guided by his hand the foundations of our Provincial law were laid solidly, and well.⁵²

The architectural metaphor was clearly intended to reassure the audience of the essential continuity and solidity of the Nova Scotian legal tradition, which the storms of responsible government could not shake. Yet there are indications in some of Townshend's work that he was searching for a way to integrate somehow the pre- and post-responsible government periods of the Supreme Court's history into a more satisfactory whole. The biography of his grandfather, for example, lingers over the earlier period of Stewart's career when he was counted as one of the reformers and an ally of Joseph Howe. Townshend speaks of the reform movement in generally respectful terms and tries to argue that Stewart eventually parted company with Howe on a matter of principle, and that both should be recognized for contributing to the "battle which eventually swept the Old Council of Twelve out of existence, and gave to the Province the great boon of Responsible Government."⁵³ To characterize as a "great boon" that system of government which prematurely terminated his grandfather's career must have been difficult. The more open discussion of the responsible government issue, however, is a marked and welcome departure from his silence a decade earlier.

In his last judicial biography, published in 1921, Townshend provided an account of Chief Justice James McDonald, in which he retreated from such open treatment of political matters.⁵⁴ In this cameo Townshend succeeded in sublimating his divided loyalties by creating an image of the court as timelessly dignified, competent and above reproach. McDonald becomes simply one of a series of chief justices who follow each other in an almost divinely ordained, and certainly uncontroversial, parade. In order to create this impression Townshend resorted to the invention of tradition.

For example, his reproach of McDonald for refusing to accept a knighthood, which "it has been the custom to bestow. . . on the heads of the highest Court . . . [i]n Nova Scotia for nearly a century,"⁵⁵ is clearly disingenuous. Townshend was too good a historian not to know that automatic knighthood for chief justices was a very recent practice. No chief justice before responsible government had ever received one, and Chief Justice Halliburton only received his in 1859, after twenty-six years

52. *Supra* note 50 at 23.

53. *Supra* note 49 at 1.

54. "The Honorable James McDonald" was read before the Society on 4 April 1919 and published in (1921) 20 *Collections* 139. In fairness, it should be noted that the paper was read when Townshend was 75 years old, just five years before his death.

55. *Ibid.* at 148-49.

in office and just a year before his death.⁵⁶ William Young became chief justice in 1860, but only received his knighthood in 1868 for his outspoken support of Confederation.⁵⁷ It is not clear when McDonald declined his knighthood but it is only with the knighting of Robert Weatherbe in 1906, after only a year in office, that one can speak of a knighthood being conferred as a matter of course. Townshend received his after four years and Wallace Graham after one, but Graham's successor Robert Harris never did receive one for reasons which remain unclear. In portraying the knighting of chief justices as a tradition of venerable integrity, Townshend was clearly trying to enhance the dignity of the Supreme Court by suggesting that it had a kind of imperial imprimatur.

Townshend's "official" history of the Court was complemented by R.V. Harris's *Catalogue of Portraits of the Judges of the Supreme Court of Nova Scotia and Other Portraits*, published in 1929 by the Barristers' Society. The collection was assembled by the Prothonotary of the Court, who was also the nephew of the current Chief Justice, Robert E. Harris. The catalogue is perfectly bland and ahistorical, providing the barest of biographical sketches beneath the reproduction of each portrait, enlivened very occasionally by a platitudinous quotation. It serves as the visual equivalent of Townshend's work at its most superficial, while containing none of the engagement of his work at its most rigorous. Informed "history" had become unreflective "tradition."

3. *The New Imperialism*

If Townshend's historical efforts had been confined to the pages of the *Collections* of the Nova Scotia Historical Society, one might well question their efficacy as ideology. He played a much more public role, however, in the ceremonies surrounding the "semi-tercentenary" of representative government in Nova Scotia (1758–1908).⁵⁸ This event provides a useful means to introduce the third strategy aimed at legitimating the judiciary: the emphasis on imperial linkages in public ceremonies, lifestyle and imagery. The celebration involved two major public spectacles attended by thousands of people in the capital, and generated a

56. P.R. Blakeley, "Halliburton, Sir Brenton" DCB, vol VIII (Toronto: University of Toronto Press, 1985) 354 at 357. Thomas Strange, Chief Justice from 1789 to 1797, received a knighthood after leaving the province, before holding judicial office in India.

57. Beck, DCB, *supra* note 10.

58. The term "sesquicentennial" was apparently not in common use, as the word "semi-tercentenary" was consistently used to describe the event. I will use it without quotes in deference to contemporary usage.

permanent addition to the Halifax skyline in the form of the Halifax Memorial Tower. However, to date it has been little examined by historians.

Recognition of the anniversary started off modestly enough with a motion by the Hon. John Neville Armstrong, a member of the Legislative Council, to strike a committee to supervise the erection of a commemorative tablet in the House of Assembly.⁵⁹ Mr. Justice Drysdale served as chairman of the committee and Halifax lawyer, Joseph A. Chisholm, as secretary. At some point, possibly when the committee became aware that Québec would be celebrating its tercentenary in a major way at the end of June 1908, the decision was made to make the unveiling a significant public event. Thus it was that Drysdale addressed an open-air gathering of thousands on 19 August 1908, following a parade featuring a 100-piece military band. Drysdale promised his audience a better spectacle than they had seen at Québec, and referred to “our American visitors” who had attended both ceremonies.⁶⁰

Supreme Court judges played major roles in interpreting the significance of this event to the public. Not only did Mr. Justice Drysdale deliver the introductory address and serve as master of ceremonies at the unveiling, but Chief Justice Townshend was chosen as the main speaker. Their presence in these roles is a highly significant indicator of the growing legitimacy of the court. One might have expected the logical choices for principal orator at such an event to be the premier of the province, the attorney-general or the speaker of the Assembly, yet it was the chief justice who was selected. Townshend was well known by this point for his historical research, yet it does seem odd to have the significance of the granting of representative government explained by one whose office is based on the principle of *unaccountability* to the people. Moreover, there is no doubt that the reason for this event did have to be made explicit to the public, because the achievement of representative government had never been previously celebrated in the province. As Joseph Chisholm stated in a 1913 pamphlet, no note was taken of the centenary in 1858: “our public men were probably so much engrossed at

59. Armstrong was an archetypal responsible government man. Born in 1854 in Sydney Mines, he taught school for many years, rising eventually to principal, to finance his legal apprenticeship. He was called to the bar at the late age of 38 in 1892. A Baptist and Liberal, he was also the first president of the Cape Breton Historical Society: D. Allison, *History of Nova Scotia*, vol. III (Halifax: A.W. Bowen, 1916) at 407–409.

60. The liberal *Acadian Recorder* (19 August 1908) provides the best account of Drysdale’s talk, no doubt because he was a Liberal and Laurier appointee. The spectacle to which he referred was a regatta on the Northwest Arm, followed by a huge display of fireworks.

the time in matters of merely local interest that the Imperial aspect of the matter was for the time lost sight of.”⁶¹

The “Imperial aspect” of the granting of representative government in 1758 was increasingly emphasized between 1908 and 1912, when the foundation stone of the Halifax Memorial Tower was laid. In Townshend’s 1908 address the accent was put on Britain’s benevolence in granting representative government. He denied that there was any great demand for an assembly, and did not seem unduly troubled by the opinion of the English Attorney General that various ordinances by Governor Lawrence were illegal in the absence of an assembly.⁶² For Townshend the granting of representative government was a logical consequence of Britain’s military pacification of the colony. Only with the removal or neutralization of those barriers to progress, the French and the Indians, could the usual machinery of government be implanted. With the fall of Fort Beauséjour, Louisbourg and Québec and the deportation of the Acadians, Nova Scotia “was at once relieved from the constant menace of French attack and Indian massacres, and has from that time onward prospered in peace and plenty.”⁶³ No Acadian or Micmac representatives, naturally, shared the platform with the many invited dignitaries, since the event was constructed to affirm the province’s British character.⁶⁴ For Townshend, Britain’s military might was evidence of the superiority of the race and the only sure guarantee of the survival of representative institutions. His theme was reflected in the pageantry of the occasion, which opened with two twenty-one gun salutes, one from the Citadel and one from the German warship *Freya* which was visiting Halifax.⁶⁵

It was left to Premier J.D. Hazen, himself a future Chief Justice of New Brunswick and one of the many invited speakers from other provinces, to set the event in the larger imperial context that would increasingly be

61. J.A. Chisholm, *The Halifax Memorial Tower* (Halifax: Canadian Club, 1913) at 1.

62. C.B. Fergusson, *The Origin of Representative Government in Canada* (Halifax: Committee on Bicentenary of Representative Government, 1958) at 23.

63. “Address of the Chief Justice Charles J. Townshend at the unveiling of the memorial tablet in Province House August 19, 1908”, typescript, PANS, MG 100, vol. 49, no. 14 at 4.

64. Such exclusiveness was fairly recent, and probably owed much to new ideas of “scientific” racism. The celebration of Halifax’s centenary in 1849, for example, had given prominent representation to both Micmacs and Blacks: see D.A. Sutherland, “Voluntary Societies and the Process of Middle-Class Formation in Early-Victorian Halifax, Nova Scotia” in *Journal of the Canadian Historical Association* (forthcoming), quoting the account in Halifax’s *Acadian Recorder* (9 June 1849).

65. See coverage of the event in *Halifax Herald* (20 August 1908); *Acadian Recorder* (19 August 1908); *Halifax Daily Echo* (19 August 1908). In a tragic portent of the bloody war in which both sides would soon be engulfed, the *Freya* had accidentally struck a fishing vessel in heavy fog off the LaHave Banks on 8 August, killing nine fishermen: *Morning Chronicle* (10 August 1908).

stressed in the next few years. The granting of representative government to Nova Scotia in 1758 was “entirely a new departure on the part of Britain . . . the initiation of that policy of confidence in the wisdom and loyalty of her kindred beyond the seas which has been the keystone in the arch of Britain’s colonial supremacy.”⁶⁶ He ended with a call not only for closer ties with Britain but for Maritime Union in the face of the dramatic growth of Western Canada.

The portrayal of the Nova Scotian House of Assembly as the “first Assembly in the outer Empire, as it at present stands,”⁶⁷ came to be the theme around which the campaign to construct the Halifax Memorial Tower was organized. The judges were not directly involved in this enterprise, but the great success of its imperial theme helps us to appreciate the context of their quest for imperial honours and deployment of imperial imagery. It was primarily through the efforts of the ardent imperialist Sir Sandford Fleming that the 1908 event became the spring-board for an Empire-wide campaign to erect a commemorative tower at Halifax. After failing to interest either the city or the province in this venture, Fleming sought the assistance of the Halifax chapter of the Canadian Club, formed in 1907. He offered to give the city 100 acres on the west side of the Northwest Arm upon condition that a memorial tower be erected “to be a permanent symbol of the gratitude of the people for the boon of representative institutions.”⁶⁸ The Club’s fundraising efforts were spectacularly successful: every Canadian province, the Yukon Territory, the Dominion government, and the Governments of Newfoundland, Australia, New Zealand and South Africa all contributed financially, as well as donating stone carvings of their coats of arms.⁶⁹

The Tower’s dedication was accompanied by ceremonies which occupied the entire week of 12 August 1912. The celebration of 1908, which had featured only local dignitaries and representatives of the governments of Québec, New Brunswick and Prince Edward Island, now ballooned into an unmistakably imperial extravaganza. The Governor of Newfoundland, the High Commissioner of Australia, two representatives of the Colonial Institute in London, the Lieutenant-Governors of Quebec,

66. *Halifax Herald* (20 August 1908).

67. The phrase belongs to Sir Sandford Fleming, as quoted in Chisholm, *supra* note 61 at 119. This characterization involves considerable historical distortion, since it requires ignoring the long established assemblies in the American colonies, as well as assemblies in Bermuda and Barbados which were established as far back as the seventeenth century.

68. *Ibid.* at 2.

69. The cost of the structure is not entirely clear: the *Morning Chronicle* (13 August 1912), reported that it cost \$50,000, but Chisholm, *ibid.* at 34, stated that it was constructed for \$23,960.

New Brunswick, Prince Edward Island and Saskatchewan, the premiers of Newfoundland, New Brunswick and Prince Edward Island, and the Lord Mayor of Bristol all attended. However, the crowning glory of the occasion was the arrival of H.R.H. Prince Arthur, Duke of Connaught and Governor General of Canada, accompanied by the Duchess and Princess Patricia. As the youngest son of Queen Victoria and uncle of the reigning monarch, Connaught bestowed a royal cachet on the occasion which none save the King himself could have equalled. Halifax had not seen such a display since the visit of the Prince of Wales in 1860.

Sport and illumination were the main forms of spectacle. Baseball and cricket matches continued all week and, on the day of the dedication, a regatta was held on the Northwest Arm to focus attention on the site of the tower—the area being virtually uninhabited at the time. That evening, the entire tower was illuminated with strings of electric lights, for which purpose a cable had been specially laid across the Arm. The entire west side of the Halifax peninsula was also lit with everything from candles to Japanese lanterns to electric lights, creating a magical effect. The grounds of a hotel on the shore opposite the tower were thrown open to the public, enabling thousands to witness the spectacle. On the following evening the Public Gardens were illuminated for a concert attended by the Duke and Duchess, and water fireworks were displayed on the pond.⁷⁰

In contrast to the martial pageantry which had accompanied the 1908 celebrations, the main entertainment at the 1912 dedication ceremony was a 500-voice children's choir. At this event the Duke referred to the tower as a Canadian Statue of Liberty, a conceit which appealed to the London *Times* in its coverage of the event. The Tower would “meet the voyager from the Atlantic and tell him that he is entering a land of liberty not less real, though perhaps a little less declamatory, than that which is celebrated . . . farther south.” Liberty in the “Ocean Empire” had not been found inconsistent “with the existence of a common Imperial patriotism,” intoned the *Times*.⁷¹ These sentiments echoed exactly those of Sir Sandford Fleming, who said the architectural plans for the Memorial Tower were to combine “the spirit of colonial liberty with imperial stability.”⁷²

What a society chooses to commemorate (or not), and how it chooses to do so, can provide us with important insights into that society. Recent

70. All the Halifax newspapers gave these events extensive coverage during the week of 12 August 1912.

71. Chisholm, *supra* note 61 at 70. The *Times*' coverage of 19 August 1912 is reproduced in *ibid.* at 68–71 as Appendix D.

72. Quoted in Chisholm, *ibid.* at 18.

historical work has looked at the construction of the Loyalist Centenary, for example, as an example of collective myth-making, and at the nature and meaning of public spectacles in the Maritimes in the nineteenth and twentieth centuries.⁷³ There was nothing inevitable or natural about the recognition of the semi-tercentenary of representative government in Nova Scotia. The event had to be constructed *ab initio*, invested with meaning and then fêted in some public way to affirm the meaning that had just been given to it. The achievement of representative government was a much more attractive vehicle for celebration than the achievement of responsible government, which has been celebrated in Nova Scotia, if at all, in a much more muted way.⁷⁴ A focus on representative government permitted one to concentrate on the exciting events surrounding the founding of Halifax and the imperial rivalries of the eighteenth century, events that had always exerted a magnetic pull over historians of the province. The distance of those events allowed the creation of a myth that representative institutions were granted as a gracious boon by the Crown, rather than—as is probably closer to the truth—reluctantly allowed as a result of increasing dissatisfaction by the mercantile élite.⁷⁵ This was to be a polite and decorous democracy, not a clamorous one.

The experience of responsible government had been neither polite nor decorous. It had inaugurated something like the “spoils system” experienced south of the border, which British North Americans always affected to dislike. Even more inconveniently, given the zenith of the imperial ideal in the *fin-de-siècle*, responsible government had an undeniably anti-imperial air about it. It was about the “whole and sole control

73. M. Barkley, “The Loyalist Tradition in New Brunswick: the Growth and Evolution of an Historical Myth, 1825–1914” (1975) 4 *Acadiensis* 3; B. Huskins, “Public Celebrations in Victorian Saint John and Halifax” (PhD Thesis, Dalhousie University 1991); I. McKay, “History and the Tourist Gaze: The Politics of Commemoration in Nova Scotia, 1935–1964” (1993) 22:2 *Acadiensis* 102.

74. The centenary of Joseph Howe’s libel trial, the event usually credited with providing the main impetus to the campaign for responsible government, was observed in 1935. The “festivities” seem to have consisted of an address on the trial delivered by Chief Justice Sir Joseph Chisholm to the Kiwanis Club and assorted local worthies at the Nova Scotian Hotel: *Halifax Chronicle* (5 March 1935). The *Halifax Mail* did not even note the event, though it did devote nearly a page to the “Eleven-Week Gala Jubilee Program” to commemorate the 25th anniversary of the accession of George V (6 March 1935). The centenary of responsible government was commemorated in 1948 by the placing of a tablet in Province House, but any celebrations seem to have been overshadowed by the those in preparation for the bicentenary of the founding of Halifax in 1949. A similar process seems to be underway at present, with the preparations for “Halifax 1749–1999” well in hand, while the approaching sesquicentennial of responsible government is ignored.

75. S.E. Patterson, “1744–1763: Colonial Wars and Aboriginal Peoples” in Buckner & Reid, eds., *supra* note 7, 125 at 150. See also Fergusson, *supra* note 62 at 28–46.

of the local affairs of the colony,” as Amor De Cosmos had said.⁷⁶ It simply was not an ideologically appropriate focus for the kind of sentiments which Nova Scotian legal and political élites shared and wished to stimulate.⁷⁷

This is not to say that responsible government was totally ignored in the euphoria of 1908. Chief Justice Townshend adverted to it briefly at the very end of his public disquisition, when he congratulated the early assemblymen for resisting the arbitrary actions of the old Council of Twelve, thereby laying the basis for the system of responsible government, “under which we live and thrive today.”⁷⁸ Joseph A. Chisholm, who was active in organizing both the 1908 ceremony and the campaign in support of the Memorial Tower, published in 1909 a new edition of the *Speeches and Public Letters of Joseph Howe*,⁷⁹ clearly the figure most associated in the public mind with the achievement of responsible government. The main motive behind his work seems to have been to rehabilitate Howe, long discredited as a sell-out to Confederation in his native province, in order to emphasize his vision of British North America as part of some larger imperial political entity.⁸⁰ Chisholm’s later work on Howe focussed increasingly on the events leading up to the achievement of responsible government, not on its consequences.⁸¹

The final way in which early twentieth century judges sought to enhance their legitimacy was through adopting a lifestyle appropriate for members of an imperial élite. This phenomenon was particularly noticeable with regard to the first three chief justices of the twentieth century, Sir Robert Weatherbe (1905–1907), Sir Charles Townshend (1907–

76. G. Woodcock, *Amor De Cosmos: Journalist and Reformer* (Toronto: Oxford University Press, 1975) at 34. De Cosmos was born William Alexander Smith in Windsor, N.S. in 1825. He emigrated to the West after the attainment of responsible government in his home province, and subsequently became premier of British Columbia.

77. Not everyone shared fully the interpretations of 1758 which were being purveyed in the 1908 celebrations. The *Acadian Recorder* (19 August 1908), for example, persisted in seeing the granting of representative government as important only as a stepping stone to the eventual granting of responsible government, and portrayed the original Assembly as a relatively powerless, dependent body. It was unique among Halifax newspapers in expressing this view, however.

78. *Supra* note 63 at 12.

79. (Halifax: Chronicle, 1909).

80. Chisholm authored a biographical pamphlet on Howe to accompany the revised edition of the letters, *Joseph Howe: A Sketch with a Chronology* (Halifax: Chronicle, 1909). This pamphlet sets Howe very much in the imperial context. According to Chisholm, Howe was very concerned about “the representation of the Colonies in the Imperial Parliament, and the Confederation of the Provinces he regarded as a small matter compared with this larger Imperial organization.” See *ibid.* at 16.

81. J.A. Chisholm, “The King v. Joseph Howe: Prosecution for Libel” (1935) 13 Can. Bar Rev. 584.

1915), and Sir Wallace Graham (1915–1917). Townshend's élite background has already been noted.⁸² Weatherbe and Graham were both true sons of responsible government, men from non-élite, non-metropolitan, non-Anglican backgrounds, who heard the siren call of "careers open to talents" in the 1860s. Yet in many ways the lifestyles of all three, and the imperial opportunities available to their children, were quite similar.

It might be expected that someone of Townshend's background would be preoccupied with genealogy and seek to establish his family's descent from the Townshends of Norfolk, "one of the best, and most honourable [families] in old England."⁸³ He went so far as to inquire of Ashworth P. Burke (of Burke's Peerage) in 1894 whether he had a right to use the Townshend arms. The receipt of a negative reply did not prevent him from claiming descent from the family in biographical accounts published in his lifetime.⁸⁴ Nor did it prevent him from naming his own country seat in Wolfville "Raynham", after the principal manor allegedly held by the Townshend family in England since Norman times.⁸⁵ Townshend's ostensibly illustrious ancestry, his impeccable Anglican credentials,⁸⁶ his invitation to the London Colonial Conference of 1907 and his 1911 knighthood all combined to create an imperial image which earned him much respect and helped elevate the tone of the court over which he presided.

In Townshend's case some type of gentry ancestry was at least plausible. With Robert Linton Weatherbe it was much less likely.⁸⁷ He was the eldest of 15 children born to farmer-shipowner-shipbuilder Jonathan Weatherbee and his wife Mary Baker at Bedeque, Prince Edward Island. For some unknown reason, Weatherbe's entire family migrated to Wisconsin in 1854. His mother died in Kansas a few years later; his father remarried and died, also in Kansas, in 1867. Weatherbe's siblings drifted around the United States, one died fighting in the Civil

82. *Supra* text preceding note 43, and *infra* note 86.

83. C.J. Townshend, "A Short Record of the Townshend Family" (16 September 1896), Townshend Family Papers, PANS, MG 1, mfm. 214-X at 1.

84. *Ibid.*, A. Burke to C. Townshend (10 January 1895). In *The Canadian Biographical Dictionary and Portrait Gallery of Eminent and Self-Made Men*, Quebec and Maritime Provinces Volume (Chicago: American Biographical, 1881) at 443, Townshend was stated to be "descended from the Townshends of Norfolk, England."

85. Obituary of Townshend contained in PANS, MG 9, Scrapbook 281 at 51, unidentified newspaper dated 16 June 1924.

86. Townshend's father, George Townshend, was named rector of Christ Church, Amherst in 1835 and held the post until his death in 1895. Townshend himself was a warden of the same church and active in diocesan affairs.

87. All biographical information on Weatherbe and his family may be found in my contribution on him in DCB, vol XIV (forthcoming), unless otherwise noted. Weatherbe dropped the ultimate "e" from the family name.

War, and a few returned to settle in Prince Edward Island. This family background was clearly unsuitable for someone of Weatherbe's pretensions, so he claimed to be

descended from the same Yorkshire family that produced the "Weatherbys" of London, who founded the "Stud Book" and established the "Racing Calendar", and who, for more than a hundred yrs., have done so much in furnishing Eng. with the finest horses in the world.⁸⁸

In fact, Weatherbe's later life was an attempt to live out the fantasy he had created. He and his wife left the Baptist church of their youth and joined the Church of England. As befitted an aspirant member of the colonial gentry, Weatherbe acquired "[o]ne of the most conspicuous estates in [Kings] county," and on this Gaspereaux Valley property, which he called St. Eulalie, he tended what would become the largest apple orchard in the province.⁸⁹ A 1906 knighthood assisted Weatherbe in his pretensions.⁹⁰

The career patterns of Weatherbe's sons (the couple had no daughters) confirm that their father's imperial allegiance did much to assist their children's achievement of status within the élite cadres of the Empire. Of his six sons, five had military careers, usually after training as engineers and in one case medicine.⁹¹ Wilfred became an officer in the Indian Army before retiring as a planter in Kenya, while Lewis settled in England as a military surgeon. D'Arcy had the most exotic career, serving with British military intelligence in Siberia, Persia, India and China before ending his days as Provost Marshal of Hong Kong. Phillip was the only son who returned to Nova Scotia, after education in Britain and service in the Boer War; he became chief surgeon at the Hospital for Sick

88. H.J. Morgan, ed., *The Canadian Men and Women of the Time*, 1st ed. (Toronto: William Briggs, 1898) at 1063. Certainly there was no contact between Weatherbe and his alleged Weatherby relatives in England. From a letter written by Weatherbe to Sir John Thompson from London on 21 June 1887 (Thompson Papers, no. 6268, NAC), it is clear that this was Weatherbe's first trip to England and in his day-by-day account of all his activities he mentions no meetings with any relatives. A very comprehensive genealogy of the Weatherbee family tracing them back to a Hampshire ancestor who emigrated to America cannot establish with certainty even the parentage of Weatherbe's Nova Scotia-born father: C. Hill, *Thomas Weatherbee and His Descendants* (Windsor Locks, Ct.: privately published, 1993) at 27.

89. A.W.H. Eaton, *The History of Kings County* (Salem, Mass.: Salem Press, 1910) at 158.

90. It is easy to forget the kind of status which Canadians with knighthoods enjoyed in the early part of the century. A useful parallel might be made with modern Commonwealth countries where such honours are still allowed and much sought after (personal communication from Judge Sandra Oxner, September 1994).

91. Several of the sons received their initial training at the Royal Military College at Kingston, and Weatherbe wrote constantly to John Thompson in the early 1890s to ask him to intervene about matters relating to their education and employment, from securing admission to interceding about failed exams to obtaining commissions: Thompson Papers, *supra* note 29, nos. 12199, 13240, 13557, 14567, 15895, 16410, 16473, 23593, 23484.

Children in Halifax. Aside from their imperial reach, the lives of Weatherbe's progeny are distinguished by an unwavering commitment to the professions. Not a single one opted for commerce or politics, suggesting that the only secure route to respectability in the Maritimes before the Great War lay in the acquisition of professional status.

Wallace Graham's family background was similar to that of Weatherbe.⁹² He was one of a large number of children born to a farmer-shipowner-shipbuilder, David Graham and his wife Mary Bigelow. The family resided near Antigonish, and although Graham's parents died there, most of his siblings emigrated to the United States at some point in their lives. Five of his six brothers followed their father's career, and the sixth died as a young man. Graham did not see the need to invent a pedigree, nor did he follow the country gentry lifestyle adopted by his former law partner. Nonetheless he followed Weatherbe's anglophile footsteps in many other ways. He was more directly exposed to English legal style since he appeared before the Judicial Committee of the Privy Council on several occasions in the late 1880s. His long letters to John Thompson are full of fascinating reflections on the nature of lawyering in England and the emergence of a Canadian identity.

On the whole, the English lawyers and judges left a very favourable impression on Graham. "I must admire the English lawyers" he said, observing that with the exception of Thompson himself, "none of our fellows have the address or form or deliberation necessary to present a case." Graham went for daily lessons, presumably in elocution and deportment, "so that I would not be like a cat in a strange garret, [and to] avoid if possible doing anything horrid." He found the lawyers occasionally too deferential, and was surprised at their uniformity of speech, what he called a Church of England service style. As for Canadians, "[W]e are a different race altogether. I think the U.S. has affected us." This impression was confirmed when he found that he shared with "a shrewd Yankee" at his hotel complaints about the lack of ice-water, porridge, desks and typewriters. Nonetheless, being from a "different race" did not prevent Graham from being immensely pleased when Lord Bramwell "chatted with me like a father." When Bramwell complimented him during his argument, Graham was "electrified". Such were the reverential, albeit occasionally ambivalent, responses aroused in an astute colonial barrister upon exposure to legal London.⁹³

92. For sources, see *supra* note 1.

93. All of these observations are contained in a letter to Thompson dated 13 July 1887, from London: Thompson Papers, *supra* note 29, no. 6360.

In Graham's personal and official life, an imperial aura was gradually fleshed out. His daughters both married British officers and went to live in Britain, where they and their families remained.⁹⁴ A member of the Baptist Church throughout his adult life, Graham's religion was either not listed in published biographies or wrongly listed as Anglican. Although he and his wife Annie had married in the Baptist church, she and their children all gravitated to Anglicanism. Their son Bruce was sent to Anglican King's College rather than Acadia, his father's alma mater, and articulated with the prominent Anglican partnership of W.B.A. Ritchie and T.R. Robertson. Lady Graham spent the remaining years after her husband's death in England and Scotland with her daughters, and when her body was returned to Halifax for burial in 1926, the Archbishop performed the funeral service in All Saints' Cathedral. Graham's knighthood came only the year before his death, but his presentation, along with Annie, to King Edward VII and Queen Alexandra in 1908, provided him with almost as much cachet. When he was appointed chief justice, the newspapers erroneously referred to him as Lord Chief Justice Graham, a title reserved for the Chief Justice of England, completing the conflation of local and English traditions.

It may be objected that my focus on the ideological dimensions of the imperial connection glosses over the popular appeal of imperialism and creates an artificial distinction between "Canadian" and "British" identity, a distinction not admitted by contemporaries. Phillip Buckner has recently drawn attention to the key role played by British immigration into Canada in the nineteenth century in buttressing popular and elite conceptions of Empire.⁹⁵ Yet, as he fully recognizes, British immigration into the Maritimes was less impressive than in Ontario, especially after 1850. The appeal of things British remained strong, but ties with the United States became ever more important, at first during Reciprocity and later with the wave of Maritime outmigration southward.⁹⁶ As has been seen with regard to the lives of both Weatherbe and Graham, family ties within their own generation were with the United States, not Britain.

94. I had the pleasure of meeting Mrs. Anne Martin of Edinburgh, a daughter of Sir Wallace's younger daughter, when she visited Halifax in September 1994. She kindly provided some information on family matters which was unavailable from other sources, for which I would like to thank her. Mrs. Martin's mother, Lalia (Graham) Bingay, did not wish to attend school in England, as her parents planned for her when she turned sixteen. She agreed to go only on condition that her father write to her every day—which he did.

95. Buckner, *supra* note 4.

96. My own work has explored these tendencies with regard to the legal profession (strong appeal of the United States university legal education) and law reform (influence of United States models) in this period: Girard, *supra* notes 8, 11.

The impressions of both men on their visits to London in the 1880s suggest that they felt their own colonial identities quite keenly, and consciously chose to emulate imperial models in law and lifestyle in spite of experiencing them as “different.”⁹⁷

G. Blaine Baker has also noted the anglophilia of the late Victorian legal profession in Ontario, and has tried to explain it as a response to challenges to the social status of the bar and as part of a wider attempt “to suppress critical inquiry through a reversion to formalism” in the wake of the Darwinian revolution.⁹⁸ The relatively undeveloped nature of Maritime intellectual history has precluded investigation of the latter approach, while my own work on the late Victorian legal profession has suggested that its public image was improving markedly in Nova Scotia in this period as a result of an ambitious program of professional reform and the high profile role that some lawyers were playing in the rapidly emerging corporate sector.⁹⁹ There is no doubt, however, that a strong streak of anglophilia in the legal profession contributed to a certain disjunction in provincial legal history around this time, very much as Baker has described for Ontario. Recourse to imperial precedent in legislation¹⁰⁰ and legal treatise-writing¹⁰¹ led to a devaluation of pre-existing local models in practice even as the province’s legal past was being reworked and sanitized in works such as Townshend’s *History*.

This paper has suggested that the attractiveness of imperial models must be seen, at least in part, as a response to problems of legitimacy traceable to the new political landscape which accompanied responsible government. These problems were particularly acute for the judges, and the appropriation of an imperial patina for the Nova Scotia Supreme Court was a useful ideological tool with which to combat the dubious legacy of responsible government. The new élite’s behaviour, represented by Weatherbe and Graham, and the old élite’s writing, represented by Townshend’s history, combined to create a new image for the court, one that anchored it in a timeless theme park called Ye Olde British

97. I am not questioning the Buckner thesis in general. Rather, I am merely suggesting that it is not as applicable in the Maritimes as in other parts of Canada.

98. “The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire” (1985) 3 *Law and History Review* 219 at 281.

99. Girard, *supra* note 11.

100. See, e.g., the shift from American or indigenous models to imperial models in Nova Scotia married women’s property law, examined in P. Girard & R. Veinott, “Married Women’s Property Law in Nova Scotia, 1850–1910” in J. Guildford & S. Morton, eds., *Separate Spheres: Women’s Worlds in the 19th Century Maritimes* (Fredericton: Acadiensis, 1994) 67.

101. See, e.g., Benjamin Russell’s Canadian editions of W.B. Odgers, *Principles and Practice of the Law of Evidence* (London: Butterworths, 1911) and S.M. Leake, *The Law of Contracts* (London: Stevens & Sons, 1912).

Justice.¹⁰² The court was now legitimated by the fact that it was the sort of institution which had the “customs and traditions” referred to in Graham’s obituary.

Conclusion

A dose of the new professionalism in its membership, a largely sanitized version of its history and a healthy dollop of imperial veneer helped the Supreme Court of Nova Scotia overcome the trauma of responsible government and establish a certain legitimacy in the early twentieth century. The best proof of this is the fact that three judges were asked to sit on a provincial commission of inquiry into some questionable land transactions of the Attorney-General in 1913.¹⁰³ Wallace Graham chaired the commission, and his colleague Benjamin Russell and County Court Judge W.B. Wallace completed the trio. While we cannot imagine the Canadian polity functioning without judges serving on royal commissions, in fact of twelve such commissions in Nova Scotia since 1849 only the first had had a judge as member.¹⁰⁴ The appointment of Graham was due certainly in part to his perceived political impartiality and his high judicial qualities, but there can be little doubt that the restored lustre of the court as a whole paved the way for its more extensive involvement in provincial life. Henceforth, judges would regularly serve on royal commissions.

Although the focus of this paper has been on strategies of legitimation, it does not mean to suggest either that these were necessarily conscious, or that their results were entirely inappropriate or deceptive. There were quite rational reasons for the high esteem in which English law was held by Canadians at the end of the last century. They saw their country as beginning to experience the kind of economic and social changes which had already transformed Britain, and took comfort in the fact that they might learn from the British example. English law might be used as a tool of modernization rather than a means for maintaining the status quo.¹⁰⁵

102. I am indebted to the work of Ian McKay for this notion: see his “Tartanism Triumphant: The Construction of Scottishness in Nova Scotia, 1933–1954” (1992) 21 *Acadiensis* 5, and “History and the Tourist Gaze,” *supra* note 73.

103. A good account of this affair can be found in J.C. Hopkins, *The Canadian Annual Review of Public Affairs*, 1914 (Toronto: Annual Review, 1915) at 525–28. See also J.M. Beck, *Politics of Nova Scotia*, vol. 2 (Tantallon, N.S.: Four East, 1988) at 59.

104. *Nova Scotia Royal Commissions and Commissions of Inquiry 1849–1984. A Checklist*, 3d ed. (Halifax: Legislative Library, 1984)

105. I have suggested that the Supreme Court of Canada may have been doing just this in property law in the early twentieth century: “Beyond Captivity: A Review of Ian Bushnell’s, *The Captive Court — A Study of the Supreme Court of Canada*” (1993) 13 *Windsor Y.B. Access Just.* 308 at 314–16.

Canadians could and did borrow from the law of the United States, but continued to have recourse to the English model as a way of distinguishing Canada from its southern neighbour. In his insightful letter to his friend Thompson, Wallace Graham saw clearly that Canadian culture had become more similar to the American than to the British, yet he continued to emphasize the British connection in his own career and in his aspirations for his children.¹⁰⁶

Yet there was always a danger, as G. Blaine Baker has noted for Ontario and as I have discussed elsewhere, that in this headlong rush to pursue English models, Canadian lawyers might lose a sense of their own past and an awareness of what remained distinctive about the Canadian experience.¹⁰⁷ There was also a danger that recourse to the English model could serve as a substitute for serious thought about possible approaches or solutions to Canadian problems. Finally, there was a danger that Canadian élites might use imperial trappings to bolster their own positions, exact deference, and mystify the source of their own authority. In Nova Scotia, the reluctance to invest responsible government with the status of a foundational myth—as witnessed by the continuing fascination with 1749 or 1758 as opposed to 1848—meant that figures in authority had every reason to blur the distinction between imperial and local “customs and traditions.”

106. *Supra* note 93.

107. P. Girard, “Themes and Variations in Early Canadian Legal Culture: Beamish Murdoch and his *Epitome of the Laws of Nova-Scotia*” (1993) 11 *Law and History Review* 101 at 137–43.