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Abstract

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The mid-nineteenth century was an age of reform in the civil courts of the common-law world. Why, in spite of the clamour for change within Upper Canada and the introduction of reforms in adjacent common-law jurisdictions, were Upper Canada's leading lawyers and politicians so reluctant to act? The answer is found in the conservatism of the province's leaders, which stemmed not only from the legal training of the lawyers, but also from the moderate conservative ideology of the Upper Canadian leadership as a whole. At an almost unprecedented time of public debate, when resentment to lawyers and the courts was being expressed and a radical critique of the courts and the profession was emerging, Upper Canada's most influential residents managed to maintain political control and steadfastly refused to act in advance of the mother country.

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THE MID-NINETEENTH CENTURY WAS a rare moment in the history of Upper Canada (later Ontario) when civil court procedure and organization became a subject of intense political debate. It was a time when change was in the air with the rise of Chartism in Britain, revolutionary movements on the continent, and the rhetoric of Jacksonian democracy in America. In the legal sphere, significant changes were already underway to common-law and equitable procedures in the province's two touchstones, England and the United States. New York State, adjacent to Upper Canada, took the bold step of abolishing its equity court and merging common law and equity in 1848. The British colonies of New Brunswick and Nova Scotia began a process of reform that led to the abolition of their courts of Chancery in 1854 and 1855 respectively.[1] Similar debates began in Upper Canada in the 1840s, the result of both internal pressure and external influence. By the early 1850s, a handful of vociferous radicals were advocating a complete overhaul of the legal system which they deemed to be unfair to the majority of the rural population. Even Upper Canada's lawyers could see that reform of the antiquated procedures of the civil law would be necessary to adapt it to the needs of an emerging capitalist environment. Yet, the province failed to launch much needed and publicly requested law reform by the mid-1850s.

Why was Upper Canada slower to introduce reforms than these other common-law jurisdictions? The reasons include the culture of its legal profession, the emerging moderate conservative ideology of prominent politicians and other leading figures in the province, and the limited influence of critics of the

1. Lawrence M Friedman, *A History of American Law*, 3rd ed (Simon & Schuster, 2005) at 293-95; AH Manchester, *A Modern Legal History of England and Wales, 1750–1950* (Butterworths, 1980) at 139-42; Philip Girard, "Married Women's Property, Chancery Abolition, and Insolvency Law: Law Reform in Nova Scotia 1820-1867" in Philip Girard & Jim Phillips, eds, *Essays in the History of Canadian Law, Volume 3: Nova Scotia* (University of Toronto Press, 1990) 80 at 109 [Girard, "Married Women"].

mainstream ideology and, in particular, of the political radicals who attempted to represent their viewpoint.

The conservatism of Upper Canada's legal profession is well known. The rigorous training that the Law Society of Upper Canada required of its students in English common law and equity encouraged a respect for legal tradition that could only have been deepened by the cautious behavior of Upper Canada's judges during the first half of the nineteenth century.[2] While the judges were reluctant to depart from English precedents, G. Blaine Baker has found that by mid-century many lawyers from both Upper and Lower Canada in the United Province of Canada were drawing on a new-found faith in the capacity for social reorganization to introduce legislation intended to improve foundational institutions.[3] This article demonstrates the limits of Baker's argument when applied to civil court reform in Upper Canada. It is true that the profession exerted much influence in politics: Not only were lawyers usually the leaders of the two political parties, but the proportion of lawyers among Upper Canada's representatives in the Assembly was never less than one third and actually slightly more than fifty per cent after the election of 1847.[4] Although leading lawyers were willing to make some adjustments to adapt the courts to the needs of an emerging capitalist society, their goals were almost invariably to preserve as much of the existing system as possible—particularly its legal procedure—while waiting for the mother country to initiate reform.

Upper Canada's lawyers were not only conservative by legal training, they were also being influenced by a broader ideological consensus emerging among the province's leading politicians, professionals, and businessmen by the 1840s. This viewpoint, which was increasingly held not only by Reformers but also by Conservatives in politics, was conservative in its rejection of revolution and its

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2. G Blaine Baker, "Legal Education in Upper Canada 1785–1889: The Law Society as Educator" in David H Flaherty, ed, *Essays in the History of Canadian Law: Volume II* (University of Toronto Press, 1983) 49 at 50-51, 55 [Baker, "Education"]; RCB Risk, "The Law and the Economy in Mid-Nineteenth Century Ontario: A Perspective" (1977) 27 UTLJ, 403 at 438.
3. G Blaine Baker, "Introduction: Quebec and the Canadas, 1760–1867: A Legal Historiography," in G Blaine Baker and Donald Fyson, eds, *Essays in the History of Canadian Law, Volume XI: Quebec and the Canadas* (University of Toronto Press, 2013) 3 at 310, 316 [Baker, "Historiography"]; *ibid* at 37-38; G Blaine Baker, "Strategic Benthamism: Rehabilitating United Canada's Bar through Criminal Law Codification, 1847–54" in Jim Phillips, R Roy McMurtry, & John T Saywell, eds, *Essays in the History of Canadian Law, Volume X, A Tribute to Peter N Oliver* (University of Toronto Press, 2008) 257 at 285-91 [Baker, "Benthanism"].
4. RD Gidney & WJP Millar, *Professional Gentlemen: The Professions in Nineteenth-Century Ontario* (University of Toronto Press, 1994) at 65.

emphasis on the value of the British connection. Maintaining the imperial tie was essential in order to differentiate the province from the United States and to guarantee its residents the rights and privileges of residents under the unwritten British Constitution. Because of their expertise in the law, the Law Society argued that lawyers had a special role to play as guardians of this Constitution.[5]

British constitutional principles were also thought to facilitate the evolution of political institutions. During the 1840s, a movement took place to adopt a political system in Upper Canada that was more liberal than the rigid authority the Tories[6] had attempted to enforce before the rebellion of 1837. Drawing originally on the eighteenth century British "Whig" interpretation of the Constitution, Robert Baldwin and other Reformers argued for greater public access to power based on the traditional right of British subjects to take part in the formation of government policy. By the end of the 1840s, even the Conservatives were coming to accept the principle that decision making should be guided by "public opinion" as expressed through the people's representatives in the Assembly.[7] By doing so, the province's politicians saw themselves, not as innovating, but as simply following the example of responsible British government which was only then being fully realized.[8]

While the leaders could be described as mid-Victorian "liberals," they remained steadfastly opposed to democracy. They believed that the hierarchical, socially, and economically differentiated society, visible in the province at mid-century was both inevitable and desirable and that the people making political decisions should be those with educational qualifications, high social status, and, in many cases, personal economic success. They watched the example of the United States with foreboding. While the development of American institutions had always been fascinating to Upper Canadians, the increasingly democratic nature of American politics was to be avoided, not only because it was un-British, but because it was thought to encourage the political participation of unqualified residents and to result in policy too often determined by the passionate excesses

5. David Mills, *The Idea of Loyalty in Upper Canada, 1784–1850* (McGill-Queen's University Press, 1988) at 5-10, 130-34. See also Graeme Patterson, "Whiggery, Nationality, and the Upper Canadian Reform Tradition" (1975) 56 Can Hist Rev 25 at 43-44 [Patterson, "Whiggery"]; Paul Romney, "From Types Riot to Rebellion: Elite Ideology, Anti-legal Sentiment, Political Violence and the Rule of Law in Upper Canada," (1987) 79 Ont Hist 113 at 121.
6. The terms "Tory" and "Conservative" are used almost interchangeably here though "Tory" usually refers to the more far-right segment of the party and its more conservative roots.
7. Jeffrey L McNairn, *The Capacity to Judge: Public Opinion and Deliberative Democracy in Upper Canada, 1791–1854* (University of Toronto Press, 2000) at 16-17, 248-60.
8. Mills, *supra* note 5 at 108-09.

of the "mob" rather than rational debate among knowledgeable people.[9] This point of view, held by the leaders of both political parties, did not bode well for the most vociferous supporters of major legal reform.

By 1850, a small group of political radicals called "Clear Grits" had emerged to challenge both the political and the legal status quo. They drew on a strain of egalitarianism which had already been visible in the pre-rebellion period. The defeat of the rebellion and the relatively small proportion of provincial residents who had supported it, tended to remove radicalism from political discourse.[10] "Radicalism" re-emerged because of the realization in "left-wing" circles of the late 1840s of how conservative the Reform Government of Robert Baldwin was, and because the demands for political reform elsewhere—in Britain, on the European continent, and in Jacksonian America—all seemed to presage the birth of a new day. The radicals sought to bypass the influence of the political leadership and gain the support of the farmers, small shopkeepers, and mechanics of the province by challenging the very nature of the social structure in Upper Canada and arguing that, by encouraging the development of a hierarchy of wealth and power, the leadership was failing to meet the needs of the majority of the population.[11]

These men drew on ideas from both Britain and America. The effort of Chartists to obtain political power for the sake of the working poor in Britain was influential, especially among recent immigrants to Upper Canada from the mother country.[12] However, in many ways, the United States was a closer fit for Upper Canada's situation because of the similarity of its social and economic conditions. While immigration had begun earlier, large areas of America were still undergoing settlement. In spite of its commercial and industrial development, much of the country remained a largely agrarian society in which American egalitarians from both the Democratic and Whig parties strove to assert the

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9. Jane Errington, *The Lion, the Eagle, and Upper Canada: A Developing Colonial Ideology* (McGill-Queen's University Press, 1987) at 128-35, 188-92; Mills, *supra* note 5 at 130, 132-34.
10. See Paul Romney, *Mr. Attorney: The Attorney General for Ontario in Court, Cabinet, and Legislature 1791-1899* (University of Toronto Press, 1986) at 62-65 [Romney, *Attorney General*]; Mills, *supra* note 5 at 107-08.
11. Kenneth C Dewar, *Charles Clarke Pen and Ink Warrior* (McGill-Queen's University Press, 2002) at 54-58 [Dewar, *Pen and Ink*]; Romney, *Attorney General*, *supra* note 10 at 319-23.
12. Chartism was a working-class male suffrage movement for political reform in mid-nineteenth century Britain. On Chartism, see Malcolm Chase, *Chartism: A New History* (Manchester University Press, 2007). For the Upper Canadian reception of Chartist ideas, see Kenneth C Dewar, "Charles Clarke's 'Reformator': Early Victorian Radicalism in Upper Canada" (1986) 78 Ont Hist 233 at 239-41 [Dewar, "Reformator"].

rights of small property holders in the face of increasing concentrations of wealth and power.[13]

Like these American politicians, Upper Canada's radicals viewed political and legal reform as two prongs of an approach that would lead to a more just and democratic society. Adopting ideas common to both British and American radicalism, they traced the roots of all the people's ills to the political system and sought to break down the control of the provincial political elite by decentralizing power and making more public offices elective. Their point of view on the legal system was based on the English principle of equality before the law, which had traditionally been a unifying symbol between the classes in common-law jurisdictions. However, their specific proposals for reform were strongly influenced by those being made by American radicals during the 1840s.[14] Besides court decentralization, the Clear Grits and others agitated for simplification of the law to make it more easily understood by laymen, the abolition of the Law Society of Upper Canada in order to open the legal profession up to competition, and the establishment of cheap, alternative means of dispute resolution which would bypass the need to go through the formal courts. It was claimed that the present legal system, far from serving the needs of everyone equally, actually worked for the benefit of the most powerful persons and the lawyers serving them at the expense of those with limited funds.

Not all of these proposals resonated with the public. They did touch on traditional lay suspicions of the law and its practitioners in Upper Canada and, in particular, on a well-spring of sentiment visible in certain rural areas which was resentful of privilege, suspicious of outside influence, and fearful of exploitation by lawyers who manipulated the law. Some rural residents wanted to dispense with the services of lawyers altogether, believing that local disputes could be settled more cheaply and with less antagonism without the intervention of trained professionals. While Clear Grit politicians hoped to exploit this discontent, they never succeeded in winning more than a handful of seats in Parliament.

Three main questions of legal reform emerged during the 1840s and 1850s: (1) the court system's reliance on traditional English procedures; (2) its emphasis on the strong centralized control of the Court of Queen's Bench; and (3) the monopoly of the Law Society over the profession, which had been meant to facilitate the training and regulation of the highly skilled lawyers thought

13. See Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848* (Oxford University Press, 2007); Lee Benson, *The Concept of Jacksonian Democracy: New York as a Test Case* (Princeton University Press, 1961); Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (WW Norton & Company, 2006).
14. Wilentz, *supra* note 13 at 593; Howe, *supra* note 13 at 440.

necessary to interpret English law. All these features had been in place since the 1790s.[15] The *Act of Union* of 1840 did nothing to alter them, although by uniting Upper and Lower Canada for political purposes, it provided that any legislative reform would require the approval of a combined majority of representatives from the upper and lower sections of the united province. On several occasions in the early 1850s, this situation resulted in the preservation of Upper Canada's Court of Chancery only because of the support of Lower-Canadian members.[16]

Traditional English legal procedure was coming under attack in many common-law jurisdictions at the time. Like them, Upper Canada was grappling with a complex system of law in which common law and equity each had their own courts and procedures. The common law adhered to antiquated forms of action and to patterns of pleading which were frequently prolonged. The Court of Chancery was notorious in England for its high costs and dilatory procedure long before it was established in Upper Canada in 1837.[17] Moreover, as long as there were separate courts of common law and equity, litigants ran the risk of failing in their endeavours because their claims had been brought to the wrong tribunal. Some disputes might require the intervention of both common-law and equity courts which could result in interminable delays.[18] In dealing with these difficulties, Upper Canada's lawyers tended to be cautious. They believed the issue was how to simplify the system without losing the predictability resulting

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15. The common law was introduced by *An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's Reign, entitled "An Act for making more effectual provision for the Government of the Province of Quebec, in North America," and to introduce the English Law as the Rule of Decision in all matters of Controversy, relative to Property and Civil Rights*, S Prov UC 1792 (32 Geo III), c 1; the Court of King's (later Queen's) Bench by *An Act to establish a Superior Court of Civil and Criminal Jurisdiction and to regulate the Court of Appeal*, S Prov UC 1794 (34 Geo III), c 2 [King's Bench, 1794, c 2]; and the Law Society by *An Act for the better regulating the Practice of the Law*, S Prov UC 1797 (37 Geo III), c 13.
16. See *e.g.* Elizabeth Gibbs, ed, *Debates of the Legislative Assembly of United Canada, 1841–1867* (Presses de l'École des Hautes études commerciales, 1970), vol 10 (1851) at 569 [*Debates*] (further citations will include the volume and year of original debates); *Debates*, vol 11 (1852–53) at 3020-3022.
17. See Michael Lobban, "Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part I" (2004) 22 Law & Hist Rev 389 at 392-97.
18. For Upper Canada, see John D Blackwell, "William Hume Blake and the Judicature Acts of 1849: The Process of Legal Reform at Mid-Century in Upper Canada" in David H Flaherty, ed, *Essays in the History of Canadian Law, Volume I* (University of Toronto Press, 1981) 132 at 132 [Blackwell, "Judicature Acts"]; Elizabeth Brown, "Equitable Jurisdiction and the Court of Chancery in Upper Canada," (1983) 21 Osgoode Hall LJ 275; Romney, *Attorney General*, *supra* note 10 at 286-290; Margaret A Banks, "The Evolution of the Ontario Courts 1788–1981" in David H Flaherty, ed, *Essays in the History of Canadian Law Volume II* (University of Toronto Press, 1983) 492 at 504-506.

from centuries of precedents. Both Conservative and Reform lawyers expressed some support for reform, though the latter tended to show more enthusiasm than the former. The Clear Grit members of the Reform Party were the most stridently insistent on the need for change.

The separation of common law and equity into different courts was part of a larger controversy concerning court organization. At the start of the period, there were two superior courts—Queen's Bench and Chancery, as well as a truncated Court of Appeal. They were all based in Toronto, though the judges of the Queen's Bench went on circuit once or twice a year to hear trials concerning common-law actions in the various districts. There were also two main courts of limited jurisdiction located in each district: District Courts and Courts of Requests. At the beginning of the Union, the District Court had a jurisdiction in contract covering disputes of up to forty pounds if the amount was already liquidated (that is, indicated by the evidence).[19] The court employed common-law procedures although its judges were not yet required to be barristers and there were no appeals to the superior courts before 1845. At the bottom of the pyramid were the Courts of Requests. They were small claims tribunals usually presided over by laymen justices of the peace who served as commissioners and made use of informal summary procedures.[20] The litigants usually represented themselves and did not employ lawyers. In these "poor men's courts," as they were known, actions of debt or contract of up to ten pounds in provincial currency or less were decided quickly, usually in much less than a day.

While the legal profession was relatively united on the question of procedural reform, tensions arose over the geographical and jurisdictional structure of the courts. The potential was almost inherent in the geography of the province, given its huge size, widely dispersed communities, and transportation difficulties. This study will show that the most prominent lawyers, who were usually based in Toronto, believed that the centralized superior courts were the standard by which the court system should be judged. As such, they were particularly concerned during the 1840s with the shortcomings of Chancery and the Court of Appeal. While the need for Chancery reform was widely accepted, the question was

19. The District Court was established by *An Act to establish a Court for the Cognizance of Small Causes, in each and every District of this Province*, S Prov UC 1794 (34 Geo III), c 3. In 1849 the county replaced the district as the main territorial unit for judicial and other purposes and the District Courts then became County Courts.

20. The Courts of Requests were established by *An Act for the more easy and speedy Recovery of Small Debts*, S Prov UC 1792 (32 Geo III), c 6. See JH Aitchison, "The Courts of Requests in Upper Canada," in JK Johnson, ed, *Historical Essays on Upper Canada* (McClelland & Stewart, 1975) 86 at 86.

whether equitable procedure should be revised or whether the court itself should be abolished and its powers handed over to the common-law courts. The leading lawyers favoured reform, although lawyers residing outside Toronto often supported abolition. The profession also regarded the existing Court of Appeal as an embarrassment. Perhaps because legislators had not expected many cases to require such a court, it had been given short shrift in the provisions of the *Constitutional Act of 1791* and the provincial legislation establishing the King's Bench.[21] These measures provided only for a committee of the chief governmental body—the Executive Council—to hear appeals rather than a body that was fully professional. Under the Union, the committee consisted of the Chief Justice of Upper Canada or the Governor of the province, the Vice Chancellor, and any two other members of the council regardless of whether they had legal training.[22] This tribunal was lacking in credibility and, although further appeals were possible in large claims to the Judicial Committee of the Privy Council in Britain, they were prohibitively costly.

There was considerable tension between central and regional interests on the question of the lower courts. While the leading professionals in the Assembly sought to standardize procedure and exert more professional control over the local courts, the proponents of local interests were often more concerned with increasing their courts' accessibility and jurisdiction. There were two manifestations of this viewpoint. Some rural communities preferred a more informal system of local justice, especially for small claims. They hoped to limit centralized control and reduce the influence of lawyers by permitting lay residents to adjudicate over disputes in their own neighbourhoods. Regional lawyers and creditors tended to be in a second camp. They were primarily concerned with commercial development which depended almost entirely on credit transactions in Upper Canada. The District Courts and Courts of Requests provided the assurance that creditors would be paid for smaller claims but, when larger amounts of money were in dispute, litigants found it expensive and time consuming to have to deal with the superior courts. Although the judges of the Queen's Bench traveled on circuit, litigants often had to hire lawyers in Toronto as well as in their own

21. See *An Act to repeal certain Parts of an Act, passed in the fourteenth Year of his Majesty's Reign, intituled, An Act for making more effectual Provision for the Government of the Province of Quebec, in North America; and to make further Provision for the Government of the said Province*," S UK 1791 (31 Geo III), c 31 [*An Act to repeal certain Parts of an Act*, 1791]; King's Bench, 1794, c 2, *supra* note 15.

22. Christopher Moore, *The Court of Appeal for Ontario: Defining the Right of Appeal in Canada, 1792–2013* (University of Toronto Press, 2014) at 4 [Moore, *Appeal*]. When appeals were made against the decisions of the Court of Chancery, the other (puisne) judges of Queen's Bench also presided. Banks, *supra* note 18 at 502, 509, 512.

districts in order to reach a judgment. The problem was worse in relation to the Court of Chancery. When it was established, its Vice Chancellor made no circuits and sat only in the capital. The regional leaders thought a partial solution would be to increase the monetary limits of the lower courts.

A third issue emerged at the end of the 1840s when criticism of the court system became more intense. At that point, radicals raised a cry against the legal profession and its rigorous control by the Law Society of Upper Canada. Under the Society's regulations, a prospective barrister had to be on its books for five years, to have articled with an established barrister during that time, and to have passed examinations set by the Society.[23] He also had to attend the superior courts in Toronto during four terms.[24] These regulations were much more stringent than those faced by lawyers in most American states, or in England at the time, and they often seemed to favour persons from families associated in some way with the political and legal establishment at Toronto.[25] During the Union period, the Clear Grits and other critics saw the profession and its governing body as a privileged group which tended to manipulate the law primarily for its own interests rather than those of the people as a whole.[26] This belief became more widespread after the Reform Government of Robert Baldwin passed the *Judicature Acts* of 1849 expanding the centralized superior courts.[27] It became law mainly due to pressure from leading Toronto lawyers, but seemed of little benefit to many of the province's residents. Drawing on public resentment, radicals began arguing for broadening access to the profession and establishing a free market in legal services.

The debate over these issues unfolded over two time periods: 1841–1849 and 1850–1853. During the former time period, the main focus of politics was on the struggle over responsible government. The discussion of legal reform was sporadic and usually confined only to lawyers. It was dominated largely, though not completely, by the leaders of the profession who sought to improve

23. Baker, "Education," *supra* note 2 at 49-55.
24. *Ibid* at 66, 68, 119; Christopher Moore, *The Law Society of Upper Canada and Ontario's Lawyers, 1797–1997* (University of Toronto Press, 1997) at 88-92.
25. Baker, "Education," *supra* note 2 at 79-80.
26. See *e.g. North American* (4 June 1850, 22 November 1850), Ottawa, Library and Archives Canada (accessed on microfilm).
27. *An Act to make further provision for the Administration of Justice, by the establishment of an additional Superior Court of Common Law and also a Court of Error and Appeal, in Upper-Canada, and for other purposes*, S Prov C 1849 (12 Vict), c 63 [S Prov C 1849 (12 Vict), c 63]; *An Act for the more effectual Administration of Justice in the Court of Chancery of the late Province of Upper-Canada*, S Prov C 1849 (12 Vict), c 64 [S Prov C 1849 (12 Vict), c 64].

the centralized superior courts at Toronto. The expansion of these courts in 1849 represented the culmination of their efforts, but it also resulted in an outburst of public resentment and cries for radical change which made court reform a major political issue over the next four years. Ultimately, all these challenges to the status quo failed because of the distaste of Upper Canada's leaders for radical reform and their ability, along with their allies in Lower Canada, to maintain control over the Legislative Assembly.

I. REFORMING THE COURTS DURING THE STRUGGLE FOR RESPONSIBLE GOVERNMENT, 1841–1849

Drawing on their training and the predominantly conservative ideology of the province, the most prominent legal professionals sought to adapt the court system to changing provincial conditions during the 1840s while maintaining the bulk of its English heritage. While much of the history of court reform during these years dealt with the superior courts, the period began with a confrontation over the lower courts in which leading lawyer–politicians found themselves at odds with members of the Assembly representing constituencies outside Toronto, particularly those with more radical inclinations.

A. REGIONALLY-BASED LOWER COURTS

The battle lines over the lower courts were drawn in 1841 when Tory Attorney General William Draper introduced bills to reform both the District Courts and Courts of Requests. These reforms were similar to efforts being made in England at the time to foster wider legal uniformity and professionalization in the justice system.[28] Under Draper's legislation, the lower courts received more professional supervision by requiring the District Court judges to be barristers and by replacing the Courts of Requests with Division Courts. The jurisdiction of the latter courts was initially identical to that of the old courts and the procedure was still supposed to be summary, but the Division Courts were to be presided over by the nineteen District Court judges located across the province rather than the lay judges of the Courts of Requests. Draper commented that there had been over one thousand of these lay commissioners scattered over the province,

28. *An Act to repeal the Laws now in force in that part of this Province, formerly Upper Canada, for the recovery of Small Debts, and to make other provisions therefor*, S Prov C 1841 (4 & 5 Vict), c 3 (creating the Division Courts); *An Act to alter and amend the Laws now in force in that part of this Province formerly Upper Canada regulating the District Courts*, S Prov C 1841 (4 & 5 Vict), c 8 (creating the District Courts).

many of them living in the communities they served, which raised the possibility of favouritism. He claimed that his judges would be educated men, free of the prejudice of locality. However, since his proposal created a potentially heavy workload for the District Court judges who, in addition to their other duties, also had to officiate over the Quarter Sessions[29] and Surrogate Courts in their districts, a limit was placed on the number of Division Courts to be created in each district: Initially the maximum was six in each district. Before 1841, there had been 23 Courts of Requests in the Home District alone and 187 in total scattered over the province as a whole.[30]

The main opposition to the Division Courts was led by a group of five laymen Reform members living outside Toronto who expressed serious doubts about the value of professionalism and centralization.[31] Similar views about the court system would be expressed again by representatives of rural areas during the early 1850s. The Courts of Requests, they said, were largely satisfactory as they were. The lay judges in them had the opportunity to work with suitors in their communities to facilitate a cheaper and more harmonious settlement of differences than was possible through the formal process of the law. According to John Roblin, a prominent farmer from the Bay of Quinte area, the new proposal would deprive the poor man of justice.[32] The number of small claims courts was not only to be greatly reduced, but they would only hold hearings once every two months instead of every fortnight as in the Courts of Requests. For suitors outside the main towns, the result would be the necessity to travel substantial distances to a court that met less frequently: The court would then be overburdened and suitors would have to wait for three or four days instead of the traditional one day or less to get their cases heard. In these circumstances, the poor would not be able to afford the expense of attending. Instead of replacing the Courts of Requests, Roblin and W.H. Merritt, a well-known Niagara area businessman who favoured local interests and control, recommended that their jurisdiction be increased from ten to fifty pounds in claims of debt or contract in order to make the court system more accessible to suitors in the regions.[33]

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29. The Quarter Sessions dealt with local administrative issues and minor crime. See Banks, *supra* note 18 at 494.
30. *Debates*, *supra* note 16 at vol 1 (1841) at 234; Aitchison, *supra* note 20 at 92-94.
31. These members were all merchants or entrepreneurs with the exception of one farmer. Draper's bill was passed by a vote of forty to eleven. See *Debates*, *supra* note 16, vol 1 (1841) at 488-89.
32. *Ibid* at 488.
33. *Ibid* at 361, 484-88.

When it became clear that a bill enabling reform of the Division Courts would pass, the rhetoric between the two sides heated up. While opponents supported easier access to the law, Draper argued that cheap law was not necessarily a good thing and tended to promote unsubstantiated claims. He believed that the business of the Court of Requests had already escalated to unhealthy levels while the new system, by making it more difficult for plaintiffs to sue, would discourage fraudulent or frivolous suits. Leading politicians and lawyers would make similar criticisms of "cheap law"[34] in the coming years. Merritt and Roblin responded that there were too many lawyers in the Legislature and they were too ready to provide judgeships for members of their profession at the expense of the interests of the yeomanry.[35] The rhetoric of yeomanry versus lawyers was one that was already visible among radical Reformers before the Rebellion of 1837. It was part of an egalitarian point of view which would be expressed more fully after 1849. In the early 1840s, it represented a minority opinion among elected representatives, discredited to some extent by the violence of the Rebellion and muzzled by the need for a united front among Reformers seeking to bring about constitutional change through the achievement of responsible government.

Demands continued to be made for a legal system more sensitive to the needs of persons outside Toronto during the rest of the 1840s. The most common appeal was for an expansion of both the geographical accessibility and the jurisdiction of the Division Courts. At least seventeen petitions on the subject of accessibility were submitted to the Assembly from persons and municipalities in different parts of the province between 1843 and 1849, almost all seeking to re-establish the Courts of Requests. While the petitioners stressed the need for more courts, their preference for the Courts of Requests also suggests that they were satisfied with lay judges. The government agreed to increase the number of courts but refused to budge on the issue of professional control. The maximum number of courts in each district was increased from six to nine in 1845[36] and expanded again to twelve in 1850.[37] Pressure was also exerted to expand the jurisdiction of the

34. *Ibid* at 236, 360.
35. *Ibid*.
36. *An Act to amend an Act passed in the fourth and fifth years of the reign of Her Majesty, entitled,* An Act to repeal the laws now in force in that part of this Province formerly Upper Canada, for the recovery of Small Debts, and to make other provisions therefor, S Prov C 1844-1845 (8 Vict), c 37.
37. *An Act to amend and consolidate the several Acts now in force, regulating the Practice of Division Courts in Upper Canada, and to extend the jurisdiction thereof*, S Prov C 1850 (13 & 14 Vict), c 53. The published debates reveal eight petitions presented in 1843, three more in 1844-45, two in 1846, one in 1847, one in 1848, and seven in 1849. See also Banks, *supra* note 18 at 502, 509.

Division Courts and, by the later 1840s, jurists and politicians began to rethink their position in order to satisfy popular demand. In 1847, Judge Robert Easton Burns of the Home District published a pamphlet recommending reforms in the Division Courts, including an increase in their monetary jurisdiction. In 1849, former Tory Attorney General Henry Sherwood pushed for an expansion of the monetary limit, but was blocked by the Reform Government.[38]

Controversy also arose over the District Courts. In 1845, the Conservative government of William Draper presented a consolidating act which represented a further effort to professionalize these courts by providing for appeals from their decisions to the Queen's Bench and for standardized pleadings between the District and Queen's Bench courts. Reform leader Robert Baldwin supported fellow barrister Sherwood in this legislation in spite of their political differences. However, this act also led to mounting demands for increasing the financial jurisdiction of the District Courts. The question would have been of particular interest to regional lawyers who tended to rely on the District Courts for much of their business. While Draper's act made modest improvements in jurisdiction, several lawyers from outside of Toronto demanded greater changes. Speaking on their behalf, Conservative lawyer George Macdonell of Dundas argued that the present bill might increase the business of lawyers around Toronto, but it would not aid the outlying districts far from the courts of superior jurisdiction.[39] He renewed his demands in 1847, revealing his frustration at the mount of legal business reserved for Toronto barristers due to their proximity to the superior courts. He argued without success that the District Courts "were highly popular judicatories and were only confined to small sums to suit a few city lawyers."[40] Drawing the battle lines clearly, Attorney General Sherwood dismissed his criticism as the meddling of "*a country lawyer*."[41]

B. SUPERIOR COURTS

While the question of procedural reform was coming to the fore in the United States, and to a lesser extent in Britain during the 1840s, there was only limited interest in this issue in the colonies of Upper Canada, Nova Scotia, and New

38. *Debates*, *supra* note 16, vol 4 (1844–45) at 243, 1933-34; *ibid*, vol 8 (1849) at 429; RE Burns, *A Letter on the Subject of Division Courts: with proposed alterations in the jurisdiction and details of the system* (Scobie and Balfour, 1847); letter from Gowan to Baldwin (20 March 1849) Ottawa, Library and Archives Canada (Letterbook 6, accessed on microfilm in the Gowan fonds); Gowan to Baldwin (21 April 1850) Toronto, Toronto Reference Library (Robert Baldwin fonds).
39. *Debates*, *supra* note 16, vol 4 (1844-45) at 294, 1441-42.
40. *Debates*, *supra* note 16, vol 7 (1847) at 376.
41. *Ibid* at 377-78 [emphasis added].

Brunswick until the late 1840s. Once the principle of responsible government was resolved, a debate on law reform quickly emerged in the Maritimes and led to the establishment of law reform commissions in both Nova Scotia and New Brunswick in 1851.[42] However, by this time, the leading lawyers of Upper Canada had already been considering the question of Chancery reform for some time because of circumstances resulting from the creation of the Union. The union of the upper and lower provinces had resulted in the need for a common seat of government: it was initially situated at Kingston, which was located between Montréal and Toronto, the major cities of the two sections. The head of Chancery, Vice Chancellor Robert Sympson Jameson, had then moved the Court of Chancery to Kingston where he was also serving as the Speaker of the Legislative Council. Prominent members of the Toronto bar were infuriated.[43] In protest, the Law Society of Upper Canada drew up a memorial to the Governor General in 1842, which resulted in the appointment of a commission in 1843 to examine the question of Chancery as a whole, and especially the problems of its delays and expense.[44]

The Chancery Commission was decidedly conservative in its approach to reform. Composed of some of the most respected jurists and lawyers in Upper Canada, its members included the old Tory leader, Chief Justice John Beverley Robinson, Judge James Buchanan Macaulay of the Queen's Bench, Vice Chancellor Jameson, and three rising young Chancery counsel—R.E. Burns, W.H. Blake, and James Christie Palmer Esten.[45] In two reports released in 1844

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42. Greg Marquis, "Anti-Lawyer Sentiment in Mid-Victorian New Brunswick," (1987) 36 UNBLJ 163 at 166-67 [Marquis, "Anti-Lawyer"]; Girard, "Married Women," *supra* note 1 at 108-09.
43. Jameson and his court went back to Toronto in 1843. See John D Blackwell, "Jameson, Robert Sympson," in *Dictionary of Canadian Biography* [DCB], online: <www.biographi.ca/en/bio/jameson_robert_sympson_8E.html> [perma.cc/ZB8G-VKF4] [Blackwell, "Jameson"].
44. John D Blackwell, *William Hume Blake and Judicial Reform in the United Province of Canada* (MA Thesis, Queen's University, 1980) [unpublished] at 59, 60 [Blackwell, Thesis].
45. On Robinson, see Patrick Brode, *Sir John Beverley Robinson: Bone and Sinew of the Compact* (University of Toronto Press, 1984). For the others, see the following DCB entries online. Gordon Dodds, "Macaulay, Sir James Buchanan," online: *Dictionary of Canadian Biography* <www.biographi.ca/en/bio/macaulay_james_buchanan_8E.html> [perma.cc/5QU9-5FM3]; Blackwell, "Jameson," *supra* note 43; Brian H Morrison, "Burns, Robert Easton," online: *Dictionary of Canadian Biography* <www.biographi.ca/en/bio/burns_robert_easton_9E.html> [perma.cc/5DRM-Q4NP]; Donald Swainson, "Blake, William Hume," DCB, online: *Dictionary of Canadian Biography* <www.biographi.ca/en/bio/blake_william_hume_9E.html> [perma.cc/N3G7-X2YS]; Robert Hett, "Esten, James Christie Palmer," online: *Dictionary of Canadian Biography* <www.biographi.ca/en/bio/esten_james_christie_palmer_9E.html> [perma.cc/3M2L-7Z7S].

and 1845, the commission recommended against making major changes to the court. The best course was gradual reform based on measures tried in the mother country. Delays could not be reduced substantially. While they were greater in equity than in the common law, this was understandable because equity looked at all the outstanding points of a dispute rather than specific allegations and its decisions sometimes embraced the interests of numerous parties.[46]

While the Court of Chancery was often criticized as a tribunal for parties with large pockets, the commissioners were reluctant to make it more accessible. Like Draper in 1841, they showed themselves suspicious of the motives of parties with limited funds. In the report, they referred cryptically to past transactions that might be subject to groundless claims of fraudulent behaviour if persons of humble means were given access to an equitable jurisdiction.[47] They were almost certainly alluding to the substantial amounts of landed property which had been lost on defaulted mortgages prior to the establishment of the Court of Chancery. As judges, Robinson and Macaulay were engaged at this time in trying to protect the interests of large property holders and prevent the disruption that would result if these properties were redeemed. On the commission, they favoured reducing equitable costs "without affecting to make the Court of Chancery that kind of cheap tribunal, that parties may be tempted by the facility of access, to abuse its purposes, and make it what it is capable of being made, one of the worst afflictions a country can suffer under."[48]

However, the commissioners were willing to go beyond English practice in one important respect. They proposed abolishing the oft-criticized, lengthy, and costly process of a detailed written bill, interrogatories, and answers, and replacing it with a much shorter written bill and answer that would be followed by viva voce examination of the parties before a judge in court at *nisi prius*; that is, by a common-law judge on assize. For the first time, the defendant would also be

46. The first report appeared in 1844; it was not published and now seems lost. See Blackwell, "Judicature Acts," *supra* note 18 at 143. For the second report, see Province of Canada, Legislative Assembly, "Report of the Commissioners appointed to consider and report what alterations it may be expedient to make in the practice and proceedings of the Court of Chancery in Upper Canada," *Journals of the Legislative Assembly*, Appendix JJ (4 March 1845) online: <eco.canadiana.ca/view/oocihm.9_00955_4_2/206?r=0&s=1> [perma.cc/X5LM-BB7L] [Chancery Report].
47. Chancery Report, *supra* note 46.
48. *Ibid* at 5. During 1845-46, Robinson and Macaulay were sitting as members of the Court of Appeal in the important case of *Simpson v Smyth* in which they denied the right of Smyth's heirs to redeem. See JC Weaver, "While Equity Slumbered: Creditor Advantage, a Capitalist Land Market, and Upper Canada's Missing Court," (1990) 28 Osgoode Hall LJ 871 at 893-94.

permitted to examine the plaintiff as to the veracity of his case in the original suit instead of by a cross bill. While prominent English members of the profession believed such changes would interfere with the rights of parties to a full and fair hearing, the expense of the existing system was harder to justify in Upper Canada where most cases involved relatively small financial amounts. The commissioners supported lowering costs "within a limit somewhat in proportion to the value of the business to be transacted" without affecting the essentials of Chancery practice.[49] In their first report, they made specific recommendations for change that were subsequently accepted by government, including reforms to mortgage foreclosure procedure, which took up the bulk of the business of Chancery in these years.[50] Their proposals were expected to reduce costs in such disputes by half. In the second report, in 1845, the commissioners concluded by proposing that some mechanism be put in place for an ongoing review of rule changes.[51]

While the Commission was urging a cautious approach, hostility to the Court of Chancery was being expressed by lawyers and other members of both political parties in the Legislature. In both 1845 and 1846, the House of Assembly agreed to debate the possibility of abolishing the court and shifting its jurisdiction to the common-law courts. Resolutions in favour of this change were defeated in both years, but with strong minorities supporting the idea: In 1846, the vote was twenty-five to nineteen. Those in favour of abolition pointed to the public hostility against the court because of its high costs and delays and the fact that it met only in Toronto. This pressure was resisted by William Draper and Robert Baldwin, the Toronto barristers who led the Conservatives and Reformers respectively. Eager to protect the sanctity of the English law, they stressed the difficulty of merging equity and the common law and argued that most learned English lawyers were against abolition.[52]

At the same time as these debates were going on, R.E. Burns and W.H. Blake, two former members of the Chancery Commission, were putting forward a plan that sought to deal with both the ills of Chancery and the lack of a credible appeals court by expanding the central court machinery. This proposal, which

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49. Chancery Report, *supra* note 46 at 5. See also Blackwell, "Judicature Acts," *supra* note 18 at 145.
50. According to information in the papers of William Lyon Mackenzie, mortgage foreclosures made up 216 of the 246 cases considered by Chancery between January 1845 and March 1851. See press clipping (undated), Toronto, Archives of Ontario, Mackenzie-Lindsey fonds (file 5454, MU 1888, series A-2, Mackenzie-Lindsey family fonds, F 37) [Press clipping, Mackenzie-Lindsey fonds].
51. Chancery Report, *supra* note 46. Blackwell, "Judicature Acts," *supra* note 18 at 145.
52. *Debates*, *supra* note 16, vol 4 (1844-45) at 1625-27; *ibid*, vol 5 (1846) at 1575-80.

would eventually lead to the reforms of 1849, was first put forward in 1845 and sought to create a second superior court of common law in addition to Queen's Bench, appoint two more judges to the Court of Chancery, and establish a court of appeal that would be staffed by judges from the three courts. These changes would increase the capacity of the trial courts to hear cases at first instance, although the evidence from the time indicates that there was no bottleneck of business. It would also improve the credibility of the appeal court, which would now be composed solely of legal professionals for the first time. By appointing two more judges to the Chancery Court, Burns sought to remedy the perceived weakness of the court under the cautious Jameson whose decisions were frequently being questioned and overturned on appeal.[53]

Blake gave a lengthy defence of the new plan in a published pamphlet and in letters to Reform Attorney General Robert Baldwin whom he hoped to win his cause. Improving the Chancery, he said, was "*the smallest part of the plan*."[54] The major goal was to establish a more effective court of appeal. Blake believed that for the administration of the law to become "the greatest boon to civilized life," the courts must be seen to be professional and even-handed.[55] At present, there was no effective process of review. The only members of the profession who were eligible to sit on all cases heard by the appellate body were Chief Justice Robinson and Vice Chancellor Jameson. In the absence of more legal talent, the body was dominated by the Chief Justice. The result was that, while appeals had been brought from the Court of Chancery, none had ever been submitted from the Queen's Bench. Beyond the provincial level, an appeal was possible to Britain, but this step was so expensive and took so long "that it amount[ed] in effect to a total denial of justice."[56] An effective appeals process based primarily in Canada would not only be quicker and cheaper for suitors than appealing to Britain, but its decisions would also carry the moral sanction of justice seen to be done. The cost of expanding the courts, while significant, would be inconsiderable compared to the risk of a ruinous suit which would bring the judicial system into disrepute.[57]

Blake's plan made little impression at first. Baldwin declared himself convinced in principle, but he was reluctant to take up the proposal unless the governing Conservatives were on side. They were not. The administrations of W.H. Draper

53. *Debates*, *supra* note 16, vol 4 (1844-45) at 982, 1051, 1854; Wm H Blake, *A Letter to the Honourable Robert Baldwin, from Wm H Blake, AB, Professor of Law in the University of King's College, Upon the Administration of Justice in the Western Province* (George Brown, 1845).
54. Blackwell, "Judicature Acts," *supra* note 18 at 147.
55. *Ibid* at 148. See also Moore, *Appeal*, *supra* note 22 at 10-16.
56. Blackwell, "Judicature Acts," *supra* note 18 at 148.
57. Blackwell, Thesis, *supra* note 44 at 84.

from 1845–1847 and Henry Sherwood later in 1847 were distracted by the economic crisis, the Irish famine migration, and their relatively fragile hold on power. Draper acknowledged the need for a better process of judicial appeal, but felt that the amount of business in the Queen's Bench did not justify the creation of a second common-law court.[58] Both he and Sherwood were concerned with the high administrative costs of justice and fearful of the public outcry which would almost certainly come from expanding the centralized court system.

The turning point came with the election of 1848, which created a substantial Reform majority in the Legislature. W.H. Blake was now appointed Solicitor General by Robert Baldwin. The momentum for reform had also grown within the legal establishment. The profession in Toronto now supported the proposals albeit with some reservations. A meeting at Osgoode Hall in the fall of 1848 endorsed Blake's proposals because of the need for a better appeal procedure but, while favouring the expansion of Chancery to three judges, it said nothing about another common-law court.[59] Petitions by Skeffington Connor (Blake's brother-in-law) and by Robert Burns and other members of the profession were presented to the Legislature early in 1849 urging the government to act because of the need for a proper appeal procedure.[60]

Balanced against these public expressions were the privately-conveyed reservations of three judges of the Queen's Bench consulted by Blake: Chief Justice Robinson and puisne judges Macaulay and Archibald McLean. Writing to Blake, all three were skeptical of the expansion and, while their viewpoints differed, there was considerable concern that the amount of legal business at the superior-court level did not justify the added expense. On the question of Chancery, it is interesting to note that two of the three judges of the supposedly tradition-bound Queen's Bench were leaning towards abolishing Chancery and transferring equitable jurisdiction to a common-law court. While Robinson demurred, Macaulay and McLean suggested this possibility although it would represent a break from English practice.[61] Even among its leaders, the profession was divided on the question of law reform.

Outside of the profession, the question of expansion at first elicited little reaction probably because it was viewed chiefly as an issue for legal professionals.

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58. Michael S Cross, *A Biography of Robert Baldwin: The Morning-Star of Memory* (Oxford University Press, 2012) at 184-85, 238, 259-60; *Debates*, *supra* note 16, vol 5 (1846) at 333-34.
59. Blackwell, "Judicature Acts," *supra* note 18 at 154.
60. *Debates*, *supra* note 16, vol 8 (1849) at 278, 1822.
61. Letters from Blake to Baldwin (7, 25 September 1848) and from John Beverley Robinson to Baldwin (8 June 1849), Toronto, Toronto Reference Library (Robert Baldwin fonds).

The radical *Toronto Examiner*, however, revealed what the proponents could expect if it went ahead. This journal, previously aligned with the Reform party, attacked the plan from the point of view of farmers and mechanics, characterizing it as too expensive and "a bold and open conspiracy for the benefit of the [legal] craft."[62] Instead of establishing a new common-law court to aid in assembling a competent court of appeal, the *Toronto Examiner* recommended that the latter could be made up of superior-court judges, supplemented when necessary by judges of the lower courts. The suggestion testified to the lack of sympathy felt by some laymen towards the centralized courts which they regarded as less relevant to the needs of the people than the regional courts.

In spite of these criticisms, Blake's proposals were introduced in Parliament early in 1849 in the form of two bills. The first dealt with Chancery, increasing the number of judges to three and acting on the earlier commission's recommendations that practice be simplified while authorizing the judges to look further into this matter. The second bill established new courts of common law and of error and appeal. At the trial level, this measure reduced the number of judges in the Queen's Bench from five to three while creating a Court of Common Pleas with three judges. This court was to have equal and concurrent jurisdiction with the Queen's Bench and was to follow the Queen's Bench's mode of procedure. The regional capacity of the superior-court system was also expanded. Commissions could now issue three times a year for common law judges to go on circuit in the regions outside Toronto. The Court of Appeal would be fully professional, consisting of the nine judges from the trial courts.[63]

The Reform government introduced these bills in March during the crisis sparked by the *Rebellion Losses Bill* which sought to compensate persons who had lost property during the Lower Canadian Rebellion of 1837–1838.[64] Because people who had been sympathetic to the rebels might be compensated, the bill inflamed Tories who had been instrumental in suppressing the uprising.

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62. *Toronto Examiner* (12 November 1848), Toronto, Archives of Ontario, Mackenzie-Lindsey fonds (file 5494, MU 1891).
63. These bills became two separate acts, one concerning the Courts of Common Pleas and of Error and Appeal and the other concerning the Court of Chancery. See S Prov C 1849 (12 Vict), c 63, *supra* note 27; S Prov C 1849 (12 Vict), c 63, c 64, *supra* note 27. An appeal from the Court of Error and Appeal to the British Privy Council was possible when the amount of the dispute exceeded 1,000 pounds.
64. *An Act to provide for the Indemnification of Parties in Lower Canada whose Property was destroyed during the Rebellion in the years 1837 and 1838*, S Prov C 1849 (12 Vict), c 58 [*Rebellion Losses Bill*]. See also JMS Careless, *The Union of the Canadas 1841–1857* (McClelland & Stewart, 1967) at 123-26 [Careless, *Union*].

When Governor General Elgin approved the legislation, thus affirming that he would uphold the principle of "responsible government" by bowing to the will of Parliament, the Tories felt betrayed by the Crown whom they believed themselves to have been serving during the Rebellion. Conservative supporters rioted in the streets of Montreal and burned down the parliament buildings on the 25 April 1849.

In this atmosphere, the court reforms received limited attention in the Assembly. On second reading of the court bills on 15 May 1849, only four members opposed them—the old radical Louis Joseph Papineau from Lower Canada, and three Conservative lawyers from Upper Canada—Henry Sherwood of Toronto, Henry Smith of Frontenac, and the young John A. Macdonald of Kingston. On the third reading, held on 21 May 1849, George Sherwood, brother of Henry and a Conservative lawyer from Brockville, led the opposition.[65] He opposed increasing the number of Chancery judges and argued that the bill to create Common Pleas and a new appellate court be returned to committee with an instruction to "report upon the propriety of increasing the jurisdiction and efficiency of the present Local and Inferior Courts in Upper Canada, and to relieve the Court of Queen's Bench from a great portion of civil business."[66] The latter motion was supported by six Upper-Canadian representatives from outside Toronto, reflecting once again the lack of enthusiasm for the centralized courts in the regions. In spite of this opposition, the two bills passed and became known as the *Judicature Acts* at the end of May 1849.[67]

After passage, criticism of the measures began to emerge chiefly from radical supporters of the Reform Party. Resentment was expressed at public meetings in two strongly reform-oriented regions. A gathering to protest the reforms held at Sharon, north of Toronto, in October 1849 drew participants from five townships and three ridings in the surrounding area. Sharon itself was the headquarters for the Reverend David Willson's Children of Peace sect, which had supported William Lyon Mackenzie prior to the Rebellion. The meeting singled out Robert Baldwin for censure.[68] A second gathering, held in Grantham Township, in the Niagara area, resulted in more explicit demands for popularly based justice. Its proposals were framed within a broader demand for financial retrenchment and

65. *Debates*, *supra* note 16, vol 8 (1849) at 2323.
66. *Ibid* at 2379.
67. *Ibid* at 2378-80; S Prov C 1849 (12 Vict), c 63, c 64.
68. *Toronto Examiner* (7 November 1849), Ottawa, Library and Archives Canada (accessed on microfilm). See also SD Clark, *Movements of Political Protest in Canada, 1640–1840* (University of Toronto Press, 1959) at 424-25.

making local governmental institutions elective. Concerned primarily with the local courts, the participants argued that even the fees of the Division Courts were too expensive and that the collection of small debts could be made cheaper by taking the jurisdiction out of the hands of the district court judges and placing it in the hands of the township councils or elected commissioners' courts.[69]

Unwilling to speak up during the tumult of the session, the *Toronto Examiner* led the way among Reform journals. Published by James Lesslie, an old colleague of William Lyon Mackenzie, the *Toronto Examiner* argued that "hitherto a language and a host of useless forms peculiar to the legal tribe has been used to make law a profitable mystery … the more plausibly to draw upon the resources of litigants, and to enrich the practitioner." The journal called for reform that would make "justice simple, cheap, and accessible to the poorest in the land."[70]

Here were several ingredients of an emerging radical critique. The law was seen to serve the interests of lawyers and, by inference, of well-heeled suitors. It put the poor at a disadvantage since they required cheap justice in order to have equal access to the law. Instead of alleviating these problems, the expanded system of superior courts added to them by increasing the overall costs of justice. The *Toronto Examiner* and other Reform sources were rapidly concluding that the party of Robert Baldwin was establishment oriented and did not necessarily represent the interests or beliefs of common people such as farmers and mechanics. This recognition was expressed in terms of a conspiracy. The party had been infiltrated by Blake and other "cunning attorneys" from Toronto who raised a howl for law reform and then brought in legislation creating new jobs for themselves and their friends.[71] The comments became particularly biting when Blake left the government in autumn 1849 in order to head up the enlarged Court of Chancery. Many Reformers felt betrayed. They charged that the old Tory clique had been replaced with a new "legal aristocracy." There was growing criticism of the lawyers in the Assembly where they comprised more than half of Upper Canada's representatives. Elected because of their specialized knowledge,

69. "Great Reform Meeting at the 10 Mile Creek, Grantham Township," press clipping, (undated, c1849), Toronto, Archives of Ontario, Mackenzie-Lindsey fonds (file 5460, MU 1889).
70. *Toronto Examiner* (12 December 1849), Ottawa, Library and Archives Canada (accessed on microfilm).
71. "Thrown Overboard" (undated), Press clipping, Mackenzie-Lindsey fonds, *supra* note 50 (file 5459, MU 1889). See also letter from James Lesslie to William Lyon Mackenzie (20 September 1849), correspondence at 7282-290, *ibid*; *Toronto Examiner* (19 December 1849), *supra* note 68.

the *Toronto Examiner* argued that they tended to legislate mainly for themselves and deserved to be reduced in numbers at the next election.[72]

By the end of the 1840s, several viewpoints had surfaced on court reform. The leaders of the profession had been willing to consider procedural reform but, in keeping with their respect for the English legal tradition, they were extremely cautious about doing so. Their emphasis on the centralized superior courts as the primary measure of the system's credibility had led them to expand this part of the system in order to offset the problems identified with the Court of Chancery and the appeals court. However, they also faced pressure from persons in the regions for improvements in the local system of justice, and some of this pressure, particularly from rural areas, revealed a suspicion about legal procedures and the role of lawyers which began to be expressed more forcefully after 1849.

II. COURT REFORM AS A POLITICAL ISSUE, 1850–1853

In 1850, further reform of the civil courts seemed imminent. Nova Scotia and New Brunswick were moving towards reform and a new code of civil procedure had been in place next door in New York State since 1848.[73] A backlash was emerging to the expansion of the superior courts in Upper Canada and, particularly, once again to equitable procedure and the Court of Chancery. Over the next three years, a series of proposals were put forth in an effort to make the legal system more accessible and less costly to suitors. These years saw the emergence of the Clear Grits and other radical spokesmen whose wide-ranging demands for change alarmed and infuriated leading lawyers and politicians. However, while members of the profession resisted major changes, even they understood that some concessions would be necessary to defuse public discontent.

A. THE CLEAR GRITS AND THE RADICAL SPRING OF LEGAL REFORM

The political crisis of 1849 had confirmed that responsible government was in place and the Reform Party was firmly in control. With this realization came an outpouring of radical sentiment on legal and political questions suppressed during the long struggle for responsible government.

This sentiment was seized upon by a small group of political radicals who came together during the winter of 1849–1850 to form a loose coalition called

72. *Toronto Examiner* cited in *Toronto Globe* (11 December 1849), Ottawa, Library and Archives Canada (accessed on microfilm); letter from Lesslie to Mackenzie (20 September 1849), Press clipping, Mackenzie-Lindsey fonds, *supra* note 50.

73. Friedman, *supra* note 1 at 293-95.

the Clear Grits. The group consisted of two intersecting circles of people. The older circle included veteran reformers such as the journalist James Lesslie of the *Toronto Examiner* who had been active before the Rebellion of 1837. The old rebel William Lyon Mackenzie was in touch with Lesslie in Toronto prior to his return from exile in New York in May 1850. The younger circle included Toronto-born lawyer William McDougall and recently arrived British immigrants like the journalist Charles Clarke. While they sought to appeal mainly to the farmers and mechanics of the province, these men were predominantly middle class—newspaper men, professionals, and businessmen.[74] They were all influenced to varying degrees by the egalitarian ideas of American and British radicals.

Charles Clarke became the intellectual leader of the Clear Grits. Writing under the pseudonym "Reformator," he submitted articles to the Irish-Catholic journal, the *Toronto Mirror*, in 1849 and 1850, which were widely reprinted in reform journals across Upper Canada. After the *North American* became the main organ of the Clear Grits under the editorship of William McDougall in Toronto, Clarke continued his efforts with a series of columns in that journal in 1851. He admired America's democratic activists, but he also had first-hand knowledge of the Chartist fight for universal suffrage in Britain and based his political philosophy on the utilitarianism of Jeremy Bentham and his principle of pursuing the greatest happiness for the greatest number.[75]

Clarke looked forward to creating a society in which individual freedom would prevail and a more equal distribution of wealth and power would be accomplished with the aid of changes to the political system. Drawing on an argument central to both British and American radicals,[76] he saw the chief evil to be monopolies, or concentrations of power of any kind, and the main means of rooting them out to be by introducing reforms to the political system, such as a broadened franchise and the establishment of elective institutions, particularly at the local level. Like many radicals, Charles Clarke was emphatic in his argument for decentralization as a means of utilizing the shared interests of local communities to forestall the tendency of central political bodies to acquire increased power. Through these reforms, the sovereignty of the people could be asserted over existing political elites first at the local and then at the central

74. JMS Careless, *Brown of the Globe Volume I: The Voice of Upper Canada 1818–1859* (Macmillan, 1959) at 104-11, 117; Cross, *supra* note 58 at 287-91, 312-13.

75. Dewar, "Reformator," *supra* note 12 at 239-41, 247-48; see also Dewar, *Pen and Ink*, *supra* note 11 at 55-66.

76. Gareth Stedman Jones, "The Language of Chartism" in James Epstein & Dorothy Thompson, eds, *The Chartist Experience: Studies in Working-Class Radicalism and Culture, 1830-60* (Macmillan, 1982) 3 at 12-16; Benson, *supra* note 13 at 34-38, 94-97.

levels. By taking political control of the primarily agrarian society, the farmers, shopkeepers, and artisans making up the majority of the population would also be able to crush other monopolies in Upper Canada.[77]

Chief among these other targets were the religious and legal systems. The Clear Grits aimed to attack religious privilege by secularizing the clergy reserves which gave certain sects an advantage over others in funding. This had been a major issue since the early 1820s, but at mid-century it was at first overshadowed by the question of legal reform. The Clear-Grit platform published in the *North American* on 22 November 1850 included "Law Reform" as a subject for immediate legislation. The journal advocated the abolition of Chancery, the simplification of law proceedings, and the abolition of the monopoly of legal services held by the existing legal profession.[78] The Court of Common Pleas was also to be done away with; lawyers' fees were to be reduced, and jury law was to be amended.

This interest in the law stemmed mainly from events in the United States. While Jeremy Bentham, Lord Henry Brougham, and others in England had spoken in favour of simplifying the law and reducing its costs to benefit the poor, their rhetoric was less extreme than that of American radicals who argued that the complexity of the common law had facilitated the creation of a monopoly. It had given the courts great discretionary power while making the law a mystery which rendered the profession indispensable, thereby creating a modern legal and judicial "aristocracy" which was more in tune with the interests of the rich than the poor.[79]

During the 1840s, when legal reform seemed almost inevitable on both sides of the Atlantic, the New York State Constitutional Convention of 1846 served to drive the programme forward. Dominated by radical politicians from both American parties, the Convention gave rise to demands for simplifying the law and led to a commission on law reform headed by David Dudley Field, a long-time supporter of legal codification. The resulting Field Codes of 1848 and 1850 were revolutionary for their time and especially influential in New York where the Court of Chancery was abolished in 1848 and law and equity were combined under one court system. The new regulations also abolished the common-law

77. Dewar, "Reformator," *supra* note 12 at 235-36, 240; Gidney & Millar, *supra* note 4 at 49-51.
78. *Toronto Examiner* (18 September 1849, 16 January 1850), Ottawa, Library and Archives Canada (accessed on microfilm); *North American* (4 June, 22 November 1850), Ottawa, Library and Archives Canada (accessed on microfilm).
79. Friedman, *supra* note 1 at 69-70; Arthur M Schlesinger, Jr, *The Age of Jackson* (Little, Brown, 1945) at 329-30.

forms of action and simplified pleadings. The 1850 code was eventually adopted, or partially adopted, in at least twenty-four American states.[80]

These developments drove on discontent with the court system in Upper Canada. In April 1850, Charles Clarke's "Reformator" made several proposals for reform that would be taken up by other sources. First, he argued for decentralizing the legal system by abolishing the Chancery Court and the Court of Common Pleas and increasing the jurisdiction of the regional courts. Second, echoing American arguments, he proposed that the law system be codified so that it "may be found on the library shelves of every mechanic, merchant, and citizen."[81] His third demand was that the responsibility for setting legal fees be transferred from the profession, as embodied by the judges, to Parliament where laymen could exercise more control. Finally, he posited that jurymen be paid in the same way as other officers. The founding convention of the Clear-Grit movement at Markham in March 1850 had actually gone a step further, demanding that the jurisdiction of the Division Courts and their appointed judges should be transferred to municipal and township courts, which presumably would be staffed by elected officials.[82]

The Clear Grits were particularly critical of the legal profession. Like British and American radicals, they subscribed to a labour theory of value which distinguished between occupational groups that produced material wealth and those that did not.[83] Since agriculture was the lynchpin of Upper Canada's economy, farmers were vitally important as producers of food, though artisans, such as blacksmiths and tailors, also produced goods of value. While the economy depended on the output of these people, their labour was exploited by persons who relied on this production without adding any tangible value to it, such as leading merchants, bankers, and the parasitic lawyers. The Upper Canadians adopted American proposals to break down the privileged position of the legal profession by opening it to competition and reducing legal fees.[84]

Some provincial radicals were also encouraging the use of the traditional process of arbitration—usually employed in commercial cases—in disputes

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80. Wilentz, *supra* note 13 at 593; Friedman, *supra* note 1 at 293-95, 303-06.
81. *Toronto Mirror* (12 April 1850) Ottawa, Library and Archives Canada (accessed on microfilm); Howe, *supra* note 13 at 440.
82. Public meeting at Markham to support Grit principles reported in the *Toronto Globe*. See *Toronto Globe* (21 March 1850).
83. For the British and American viewpoints, see respectively Stedman Jones, *supra* note 76 at 18, 31-34; Benson, *supra* note 13 at 94-97.
84. *Toronto Mirror* (19 April 1850) Ottawa, Library and Archives Canada (accessed on microfilm).

involving persons of limited means in the hope of reducing the influence of lawyers and avoiding the complexities of the court system. This idea would have entailed the involvement of neighbours in solving local disputes which might have been impractical given the marked reluctance of many Upper Canadians to take part in juries and other local institutional bodies at the time.[85] However, it was proposed in the Niagara region as an idealistic and even Christian-utopian means of building community harmony. This viewpoint may reflect the influence of similar arguments being made at this time in western New York, directly adjacent to Niagara, where the religious revival of the "Second Great Awakening" was underway.[86] In Niagara, there had already been a steady source of petitions in favour of legal reform before a meeting held at Howard's Hotel in the town of Niagara in autumn 1850 resulted in the formation of the Niagara Town and Township Association for the Suppression of Litigation, and the Settlement of Disputes by Arbitration. At the meeting, participants argued that complaints were often brought to lawyers and the courts from a spirit of avarice with the goal of getting a favourable result regardless of fairness. This led to bitterness and the ruin of both parties to a suit, especially when lawyers might be more concerned with their own financial interests than those of their clients. While pushing for arbitration, the members of the Niagara association also supported court reform. They advocated extending the jurisdiction of the regional courts and simplifying and codifying the law to reduce expense and procrastination. None of these reforms was thought possible while lawyers dominated the Assembly.[87]

The interest in arbitration expressed in Niagara was also associated with an international campaign to establish conciliation courts. Lord Brougham had raised the topic in Britain, proposing to establish conciliation courts on a similar basis as those in operation in France, Germany, and other continental European states. The idea had been taken up in America where it was argued that conciliation courts would provide faster and cheaper justice and allow citizens with limited funds to partake in a judicial system that was equal for all rather than tilted in favour of the wealthy. The original proposal was for parties to submit

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85. See R Blake Brown, *A Trying Question: The Jury in Nineteenth-Century Canada* (University of Toronto Press, 2009) at 49-51.
86. Amalia D Kessler, "Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication" (2009) 10 Theor Inq L 423 at 449-50, 453-54; Perry Miller, *The Life of the Mind in America from the Revolution to the Civil War* (Harcourt, Brace & World, 1965) at 186-88.
87. "Meeting at Howard's Hotel," *Niagara Mail* (13 November 1850), Toronto, Archives of Ontario, Mackenzie-Lindsey fonds (MU 1889, file 5460) ["Meeting at Howard's Hotel"].

their disputes voluntarily to tribunals, which, like those in Europe, were usually headed by prominent lay persons rather than professional judges. Deliberating without the presence of lawyers, the judges would hold private hearings where the disputants might find it easier to find common ground than in formal public hearings. Compromise would be encouraged and binding decisions would be based on conscience rather than the rule of law. The second Field Code, in 1850, contained a proposal for conciliation courts which New York State considered but never enacted. In Upper Canada, McDougall's *North American* was supportive, arguing that when such bodies were erected lawyers "will be obliged to earn their living honestly by ploughing the land instead of quoting 'my lord' this and 'my lord' that."[88]

B. LEGISLATIVE DEBATES, 1850–1853

The struggle for reform reached a peak during a series of raucous debates in the House between 1850 and 1853. The question involved four main issues: (1) Legal procedure, (2) The Court of Chancery, (3) The structure of the legal profession, and (4) The balance of power between the centralized and regional courts. In 1850, even before the impact of the Clear Grits was fully felt, lawyer–politicians began making efforts to assuage public discontent by proposing procedural reforms and the abolition of Chancery. In 1851, radical laymen got support from the returning prodigal, William Lyon Mackenzie, who had been elected to Parliament shortly after returning from exile in America for his part in the Rebellion of 1837. Mackenzie quickly became the leading spokesman for legal change. Drawing on ideas he had heard as a journalist attending the New York Constitutional Convention of 1846, he made blistering attacks on the Law Society's control over the profession and proposed the establishment of conciliation courts as alternatives to the present courts.[89] While his arguments led to heated exchanges in the House in 1851 and 1852, he was largely stymied by the conservative viewpoint of most lawyers and laymen representing Upper Canada. By 1852, the Reform Ministry had begun to deflect attention from his more radical nostrums by proposing limited court reforms of their own. By the following year, they were promising more substantial changes, but only after reforms being considered in England became law.

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88. *North American* (19 April 1850), Ottawa, Library and Archives Canada (accessed on microfilm); Kessler, *supra* note 86 at 449-50.
89. Lillian F Gates, *After the Rebellion: The Later Years of William Lyon Mackenzie* (Dundurn Press, 1988) at 136-37, 181-82.

The parliamentary session of 1850 opened with debates over reforming legal procedure and abolishing Chancery. Liberal-leaning lawyers introduced at least eight unsuccessful bills to simplify procedure during this session and the one in 1851. By proposing measures that were similar to those being put forward in the United States and the Maritime Provinces, they hoped to portray themselves as at the forefront of reform and also to refute allegations that the profession was avaricious. Reform barrister James Smith claimed to be speaking for most of his colleagues when he commented that, "in general lawyers were not over-paid for what they did, but that they were required to do a great more than was necessary."[90] His bill, and those of others, sought mainly to simplify common-law procedure in commercial cases and seem to have had been heavily influenced by the recent reforms in New York. However, the bills do not seem to have been sufficiently detailed or credible to gain much support.

Attorney General Robert Baldwin was dead-set against such proposals. The simplicity desired by reformers, he said, was not often possible "among a civilized people where transactions were complicated and interests involved important." The settlement of disputes relied on the existence of precedents which might no longer be relevant if the law was reformed. He thought the bills in question would overturn procedures understood by all in favour of "the mere skeleton of [a new system]."[91] Prominent Tory lawyer Sir Allan MacNab believed that a commission would be necessary before reforming the law. Even Clear-Grit lawyer William McDougall of the *North American* thought that the lawyers' bills were half measures designed to gain publicity, and the appointment of a commission would be necessary for a full-scale overhaul of the law.[92] Yet, the government made no further effort to move on the question.

While procedural reform was discussed mainly by lawyers, Chancery was the bête noire of the legal system and came under attack from both lawyers and laymen. In May 1850, Sir Allan MacNab noted that the public regarded the reforms of 1849 "as a job," and that there was not a more popular issue in the country than the abolition of Chancery. As a Tory, he was hardly an objective observer, but on the question of Chancery he was not far from wrong. The court was attacked in 1850 and 1851 by moderates and radicals alike. In 1850, two lawyers, Henry Smith and John Prince, political moderates representing constituencies outside Toronto, introduced motions that would have led to

90. *Debates*, *supra* note 16, vol 9 (1850) at 73.
91. *Ibid* at 325, 354.
92. *North American* (4 June 1850, 2 August 1850, 18 July 1851), Ottawa, Library and Archives Canada (accessed on microfilm).

its abolition. In 1851, the call for abolition was echoed more stridently by the newly-arrived Mackenzie.[93]

The resentment against Chancery was reaching a peak internationally. In England, jurists were considering reform. The American states of New York and Ohio had abolished the court, and the British provinces of Nova Scotia and New Brunswick were moving in the same direction. While the complexity, delays, and costs of equitable procedure were issues in Upper Canada, the chief grievance was the court's centralization. Writing to Mackenzie while he was still in New York, Lesslie of the *Toronto Examiner* had commented that many lawyers outside Toronto did not practice in the court and favoured its abolition. He might have added, as did the *Toronto Patriot*, that parties from outside the city incurred extra costs as their local counsel had to employ a Toronto agent.[94] The expense posed a particular problem for people of limited means. Because of the court's location, Mackenzie noted that the court was almost invisible to most Upper Canadians until they were dragged into its clutches and underwent endless costly proceedings.[95]

There were other criticisms. In both England and Upper Canada, it was believed that Chancery's archaic procedures did not respect the hard-won rights of British subjects under the common law. Since the court relied greatly on the evidence of written documents, it was regarded as not providing the parties with the prerequisites of a fair trial including open hearings, oral testimony, and, most crucially, trial by jury. While the court of equity did sometimes refer disputes to the common-law courts for a determination of facts by a jury, this stratagem involved the cumbersome process of beginning a feigned common-law action.[96] The public was also increasingly exasperated by the existence of the two parallel systems of law adjudicated in separate courts. It was still possible for a just cause to fail because it was launched in the wrong court, and the course of litigation

93. *North American* (21 May 1850), Ottawa, Library and Archives Canada (accessed on microfilm); *North American* (24 May 1850), Ottawa, Library and Archives Canada (accessed on microfilm); *Debates*, *supra* note 16, vol 10 (1851) at 562-69.

94. Letter from Lesslie to Mackenzie (23 January 1850), Press clipping, Mackenzie-Lindsey fonds, *supra* note 50 (correspondence at 7355-56); *Toronto Patriot* (24 February 1851), Press clipping, Mackenzie-Lindsey fonds, *supra* note 50.

95. Mackenzie, handwritten note (undated, c1853), Toronto, Archives of Ontario, Mackenzie-Lindsey fonds; *Debates*, *supra* note 16, vol 10 (1851) at 562-63.

96. Letter from A Grant to Toronto Globe (17 December 1853), Toronto, Archives of Ontario, Mackenzie-Lindsey fonds (MU 1888); "A Plea for Reform in the Courts of Law and Equity for Upper Canada," letter from "A Barrister" to the British Standard (Perth) (27 August 1852), Toronto, Archives of Ontario, Mackenzie-Lindsey fonds.

in each jurisdiction was hampered by the absence of procedures and remedies available in the other.[97]

Among the Upper-Canadian court's many sins, was its shrinking credibility. During the 1840s, Vice Chancellor Jameson's decisions had frequently been reversed on appeal by the common-law judges, bringing his capability into question. In the space of a few months, W.H. Blake and John Godfrey Spragge, the two judges appointed in 1849, reversed a series of Jameson's decrees which had allowed actions for ejectment to continue even though the defendants were absent from the country. Since large amounts of property were involved in these suits, the Legislature moved to enact a law confirming the previous decrees.[98]

In spite of these grievances, the court was staunchly defended in Parliament by the Reform Ministry and many of its supporters who argued that the improvements made by the act of 1849[99] and by the rules of new Chancellor Blake should be given a trial. A major complaint had been about the time and expense consumed by the Chancery's reliance on written bills and interrogatories. Acting on the recommendations of the commissioners of 1844–1845, the statute of 1849 had replaced the written proceedings with provisions for the parties to examine each other viva voce before a judge or a master of the court. One legal commentator in Upper Canada noted in 1851 that practice was now faster than in England where the traditional bills and interrogatories had been revised but not abolished.[100] During 1850, provision was also made for the judges of the Chancery to appoint masters and deputy registrars in the regions to collect testimony and documents for forwarding to the court in Toronto.[101] Nonetheless, the Chancery judges still sat only in Toronto and depended on the transcripts of evidence taken elsewhere rather than hearing it first-hand and orally.

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97. Letter from Lesslie to Mackenzie (23 January 1850), Toronto, Archives of Ontario, Mackenzie-Lindsey fonds (correspondence at 7356).
98. *Debates*, *supra* note 16, vol 9 (1850) at 309, 1142-44, 1499-501; *An Act to confirm decrees and orders and other proceedings of the Court of Chancery of Upper Canada, in certain cases*, S Prov C 1851 (14 & 15 Vict), c 113.
99. See *North American* (24 May 1850), *supra* note 26; Debates, *supra* note 16, vol 10 (1851) at 564-68.
100. *An Act for the more effectual Administration of Justice in the Court of Chancery of the late Province of Upper Canada*, S Prov C 1849 (12 Vict), c 64, s 11; see Robert Cooper, *The Rules and Practice of the Court of Chancery of Upper Canada* (AH Armour, 1851) at 10-12, 53-54, 143-44.
101. *An Act to confirm and give effect to certain Rules and Regulations made by the Judges of Her Majesty's Court of Error and Appeal for Upper Canada, and for other purposes relating to the powers of the Judges of the Courts of Law and Equity in that part of the Province, and the Practice and Decisions of certain of those Courts*, S Prov C, 1850 (13 & 14 Vict), c 50.

The votes on the motions of 1850 and 1851 revealed the extent of the court's unpopularity. While some of the most prominent lawyers argued that abolishing the court would lead to legal confusion, a slim majority of Upper-Canadian members voted against the court in 1850. In the following year, twenty-five Upper Canadians supported abolition, while only nine voted against. Eight lawyers voted for the court's demise.[102] Faced with these results, Attorney General Baldwin took the opportunity to resign, remarking that he could be of no further use to the province since he was unable to protect foundational institutions such as the courts "from becoming the sport of demagogue clamour."[103] However, regardless of his resignation, the court survived because of the politics of the Union: The majority of Lower-Canadian members voted to support the court for the sake of their coalition with Baldwin's Upper-Canadian Reformers.

The session of 1851 represented the apogee of radical dissent in the House. It was dominated by the presence of William Lyon Mackenzie who made a frontal attack on the legal profession. By this time, many radicals and their supporters had become incensed at the influence of the profession in politics and the tight control exerted over it by the Law Society of Upper Canada. There were allegations once again that Baldwin's government had replaced the rule of the Family Compact with a legal aristocracy headed by the benchers of the Law Society of Upper Canada.[104] Mackenzie also drew on the public hostility being expressed against the professions generally in Upper Canada during the early 1850s. Between 1849 and 1851, three attempts to incorporate the medical profession were thwarted because of widespread public opposition, especially from rural areas where it was believed that the goal was to create a monopoly for medical practitioners in Toronto at the expense of traditional practitioners and midwives elsewhere.[105]

Mackenzie proposed to clothe the legal profession in more democratic garb by opening it to competition. His was one of several proposals made during the

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102. Debates, *supra* note 16, vol 10 (1851) at 562-66, 570; *ibid*, vol 11 (1852-1853) at 2714, 3005-3022; *North American* (4 July 1851), Ottawa, Library and Archives Canada (accessed on microfilm).
103. Quoted in Blackwell, Thesis, *supra* note 44 at 150.
104. See "A Canadian," unknown source, (undated) Press clipping, Mackenzie-Lindsey fonds, *supra* note 50; "A Chapter on Law Reform," letter from "Whitby" to The Reformer and News-Letter, Oshawa (30 October 1851), Toronto, Archives of Ontario, Mackenzie-Lindsey fonds (MU 1889, file 5460) [Letter from "Whitby"]; See also Letter from DE McIntyre to John Sandfield Macdonald (25 August 1851) Vol. 1 at 385c-d, Ottawa, Library and Archives Canada (accessed on microfilm, Sandfield Macdonald fonds).
105. Cross, *supra* note 58 at 291, 319.

1850s that would have ended the Law Society's monopoly over entrance to the profession and allowed anyone to plead for a suitor in a court of law.[106] The critics envisaged a free market in legal services in which the most capable individuals would rise to the top. The bar, Mackenzie said, had long been closed to those who had not gone through certain preliminaries. He wanted to do away with the need to enroll with the Law Society, article with an accredited barrister, and pass examinations. In his utopian view, the law should be like a trade. If it was simplified and codified, it would be possible for "any man who chose to do so, to stick up his shingle, and call himself a lawyer, just as he could if he were a watch-maker. The ablest man would always get the greatest practice."[107] He was particularly opposed to the apprenticeship system. In his personal papers is a note in which he argued that becoming an apprentice usually entailed a personal relationship with a barrister that tended to keep persons without influential connections out of the profession.[108] Similar ideas had already been persuasive in the United States: In the 1840s, Maine, New Hampshire, and Wisconsin had eliminated all restrictions for entry except good behaviour. In the British province of Nova Scotia, Joseph Howe's "Free Trade in Law" Act of 1850 took advantage of anti-lawyer sentiment to permit any litigant to appoint any lay person to represent him in court.[109]

Such schemes had less chance of success in Upper Canada. While Solicitor General John Sandfield Macdonald noted the resentment against lawyers in many rural areas, commenting that "country constituencies" would be happy "to do away altogether with lawyers,"[110] the strength of the profession in the House and the conservative tendencies of many lay members made changes unlikely. Opening the profession would threaten the livelihoods of existing lawyers and endanger their social status. Moreover, they had been taught that their training under the Law Society was necessary precisely because they were not to be tradesmen but leaders and protectors of the constitution.[111] Most lawyers and other members of the House also believed that the existing regulations protected the vulnerable. As Robert Baldwin had commented in 1850, lawyers would still

106. *Debates*, *supra* note 16, vol 9 (1850) at 324-25; *ibid*, vol 10 (1851) at 1203-206; *ibid*, vol 11 (1852–53) at 670-71, 700-701.
107. *Ibid*, vol 10 (1851) at 1204.
108. Mackenzie's notes, possibly for a speech or article (undated), Toronto, Archives of Ontario, Mackenzie-Lindsey fonds (file 5471, MU 1890).
109. Friedman, *supra* note 1 at 236-37, 498-500; Girard, "Married Women," *supra* note 1 at 114-15.
110. *Debates*, *supra* note 16, vol 10 (1851) at 368.
111. Baker, "Education," *supra* note 2 at 50-51.

be paid in a free market, but "the ignorant might be imposed on."[112] Crucially, Mackenzie's proposals also failed to make any provision for legal training. While George Brown of *The Globe* was critical of the Law Society's control, he thought that examinations would be essential to ensure that lawyers were capable. He argued that the proposals tore down existing regulations without offering anything substantive in their place. For all these reasons, the bill was defeated both in 1851 and when it was re-introduced in 1852.[113]

Mackenzie also proposed the establishment of conciliation courts in 1851. Like the participants of the Niagara meeting in August 1850, he professed to believe that Christians had a moral responsibility to solve their differences personally and amicably without resorting to an adversarial process which tended only to embitter relations between them. He was again critical of manipulative lawyers whom he believed used disputes to bear off "the prizes contended for, while the angry disputants themselves were left to mourn their obstinacy[.]"[114] His comments raised the hackles of the legal practitioners in the House, but also brought forward applause from his supporters in the galleries. Besides reducing the influence of lawyers, his bill also sought to offer a quicker, cheaper, and more informal means of settling disputes than the traditional courts.

Mackenzie's proposal was based almost word-for-word on similar measures in New York's Field Code. Bending to popular pressure, the commissioners had agreed to recommend the establishment of tribunals on the European model in which the judges would meet privately with the disputing parties without lawyers and witnesses, but Field and his colleagues had one proviso. Instead of lay judges, the tribunals should be presided over by New York State's professional county court judges. If the parties consented, the decisions of these judges would be binding and could be enforced like any judgment after a memo filed in the County Court. Mackenzie urged the adoption of the same provisions in Upper Canada and claimed that the resulting tribunals would be helpful, particularly to the disadvantaged because they would prevent delays which tended to "increase expense and anxiety of mind, unsettle men's plans of life, give to the rich an unjust and … advantage over the humble, and are very unfavorable to the administration of justice."[115]

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112. *Debates*, *supra* note 16, vol 9 (1850) at 325.
113. *Ibid*, vol 10 (1851) at 1203-206; *ibid*, vol 11 (1852–53) at 670-71, 1207; *North American* (3 September 1852), Ottawa, Library and Archives Canada (accessed on microfilm).
114. *Debates*, *supra* note 16, vol 10 (1851) at 364, 371.
115. *Ibid* at 365; Kessler, *supra* note 86 at 464-68.

In spite of strong opposition from the lawyers in both parties, this proposal was not easily defeated. John Sandfield Macdonald and William Buell Richards spoke on behalf of the government and noted that the county court judges were already badly overworked since they had to preside over the County Court, the Quarter Sessions, the Surrogate Court, and all the Division Courts in their counties. John A. Macdonald eventually argued that a system in which a judge made decisions behind closed doors with no possibility of a court appeal would threaten the rule of law.[116] Similar concerns had already been expressed in the United States and Britain, but the prospect of a cheaper and less dilatory process for settling disputes was attractive in Upper Canada. The bill gained substantial support in the Assembly, especially from representatives of "country constituencies," including several of the lawyers who had earlier supported procedural reform.[117] The vote from Upper-Canadian members was almost evenly split and, once again, a question affecting Upper Canada was decided in the government's favour by Lower-Canadian votes. A similar bill was introduced in 1852 and, according to Mackenzie's later comments, passed a second reading before the majority of the lawyers rallied to defeat it in committee of the whole.[118] It was more easily defeated when it was introduced yet again in the next session.[119]

The driving force in the session of 1852–1853 slipped from the hands of the radicals to the new Reform Ministry in Upper Canada, led by Francis Hincks. William Lyon Mackenzie found himself increasingly isolated after December 1852 when two Clear Grits joined the provincial Cabinet. The other radicals were now more reluctant to criticize the ministry. William Buell Richards, the new Attorney General for Upper Canada, took the initiative by introducing two bills dealing with procedural reform. He was well aware of developments in England where the first report of the common-law commission on reform had led to the *English Common Law Procedure Act* of 1852. Since it was reported that the commissioners were working on further changes, he was hesitant to do more before they were announced.[120]

Richards's first bill, which extended a limited equity jurisdiction to the County Courts, seems to have been based largely on the ideas of Judge James Robert Gowan of Simcoe who was quickly becoming the Province of Canada's

116. *Debates*, *supra* note 16, vol 11 (1851) at 368-69; *ibid*, vol 12 (1854-55) at 3418.
117. *Ibid*, vol 10 (1851) at 368.
118. *North American* (20 June 1851), Ottawa, Library and Archives Canada (accessed on microfilm); *Debates*, *supra* note 16, vol 12 (1854–55) at 3418-19.
119. *Debates*, *supra* note 16, vol 12 (1854–55) at 408, 3419; *Toronto Globe* (21 May 1855), Ottawa, Library and Archives Canada (accessed on microfilm).
120. See Robert A Harrison, *The Common Law Procedure Act, 1856* (Maclear & Co, 1858) at 1.

chief advisor on Upper Canada's lower courts. Gowan, who based his thinking on similar proposals made for the English County Courts, hoped such an innovation might reduce "the hue and cry against Chancery" and answer complaints against its limited accessibility to persons outside Toronto.[121] While Richards presented the bill in the House as a trial of the principle of joining equity and common law, he was also hoping to head off "a complete remodeling of the whole procedure" before more study took place. Nonetheless, his reform was welcomed in the House and became law.[122]

Richards's second bill was much more ambitious than the first but bore the imprint of similar thinking. It was a mammoth ninety-three-page draft of the very kind of reform that he seems to have hoped to forestall, at least for the time being: A general simplification of the procedures of the common law and equity and their consolidation into one unified system. No copy of the bill seems to have survived. The *British Colonist*, usually moderately conservative in tone, was favourable and reported that there was to be "a simple form of action" and that proceedings would be "conducted not in a distorted interpretation of words … but in a plain statement, in plain language."[123] The measure seems to have been introduced to satisfy the demand for discussing reform, but not to lead to legislation. After setting it aside for public consideration, the government signaled that it would proceed no further during the session.[124]

The bill got mixed reviews. While the *British Colonist* praised the measure as the dawn of "a new era," it also saw one egregious weakness: The burden that the law placed on the poor. As long as court officials depended on fees, the poor would be shut out of the courts: "Let all the officials, like the Judges, be paid from the revenues of the Province … The jurisprudential institutions of a country … should not be guided by a test which makes wealth the passport to their halls."[125] Other commentators were more critical. Judge Gowan remarked enigmatically that there were things in the bill which were "difficult to reconcile."[126] A barrister

121. Letter from Gowan to Baldwin (21 April 1850) Toronto, Toronto Reference Library (Robert Baldwin fonds); letters from Gowan to Richards (1, 8, & 11 September 1852), Ottawa, Library and Archives Canada (Letterbook 8, accessed on microfilm in the Gowan fonds).
122. *Debates*, *supra* note 16, vol 11 (1852–53) at 753. For the bill, see *An Act to confer Equity Jurisdiction upon the several County Courts in Upper Canada, and for other purposes therein mentioned* S Prov C 1852-53 (16 Vict), c 119.
123. *British Colonist* (11 February 1853), Press clipping, Mackenzie-Lindsey fonds, *supra* note 50.
124. *Debates*, *supra* note 16, vol 11 (1852–53) at 3011; *Toronto Globe* (9 October 1852), Ottawa, Library and Archives Canada (accessed on microfilm).
125. *British Colonist* (11 February 1853); *British Colonist* (15 February 1853).
126. Letter from Gowan to Richards (12 October 1852), Ottawa, Library and Archives Canada (Letterbook 8, accessed on microfilm in the Gowan fonds).

writing in the *British Colonist* was less diplomatic, describing the bill as "crude, cumbrous and ill-digested" and calling for lawyers to form a Law Amendment Society in order to give the subject the more detailed study it deserved.[127]

When debate resumed in the spring of 1853, Richards brought in only modest reforms to the courts of common law. He got approval for minor procedural changes in a bill designed to equalize the amount of business being heard by the courts of Queen's Bench and Common Pleas. For the rest, he preferred to await further developments in Britain where the second report of the English Common Law Commissioners had been released but not yet incorporated into law.[128] This cautious approach contrasts with the rapidity with which Nova Scotia and New Brunswick moved to implement many provisions of the *first English Common Law Procedure Act* in 1853 and 1854 respectively.[129]

Richards took a similar position in relation to Chancery after Mackenzie brought a third motion for the court's abolition in 1853. When it was also defeated by Lower Canadian votes, Richards acknowledged that Upper Canada was clearly opposed to the court. The ministry would now be pledged to abolish the Chancery pending the release of the opinions of the judges in England.[130]

The reforms of 1849 had also reopened conflict over the balance of power between the centralized and regional courts. Radicals, and some moderate regional spokesmen, were upset that it had been the central courts, and not the regional courts, that had been expanded in 1849. They were joined by Conservative lawyers who were unimpressed with the need for a larger superior court system and, in some cases, looking for an issue on which to attack the Ministry. Most of the criticism hinged on the fact that the superior courts had not been overworked before the reforms. The *British Colonist*, for example, regarded the new Court of Common Pleas as duplicating the Queen's Bench and thus redundant. Its creation, along with the enlargement of Chancery, had taken place mainly for political reasons. "A Barrister," writing in the *British Standard*, published at Perth, Upper Canada thought that, because of limited court business, one of the superior courts of common law should be abolished and the number of judges in

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127. "A Law Reformer," *British Colonist* (22 March 1853), Ottawa, Library and Archives Canada (accessed on microfilm).
128. *Debates*, *supra* note 16, vol 11 (1852–53) at 1904, 2318, 2855-56, 3106, 3318.
129. Nova Scotia, *Second Report of the Law Reform Commission* (1853) Journals and Proceedings of the House of Assembly, Appendix 16, online: <eco.canadiana.ca/view/oocihm.9_00946_104/430> [perma.cc/32RG-JCSU]; *The Public Statutes of the Province of New Brunswick passed in the Year 1854* (J Simpson, 1854), online: <eco.canadiana.ca/view/oocihm.9_02186/4> [perma.cc/SD26-NCFA].
130. Debates, *supra* note 16, vol 11 (1852–53) at 2714, 3005-22.

the Chancery reduced to one, pending its abolition.[131] In 1853, eleven "liberal" members of the Assembly from Upper Canada sent a letter to the leader of the Upper-Canadian section of the government, Francis Hincks, urging the abolition of Common Pleas. The signers argued that the court was "a most unnecessary and expensive complication," which had been superseded for all purposes by the more economical and regionally oriented County Courts. Hincks was conciliatory on this, as he was on other aspects of legal reform, pledging to take up the question in the next session while noting that public opinion seemed to favour changes of an even "more extensive character" than those suggested in the letter.[132] He could not know that political circumstances would make further action on his part impossible.

The flip side of the issue was the question of the jurisdiction of the regional courts. Pressure continued to be exerted from outside Toronto for an increase in the jurisdictions of the lower courts in order to save suitors from having to use the superior courts where costs were thought to be too high. The leaders of both parties were aware of the resentment against the *Judicature Acts* and willing to make some concessions, but not to the extent of completely overhauling the court system or making reforms that would require a substantial outlay of new funds. Instead, they expressed concern over the congestion of legal business that might result from encouraging too much "cheap law" at the local level.

On the advice of several county court judges,[133] the Reform Ministry increased the jurisdiction of the lower courts in 1850 in an effort to reduce rural discontent. Solicitor General Sandfield Macdonald expanded the jurisdiction of the Division Courts, even though some observers warned that permitting larger claims might compromise the ability of these bodies to fulfill their original role of dealing quickly and cheaply with small claims.[134] The financial jurisdiction

131. *British Colonist* (15 February 1853), Ottawa, Library and Archives Canada (accessed on microfilm); *British Standard* (27 August 1852), Press clipping, Mackenzie-Lindsey fonds, *supra* note 50.

132. "A Letter to Hincks," *North American* (10 May 1853); *Debates*, *supra* note 16, vol 11 (1852–53) at 3114-15.

133. Letters from Gowan to Baldwin (21 April, 20 July 1850), Toronto, Toronto Reference Library (Robert Baldwin fonds); Burns, *supra* note 38; GM Boswell, *Law Reform in the Inferior Courts* (Gazette Office, 1850), online: <catalog.hathitrust.org/Record/100279974> [perma.cc/DGD4-VQDA].

134. See *An Act to amend and consolidate the several Acts now in force, regulating the Practice of Division Courts in Upper Canada, and to extend the jurisdiction thereof*, S Prov C 1850 (13 & 14 Vict), c 53; *An Act to amend the Upper Canada Division Courts Act, of one thousand eight hundred and fifty, and to extend the jurisdiction of the said Courts*, S Prov C 1852-53 (16 Vict), c 177. The Division Court's jurisdiction was also moderately increased in 1852-53.

of the County Courts, which had replaced the District Courts in 1849, was also expanded.[135] Though they presided over different geographical areas than the old courts, they had been initially similar in most other respects, including jurisdiction and procedures.

In spite of the changes, regional politicians continued to make demands for an even broader role—especially for the Division Courts. For the Clear Grits and radicals, such as William Lyon Mackenzie, diverting as much business as possible from the central courts to the Division Courts was part and parcel with their desire to decentralize governmental institutions generally in order to eliminate concentrations of power.[136] Even some prominent Tory laymen exhibited a sensitive ear for these kinds of issues, perhaps from a desire to embarrass the Reform government, but also quite possibly from a desire to support creditors in their regions.[137]

The leading lawyers in the House strongly resisted these demands. In the session of 1852–1853, Attorney General Richards, among others, emphasized that further increasing the jurisdiction would risk slowing the pace of justice and raising legal costs, thus defeating the goal of making justice available to everyone. Richards, however, went further, arguing that the change would have the effect of "inducing people to dispute what they otherwise should not." "Cheap law," he said, though generally desirable, was not always so.[138] The pitfalls of "cheap law" had also been cited during the debate on Mackenzie's bill to establish conciliation courts in 1851, when Solicitor General Macdonald argued that cheap law would only lead to an undesirable proliferation of cases.[139] In reality, it should have been evident that continuing to expand the jurisdiction of the small claims courts would require the government to make more investments in them, perhaps by restructuring them or appointing more judges. This was not a step that the leaders of Upper Canada were willing to consider.

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135. *An Act to alter and amend the Act replacing the Practice of the County Courts in Upper Canada, and to extend the jurisdiction thereof*, S Prov C 1850 (13 & 14 Vict), c 52.
136. Gates, *supra* note 89 at 210; Letter from "Whitby," *supra* note 104.
137. Debates, *supra* note 16, vol 10 (1851) at 539-40; *ibid*, vol 11 (1852–53) at 221, 364; *ibid* at 2754-55 (noting the petition Municipal Council of Simcoe concerning Division Courts); *North American* (3 September 1852), Ottawa, Library and Archives Canada (accessed on microfilm). See also Debates, *supra* note 16, vol 12 (1854–55) at 1053.
138. *Ibid*, vol 11 (1852–53) at 2755.
139. *Ibid*, vol 10 (1851) at 368; *North American* (8 August 1851), Ottawa, Library and Archives Canada (accessed on microfilm).

C. EPILOGUE

The possibility of major legal reform, which probably appeared strong in 1853, seemed much less so afterwards. While the Reform Party under the leadership of Francis Hincks in Upper Canada seemed poised to act, it was soon rocked by scandal and was eventually replaced by a moderate coalition of Liberal–Conservatives in 1854. The attention of the public also shifted to other matters. In Upper Canada, these included questions of church and state, the perceived undue influence of French Canada, the Grand Trunk Railway, and ultimately the future of the Union of the Canadas. Among supporters of the Reform Party, religious issues had come to the fore. They included the old problem of the clergy reserves, which the Reform Ministry had failed to resolve, and a new question with both religious and ethnic implications—Upper Canada's Roman Catholic separate schools. Under pressure from the Catholic Church, the government had passed legislation in 1850 facilitating the development of a large state-supported separate school system.[140] The issue inflamed many Protestants who favoured the separation of church and state and saw state-church forces cutting into the non-sectarian public-school system. The reform also touched on ethnic and sectional questions because, like the Court of Chancery issue, the creation of separate schools had been determined against the wishes of the majority of the Upper-Canadian members by Lower-Canadian votes. On the question of separate schools, many radicals and other Upper-Canadian supporters of the Reform Party, who had previously spoken out against privilege in the legal system, showed themselves even more virulently opposed to Catholicism and the influence of French Canada.[141]

With the attention of the public elsewhere, the question of court reform became one of interest primarily to lawyers and soon passed into the hands of John A. Macdonald, Upper-Canada's new Attorney General. He based his *Common Law Procedure Acts* of 1856 and 1857 closely on the English reform acts of 1852 and 1854, stating that, except for minor changes necessitated by uniquely Upper-Canadian circumstances, he would go no farther than the English model which had been established after much deliberation by the home profession. His reforms simplified the procedures of the common law and allowed access in the common-law courts to certain remedies previously accessible only in the equity

140. *An Act for the better establishment and maintenance of Common Schools in Upper Canada*, S Prov C 1850 (13 & 14 Vict), c 48.

141. Gidney & Millar, *supra* note 4 at 64-66; Dewar, *Pen and Ink*, *supra* note 11 at 99-102; Careless, *Union*, *supra* note 64 at 176-77.

court. He was not ready to abolish Chancery, but he was willing to introduce changes to suit provincial conditions. For the first time, the court's judges were empowered to go on circuit, which made equitable remedies more readily available to "country" practitioners and their clients. And, responding to public demand, he permitted Chancery to employ juries for the first time.[142]

These changes removed some of the differences between common-law and equitable courts without merging the two systems altogether. It was still possible for a just cause to fail because it was launched in the wrong court, and for the course of litigation to result in the parties having to access both courts. However, as imperfect as they were, Macdonald's reforms had done much to satisfy the most pressing demands for change as political attention turned to other questions.

III. CONCLUSION

The mid-nineteenth century was a period when the need for procedural reform was clear, and repeated demands for change were being made not only in Upper Canada but also in many parts of the common-law world. While the conservatism of Upper Canada's legal profession during the early nineteenth century is well known, G. Blaine Baker has pointed out that the 1840s and 1850s were decades when the leading lawyers in both Upper and Lower Canada took the initiative in creating legislation relating to basic institutions, such as municipalities, public education, general incorporation, and bankruptcy, among others.[143] Besides these innovations, Upper Canada's leaders also pushed successfully for legislation expanding the superior courts in Toronto. From that vantage point, their reluctance to act on procedural reform seems peculiar. Not just another example of a broad ideological conservatism, it speaks to the depth of their conservatism on this particular issue even in the face of fairly widespread public demands.

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142. *Debates*, *supra* note 16, vol 13 (1856) at 461; *An Act to amend and consolidate the provisions of certain Acts therein mentioned, and to simplify and expedite the proceedings in the Courts of Queen's Bench and Common Please in Upper Canada*, S Prov C 1856 (19 & 20 Vict), c 43; *An Act to amend the Common Law Procedure Act of 1856, and to facilitate the remedies on Bills of Exchange and Promissory Notes*, S Prov 1857 (20 Vict), c 57; *An Act for further increasing the efficiency and simplifying the proceedings of the Court of Chancery*, S Prov C 1857 (20 Vict), c 56.

143. Baker, "Historiography," *supra* note 3 at 10; Baker, "Benthanism," *supra* note 3 at 285-91. Baker notes that the legal profession in Lower Canada brought in major changes to the legal system during this period, including a new a civil code—which throws the cautious approach in Upper Canada into sharp relief (*ibid*).

Even the expansion of the superior courts was not achieved without criticism. The misgivings expressed by some lawyers and laymen outside of Toronto reflected their interests which differed from those of the most prominent lawyers and politicians of the province. The leaders of the profession tended to gravitate towards the superior courts at Toronto and believed that they represented the heart of the system. While they realized the need for regional courts and sought to standardize their procedure, they were often less familiar with the day-to-day workings of these bodies and had to depend on the advice of county court judges. Even then, they tended to regard these courts as secondary priorities. However, for lawyers and laymen outside of Toronto, the lower regional courts were more convenient and less costly to use than the superior courts. The bulk of the courtroom practice of the lawyers in particular probably took place in the District (and later County) Courts, which also would have accounted for a significant part of their income.

This periodic tension within the profession was mirrored in phraseology. The term "country lawyer" seems to have been broadly embraced in the legal community to differentiate a member of the profession situated in the smaller towns and rural areas of the province from those in Toronto and other major centres such as Kingston. We have seen Henry Sherwood dismissing Conservative barrister George Macdonell from Dundas as "a country lawyer" when the latter proposed to expand the jurisdiction of the District Courts in 1847. As the controversy heated up, the term "Toronto" also sometimes became an epithet. Frustrated by the reluctance of Robert Baldwin and his colleagues to consider change, George Byron Lyon, a lawyer-politician from Russell, lashed out in 1850 that: "Toronto lawyers were opposed to any bill that would affect their pockets. These parties were opposed to any change in the present system, which gave all the profits of the profession to them." Other "country" lawyers expressed similar sentiments. The conflict between Toronto and the outlying regions has been referred to before by G. Blaine Baker. He saw it originating in the 1850s over the Law Society's policy of concentrating legal education solely in Toronto, but the debates of the Union period suggest the dichotomy was present earlier and extended beyond one issue.[144]

On the question of legal procedure, there were only a few exceptions to the reluctance of lawyers to act in advance of the English example. Several

144. Baker, "Education," *supra* note 2 at 52, 98; *Debates*, *supra* note 16, vol 6 (1847) at 376-78; *ibid*, vol 9 (1850) at 325-26. See also Letter from George Macdonald, Cornwall, to John Sandfield Macdonald (6 June, 1850) vol 1 (MG24-B30) at 202-06, Ottawa, Library and Archives Canada (accessed on microfilm, John Sandfield Macdonald fonds).

members of the profession did advance proposals for procedural change, but these were quickly rejected by members of the Assembly who believed they were premature and lacking in credibility. Even the judges were sometimes willing to countenance changes in procedure if local conditions required it and other jurisdictions were seen to be moving in that direction. This willingness was more noticeable in relation to equity than common law. The Chancery commissioners of 1844–1845, led by a common-law expert and arch-conservative Chief Justice Robinson, proposed significant changes in equitable procedure at a time when similar reforms were also being discussed elsewhere. Blake's *Judicature Acts* of 1849, besides revamping court structure, codified these proposals which he then implemented as Chancellor of the Court of Chancery. But Blake was more reform-minded than most leading members of the profession. R.C.B. Risk, who first analyzed the conservatism of the judges, described him as the only jurist of the mid-century period in Upper Canada who felt responsible for adapting the law to local conditions, although never to the extent of challenging established English precedents. As a legislator, he displayed a similar ambivalence. While his willingness to consider equitable reform was similar to that of Nova Scotia legal reformers discussed by Philip Girard, his goals were more conservative, and his strategy was intended in no small measure to head off the growing demand for Chancery's demise.[145]

This emphasis on caution contrasted with action taken elsewhere. We have seen that, during a period when Chancery was being abolished in at least two American states as well as in New Brunswick and Nova Scotia, Upper Canada's leaders fought to preserve the court. Similarly, while the need for common-law procedural reform was widely recognized and discussed, W.B. Richards and John A. Macdonald refused to act in advance of the findings of the English law commissioners. The two Maritime Provinces had confronted these challenges by establishing law commissions to consider ways of simplifying the law and bringing the common law and equity closer together. The findings of these commissions resulted in procedural reform in Nova Scotia in 1853 and New Brunswick in 1854. There were repeated calls for a similar commission in Upper Canada from all parts of the political spectrum—Tories, Reformers, and Clear Grits—but nothing was done.[146] At a time when recent American innovations in

145. Risk, *supra* note 2 at 429-30; Girard, "Married Women," *supra* note 1 at 89.

146. *North American* (2 August 1850, 3 June 1851, 11 June 1851, 15 July 1851), Ottawa, Library and Archives Canada (accessed on microfilm); *Debates*, *supra* note 16, vol 11 (1852–53) at 3005-21.

procedure were being studied even by the law commissioners in England, Upper Canada still waited on developments in the home country.

This study has traced the conservatism of the legal profession to two related sources: The prevailing political and social ideology of prominent people and the particular training of the lawyers. The dominant ideology centred on the value of the British connection and the benefits of the unwritten British Constitution, which the Law Society urged lawyers to defend. While the constitution had evolved by mid-century to include a political system more responsive to "public opinion," the transition to responsible government did not reflect the acceptance of democratic or egalitarian ideas which were still feared for their demagogic potential.[147] This fact made it unlikely that the province's lay and legal leaders would be receptive to the proposals of Upper Canada's radicals on legal or political change. However, the reluctance of the leading lawyers to initiate procedural reform in particular probably owes much more to their legal training. The intensive tutelage in common law and equity they received under the auspices of the Law Society of Upper Canada bred a respect for case law and for English legal tradition which would have tended to make them particularly cautious on this question. In spite of their willingness to improve municipal and other institutions, the lawyers deferred to the opinions of the English judges on procedure.

The re-emergence of radicalism at the end of the 1840s represented a direct challenge to Upper Canada's social and political leaders. Although the Clear Grits and other radicals did not advocate rebellion, they were clearly heirs to the tradition of Mackenzie and his supporters of the 1830s. Like the latter, the mid-century radicals grounded their analysis on thinking in both Britain and the United States. Drawing particularly on American radical rhetoric of the 1840s, they believed that both the legal and political institutions of the province served to benefit the most influential persons in Upper Canada at the expense of the "common people." For this reason, they proposed changes in both the legal and political spheres.

On the question of legal reform, the radicals became the spokesmen for a point of view that was suspicious of the existing law, hostile to its arcane language, complexity, and cost, and resentful of its association with privilege. While there was considerable support among leading citizens in the regions for decentralizing the courts and modernizing the law, especially after the *Judicature Acts* of 1849, the hostility in some rural areas ran well beyond a desire for decentralization. The regions around Toronto and the Niagara Peninsula appear to have constituted particular hotbeds of such feeling. Solicitor General John Sandfield Macdonald

147. Mills, *supra* note 5 at 133, 136; Patterson, "Whiggery," *supra* note 5 at 43-44.

referred to areas like these in 1851 with his comment that many country constituencies would be happy "to do away altogether with lawyers."[148] The thinking of these people was manifested during the debate over the abolition of the Courts of Requests in 1841 when W.H. Merritt and five other rural representatives of the Assembly expressed confidence in the capability of their communities to adjudicate small claims without the intervention of lawyers, and to do it more cheaply and in a less adversarial style than the formal courts. The meeting at Howard's Hotel in the town of Niagara in 1850 took this attitude a step further when participants condemned the existing law from a Christian and moralistic point of view because its complexity tended to obscure the ideal of justice. Such viewpoints were often accompanied by a desire for local control of affairs and a suspicion of trained professionals as outsiders.[149]

How widespread were such views in Upper Canada? We get only glimpses of anti-legal attitudes in the newspapers across the province and in the correspondence of William Lyon Mackenzie who was a sounding board for this kind of thought. While similar attitudes were expressed by persons from many parts of Upper Canada, it is not clear how extensively they were held in each area. The difficulty stems from the lack of extant evidence regarding the points of view of the farmers and other "common" people who made up the majority of the population. It is no coincidence that historians have focused primarily on the views of prominent people, for their opinions were more likely to have survived. We know that sentiment critical of the law and legal profession was common in the history of western Europe and North America, especially in rural areas. Views like those in Upper Canada were also being expressed at this time in the United States and other parts of British North America. Greg Marquis has described how farmers in New Brunswick were being urged to elect producers rather than greedy lawyers. Philip Girard found that the law was condemned in Nova Scotia as antiquated, overly expensive, and the creature of privileged special interest groups including lawyers and others.[150] In Upper Canada, there were only a handful of radicals arguing these points in the Assembly. They were vociferous in their condemnations of lawyers and the legal system, but their radical program as a whole, embracing both political and legal reform, failed to attract broad electoral support, even from rural areas. At least in electoral terms, radicalism made only

148. *Debates*, *supra* note 16, vol 10 (1851) at 368.
149. *Ibid*, vol 1 (1841) at 484-88; "Meeting at Howard's Hotel," *supra* note 87.
150. Marquis, "Anti-Lawyer," *supra* note 42 at 163-64, 165-66; Kessler, *supra* note 86 at 446, 449-50; Girard, "Married Women," *supra* note 1 at 81.

limited headway against the moderate–conservative consensus promulgated by the province's leading residents.

Nor was the popular interest in legal reform long lasting. The fact that the question attracted attention for only a short time and then was pushed aside by ethnic, religious, and other rivalries suggests that, while there was hostility to the legal system, legal reform was not usually a high priority. Widespread public interest in court reform had been the product of specific time-related events: the desire for the legal system to meet the developmental needs of the province, the prevalence of international debate over court reform, and the momentous social and political upheavals taking place in North America and overseas which raised the hopes of radicals that systemic change in Upper Canada's courts might be possible.