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**FORGOTTEN MAGISTRATES:
HISTORICAL GLIMPSES OF NEW BRUNSWICK'S
COMMUNITY JUSTICES, 1870—1980**

**By
Russell James Prime**

**A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfilment of
the requirements for the degree of**

(Master of Arts)

**Department of Law
CARLETON UNIVERSITY
Ottawa, Ontario**

1996 May 1

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**Forgotten Magistrates: Historical Glimpses of New Brunswick's Community Justices,
1870-1980**

submitted by Russell James Prime, B.Sc., LL.B.

**in partial fulfilment of the requirements for
the degree of Master of Arts**

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ABSTRACT

New Brunswick legal historians have recognized the innovative justice provided by some local magistrates before 1867; however, they imply that after the replacement of the justices' Court of General Sessions with professional county courts and elected municipalities that magistrates stopped participating in criminal, civil, and community affairs. This study challenges that conclusion by showing that lay justices of the peace, police/stipendiary magistrates, and parish court commissioners continued providing accessible, inexpensive, and innovative justice to residents. This paper also documents how magistrates were squeezed out of the legal regime by a centralizing state and growing attorney monopoly. It concludes that at the turn of this century, formal justice was more pluralistic in New Brunswick than is commonly accepted and that magisterial experiences might help inform the current societal debates surrounding the use of discretionary justice, diversion, arbitration, mediation, sentencing circles, and other forms of alternative dispute resolution within communities.

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CHAPTER 1

INTRODUCTION

The Sessions of the Peace for the City and County of Saint John are held in the court house — usually the Supreme Court Room. This sapient body is composed of magistrates. . .who assemble. . .to adjudicate on matters of which they are profoundly ignorant.

Justices of the Peace. . .are manufactured in batches. . .appointed under various administrations, and are as a general thing, men possessed of a variety of qualifications of which wisdom is not one. So numerous have they now become that it would be a difficult matter to stand on any public corner and fire a stone at random without hitting one of these oracles . . .These gentlemen represent no particular class of people — some are farmers, some merchants, and some interested in the lumber business.

. . .they are not even ashamed of their ignorance. We know of some scarcely competent to scrawl their own names, and yet these men are entitled to sit on the Bench with the Chief Justice. . .There was a time. . .in the annals of the province when some little dignity attached to the title of Magistrate.¹

Why would anyone want to study justices of the peace and lay magistrates, especially in New Brunswick? They had all the wrong labels. They represented a brand of British imperialism, a colonial force that had stolen North American Aboriginal lands and had proceeded to plunder them for their material wealth. Almost all of them were males; women were only appointed beginning around 1904. These 'squires' exemplified an hierarchical class system of which many of them keenly saw themselves in the upper echelons. They were, afterall, appointed heirs to the anti-democratic throne of governmental affairs in each county set up in reaction to the American "embarrassment" of 1783. Furthermore, they typified a time and place when

¹*New Dominion and True Humorist*, February 4, 1871.

informal legal considerations such as religion and moral convictions could be used in case determinations. Besides, George W. Day, the editor and proprietor of Saint John's *New Dominion and True Humorist*, described them above as so numerous and inept that it was better not to associate with one. I would suggest in a summary fashion, however, that anyone interested in the history of communities and justice and concerned about efforts to rebuild neighbourhoods and re-establish some trust in our beleaguered judicial and legislative systems should be curious about JPs. Even Editor Day was able to overlook his comments on the Saint John magistrates once he and others had helped remove the control of county business away from the sessions to elected governments; Day was appointed a justice of the peace in 1879. For a time, at least, let us look past these obvious limits to their function.

New Brunswick abolished its system of local and lay courts in the middle of this century. A variety of individuals had presided over these decentralized tribunals, including justices of the peace, stipendiary and police magistrates, parish court commissioners, and others. D. G. Bell, Mary E. Hatherly, and John E. McEvoy have pioneered a recognition for the innovative and pluralistic functions of the inferior courts in the New Brunswick context,² but all three commentators have suggested in earlier writings that with "the advent of county courts in 1867 and universal county government a decade later, the positive contribution of JPs to the administration of justice and government came to an end".³ As they might admit today, nothing

²See D. G. Bell, "A Perspective on Legal Pluralism in 19th-Century New Brunswick" (1988), 37 U.N.B. L.J. 86 (hereinafter referred to as "Pluralism"); Mary E. Hatherley, "A Survey of Courts of Criminal Jurisdiction in New Brunswick, Nova Scotia, and Ontario", unpublished material prepared for the New Brunswick Department of Justice, c.1987 (available at the University of New Brunswick Law Library); and, John P. McEvoy, "Courts of Criminal Jurisdiction and Section 96: An Overdue Evaluation" (1987), 36 U.N.B. L.J. 87.

³Bell, "Pluralism" (1988), 93.

could be further from the elusive "truth". The changes to the responsibilities of justices of the peace and magistrates during the 1867 Union period did signal the 'writing on the wall' of their demise, but I will attempt to show in this brief study that a resurgence in the importance of their local judicial and non-judicial functions occurred from the 1870s into the early parts of this century. The process of getting rid of these local tribunals took on renewed energy in the 1920s and crystallized in the 1940s and 1950s. I intend to show also that the move to displace JPs corresponded roughly with an increase in power by the legal profession and a general rise in the influence of the state bureaucracy in citizens' lives. The professional re-orientation of the judicial and provincial administrative apparatus at mid-century was made without any study and has been almost universally viewed as a progressive reform both then and now. New Brunswick went the furthest of any Canadian jurisdiction by totally abolishing any role for lay magistrates; no other province, except Prince Edward Island, has gone this far. In fact, few other Anglo-American jurisdictions have abolished the office of justice of the peace (the most inferior magistrate) with perhaps the exception of the adjoining State of Maine.⁴

In this study, I attempt to challenge the wisdom of removing these courts and officials from the provincial service, at least without proper investigation into their various roles and functions. However, perhaps more importantly, I felt the need to investigate the place of these magistrates in an historical context and wanted to share glimpses of what I believe was at times a very responsive and accessible justice system, especially between 1870 and 1920. My findings

⁴From the oral comments of Professor L. Kirvin Wroth of the School of Law at the University of Maine during the Atlantic Law and History Conference, Dalhousie University, 1995. For technical (constitutional) reasons, Maine still has justices of the peace in name; however, the office is exclusively held by lawyers performing a larger function.

challenge the inevitability of the magistrates' demise and the so-termed logical growth of modern state bureaucracy. Magistrates in New Brunswick did not shrink in stature and influence as a matter of course; instead, elements of the legal profession worked actively to rid the province of their presence, and provincial officials crowded magistrates out of their many other responsibilities.

Just as H. W. Arthurs has attempted to confront the inherency of superior tribunals and lawyers in the administrative context in his book, *Without the Law*,⁵ this paper as a matter of course must seriously question the innate or "naturally" superior position of our supreme court system and its legal professionals. This challenge is inevitable as my paper studies a period of New Brunswick history where the majority of criminal, civil, and even informal conflicts — estimated at 90 percent⁶ — were handled locally with little aid from law professionals or outsiders. In fact, the historic nature and community acceptance of the commissions of the peace over several centuries cannot help but build a case for the inherency and usefulness of local courts and officials.

Forgotten Magistrates: Who Were They?

Justices of the Peace and other lay judges and officials have served New Brunswick and many other British-influenced criminal jurisdictions around the world for centuries. As a group, all

⁵H. W. Arthurs, *"Without the Law": Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985).

⁶Premier J. B. McNair (also the Attorney General) suggested that upwards of 90 percent of cases were handled by magistrates in New Brunswick: *Synoptic Reports of the Proceedings of the Legislative Assembly of New Brunswick for the year, 1942* (Fredericton: Queen's Printer, 1942), 64 (hereinafter referred to as *Synoptic Reports*).

lay adjudicators were often called "magistrates", a generic term that is expansive enough to include all manner of public officials with ministerial or judicial functions. JPs tribunals constituted the first instance of courts of record available to citizens.⁷ Magistrates' responsibilities frequently included more than the provision of civil and criminal court and justice services on a local scale, but sometimes also extended to matters of county administration and informal assistance between citizens and their state.

Justices and other magistrates were almost universally unsalaried, honorary officials in New Brunswick. Their pay came from a loyalty to the Crown or sense of civic duty (sometimes) and from the right to influence county affairs and to charge scheduled fees at their discretion (more often). Many did not have any formal legal training, although they frequently had a substantial business or merchant background and were acquainted with commercial legal principles. They became an increasingly rural phenomenon in this century and suffered ridicule and a loss of reputation as a result of their experience-based, common-sense approach to justice issues.

Professionals viewed them as folksy or "inferior". The level of discretion exercised in their courts was juxtaposed against the more formal and rigid strategies employed by attorneys and superior court judges. A recent book on the nature and role of judges in Canada justified the exclusion of lower magistrates from its discussions this way:

Although JPs do perform adjudicative functions, we have not included them in our count of Canadian judges. This is partly because their status will remain

⁷JPs did not constitute courts of record in all jurisdictions, but they did in New Brunswick and Nova Scotia.

unclear until the Supreme Court of Canada makes an authoritative decision on the matter [of their judicial independence], and partly because *JPs do not have the educational background or experience* associated with being a "judge" in the common law world.⁸
[emphasis added]

This view of JPs reeks of professional snobbery and flies in the face of nearly seven centuries of the use of magistrates as judges in the "common law world". Magistrates adjudicated many misdemeanours along with a few major felonies, including murder. It is true that magisterial offices are generally held at the pleasure of the executive (or Crown) and therefore they may be dismissed at any time theoretically; however, this was the situation of most Canadian judges until recent years.⁹ While judicial independence is an important concern, Lord Denning has suggested that "the great principal that judges should be independent has become so ingrained" that it extends in practise to justices and stipendiary magistrates as well.¹⁰ I believe that much of the confusion over the role and function of JPs and other magistrates stems from the fact that their historic role has been neglected in law schools and elsewhere, and magistrates have remained unstudied and misunderstood, especially in Canada during recent decades.

⁸Peter McCormick and Ian Greene, *Inside the Canadian Judicial System: Judges and Judging* (Toronto: Lorimer, 1990), 19.

⁹Section 99 of the *Constitution Act, 1867* provided that superior court judges were appointed during good behaviour as opposed to during pleasure and could only be removed on an address by Parliament. County and district judges did not formally enjoy these safeguards, although practise entrenched them. During colonial times, most judges held tenure according to royal pleasure; a security of tenure was given formally to judges in the Canadas, for instance, in the 1840's.

¹⁰Denning, *Road to Justice*, and the opinion of L.M. Singhvi both cited with approval in *R. v. Lippe*, [1991] 2 S.C.R. 114. Singhvi was a keynote speaker to a seminar on the issue of judicial independence in Montreal in 1987 and suggested that "the appointment of part time judges, *ad hoc* judges, temporary and probationary judges..., justices of the peace and lay magistrates" is a wide-spread phenomena throughout the entire world. "The system has its justification in practical viability and traditional acceptability." See also *Re Currie and Niagara Escarpment Commission* (1989), 46 O.R. (2d) 484 (O.C.A.) cited favourably by the British Columbia Court of Appeal in *Isaac v. B.C.*, [1989] B.C.J. No. 183.

New Brunswick was formally created in 1784 as a result of pressure from the American refugees during the aftermath of the American Revolution. Almost overnight, the territory of Nova Scotia or Acadie was flooded with thousands of people (approximately 50,000) looking for a place to live. Governor John Parr of Nova Scotia was unable to quiet the discontentment of the refugees; this pressure combined with the sheer distance of the territory from the colonial capital of Halifax ended in the partition of Sunbury County from Acadie¹¹ to become the Province of New Brunswick. One of the formative acts of the new Governor of New Brunswick, Thomas Carleton, was to create the province's shire and parish system, similar to the English system. This move by Carleton and his advisors was a deliberate attempt on the part of the governing elite to rid themselves of any vestiges of American republican influences. New Brunswick was to administer its shires by 'loyal' appointees rather than with elected officials until 1850; this was in sharp contrast to the New England influences of "townships" that continued to exist in its Nova Scotian and Republican neighbours.

Each county charter named a sheriff, a coroner and, more importantly for this study, several justices of the peace to transact county affairs and provide access to English justice in the various parishes of the shire.¹² Justices of the peace were historically responsible for keeping the peace, dispensing summary justice administration, appointing parish officers, and regulating county affairs. Summary and peace officer functions were handled by the magistrates in their individual capacity with the help of parish constables, while the other duties were controlled by the justices meeting in the Court of General Sessions. The office of justice of the peace

¹¹The name also commonly used for Nova Scotia during the 18th century.

¹²The county and parish system was created by Governor Thomas Carleton entirely through delegated executive authority contained in his commission as governor and, in 1786, lieutenant-governor.

developed from obscurity amidst the violence of daily life in early Britain well before the 14th century. An English statute in 1327 officially recognized the already existing system which consisted of local gentry and knights who had been commissioned to be "keepers" of the peace. This commission created a type of peace officer slightly more powerful than the hundred keepers and watchers of the night. With some fluctuation, the keepers of the peace became "justices" in 1361, having been given the powers to try the felonies and trespasses that they had initiated. The Court of General Sessions ceased to function as a criminal court in the province by the early 1870s and as a municipal administration by 1877; however JPs continued to function as summary conviction and small claims tribunals.

The City of Saint John, however, posed as a partial exception the anti-democratic forces in the province. This city was the first to be incorporated in what is today Canada, as it received its royal charter in 1785. The charter included provisions for the "freemen" and "freeholders" of the city to elect one alderman and councillor for each ward; on the other hand, the mayor of the city was appointed until the mid-1800s. The aldermen and mayor were *ex officio* justices of the peace, and therefore constituted the only known elected magistrates in the province.¹³ Similar anti-democratic forms of local government were created in Upper Canada in 1791, and Nova Scotia made efforts to limit the powers of its townships. No further urban municipalities would be created in British North America until the creation of the City of Toronto in 1834 and Halifax and Fredericton in the 1840s.

¹³Saint John is often the exception to the general rule in any local or legal matter in New Brunswick, at least historically. For more information on the common council structure of Saint John and its surprisingly wide variety of councillors and voters, see T. W. Acheson, *Saint John: The Making of a Colonial Urban Community* (Toronto: University of Toronto Press, 1985), 27-47.

Other forms of magistrates were also created. Police or stipendiary magistrates were gradually appointed beginning in the mid-19th century in cities, towns, and the more populated parishes of New Brunswick.¹⁴ These officials often had more criminal jurisdiction¹⁵ and could deal with more expensive tort and debt cases. While these magisterial posts would eventually become dominated by lawyers, most magistrates outside of cities continued to be non-professionals prior to 1942. In parishes without stipendiary magistrates, parish or local courts were created to handle small claims, debts and torts comparable to those handled by the magistrates; the adjudicators of these courts were called parish commissioners. Commissioners were often drawn from the most experienced justices of the peace in the parish. All of these local courts made use of small juries — most often consisting of three area residents. Frequently, by the dawn of the 20th century, people had the choice of a variety of civil inferior courts within their parish: for example, several justices' civil courts, a stipendiary's court, and/or one or more parish courts might all exist. The sheer numbers of courts signals the possibility of diversity, if not plurality. Each of these tribunals would eventually be replaced by lawyers by 1960 as the New Brunswick Provincial Court came into being.

I often use the term magistrates to denote all of these lower court adjudicators, including justices of the peace and parish court commissioners.¹⁶ When I use the phrase "citizen magistrate",

¹⁴Designed around the English model that began to develop in the late 18th century: Manitoba JP Study, 8.

¹⁵In most jurisdictions, stipendiary or police magistrates had the authority of two or more justices of the peace acting together; this was not traditionally the case in New Brunswick.

¹⁶Historically, in New Brunswick (and elsewhere), the term magistrate has frequently been a substitute word for justice of the peace. In fact, the *Interpretation Act*, R.S.N.B. 1973, c. I-13, s. 38 of the province states that "magistrate" means a justice of the peace.

I am referring to any inferior court judge that is not a lawyer. I prefer the term citizen magistrate instead of "lay magistrate" as the word citizen reinforces the magistrate's involvement in a community. The word "lay", on the other hand, means "not a professional" and might be taken as if I believe that such officials are something less or second best than a professional.¹⁷

Magistrates were at once a source of frustration yet indispensable in the early years; however, their role has been largely forgotten in New Brunswick and in Canadian legal literature. This is partly due to them being remembered only for their "bouts" of "fogeyism", and they have accordingly been dismissed as a serious subject of inquiry. A few studies have been undertaken, evidenced by the recent book produced by the Centre of Criminology at the University of Toronto and the Manitoba Law Reform Commission Report in 1991 entitled, *The Independence of Justice of the Peace and Magistrates*.¹⁸ D. G. Bell has also uncovered much of JP's earlier history in New Brunswick and is particularly interested in the brand of criminal and civil justice that they meted out. Other works have dealt with Canadian justices in a purely pre-emptory way such as the British survey book by Sir Thomas Skyrme, and New Brunswick Anglophone academics have looked at the powers of justices in general sessions at the time of Confederation

¹⁷It is interesting to note that in Ontario, lawyers could not normally be appointed to the position of JP by custom and statute. Ontario removed the restriction in 1886 for police magistrates. In the U.K., barristers appointed as a stipendiary magistrate had to cease their law practise. See an interesting pamphlet on the Ontario situation by a barrister reacting against the 1886 change of policy: R. J Wicksteed, *The Inferior Magistrates, or, Legal Pluralism in Ontario*, ?Ottawa, c. 1886 (available in C.I.H.M. microfiche format).

¹⁸This report provides an excellent overview of justices and magistrates in the context of judicial independence: Manitoba Law Reform Commission, *The Independence of Justices of the Peace and Magistrates*, Winnipeg, 1991.

interested primarily in investigating the historical purview of the superior courts.¹⁹ Studies on constabulary and police developments have also proved useful in uncovering some of the mysteries of the magisterial role.²⁰ And, a recent work has been completed by Scott See on the Orange Riots of the middle 19th century in the province and provides some interesting insights into the inadequacies of the mid-century policing and justice system to curb violence.²¹ Some historians have also used justices' records and accounts, but few investigators have a good feel for the wide-ranging and varied roles of citizen magistrates and their unique jurisdictions in New Brunswick or elsewhere, especially after 1867.

Surprisingly, for such a British institution (and perhaps because of that), the most comprehensive studies on New Brunswick magistrates have been undertaken in French by Acadian historians. Jacques Paul Couturier completed a comprehensive doctoral report of all civil courts (superior, county, and parish) in Gloucester County between 1873 and 1899 which he defended in 1990

¹⁹See the following studies: Mary E. Hatherley, "A Survey of Courts of Criminal Jurisdiction in New Brunswick, Nova Scotia, and Ontario", unpublished material prepared for the New Brunswick Department of Justice, c.1987 (available at the University of New Brunswick Law Library) and John P. McEvoy, "Courts of Criminal Jurisdiction and Section 96: An Overdue Evaluation" (1987), 36 U.N.B. L.J. 87. These studies are especially helpful as the Supreme Court of Canada in its *Residential Tenancies* references uses the historical jurisdictions as a test for current provincial and federal administrative powers.

²⁰Allan Greer, "The Birth of the Police in Canada" in *Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada*, ed. Allan Greer and Ian Radforth (Toronto: University of Toronto Press, 1992), 17. This article has proved very helpful in gaining insight into the relationships between the rising police forces and magistrates. This article digests a fair amount of T.W. Acheson's comments on the development of magistrates and police in urban New Brunswick. This article, while very skillful in its development of the police-state relationship, fails to fully expose the role of JPs as "conservators of the peace" or peace officers, themselves. The role of early JPs as conservators needs to be further explored and studied. A book by Peter McGahan has also proved helpful: Peter McGahan, *Crime & Policing in Maritime Canada: Chapters from the Urban Records* (Fredericton: Goose Lane Editions, 1988). John C. Weaver's recent work, *Crimes, Constables, and Courts* has assisted me in attempting to contextualize the fate of magistrates amongst a growing centralized state bureaucracy, a tightening monopoly by the legal profession, and a shift of societal values from notions of communal responsibility and discretion towards rights and legal formalism: John C. Weaver, *Crimes, Constables, and Courts: Order and Transgression in a Canadian City, 1816 - 1970* (Montreal: McGill-Queen's University Press, 1995).

²¹Refer to Scott W. See, *Riots in New Brunswick: Orange Nativism and Social Violence in the 1840s* (Toronto: University of Toronto Press, 1993).

at the Université de Montréal. The power of this thesis is in its engagement with the perception and usage of civil courts by Francophone residents of Gloucester County. Couturier is able to isolate the records of three parish courts for his study but, unfortunately for my work, was not able to locate case files or letterbooks for the stipendiary or justices' civil courts in the county. The few, scattered and sometimes poor quality of existing justice of the peace records constituted an important problem for me also; accordingly, I chose to use the most accessible justices' records that I could find and concentrated on them. Nevertheless, the prominent lack of files and records may account in some measure for the few studies on justices and magistrates. Marie-Claire Pitre also completed a well-researched and presented paper on the justices of the peace of Gloucester County prior to Confederation; the work of this Tracadie-based historian was published in *La Revue d'histoire de la Société historique Nicolas-Denys* in 1990. There is also an intriguing monograph by Régis Brun on Joseph Gueguen, an early French-speaking magistrate in Northumberland County.

Communities and Justice

In this study, I have made a point to cast state and community into separate spheres, at least on the surface. I have done this for several reasons. Primarily, it is to emphasize the interconnectedness of individuals and to highlight the relationships amongst people. Concepts of community can do this in ways that talk about state and state "institutions" cannot. Secondly, as we shall see, the use of community has direct implications for the way we see and define other concepts such as justice. And, finally, in the context of this essay and from an historical

perspective, the agents of state and community have often been distinct and different individuals. I would however be the first to admit that notions of community can be large and complex enough to encompass the entire state apparatus and its agents. In fact, interest groups such as lawyers, farmers, and other people of similar interests can even form communities.

Then, what is a community? A common notion of community is a geographic place which forms a distinctive presence either because of geology, history, values, religion, language, and/or economy. Stephen Tomblin also had to deal with concepts of communal identity in his book on regional integration. He discusses three broad approaches to the concept of region or community: geographical forces, historical relationships, and the *imagined* approach. I have already introduced the geographical concept briefly above. Historical relationships have to do with "past experiences and dependencies" and outside "attacks on the sovereignty or sense of identity of any community can backfire if there is a history of turbulent relations and a consequent lack of trust between the parties" or can strengthen the community for the future. The imagined approach is centred around the view that "ideas, perceptions, myths, and visions" can pull apart people, unify individuals, or do both.²² All of these approaches are important to keep in mind, but it is the geographic sense of community that I appeal to most often in my study, for neighbourhoods, hamlets, villages, and vales encompassed more important centres in the not so distant past. Furthermore, it is this concept of community that lies most juxtaposed against the state. As I have already hinted, however, these examples of cohesiveness such as religion and/or economics can even transcend or further divide geographic communities. It is

²²Stephen G. Tomblin, *Ottawa & the Outer Provinces* (Toronto: James Lorimer & Company Ltd., 1995), 5-7.

important to identify this complexity, especially in this essay; loyalties can be varied.

Graeme Wynn in "Ideology, Society, and State in the Maritime Colonies of British North America, 1840-1860" has most spiritedly introduced the complexity of the Maritimes and New Brunswick in the mid-19th century, and he calls this puzzling situation being "fragmented by adherence". As he states, however, "with skill and appropriate emphases, diversity and dissimilarity can be rendered intelligible, labyrinthine reality can be ordered and understood." Such a large task of reconciliation, while possible for some, perhaps, will not even be attempted in this short study; nevertheless, Wynn is able to capture some glimpses between the more traditional and the more modern realities of both states and communities. He provides the example of the provincial census of 1861 to show how the colonial state had definite physical, institutional, and human resource limits; centralized state planning had not yet become a possibility or reality in the province. Large "segments of colonial life" were "to all intents and purposes, beyond the effective everyday sway of the colonial 'state'." As he has correctly observed, religion could often be more powerful than the state in the middle decades of the last century, and each Maritime province was spawning its distinctive character while "'loyal, true, and brave' Maritimers courted Victoria's smile".²³ Today, rural communities have few official agents or leaders to act for them, yet the bureaucratic state (Province of New Brunswick) would have little problem undertaking a reflective count of its residents. What have we lost to create and support this bureaucratic and professional system? I do not want to return to "happier days", but I do want to explore this apparent inversion in the power relationship between state

²³Graeme Wynn, "Ideology, Society, and State in the Maritime Colonies" in *Colonial Leviathan*, ed. Allan Greer and Ian Radforth (Toronto: University of Toronto Press, 1992), 321.

and community since the mid-19th century. Is this change anything short of a revolution?

Now for a second question. With the clouds of community overhead, what is justice — this "gentle rain from heaven"? The legal answer to this question includes to punish, deter, make an example of a person, and rehabilitate. These are all valid objectives, but I would humbly suggest that a justice system should fundamentally provide opportunities for healing — the reconciliation of victims, defendants, and of the surrounding families and communities. The objective of healing becomes the overpowering need when one thinks in terms of a community instead of a more top-down notion like the state. Dealing with the notion of community only emphasises the interconnectivity of individuals and the mutual responsibility and dependence of humans. Healing concepts do not take away a need for punishment or deterrence; instead, they provide frameworks in order to measure each component and seek to find a result that will make a family, a community, or even a society a better place for its constituent citizens. For instance, if I were to view justice as only a method of punishment, the type of sanction meted out does not matter because discipline is my goal, and the only person that I need worry about is the wrong-doer. However, if punishment is seen amongst the greater sense of healing, it is then necessary to fashion an appropriate punishment to help heal the individual as well as the greater group. If deterrence were the reason to have a justice system, perhaps all offenders would be transported out of the country or executed regardless of the offence; this would not be unlike the English system of the late 17th and 18th centuries.²⁴ I believe that justice systems must do

²⁴It is important to note that utilitarian reformers such as Bentham reacted against the idea of severe punishment for all crimes spiced with the deferential element of mercy; Bentham and others reasoned that it would be a much greater deterrent to have certain levels of punishment that more closely matched the severity of the crime. This view may have been held due to the excesses which many had seen performed at the "hands" of the Crown, in the name of justice. The objective of

more than these aims and must focus on benefitting the whole community as much as possible. Such systems, however, must be built to a greater degree on discretion and be able to be influenced in some measure by the community that is being served. Again, this suggests a better balance between state and community.

Definitions and ideas about community and justice working together are currently available from several sources: Aboriginal justice studies, community policing models, alternative dispute resolution and sentencing circle research, theological and spiritual investigations, and the larger philosophical debates. I am drawn to the Aboriginal writings, in particular, because of their attempts to forge current needs into systems which rely for their basis on traditional culture, spirituality, and healing. To some extent, my larger aim of trying to bring some of the valuable JP-related history into the current climate is not unlike the Aboriginal attempts to forge anew relevant systems with ties to the past.²⁵ Aboriginal initiatives have also come about more as a result of pushes from local leadership and individuals rather than the top-down design being followed in the community policing initiatives. The Aboriginal designs, therefore, place an emphasis on responsibility; this is the same accent that I am attempting to broker and highlight by looking at notions of community.

the reformers was to restore the integrity of the court system and only differs from this study in the manner in which the aim is to be accomplished.

²⁵For one Aboriginal view, see Aki-Kwe / Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter of Rights and Freedoms: Contradictions and Challenges" in *The Social Basis of Law*, ed. S. L. Brickey and E. Comac (Toronto: Garamond Publishing, 1990), 223-237.

Finally, there is one important subject which must be highlighted in relation to community participation in justice, and that is the topic of juries.²⁶ Juries are that sometimes maligned champion of English liberties that developed from being the investigator and determiner of evidence to becoming the body that is rarely entertained outside of serious criminal proceedings.²⁷ Historically, juries were sometimes responsible for nullifying oppressive laws and prosecutions by giving verdicts according to conscience.²⁸ Juries were not always loved by utilitarian reformers for they, like magistrates, introduced an element of uncertainty into an otherwise ordered process. The similarities between the positions of juries and magistrates are significant, notably as a lay presence in the administration of justice. Juries were often noted for reflecting a popular element in case determinations in opposition to the power of the sovereign or central state and for being sensitive to local or individual needs. Unlike juries, historians have largely neglected the popular dimensions of the magistracy. This paper will strongly suggest that magistrates, especially at the turn of this century, also embodied a local sensitivity and a popular element in judicial proceedings.

²⁶Jurors were chosen from those eligible citizens within a certain geographic area of the place of trial. The scope of eligible jurors is much wider today than in previous periods where gender, ethnicity, religion, income, and class could determine acceptability. The sheriff of the county was responsible for summoning individuals for service on the grand and petit juries. Grand juries by the 18th century in Britain were convened to determine whether important trials should proceed and for the general inspection of public buildings such as county gaols; they consisted of up to 24 individuals and this practice was mirrored in New Brunswick until the late 1800s. Grand juries are no longer utilized in Canada; judges sit in preliminary inquiry hearings in order to determine whether trials should be ordered. The petit jury is the group that still takes part in trial hearings on occasion in Canada. Normally twelve people make up petit juries. Coroners' juries are also sometimes convened in New Brunswick and in other provinces without medical examiners upon the suspicious death of an individual: N. B. Department of Justice, *Report of the Chief Coroner of New Brunswick*, Fredericton, 1993.

²⁷The Supreme Court of Canada addresses the role of the jury and its *de facto* ability to disregard a law that it sees as oppressive: *R. v. Morgentaler*, [1988] 1 S.C.R. 30. It is safe to say that the O. J. Simpson case in California has made the public very aware of the dynamics of jury decisions and how much their collective view is allowed to be restricted by legal actors.

²⁸In the past, the finding of not guilty by a jury could not be appealed or circumvented by a new trial.

As will be elaborated in Chapter 3, juries have a powerful ideological impact as impartial triers of cases, and therefore it is not without significance that magisterial civil courts in New Brunswick often sat with three-person juries. The magistrate would order a local constable to assemble a jury using a "venir" and the three residents chosen were obliged to attend and determine the facts of the case. Bell suggests that the use of juries by magistrates outside of the general sessions (sometimes called petty sessions) actually increased the civil jurisdiction of their courts.²⁹ Local juries in magisterial courts became especially important following the abolition of the Inferior Court of Common Pleas and the General Sessions; they no doubt aided the sensitivity of these tribunals to local concerns (even if only symbolically), and they therefore enhanced the position of these community-based courts. Juries involved local residents in trials, gave them a role in the decision-making process, and ensured a level of fairness and accountability of courts and officials. Sadly, there has been as much an assault on the jury as there has been on citizen magistrates in Canada; the parallels are difficult to overlook. I will mention the use of juries at various points in my paper, but I have not benefitted from any extensive studies of these traditional institutions in Canada. The decline of juries like that of magistrates has also been neglected by Canadian legal academics and urgently requires further study.³⁰

²⁹Bell, "Pluralism", 92

³⁰We have no studies to compare to the British and American books and research on this topic; for example, see the book of essays on British criminal juries edited by J. S. Cockburn and Thomas A. Green, *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800* (Princeton: Princeton University Press, 1988). Our system in Canada appears to have followed the British model very closely in the early years.

**NB's Centralized State Model:
Effects of State Building and Professionalization.**

There may be only one greater legal myth than the story of the babbling, bungling New Brunswick magistrate,³¹ and it is the myth of the modern legal culture and its inherent status.³² The New Brunswick court system was transformed in this century from a decentralized and somewhat informal one (even at the supreme court level)³³ to a highly centralized and controlled, yet efficient, administration. This province was the first to involve legal professionals "only" as judges and court officials. Since the 1960s, it has pioneered the one level, one appeal for any matter. All summary conviction and lesser criminal trials are handled by the Provincial Court of New Brunswick, which has always had province-wide jurisdiction. All other matters, including all civil, family, small claims, and probate issues, are handled by Justices of the New Brunswick Court of Queen's Bench. An appeal of any case is made directly to the New Brunswick Court of Appeal. Contrary to the opinion held in Central Canada, New Brunswick was the earliest and continues to be the most fervent advocate of simplified, unified courts.³⁴

³¹Anthony N. Doob *et al.*, *Understanding Justices: a Study of Canadian Justices of the Peace* (Toronto: Centre of Criminology, University of Toronto, 1991), 38-39.

³²Although I am unable to devote any serious space to considering the argument of inherency as it relates to the superior courts or inferior ones, I would suggest reading Mary E. Hatherly, "The Chilling Effect of Section 96 on Dispute Resolution" (1988), 37 U.N.B.L.J. 121, for a background to this matter.

³³It became the common practise in the early part of this century for the judges of the county and supreme courts in New Brunswick to deal with many matters in chambers, especially where the county seat no longer constituted a major centre.

³⁴Readers must be weary of what Tomblin has termed "Central Canadian Imperialism". The 1989 court reforms undertaken in Ontario in response to the Zuber Commission Report were presented as ground-breaking in the book, *Judges and Judging*, by Peter McCormick and Ian Greene, when they in fact do not even come close to the sleek organization of New Brunswick courts; this is especially true in the area of family trials. New Brunswick continues to endeavour to collapse the responsibilities of provincial courts into the superior court level, especially interested in a cost savings to provincial taxpayers: see the McEvoy decision of the Supreme Court of Canada: *McEvoy v. A.-G. N.B. & A.-G. Can.*, [1983] 1 S.C.R. 704.

Centralization was not only the banner raised over the court reform process, but it was also paraded in front of a multiplicity of governmental initiatives designed to radically alter the provision of services to citizens and corporations in New Brunswick. These changes included the redesign of social services, welfare, and municipal institutions, a process that was urgently needed especially in relation to welfare which had not been significantly altered since the enactment of the "Poor Laws" in 1786.³⁵ Many of the changes were accomplished by the Robichaud government in the 1960s. These forces were fuelled by a growing social agenda in Canada and the Western world and by a "quiet revolution" among Acadian New Brunswickers of their own.³⁶

The population of the northern and western parts of the province was and is primarily Acadian or French-speaking, and these citizens traditionally had suffered from fewer economic opportunities than their Anglophone neighbours. There had been serious disparities in the levels of government services in Acadian counties, especially those funded by municipal taxes. The economic key to solving these contrasting situations was seen by Robichaud and others as requiring the provincial takeover of many social services; this would eventually lead to the abolition of local involvement and control.³⁷ The Acadian/Anglophone inequities were one reality that pushed the bureaucratization process, but even here, the economic situation of the hinterland counties suggests the existence of at least one other rift that will be alluded in this

³⁵James M. Whalen, "Social Welfare in New Brunswick, 1784-1900" in *Acadiensis* (Autumn 1972), II, 1, 64.

³⁶Léon Thériault, "Acadia, 1763-1978: An Historical Synthesis" in *The Acadians of the Maritimes*, ed. Jean Daigle (Moncton: Centre d'études acadiennes, 1982), 83.

³⁷Tomblin, 75.

study: the growing division between urban and rural needs during this century.

However, while Tomblin and others have correctly identified the Liberal Robichaud years as the critical ones,³⁸ reforms themselves emanated from the efforts of earlier governments such as John Babbit McNair's Liberal administration (1939-1952) and even the Flemming Conservative government (1952-1960). This is especially true in the area of justice "modernization" where the critical changes were accomplished by 1952, much earlier than in other provincial sectors. The rallying cry for centralization was for the sake of financial efficiency and the social good, but invariably, changes were made to help usher in an era of central planning and bureaucratization that would give the provincial government the control it wanted in order to promote industrialization and (as some have suggested) Atlantic regional integration. Local institutions that stood in the way of provincial integration and control would have to be sacrificed. For instance, as has already been suggested, municipal government outside cities, towns, and villages would disappear in the 1960s. Major efforts were also made in this period to consolidate adjacent urban governments and surrounding rural areas.

The justices of the peace formed another local institution like municipal governments that possessed an important, yet forgotten, influence even at the provincial level in mid-century New Brunswick. JPs and their cousins, the lay police and stipendiary magistrates, presented some obstacles to an integrated provincial bureaucracy. First of all, they possessed a wide array of privileges, powers, and informal functions that ranged from granting licenses and permits to the power of arrest and police regulation. A centralized planning administration could not exist

³⁸See Della M. M. Stanley, *Louis Robichaud: A Decade of Power* (Halifax: Nimbus, 1984).

without the ability of directly controlling such matters, especially licensing and police functions. Secondly, their authorities emanated from the Members of the Legislative Assembly that had recommended their appointment and also from the federal criminal laws. In order to change this arrangement, the Assembly members and their patronage powers would have to be curtailed or regulated by a centralized regime. Furthermore, the existence of magistrates who were not formally educated in legal methods placed the commercial certainty desirable for business growth in some jeopardy and competed openly with the place of the more agreeably trained lawyers of the province. Most importantly, however, magistrates were unsalaried officers of the Crown that historically and traditionally fell outside of the purview of day-to-day government control and review. While they provided the bulk of judicial and administrative services (even municipal) to local residents, they remained outside of the direct supervision of officials. They existed as an archaic left over and their days would therefore be numbered in the province.

Theoretical and Methodological Considerations

Recent historical works from Ontario and elsewhere such as the essay compendium, *Colonial Leviathan*, edited by Alan Greer and Ian Radforth have seriously challenged the view of the more traditional approaches to state formation that have concentrated on the development of modern democratic government; liberal studies often assumed that the growth of state regulation and intervention was natural and progressive. The challenge lies in the fact that the creation of the modern social welfare state was far from inevitable. Instead, the authors in the *Leviathan* collection focus on the administrative, economic and legal practises "by which citizens came

under the control of the state",³⁹ a slightly ominous outlook. State control can arise out of more than a growing bureaucracy, it can be encouraged by parallel professional movements that both foster further development and that can be eventually themselves controlled. Hence, several of the authors are interested in the development of police and justice structures as well as state influences in education, transportation, and the economy. The studies also deal with gender and religious considerations.

The *Leviathan* essays provided me with an alternative to the liberal theories of state that helped place my research in the context of more critical approaches to history in the post-Confederation period. However, if I try to fit my findings into the larger picture of British legal history from the obscurity of the twelfth century to the present, I am drawn towards the suggestion that the centralization process that occurred in the common law world over the past three centuries can also be expressed as a shift in the ongoing balance between centralism and pluralism. L. Kinvin Wroth, a Professor of Law at the University of Maine, described this view during an introductory address at a symposium on dispute resolution held at the University of New Brunswick's Faculty of Law in 1988. He states at the bottom of page 77:⁴⁰

[P]luralism and centralism are not competing models but complementary aspects of a single model. Changing demographic and economic circumstances, or intellectual or technological change, may cause one or the other of the regimes to assume dominance in any given era. Or the predilections or presuppositions

³⁹Allan Greer and Ian Radforth, "Introduction" in *Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada* (Toronto: University of Toronto Press, 1992), 13.

⁴⁰L. Kinvin Wroth, "Pluralism and Uniformity in the Common Law Legal Tradition" (1988), 37 U.N.B.L.J. 76 at 77. Wroth is not optimistic about large shifts in any "rebalance"; he suggests at page 82 "that the history and structure of American Constitutionalism and the system of private law that has grown up within it inevitably mean that alternative dispute resolution will complement the present legal system, not remake it." Perhaps this is the best that can be hoped.

of the historian or social scientist may illuminate one more brightly than the other in any given study...The only question is the relative balance between the two.

Wroth builds this view to reconcile the evidence of Arthurs on plurality in Britain and of Jerold Auerbach's look at the history of alternative dispute resolution in the United States in his book, *Justice Without Law?*⁴¹ Wroth is critical of the level of pluralism and the late period that both authors find it within; however, he does admit that elements of pluralism always exist in the face of formalism. I do not fully subscribe to this theory, but the perspective is useful because it allows me to remain hopeful about the possibility of the balance being redistributed to include more local participation in the future.

John C. Weaver, in his study on crime and the justice system over the past two centuries in Hamilton, Ontario, is much less settled on the persistence or usefulness of pluralism. He instead presents the professionization of magisterial functions as generally a progressive development, yet he shows how the rationalizing forces by their own construction created an ideology of political, civil, and social rights that would later serve as potential checks on increasing interventions by the state. He presents his view this way:

Over the centuries, the common law has expressed principles that have sustained the protection of the rights of the accused. Furthering the protection of individuals against the state has been an achievement of the courts and the defence lawyers. Professionalization and specialization have served individual rights as well as the state. In certain situations, law schools, law societies, lawyers, and judges counterbalanced the state; they have been able to do so because of the law. Even the acceptance of the concept that trials represent an

⁴¹Jerold S. Auerbach, *Justice Without Law?* (New York: Oxford University Press, 1983).

adversarial process has provided a grounding for the preservation of rights in the absence of a constitutional bill of rights. When, during the nineteenth century, jurisdictions throughout the transatlantic world elevated the rule of law, they gave themselves greater authority, but paradoxically they also confirmed the basis for resistance.⁴²

I will suggest that "resistance" to Weber's notion of an increasingly rational state can not only be rights-oriented, as Weaver primarily sees it, but can also take pluralistic forms outside the formal processes of the high courts. Both views of opposing the negative influence of the modern state can prove helpful in illuminating the complexity of the real situation. For instance, lawyers may be seen both as agents of state utilitarian intervention and as protectors against state control. Equally, modern governments can be characterized as either threatening or supportive of communities and individuals. The reality of each characterization is somewhere in the middle of these extremes and may vary with the situation or concern discussed. So, too, pluralism is another concept around which judicial systems can be based to either work for or against the social good.

In addition, this paper attempts to blend legal and historical methods. It is informed by a theoretical skepticism of liberal and utilitarian notions that have long dominated the modern legal paradigm. These views assume that a unified legal system with tight centralized control and professionalism is the only paradigm which contributes to an ordered and safe society. This is an elitist and positivistic approach to the rule of law, one that equates the semi-autonomous realms of legal activity such as the work of justices of the peace to archaic, amateuristic, and

⁴²Weaver, 12-13.

obsolete holdovers of a different era — if they are recognized at all. On the other hand, theories of legal pluralism provide an alternative view which recognizes that there may be virtues in diversity and localism and allows autonomous or semi-autonomous legal fields to be identified. Allowing for pluralism opens the way to take subjects such as JPs seriously and to recognize their value and their limits. For instance, equity has been defined in the dominant legal view to include the remaining (non-capricious) elements of the Lord Chancellor's practice; however, more decentralized approaches to law would allow that the discretionary procedures followed by magistrates also constituted equity in the pure sense of the word. Pluralistic approaches would also recognize that the source of jurisdiction for both the Chancellor and the JP rested in the same "fountain of justice".⁴³

The traditional legal methods used by barristers and the bench were developed over many years for the practical purpose of resolving legal disputes. They involve a highly structured approach to sources and well-defined lines of reasoning designed to illuminate legal doctrine, not to explore why laws were designed in the first place or how they were administered and experienced. Moreover, these traditional methods are highly technical and cloaked as being neutral and value free, when in fact the concerns of the state and the courts may not necessarily reflect social consensus. Bell has stated that taking "legal pluralism seriously is a challenge the contemporary lawyer is ill-equipped to meet" because that lawyer may presume the formal dispute resolution model and not even see the other processes such as arbitration or mediation

⁴³Other authors recognize the possibility of lower tribunal equity: "Here we have epitomized the cultural clash between the magistrate offering equity and the lawyer thriving on technicality": Bell, "Pluralism", 93. In fact, this construction of the single source of justice might be closer to the way that the situation was viewed at the time of the creation of justices of the peace. Appeals from the royal courts and the justices and sessions was only available from the sovereign.

at work.⁴⁴

In order to provide a fuller account of the positive discretion that I see made use of frequently in the inferior courts at the turn of this century and to describe better the subsequent decline of magistrates in New Brunswick, there is a need to resort to some of the empirical methods used by historians. Historical research provides a wider range of insights into why laws were legislated and took the forms they did, how the law was actually administered in practice, and how the law was experienced in the social context. Historical enquiry opens the researcher to a broader range of sources. But there are also important limitations. Power affects record keeping, and the student of history must be careful to avoid teleological assumptions. It is important to recognize that written historical evidence in the archives or libraries largely reflects the hand of literate and privileged actors and of official record keepers. The researcher not only intervenes as an interpreter of these records but must also fill in the gaps according to theoretical assumptions in order to provide a coherent account of the past. All of these dangers demand an informed approach, but one that is not closed to possibilities.

Organization of this Study

Justices of the peace have enjoyed at least two building up periods over the past seven centuries that relate to the New Brunswick context. The first one occurred beginning in the 15th century and coincided with the rise of parliament in Britain. New Brunswick also experienced the results of this increase in magisterial jurisdiction by receiving the imperial common and statute

⁴⁴Bell, "Pluralism", 86.

laws and building a similar magisterial system in the province. In almost a repeat of the manner that the British parliament had patronized the justices in the middle centuries of this millennium, so too did the New Brunswick legislature foster the growth of magisterial power and influence in the province; after all, justices frequently came from the same family and class structures as the House of Commons or Assembly members.⁴⁵ In both cases, magistrates saw their formal jurisdictions increase almost by each statute promulgated. My second chapter contains a review of this establishment and building process. It also attempts to show how justices were at once an arm of state surveillance in early New Brunswick and yet a source of community independence; as Alan Greer has commented, it is impossible to view even classed-based justices as merely an extension of the colonial enterprise.⁴⁶

Just when it seemed that magistrates were losing their influence following the abolition of the general sessions courts and the removal of county affairs from their administration, I believe that a second awakening occurred. New Brunswick magistrates benefitted from a renewal of their summary jurisdiction under the new Dominion government legislative scheme and temperance laws and of small claims jurisdiction under the provincial purview. Principles of responsible government were firmly entrenched in the province, and the appointment of justices of the peace and magistrates became a political plumb of a rather independent group of Assembly members (party discipline was at its infancy in the province before 1900). New Brunswick was still not

⁴⁵One-half of the 28 members of the House of Assembly members were justices of the peace, themselves, in 1828; many of these doubled as justices of the Inferior Court of Common Pleas: *The New Brunswick Almanac. . . 1828* (Saint John: H. Chubb, 1828?).

⁴⁶Greer, "Police", 19.

fiscally able to replace magistrates with any truly central court system, although this was favoured by the elected elite; accordingly, it is my hypothesis that in this renewed climate of magisterial influence in local judicial affairs that a revitalized freedom existed that led to the possibility of true "community" criminal and civil courts developing. Inferior court records are indeed sparse in this (and any) period; however, I have chosen as Wynn did in his article on the status of political ideology and development in the Maritimes to use the limited vignettes available to me. I am particularly blessed with a tangible record of the justice of the peace and magisterial courts of William H. Moran, a merchant, master mariner, insurance broker, shipowner, and proprietor of a substantial shipbuilding enterprise in St. Martins and Saint John, New Brunswick. Although Moran was not the only magistrate in the parish or the most economically influential, these rich papers along with a variety of other records available between 1877 and the 1930s will provide the core of my third chapter which focuses on providing glimpses of this renewed position of "community" courts and the role of discretion or "equity".

My fourth chapter documents the slow decline of magisterial authority, particularly in the rural parts of the province. The narrative of this chapter attempts to uncover the near revolutionary shift from local judicial and representative control to a centralized planning administration. The keys to my study are the records of the legal profession of New Brunswick and the ideological shifts and expansion experienced in the provincial bureaucracy before and after the 1930s. This section documents the monopolizing influence of legal professionals over the entire justice system and further shows (in a small way) how the provincial administrators are even assuming

control over these successful professionals. Importantly, as well, magistrates of course contributed to their own demise through corruption, self-interest, fierce independence, and an indifferent reaction to the challenge of their public support.

I end with a chapter that attempts to reflect on the changes, movements, and influences that have led to the demise of the place for citizen magistrates and other community representation in the justice system and in other sectors of the provincial social services. I try to characterize these changes and make an effort to show the effect that centralized forces have had on local communities. I am hopeful about the future place of community leadership and consultation, and I try to bring some of the knowledge gained through this report writing process into the present context where it can hopefully help inform some of the decisions currently facing us in the community 'realm', especially the implications of the 1870's resurgence of magisterial courts.

My aims may seem very limited when compared with the sheer scope of the introduction; however, space and time have meant some important choices for me. Much greater development and analysis could be performed on the historical processes that I attempt to document in this study. Work needs to be done on the gender, political, class, spiritual dimensions and ramifications of local magisterial appointments. Important sequels to the Couturier and Pitre studies need to be undertaken to determine the context of Acadian recruitment and use of the magisterial courts in this century. There is room for work focusing on the place of Blacks, Aboriginals, and other ethnic groups or "communities" in our historic and evolving justice

system. Further efforts need to be undertaken to better understand the development of state regulation and surveillance in New Brunswick, especially in relation to the historic role of justices. However, I will remain content if this small study is able to introduce our current legal actors to the historic role of justices and magistrates, to the pluralistic forms and immense jurisdictional scope of earlier inferior courts, and to the role that discretion played not so long ago within our European-based justice system. Providing such a basis can only help us understand the basics of our current system better.⁴⁷ I hope, too, that this work will provide a statutory framework to assist future studies in the area of inferior courts, juries, and other lay officials in New Brunswick.

⁴⁷Weaver, 12.

CHAPTER 2:

"Without Coat or Neckcloth": Background and Early Developments, 1784 to 1877

The Maritime Province of New Brunswick although geographically a small part of Canada is in fact a land of many contrasts. Its northern and eastern counties are largely Catholic and Acadian or French-speaking. In the South and West, English words dominate the circles of conversations. Protestants surround Carleton and Victoria Counties south along the St. John River to the Bay of Fundy and east toward Sussex, Moncton, and Sackville. Like the hinterland of the central mountainous districts, there are pockets of ethnic communities, especially the Irish of the Miramichi and Saint John or the Danes of the upper St. John River Valley, and these are surrounded by many other families from Great Britain, Africa, Europe, and elsewhere. The rocky shores and islands of the Bay of Fundy are pounded by the swells of the highest tidal waters in the world, while the waves of the Northumberland and Chaleur wash in over dunes of red and grey sand. St. Andrews and Caraquet, though with different languages, build their existence by means of aquaculture and the sea, and the upper St. John River Valley is the site of one of Canada's largest producers of potatoes. First Nations' communities like Tobique and Kingsclear are inhabited by the Maliseet while the others away from the St. John River are bases for the Mi'kmaq; names like Nashwaaksis, Nepiquit, and Maqtaqac abound. The bustling working-class port of Saint John lies juxtaposed against its slightly northern capital of Fredericton, a white collar university and government town. The province is officially bilingual today, but it still must deal with linguistic tensions and fears. New Brunswick is in many ways

a miniature study of Canada.

Magistrates reflected the variety of New Brunswick, but they would not often be considered radical. However, at least one early JP proved that these early officials could rarely be considered mere "arms" of the executive government. When Lieutenant-Governor Sir Howard Douglas visited The Bend (future Moncton and Riverview) in 1825 on his meet-the-province tour, Magistrate Malcolm Wilmot was waiting for him. Douglas, a member of the Church of England, was charged with infractions of the Lord's Day law when he attempted to travel from The Bend on Sunday. Douglas had been staying at a "non-conformist" inn and decided to extend his stay upon hearing of the charges. The case was dismissed by Wilmot on Monday morning as His Excellency "had decided to respect the Sabbath". W. C. Milner, an early Dominion Archivist from Dorchester, New Brunswick, would explain that this incident attested "to the democracy (or political bigotry) which existed" in the colony. Malcolm Wilmot, J.P., had a more famous cousin, the Honourable Lemuel Wilmot; the latter was a fighter for responsible government and somewhat of an opponent of colonial governors in the assembly.⁴⁸ The next lieutenant governor, Sir Archibald Campbell, would be fined six pounds by Magistrate Wilmot for travelling on a Sunday in August of 1835. Wilmot would not fare so well this time; Campbell was so furious that his plans had been interfered with by a magistrate "without coat or neckcloth" that he dismissed the JP two weeks later.⁴⁹ New Brunswick justice was somewhat rough and ready.

⁴⁸John Edward Belliveau, *The Monctonians: Citizens, Saints and Scoundrels* (Moncton, N.S.: Lancelot Press, 1981), 65-66.

⁴⁹Belliveau, 66 and H. J. Whalen, *The Development of Local Government in New Brunswick* (Fredericton, 1963), 14.

The colony's first century that this chapter will attempt to summarize can be roughly divided into two separate periods of development, especially in relation to the lower magistrates. The first is a period of growth in magisterial powers directly from the influence of the justice's family and friends in the legislature. The second half century calls the role of justices of the peace and other appointed officials into serious question through assaults from the mounting responsible government movement, an increasingly "irreverent press", and a developing legal profession. Let us begin to explore both of these periods below.

Period of Growth: 1784 to 1832

Justices of the Peace had served in the province before its establishment in 1784. The whole area was known as Nova Scotia or Acadie, and justices and township officers had been appointed for Sackville, for example, as early as 1763.⁵⁰ Justices were present and active in the Maudslayi area in the same period. The influx of American refugees into Nova Scotia following the 1776 Revolution led to a division of that former province. The northern and mainland portion became New Brunswick in August of 1784.⁵¹ In 1785, the new territory was

⁵⁰Ernest Clarke, "The Cumberland Glebe Dispute and the Background to the American Revolution in Nova Scotia, 1771-1774" (1993), 42 UNB LJ 95 at 97, note 5.

⁵¹It is important to note here that New Brunswick was not only formed by the loyalist experience. New Brunswick is home to many different peoples, but the Acadian or Francophone population creates a special dynamic in the province and makes up nearly a third of its residents. The majority of Acadians were marginalized under the loyalist-controlled administration (although some like Joseph Gueguen yielded wide influence). Many Acadians had found their way into the former Sunbury County either at the time of the expulsion from peninsular Acadie in 1755 or following a trek back from their American displacement points after 1763. Those that arrived in New Brunswick settled along the North and Northumberland shores, and they attempted to re-build their communities and lives in these new areas.

officially divided into eight counties,⁵² each with local government by Justices of the Peace. The model was based on the English design of government as had been modified in many of the colonies. The despotic innovation in New Brunswick was the use of the parish and appointed parish officers instead of a township-style government for county divisions; following the Revolution, there was "some" mistrust of local democratic institutions by Governor Thomas Carleton and party. The county government system retained the Court of General Sessions of the Peace as had existed outside of Halifax. All local government officers were to be appointed, including the mayor of Saint John; the only exceptions were the elected aldermen and assistants of the Saint John's common council and the lower chamber of the assembly.⁵³ "The Loyalist elite's vision of the most 'Gentlemanlike' government on earth did not include opposition".⁵⁴ Nor, was it willing to entertain "mob rule"; even a House of Assembly was not elected until a year after Carleton's arrival, as he preferred to rule by decree.

The General Sessions, called Quarter Sessions in England, were to meet in the shiretown on appointed days twice each year, with the exception of the City and County of Saint John which met quarterly. For example, in King's County, the justices of the peace (at least two of

⁵²The original eight counties were Saint John (joint city and county), Sunbury, Kings, Queens, Westmorland, Northumberland, Charlotte, and York.

⁵³The franchise for the assembly was much wider than that of the City of Saint John, which included for the civic elections only the freemen and freeholders of the city; women could possess "citizenship" of the city but were not accorded voting rights even if they "purchased" their freedom [economic]: Acheson, 27-33.

⁵⁴D. G. Bell, *Early Loyalist Saint John: The Origin of New Brunswick Politics, 1783-1786* (Fredericton: New Ireland Press, 1983), 108

them)⁵⁵ met at the court house in Kingston on March 1 and October 17 along with 24 freeholders of the county.⁵⁶ The 24 "good men" constituted the Grand Jury and were brought together shortly after the proclamation for the court was read.⁵⁷ This "court" had both administrative and judicial functions within its own county. Administratively, the justices in session appointed county and parish officers, regulated hunting and fishing, provided for parish assessments and ratings,⁵⁸ issued tavern licenses, and regulated other matters. The grand jury assisted by advising the justices of the concerns of residents and by recommending people for parish offices. In criminal matters, the court had full power and authority from its county charter:

⁵⁵Justices of the Peace were appointed together on a Commission of the Peace; all were listed in the early years. Two or three of the justices were appointed to form a "quorum"; these quorum justices normally had substantial experience as magistrates or had some legal training. Two justices of the peace were required to constitute the Court of General Sessions, and at least one of the two had to be of the quorum. The most senior (or politically influential) quorum justices normally also held the post of Justices of the Inferior Court of Common Pleas which met with the sessions but at different times: a commissioning letter patent for the justices of Northumberland County in Régis Brun, *Pionnier de la nouvelle Acadie: Joseph Gueguen, 1741-1825* (Moncton: Les Éditions d'Acadie, 1984), 98-99. By the 1820s at least, all justices but the most recent appointees were designated "of the quorum" to ensure that the sessions could meet regardless of who arrived in the rural counties. Again, from a survey of almanacs, Saint John was different; only the city's aldermen were ever appointed quorum justices.

⁵⁶The sheriff of the county was responsible for seeing that jurors were chosen and notified. This was an important power of selection left in the sheriff's hands. Magistrates could not be required to serve on a jury in New Brunswick until 1870 as they formed part of the bench of the courts. The situation appears to be very different in Ontario if it is as John C. Weaver has described it; the grand juries were "packed" with magistrates: Weaver, 36. This appears to have been the *de facto* practise in Britain: Peter J. O'Hearn, *The Grand Jury: A Working Paper* (Halifax: Nova Scotia Law Reform Advisory Commission, 1973), 22. I feel that Weaver might be mistaken here.

⁵⁷Once the jury had decided unanimously whether a "true bill" (proceed to trial) or "no bill" (dismiss) had been made out before them, the foreman would announce to the Court of General Sessions the outcome. For an overview of the history of grand juries in Canada (at least in Nova Scotia), see O'Hearn, 22. In 1973 at the time of the O'Hearn report, Nova Scotia's grand juries consisted of 13 people while Ontario's consisted of seven jurors. Nova Scotia was the last province to abolish grand juries in 1984.

⁵⁸Taxation powers of the sessions were extremely limited. Assessments could be levied to pay for the parish's responsibilities for the poor and for justice expenditures. Other rates could only be assessed and collected after being authorized by the legislature. The legislative procedure would be adopted in the capital expenditures for a new court house or gaol, for example: *An Act to remove the Shire Town of King's County to a more convenient locality*, S.N.B. 1870, c. 50.

to enquire of, hear, determine within the county aforesaid, all and all manner of felonies, imprisonments riots, routs, oppressions, extorsions, forestallings, regratings, trespasses, offences, and all and singular other evils, deeds and offences whatsoever. . .[sic]"

The role of the Grand Jury in penal matters was to hear the evidence and to decide if any charge should proceed to court, not unlike the preliminary inquiry system used today. If the court decided to "order" the offender on a "true" bill to appear before it, a Petit Jury of twelve freeholders was empanelled by the sheriff to hear the case.⁶⁰ Justices also had individual jurisdiction to preserve the peace, take informations concerning breaches of the peace, issue warrants and summons, remand or bail a defendant until the next sitting of the applicable court, and hear and determine summary offences. Summary conviction fines often were used to support the poor of the parish.⁶¹

Other courts were of course created in the new province: a Supreme Court based in Fredericton (chief justice appointed by the British government), Courts of Oyer and Terminer and General Gaol Delivery (in essence, irregular county circuit courts presided over by a supreme court judge

⁶⁰Hatherly, 68. On paper, at least, the sessions court had original jurisdiction equivalent to the Supreme Court in criminal matters. The only appeals possible were to the Governor-in-Council or the Privy Council. However, Hatherly states that, in practice, the more serious offences were ordered before the circuit courts (Nisi Prius sittings of the Supreme Court or under Commission of Oyer and Terminer and General Gaol Delivery). In York County, serious crimes were held before the Supreme Court; however, no extensive archival work has been undertaken to substantiate this claim. It was uncommon for justices of the peace to sit on Commissions of Oyer and Terminer outside of the City and County of Saint John; normally, the bench of these "assize" sittings consisted of a justice of the supreme court and one or more justices of the inferior court of common pleas as associates: PANB, RS538 P9 & F10, Provincial Secretary, Commissions (these files contained actual commission documents and included commissions of oyer and terminer for many counties, clerk of the circuits appointments, and some commissions of the peace).

⁶¹Like the grand jury number, 24 petit jurors were summoned to the shiretown twice yearly (quarterly in Saint John City and County). Those that served in the various trials were selected from the 24 assembled: PANB, RS539 A.1, Albert County, List of Jurors, 1848-1970.

⁶²Three JP's could levy up to £10 for an offence, the money being used "for the Poor of the Town or City": *An Act against Forestakes and Regrates, S.N.B. 1786, c. 48, s. 3.*

and at least one justice of the inferior court of common pleas or of the peace), the Inferior Court of Common Pleas (a county civil court), Clerk's Courts (small claims tribunal co-chaired by the clerk of the peace and a JP),⁶² JP summary conviction courts, and various equivalent tribunals in the City of Saint John.⁶³ All of these courts, with the exception of the Clerk's and individual justices' courts met at the same time as the Court of General Sessions of the Peace to expedite the hearing of criminal and civil matters. All of them made use of the grand and petit jury members that had assembled.

Travel was difficult in the early years, and the Justices of the Supreme Court were unwilling to travel frequently to the various county seats to hold circuit courts even after authorized to do so by the General Assembly in 1786.⁶⁴ In an effort to ensure better access to inexpensive justice, the Assembly abolished the Clerk's Courts⁶⁵ as being ineffective and extended the summary jurisdiction in debt recovery matters of the Inferior Court of Common Pleas to ten pounds and gave exclusive jurisdiction in like matters not exceeding three pounds to Justices of the Peace. Three pounds for the JPs is a surprisingly high amount for the period, as is ten pounds for the

⁶²The clerk had various titles including Keeper of the Rolls, Clerk of the Peace, and Clerk of the Inferior Court of Common Pleas. This person was nearly always occupied by a lawyer, even if the lawyer did not live in the county but nearby. For example, in 1828, William Tyng Peters was a lawyer in Saint John but served as clerk for the King's County, and Fredericton attorney and legislative councillor The Honourable Samuel D. Street served as clerk for the County of Sunbury: *The New Brunswick Almanac*. . .1828.

⁶³A full list of early courts, including chancery and vice admiralty courts can be found in the Appendix to McEvoy, 104.

⁶⁴The original commission to the Chief Justice of New Brunswick only required that the court hold four sittings each year in the capital of the province. Attempts by the General Assembly to force the court to engage in more frequent circuits were vetoed by the Executive Council in 1791, 1792, 1794, and 1795. Accordingly, special commissions of Oyer and Terminer and General Goal Delivery were issued to the Justices of the Inferior Court of Common Pleas (also justices of the peace) in the county.

⁶⁵The Clerk's Court was retained in the City of Saint John; it was commonly known as the Mayor's Court: *The New Brunswick Almanac*...1828, B2.

justices of the pleas.

In 1802, the Assembly became so frustrated with the immobility of the Supreme Court that it conferred exclusive jurisdiction in matters not exceeding twenty pounds to the Inferior Court of Common Pleas. However, if the title to land was involved, recourse was only available in the Supreme Court. These actions ensured that residents of the province outside of the capital would have access to civil and criminal justice more readily. Also of concern was the cost of adjudication in the Supreme Court where barristers were required and no "summary" jurisdiction existed until much later. The increased responsibilities of the Inferior Court of Common Pleas and the justices led to an expanding prestige and profitability for JP's.

One can gain a sense of the scope of administrative powers of the early justices by looking at the type of patronage that they were empowered to carry out in this period. They were not only judicial and regulatory officers, but for each parish, they appointed three Overseers of the Poor, a Parish/Town Clerk, two or more constables, two or more Fenceviewers, a Clerk of the Market, sufficient numbers of Pound Keepers, Surveyors of Fish, Surveyors of Lumber and Cord Wood, a sealer of leather, sufficient gaugers of casks, three assessors of parish rates and taxes, a number of Weighers of Hay, and any other inspectors and examiners of staple commodities.⁶⁶ In this period, almost every act of the legislature conferred new administrative powers and summary judicial responsibilities upon the justices. For example, they were charged with investigating forest fires, appointing school trustees, and protecting trees on river banks in

⁶⁶The positions of actual appointment varied for each county depending on the needs identified by the session justices: S.N.B. 1786, c. 28.

1786. They were to regulate liquor and tavern licenses in the county in 1787. Recognition of the ability of justices (of the quorum) to marry individuals in communities without a church official was enacted in 1791.⁶⁷ They were charged with the "criminal" regulation of illegitimate children and of certifying applications for wolf bounties in 1795. In 1801, the Assembly passed an Act to limit actions against JP's in criminal matters to six months (these were heard in the Inferior Court of Common Pleas).⁶⁸ This would later be extended to JP's in their civil capacity in 1834.⁶⁹

The Assembly's confidence in these lower courts is continually in evidence. One could aptly ask why this was so? There are several possible reasons, but three are more plausible. First of all, the legislators were in many cases either justices themselves or sufficiently connected with the justices through family or class lines to want to support their empowerment;⁷⁰ this had certainly been part of the reason for the rise in administrative powers of justices in the United Kingdom. Secondly, New Brunswickers (at least the government) could have been satisfied generally with the job that most JPs performed. And, finally, they had little choice; justices worked on an *ad hoc* basis with no guaranteed salary at very little cost to the province (they were paid by the people that made use of their services). New Brunswick would have had

⁶⁷Commissions allowing justices to marry couples were popular enough to have been printed in blank form by a stationer: PANB, RS538 F2, Provincial Secretary, Commissions, 1829 February 25.

⁶⁸S.N.B. 1801, c. 2.

⁶⁹S.N.B. 1834, c. 45. A result of the law commissioners report in 1832.

⁷⁰In 1828 for instance, 14 of the 28 members of the House of Assembly were justices of the peace themselves (several were also justices of the Inferior Court of Common Pleas). Two members were clerks of the peace, the legal advisor and administrator of the counties, and many had evident family and friend connections: Henry Chubb, *The New Brunswick Almanac*, . . . 1828, Saint John, 1828.

economic difficulty supporting an equivalent paid civil service. Probably all three factors played a role.

If we look to the realities of communities, the low incidence of crime generally,⁷¹ and the financial limitations of government in this period, an officer like a justice made very good sense. Almost every community could have one, ensuring a government presence in even the remotest areas of the province. The March sessions of King's County in 1815 show that the court only had to deal with 7 assaults, and some cases had been held over from the previous session.⁷² This system was not only inexpensive, but it was viewed as a conferment of honour or accomplishment to become one of "Her or His Majesty's" justices. Many of those appointed wanted to keep the privilege and this may have helped to regulate and control the magistrates to a small degree.

Complaints against justices of the peace surfaced on occasion, especially after 1840. An early and notorious problem arose in 1822. Warren Hathaway and Gilbert Ruggles, both justices for Charlotte County, were charged for improper comments against their fellow justices in the *Sr. Andrew's Herald and Eastport Sentinel* on October 30th.⁷³ It is difficult to determine the outcome of the dispute, but it is important to note that the government had to become

⁷¹This is evidenced by the few cases of reported crimes that appear before the sessions in this early period. Most of my work looked at Kings County sessions: PANB, RS151 (Kings County Records), A/1/4 (Minutes), October 1847 to March 1872.

⁷²PANB, Minutes of the General Sessions for King's County, RS 151, A/2/1/1, first Tuesday of March, 1815.

⁷³The term "fellow" is indeed proper in this context; it appears that few women were ever appointed to a justice's position.

involved.⁷⁴ There was also some difficulty getting Gloucester justices to the sessions in 1831. In fact, the biggest problems were not with the justices, themselves, but with obtaining sufficient numbers of qualified candidates willing to hold the office.⁷⁵ One must seriously question whether or not officials that have often been viewed as government agents or spies could have been such, especially given the existence of these problems I have described. The backgrounds of justices in New Brunswick could vary widely. Gilbert Ruggles was a merchant and newspaper editor in St. Andrew's (though of a prominent family - General Robert Ruggles), and he was somewhat typical of the JPs in New Brunswick. Amos Botsford, on the other hand, was a lawyer, had been a loyalist land agent for the Saint John and Digby, N.S., and was Speaker of the N. B. House of Assembly until his death in 1812.

It is important to introduce some of the justices' non-judicial roles. JP were often called upon to mediate between Fredericton and their districts (a delicate balance). They informed others of government decisions and enforced the new laws. They also were called upon by residents to petition government for benefits and changes such as the settlement of land disputes or obtaining land grants.⁷⁶ In effect, some magistrates acted in a similar capacity as our members of the House of Assembly do today and in the stead of a European scribe. The role of mediator with the capital was very important, especially in the far-flung areas of Acadian New Brunswick.

⁷⁴PANB, RS8 (Executive Council Records), Legal Cases.

⁷⁵H. J. Whalen, 14: "On one occasion, the entire bench of magistrates in Gloucester county was allegedly composed of drunkards and embezzlers. The justices in the same county deserted their posts at quarter sessions in January, 1831".

⁷⁶Brun, 97-98. In the hopes "de gagner certains chefs de file acadiens à la collaboration [du gouvernement à Fredericton], le serment du test ne sera pas appliqué avec rigueur". Joseph Gueguen and Othon Robichaud were appointed justices of the peace for Northumberland: Brun, 64-65.

The government even recognized the imperative nature of having officials that could report to it from these Francophone areas, for it was even willing to relax the "serment du test" in order to have important Acadians in its service by 1794. The initial attempts at appointing Acadian "juges de paix" were unsuccessful because of the oath of allegiance requirement for all public officers.⁷⁷

This system of local government and justice was well-suited to a largely rural, subsistent life. People had time to leave their homes to go into the "town" to transact business at sessions and then return a few days later. While Saint John also had General Sessions of the Peace, the elected common council of the city met more frequently and had substantial self-governing powers. Urban dwellers lived under different circumstances: fewer problems with communication and transportation, much less reliance on seasonal employment, and a need for speedier resolution of residents' concerns.

It is interesting to note the seriousness with which the Grand Jury in the County of Saint John took its role of inspecting the county gaol. In the first sessions of 1812, it condemned the second story of the facility as being unsafe for prisoners and strongly urged the justices to order

⁷⁷ Justice of the peace appointments were refused by Pierre Duperré and Louis Mercure of the Madawaska area because of the "big oath" in the 1780s: Thomas Albert, *Histoire du Madawaska: entre l'Acadie, le Québec, et l'Amérique*, rev. ed. (Edmundston: Société historique du Madawaska, 1982), 105-106. Language, religion, and economic influences kept Acadians on the fringes of the predominantly Anglican and English-speaking political order; in fact, they largely governed themselves. Even though there was early representation in the general sessions by a few prominent Acadians, the majority of magistrates were English-speaking. While missionaries, doctors, and priests aided Acadians informally with their early legal difficulties, important Acadian families attempting to move into the economic mainstream of the province began utilizing the magisterial courts and seeking appointment as magistrates, themselves. Acadian JPs took on a special importance for they were representatives of the Francophones of the province that were otherwise without any voice in government; for the Acadians did not have ethnic representation in the House of Assembly before the mid-1800s.

repairs. They again visited the gaol in their second sessions of the year and in 1814, both times reporting on the progress and asking for further repairs. The 1812 jury also expressed concern about the shipping lanes and harbour entrance procedures; this may have been due to the war that was ongoing with the United States. In all these cases, the justices (which included the Mayor of Saint John and the Recorder of the city) attempted to respond to the juries' concerns.⁷⁸

By the 1830s, New Brunswick had grown beyond its pioneering beginnings, and had become a major supplier and exporter of timber and wood products to the United Kingdom and the West Indies. The trade in timber was at its peak and prosperity was in the air. The literate members of its society were well-read and informed on world events and innovations. It is not surprising then that some aspects of the rationalizing and professionalizing forces that were being encountered in Europe would manifest themselves in small ways in New Brunswick. For instance, shires began to appoint paid county treasurers, as was the custom in Britain; this was affirmed by an Act of the Assembly in 1829.⁷⁹ The central government was also putting greater regulatory control over county officers such as the sheriff.⁸⁰ While the sitting time for the general sessions in Kings County by the 1840 were eight days in length as compared to three days at 1800, New Brunswick still had a long way to go before it would need a more dedicated bureaucracy.

⁷⁸PANB, RS156 (Saint John County, Minutes of the General Sessions, March 1812 to April 1821), 1/1, 1812-1814.

⁷⁹No justice or clerk of the sessions could be a Treasurer for the county: S.N.B. 1829, c. 15. In the U.K., a justice sometimes held the position of Treasurer; however, the justice would normally appoint a deputy to act: Esther Moir, *The Justice of the Peace* (Middlesex: Penguin Books, British Institutions Series, 1969), 117.

⁸⁰*An Act, for the better regulating of the Sheriff in this Province*, S.N.B. 1836, c. 1.

In 1832, the first serious review of the justice system in the province was undertaken at the hands of three attorneys.⁸¹ The report which they produced relied heavily on a British report completed a year earlier.⁸² With the exception of recommending summary trial procedures in the Supreme Court and consolidating the fee structures, the report largely dealt with court procedures by both codifying them and recommending some changes. Accordingly, its value is in its documentation of the existing state of the courts.⁸³ For example, from the new fee structure the report recommended, it is possible to conclude that attorneys did appear before the justices' courts on occasion, where the party could afford legal help and where the lawyer did not feel it beneath his stature as a barrister of the Supreme Court. More often, however, the clerk of the peace (almost always legally trained) acted as counsel, if needed. The only other important recommendation concerning justices was that the government should designate particular justices to handle civil courts; the commissioners felt that the 177 justices constituted too many civil courts.⁸⁴ They were afraid of "justice shopping" as it would be called today; however, this concern would not be rectified until much later with the creation of parish courts in 1876 and stipendiary magistrates.

⁸¹The three commissioners ordered to inquire into the Judicial Institutions of the Country were Ward Chipman (Supreme Court Justice), Robert Parker (Solicitor General), and William Boyd Kinnear (barrister): *Report by the Commissioners appointed to inquire into the Judicial Institutions of the Province*, (Fredericton: John Simpson, Printer to the King's Most Excellent Majesty, January 2, 1833) [hereafter, Law Commissioners' Report, 1832].

⁸²Reports of the Law Inquiry in England as cited in Law Commissioners' Report, 1832, 5.

⁸³The 1833 Report (Law Commissioners Report, 1832) was used to support some of the earlier procedural statements in this paper.

⁸⁴The numbers of justices stood in each of the counties as follows: York (33), Sunbury (12), Queen's (13), King's (22), Saint John (13, not including those residing in the city), Charlotte (23), Westmorland (21), Kent (21), Northumberland (19), and Gloucester (12). The commissioners note that the Northern section of York county had been recently declared Carleton County but that information had not be separated in the report: Law Commissioners' Report, 1832, 31.

The system of law and local government in New Brunswick would remain the same for the next two decades, with little change. Other forces would be felt in the future which would encourage reform. The English free trade policy after 1833 would eventually mean an end to the preferential tariffs charged on colonial lumber exports. The growing mood of discontent in the colonies, particularly in the Canadas, would bring new challenges to provincial and local governments. These changes, coupled with British democratic reforms, British foreign policy, and the growing sophistication of New Brunswick, itself, would mean that changes would be close at hand.

Educational opportunities had increased with the growing prosperity in the 1820's and 1830's. These pressures would mean increased rationalizing pressures in all levels of government control. However, the justices for the time being were providing a government presence in hamlets and settlements throughout the province. They not only were the main providers of local civil and criminal remedies, but they also were the only government presence found outside of the capital and the City of Saint John. A major strength of the system was that it was inexpensive — user fees paid for justices' services. It was effective in a province where travel was lengthy and difficult (especially to Northern New Brunswick and Westmorland County). It was difficult to complain about such a system that appeared so well-suited to the rural character of New Brunswick. It had also been used in sharp contrast to more democratic forms of local government such as existed in the City of Saint John. Use of magistrates and appointed parish officials excluded more democratic forms of local government that some had seen as part

of the cause of the Revolution.⁴⁵ The economy and society in New Brunswick was only beginning to develop, and the justices were able to handle the needs of residents without great difficulty. During this period, JP's were a solid fixture of New Brunswick's administrative and judicial apparatus. Soon, things would begin to change.

Turbulence & Change: 1830 to 1877

The decade of the 1830's brought many challenges to the colonies in British North America. Rebellion had struck both of the Canadas in 1837, and there were significant reform movements beginning to develop in the Maritime Provinces. Lord Durham was sent to study and assess the problems in the colonies by being appointed as their new Governor General in March of 1838. His report, completed after only a few short months in North America, contained some culturally contentious issues for Lower Canada proper,⁴⁶ but it also strongly recommended the establishment of government responsible to the elected assembly and a system of democratic municipal administrations, reforms which were propelled by the report.

The force of these recommendations coupled with growing discontent over the costs of Irish immigration, alarm over potato crop failures in the province, and more importantly, concern over a change in the preferential treatment previously granted to crown colonies (especially lumber exports) all served to fuel the engine of change. Even more so, there was a growing

⁴⁵Clarke, 96-97.

⁴⁶The Durham Report is well known for its recommendations of French "integration" and assimilation. However, the report was instrumental in convincing British authorities that the time was right to allow colonial residents to exercise greater self-autonomy over local matters in English Canada, Australia, and New Zealand. It strongly recommended the adoption of elected municipalities, a move that was not fully realized in England until 1888: *The Canadian Encyclopedia*, 2d, vol. 1 (Edmonton: Hurtig Publishers, 1990), 637-638 and Moir, 182.

sense of maturity and sophistication in the province. Its timber exports had brought money, a certain amount of affluence, and better communications by post and road. New Brunswick was no longer a survivalist, frontier settlement, and its institutions would need to adapt to these new realities. The old guard, itself, that had held on the reigns of power in the province since its founding was also changing by natural means. The death of William O'Dell, long time secretary of the province and son of the first provincial secretary, in 1841, symbolized this change.

The period is characterized by four major developments in the law that affected the jurisdiction and function of justices: the rationalization of civil and criminal procedures, the increase in summary jurisdiction of magistrates, the appointment of full-time magistrates, and the gradual replacement of the county administrative powers of the justices in general sessions. As a result of the 1832 judicial commission, a number of rationalizations took place. First of all, New Brunswick criminal laws were codified and revised. Secondly, the supreme court began regular circuit sittings (still by commission of oyer and terminer and general gaol delivery)⁸⁷ and was conferred with summary civil powers.⁸⁸ It is safe to assume that the general sessions did lose some of their effective criminal powers by the increase in the circuits; however, this is difficult to assess owing to the low rate of reported crime. Furthermore, serious offences had normally been handled as a matter of course by commissions of oyer and terminer, in any event; the sessions continued to deal with assaults and other more common crimes. The extended power

⁸⁷In other words, court or commissions held to "deliver" all of those held in the gaols to be dealt with and to "hear and determine" the case: Earle O. Tubrett, *The Development of the New Brunswick Court System, 1784-1803* (University of New Brunswick, Fredericton: Unpublished thesis (M.A.), May 1967), 95 and 152-154.

⁸⁸Summary proceedings could generally only be utilized if the individual did not want a jury trial, and this was the case even when the Supreme Court was given summary conviction jurisdiction in civil cases involving less than twenty pounds in 1834: S.N.B. 1834, c. 41.

of the more professional supreme court may affected the case loads of the inferior courts of common pleas, but probably not in a major sense owing to greater costs in travelling and being heard before the supreme court outside of Fredericton.

In 1834, an Act was passed by the legislature "regulating Justices of the Peace in Civil Suits" out of the commission recommendations. It dealt heavily with procedure and provided a standard list of fees for the justices services.⁸⁹ Fee structures were very common in the 18th and 19th centuries. All officials, including judges of the Supreme Court were entitled to collect them; this included sheriffs, coroners, constables, and barristers. This codification would remain largely intact until 1952.

The assembly also continued to entrust the summary enforcement of criminal laws to justices of the peace. *An Act for the more summary punishment of Persons guilty of maliciously killing, maiming, disfiguring or otherwise injuring Cattle*,⁹⁰ passed by the legislature in 1830, is a good example. Any person injuring cattle could be imprisoned for up to six months by one justice of the peace. In the same year, the power of justices to deal with small debt actions was continued.⁹¹ Justices of the peace could grant bail in any misdemeanour offences (generally, crimes not punishable by death) and were given the ability to adjudicate cases of trespass in 1831.⁹² A justice's ruling on bail eligibility was final; however, the justice could elect to refer

⁸⁹*An Act regulating Justices of the Peace in Civil Suits*, S.N.B. 1834, c. 45.

⁹⁰S.N.B. 1830, c. 22.

⁹¹S.N.B. 1830, c. 21.

⁹²S.N.B. 1831, c. 9 (trespass) and c. 14 (*An Act for improving the administration of Justice in Criminal Cases*).

the matter to the Court of General Sessions of the Peace or the Court of Oyer and Terminer and General Gaol Delivery."⁹³

There were other pressures. An increasing number of complaints against all manner of local officials and legal personnel blossomed in the 1840's. Sheriffs appeared to be common targets, although justices had their share of disputes. A rather startling situation occurred in St. Andrew's in 1858. A man of "notoriously bad and violent character was mad drunk" on the St. Andrew's station platform of the New Brunswick and Canada Railway and Land Company. The manager, Julius Thompson, attempted to remove him several times. A scuffle ensued. The deputy sheriff, two magistrates, and one or more constables were soon on the spot. When Thompson attempted to have the person prosecuted, the judicial officials gathered and "complained that they had no funds to pay the expenses of sending the man to gaol". The man was discharged, and Thompson complained to the Provincial Secretary of this matter and also suggested that this was not the only case of "delinquents in the same neighbourhood. . .[being] allowed to go unpunished."⁹⁴

Beginning in 1849, a consolidation of the statutes relating to criminal justice was undertaken, building on the process begun in the 1830's. In criminal matters, the justices had received an increased summary jurisdiction to hear and punish minor offences while at the same time

⁹³*An Act to provide for punishment of cruelty to Animals*, S.N.B. 1834, c. 13.

⁹⁴PANB, RS13 (Records of the Provincial Secretary), 54.b.3, 1858.

gradually limiting the sessions ability to hear felonies.⁹⁵ By 1849, the two remaining, important areas of summary jurisdiction were the felonies of larceny (3 JPs) and assault (2 JPs).

These were the traditional cases tried in the session courts since 1786; however, the court was now only able to try these crimes if they were felt not to be indictable and were not committed while attempting to commit another felony. Furthermore, access to summary actions was only available if the person was charged within one month of the commission of the offence. Sessions, of course, could still deal with misdemeanours.

A second major reform study of the judicial institutions of the province commenced in 1854. It was aimed primarily at the inflexibility of the superior common law courts but had important implications for JPs. As the commissioners stated in the first of three reports, their guiding principal was radical:

We think the practice of the Law must for the future be founded more on the principles of common sense than on ancient precedent; that it is time to abolish a system by which fictions seem too often to have been considered unavoidable in order that truth and justice might be reached. . . We do not think the man who seeks justice should be driven from one form of action or Court to another, or that a Judge of any Court should ever be so painfully situated as to declare a party to have the right, but consistently with precedent find it impossible to afford the remedy.⁹⁶

⁹⁵Hatherly, 41. Her work states that the entire period after 1831 is marked by an effective reductions in the powers of the general sessions in favour of the circuits of the Supreme Court. I would suggest however, that much of this slack was also accommodated by the summary powers of the justices.

⁹⁶*First Report of the Law Commissioners* (Fredericton, 1854) at the front of S.N.B. 1854, pages 1-13. This report also recommended the abolition of the Inferior Court of Common Pleas in the province.

They reviewed the present criminal and civil courts in some detail, looked at evidentiary procedures, simplified and revised the Acts of the House of Assembly, and proposed major changes to the legal structure of the province. Aside from re-structuring the chancery courts of the province to become a division of the Supreme Court; recommending that defendants in cases be considered competent witnesses; and abolishing the equitable, marriage, and divorce jurisdiction of the Court of the Governor-in-Council; these commissioners codified and restructured the procedures and powers of all officials in the criminal system. For instance, the writ of *habeas corpus* would no longer be available in the inferior courts. The procedure of appeal from the Justices of the Peace in civil suits was expedited and made "less expensive"; appeal moved from the governor-in-council to the supreme court. And, summary conviction procedures, trial routines, appeal structures, and offence punishments were modified and set out in detail. Similar work was done in the civil area. The commissioners relied heavily on a recent English study and the Massachusetts' model of statutory reform. While a number of the reform proposals were implemented immediately, the tenor of this report was to have an impact for the next decade and a half.⁹⁷

This rationalization of the criminal justice system also resulted in what would become the greatest potential "threat" to the justices' jurisdiction — the appointment of magistrates. The Parish of Portland in Saint John received the first Police Magistrate in 1848. The City of Saint John followed in 1849, after a major riot and assault by Protestant Irish on the Catholics at York

⁹⁷*Third Report of the Law Commissioners* (Fredericton, 1854) at the front of S.N.B. 1854, xvi-xxvii.

Point.⁹⁸ The magistrate was made *ex officio* a Justice of the Peace and had special authority over nuisance problems and other specified crimes within his parish, town, or district. These magistrates also had the power to choose not more than 15 "good men" to become full time police constables and were to attend the Police Office every week day between the hours of 10 A.M and 3 P.M. This system, extended to Newcastle in 1862, was a move to create a professional police force and "judge" to handle the growing number of "offences against the peace, as well as injuries to property".⁹⁹ Growing violence and Irish religious clashes were major reasons for the need of a police force in urban areas.¹⁰⁰ A Portland parish constable had been shot to death in 1847, and the government finally gave in to citizen demands and created full-time policing system in the parish. Jacob Allen, one of the parishes four JPs, was appointed Police Magistrate for the Parish of Portland. Allen appointed one captain and seven constables in 1848.¹⁰¹ Finally, in 1849, B. L. Peters, a Barrister, was appointed as the first

⁹⁸Gregory Marquis, *The Police Force in Saint John, New Brunswick, 1860-1890* (University of New Brunswick, Fredericton: Unpublished thesis (M.A.), September 1982), 28.

⁹⁹*An Act to create a Police Force in Newcastle*, S.N.B. 1862, c. 55. In Newcastle, any of the Justices of the Peace in the County of Northumberland were given the powers of a Police Magistrate, "provided that all offences punishable under this Act shall be tried, heard and determined within the limits of the said Town of Newcastle" (section 5). The justices also acted as Commissioners of Police for the town.

¹⁰⁰There was an excellent book recently completed on the period of ethnic upheaval in New Brunswick: Scott V. See, *Riots in New Brunswick: Orange Nativism and Social Violence in the 1840s* (Toronto: University of Toronto Press, 1993). He is very skeptical of the role of magistrates; he states on page 13: "Throughout this struggle, of which these riots illustrated merely one phase, the doors to virtually all of New Brunswick's socio-economic, judicial, and political corridors remained firmly shut to Irish-Catholics. Thanks largely to the withering effects of the mid-century disturbances, élites retained virtually total control over magisterial positions, police and constabulary forces, provincial offices, and, with rare exceptions, New Brunswick's economy. Viewed from the perspective of these individuals, nativism proved a useful ideology and vigilantism a devastatingly effective tool. These riots were bloody and real.

¹⁰¹"Report for the Commissioners of Police Force in Portland" in the appendices of New Brunswick, *Journal of the House of Assembly, 1849* (Fredericton, 1849). Little is known about Jacob Allen. The nature of his letters to Robert Fulton, the Provincial Secretary in the early 1850's are evidence that he was "well connected" to government. Allen died in Portland at the age of 65, on April 4, 1856: *New Brunswick Courier*, 5 April 1856.

paid (stipendiary) Police Magistrate.¹⁰²

The legislation creating the new magistrate did not specify any qualifications for holding such an office; however, it appears that Justices of the Peace or lawyers were appointed as Police Magistrates for the parish/town or were appointed as alternates (known as Sitting Magistrates). In areas outside of Saint John and Fredericton, the magistrates were not paid a salary at first, but were stipendiary with a new fee schedule. Magistrates had few judicial powers beyond a normal Justice of the Peace in this early period, except in the case of assault.¹⁰³ The move to having a justice available on a daily basis in areas where police forces had been established was one of the first steps in the professionalization of inferior court officials; however, the process would take nearly a century. Appeals from the magistrates were to the Supreme Court, but only if the accused was sentenced to pay a fine above two pounds or to imprisonment beyond a month. These magistrates, like the justices, were most certainly political appointments. All rural magistrates and police magistrates acting in civil matters continued to collect user fees, many were still not legally trained, and few had regular access to legal assistance except in larger cases where the Clerk of the Peace was present.

¹⁰²Peters received the handsome sum of 400 pounds per year, and his son was made the clerk for 150 pounds annually: Acheson, 226-227.

¹⁰³Under statutes enacted in 1850 (East Saint John) and 1851 (Portland Parish), the Police Magistrate or his alternate could summarily hear and determine all prosecutions and complaints of common assault and battery which normally required two justices. Larceny and thefts could also be dealt with by these magistrates, but they had to act with two other justices: S.N.B. 1850, c. 1, ss. 13-14 and S.N.B. 1851, c. 7. For larceny, the magistrates could impose a sentence of up to six months in prison. Magistrates would gain the powers of two or more justices acting together in all criminal case first from the federal government in 1869: *The Criminal Procedure Act*, R.S.C. 1886, c. 174.

Even with the appointment of stipendiary magistrates in some areas of the City of Saint John and elsewhere, the dynamics of the policing situation in the city by mid-century cannot help but rekindle the debate over a centralist and pluralist balance in colonial society. T. W. Acheson, writing on the policing situation in Saint John, puts it this way:

By 1860, the peace of Saint John and its suburbs was maintained by three separate police districts, each reflecting a particular form of development. The Carleton wards had their own police committee and retained the traditional constabulary functioning under the authority of their aldermen. In the parish of Portland, the small police establishment functioned under the direction of a stipendiary magistrate. Finally, within the parish of Saint John existed a police force and criminal justice system reflecting the complex relationship of local and central authority and influences.¹⁰⁴

We can clearly here see the pressures and perhaps need of rationalization, especially in the port city. This professionalization would eventually lead to the decline of discretionary justice but not without resistance as the plurality of responses to the growing ethnic violence of Saint John shows.

In the area of civil law, justices had been charged with small debt collection for many years.¹⁰⁵ With the help of the Clerk of the Peace and 3 jurors, the Justices' Civil Courts, as they had become known, could deal with any debt to 40 shillings.¹⁰⁶ With the abolition of the Clerk's Courts in 1795, the justices were given exclusive authority to adjudicate claims that did not

¹⁰⁴Acheson, 229.

¹⁰⁵The Court of General Session always had the powers to sue upon the rates and taxes assessed by it or the Overseers of the Poor; however, summary civil powers for justices in New Brunswick can be traced to chapter 7 of the Statutes of New Brunswick in 1788. Individual debt collection powers for justices were created by *An Act for the more easy and speedy Recovery of Small Debts*, S.N.B. 1795, c. 1.

¹⁰⁶*An Act for regulating the Courts of Law established in the several Counties for the trial of cases to the value of Forty Shillings*, S.N.B. 1786, c. 10.

exceed three pounds (and the Inferior Court of Common Pleas handled up to 20 pounds). The powers of the justice's court were codified and defined in 1834.¹⁰⁷ By 1854, justices had jurisdiction up to twenty dollars and the new magistrates up to forty. Again, the new or stipendiary magistrates began a very regularized routine of civil proceedings in their districts.

Eventually, the move to police and stipendiary magistrates resulted in a lessened use of justices' civil courts in urban areas, partially as a result of the smaller limits placed on debt recovery. The creation of parish courts in 1876 was a move that had been recommended by the Law Commissioners in 1832; a move designed to cut down on the number of "practising" courts.¹⁰⁸ One of the justices of the peace of a parish was commissioned to hold the court (later known as commissioners' courts). Parish courts were only created in those parishes which did not already have a police or stipendiary magistrate. This commissioner had limited criminal jurisdiction, like the early police magistrate, and had civil jurisdiction on an equal footing with stipendiary magistrates (normally police magistrates acting in civil matters).

The other big change during the period was the replacement of the Inferior Court of Common Pleas by *An Act to establish County Courts* in 1867.¹⁰⁹ The Act also gave the new county

¹⁰⁷Law Commissioners' Report, 1832, Supplement, 34-75.

¹⁰⁸The legislation in 1876 provided for parish courts across the province: *An Act to establish Parish Courts*, S.N.B. 1876, c. 5. Similar courts had been set up previously by special legislation in Newcastle, Moncton, Salisbury, Bathurst, Portland, Saint John, Fredericton; however, this Act brought the first four parishes under the new legislation. Portland, Saint John, and Fredericton continued to have special legislation govern their courts.

¹⁰⁹*An Act to establish County Courts*, S.N.B. 1867, c. 10.

courts all civil and criminal jurisdiction of the General Sessions; although the sessions continued to operate as limited courts and municipal authorities in some counties until at least 1870. These County Court judges were to be paid for by the federal government under section 96 of the *Constitution Act, 1867*.

Indicative of the changing role of justices was the great increase in their numbers after 1850, particularly of "honorary" justices.¹¹⁰ In 1832, there were 177 justices, a number felt too high by the Law Commissioners of the period; however, by 1851, there were 355 and, by 1871, their numbers had increased to over 1300.¹¹¹ The apparent decline of the office is only coupled with the fact that magistrates were compelled to sit on supreme and county court juries when called after 1870.¹¹²

At the same time that the criminal and civil justice systems were undergoing massive rationalization, the local government functions of the justices in general sessions were also under pressures to be revamped. In 1850, the legislation regulating the provision of local government was consolidated. The Durham Report, issued in 1839, called for the election of municipal governments. The Imperial government viewed the report seriously and, through the instrument

¹¹⁰"Honorary" is the word that many writers used to designate magistrates that did not attend sessions or perform work as a justice; for example, the executive council deals with a letter in March of 1922 from M. E. Cummins advising that his community had "one or two honorary" JPs and asking that a practising JP be appointed: RS9 (Executive Council Minutes, Cabinet), 1922 March 31. The official increasingly signalled party loyalty; however, efforts continued to be made to appoint "active" JPs as well.

¹¹¹These numbers are taken from the Law Commissioners' Report, 1832 and from counting the numbers shown in New Brunswick almanacs.

¹¹²An Act relating to Grand Juries, S.N.B. 1870, c. 2. This change probably indicates that justices no longer were issued Commissions of Oyer and Terminer or sat on the bench with the Chief Justice in Saint John.

of the lieutenant governor (especially Sir William Colebrook, c. 1842), the province was pushed to create elected municipal corporations in rural areas. Elective provisions had already been made in Saint John in 1785, but not elsewhere.

The real beginnings of more democratic forms of local government across the province occurred in 1850.¹¹³ All areas outside of Saint John and Fredericton were given the ability to elect most town and parish officers such as clerks, constables and overseers of the poor. The county treasurer, auditor, overseers of the fishery, inspectors of fish, wharfingers, port wardens, harbour masters, pilots, and Firewards (a person charged with the authority to direct and compel residents to assist in the event of a fire) remained to be appointed by the sessions court. The justices also had to confirm elected parish officers. Two JP's acting together could fill a vacant parish office until the session could appoint a new person responsible and could also appoint special police constables as required. Elections were open to any ratepayers of the parish.¹¹⁴ The structure of the legislation required officers "elected" to perform their duties or forfeit a fine; accordingly, it would appear that people could be elected without accepting a nomination and that some of the positions were very unpopular.¹¹⁵

¹¹³H. J. Whalen, 20. Only the casting vote of the Speaker of the House of Assembly defeated a bill in 1842 that would have incorporated all counties in the province and saw the election of members.

¹¹⁴Electors probably included *femmes soles* and widows in the early years.

¹¹⁵One can imagine that it would be difficult to find people volunteering to be the assessors of parish rates and taxes or an overseer of the poor. None of the positions were paid ones; although some small expenses would have been covered. It is difficult to find out how active parishes were over the period; they deserve more empirical studies.

More importantly, however, in 1851, provision was made for the voluntary incorporation of counties by a two-thirds majority vote of ratepayers and householders.¹¹⁶ A meeting was called after 20 ratepayers of a county petitioned the sheriff for that purpose. In any county opting for incorporation, the administrative functions of the Court of General Sessions were replaced by elected councils (two people elected from each parish). Only three counties, Carleton, York, and Sunbury, were incorporated by 1856. Two of the major concerns that were expressed by residents during this period were the possibility of increased taxes and the supervisory abilities of the Provincial Secretary which could make the decisions of any elected council inoperative. Victoria was incorporated by charter in 1874 after a lengthy ordeal, made more difficult by the Québec, American, and New Brunswick territorial difficulties in the Madawaska region. Northumberland and Gloucester were incorporated by special legislation in 1875.¹¹⁷

The General Sessions continued to be active in King's County, for instance, where they moved the shiretown from Kingston to Hampton and built a new court house and gaol in 1870.¹¹⁸ Finally, in 1877, the legislature passed a statute incorporating all counties in the province. While there was some opposition to this move owing to the fear of increased taxes in King's County, it was generally received without any major difficulties elsewhere. This resulted in the abolition of the sessions as most of the court's criminal and civil responsibilities had been taken

¹¹⁶H. J. Whalen, 21-22.

¹¹⁷H. J. Whalen, 22.

¹¹⁸The sessions required permission to do this: *An Act to remove the Shire Town of King's County to a more convenient locality*, S.N.B. 1870, c. 50, as amended by S.N.B. 1871, c. 12.

over by the County Courts established in 1867.¹¹⁹

The advent of Confederation had little immediate effect on the day-to-day operation of the provincial justice system,¹²⁰ although changes were on the way. In 1869, the Dominion Government passed its first comprehensive legislation on criminal procedure in 1869. The *Criminal Procedure Act*, R.S.C. 1886, c. 174, extended the powers of police and stipendiary magistrates by giving them jurisdiction to try any cause recognizable by one or more justices of the peace acting together. Before this time, the magistrates of New Brunswick only had extended powers in certain instances. The province followed with similar provisions for provincial offences in 1877,¹²¹ although magistrates and commissioners in different areas continued to exercise different levels of jurisdiction. The Saint John Police Magistrates, for instance, had greater civil jurisdiction than other magistrates. Justices of the peace continued to have jurisdiction in criminal actions and in all civil actions outside of police districts. By 1886, the following acts also enabled justices and magistrates to handle various criminal processes: *The Summary Trials Act*, R.S.C. 1886, c. 176, *The Summary Convictions Act*, R.S.C. 1886, c. 178, *The Juvenile Offenders Act*, R.S.C. 1886, c. 177, and *The Canada Temperance Act*, R.S.C. 1886, c. 106. All of this would be consolidated in the *Criminal Code*

¹¹⁹Professor Mary E. Hatherly states "In 1867, all vestiges of the Inferior Court of Common Pleas and General Sessions were abolished and reconstituted as County Courts: Hatherly, 45. This statement is somewhat misleading. The Court of General Sessions of the Peace continued to operate in those counties which had not previously incorporated. For example, King's County continued to meet until 1877, and it heard assessment cases as late as 1870. In 1868, it decided a "bastardy" case: PANB, RS151 (Kings' County Records), A/1/4 (Minutes), October 1847 to March 1872. Furthermore, evidence strongly shows that the County Courts dealt with few cases and were largely viewed as a political plum with little work involved: (more work required here).

¹²⁰The only major change is that appointments to section 96 courts were now in the hands of the Dominion government.

¹²¹Police, Stipendiary (District), and Sitting Magistrates were to have the power of two justices: *Respecting Local Courts*, C.S.N.B. 1877, c. 62, s. 3.

provisions of 1892.

From 1840 to 1877, major changes had occurred in the powers that the justices exercised. The need of a more systematic system of justice fostered the creation of police and stipendiary magistrates and parish commissioners. Most of these new officers were chosen from the ranks of the justices in a particular parish; however, the move had begun to ensure that certain designated individuals handled the majority of cases, as well as the more important ones. There was a slight move away from the fee system. And while fees were still collected, the police magistrates in criminal matters received a designated salary, passing most the fines and fees back to the municipality or police commissioners. The creation of the county courts resulted in the effectual abolition of most of the judicial functions of the justices in sessions in 1867, and the municipal functions were taken away in all counties by 1877. The sessions did not exist after that year. Many of these changes were not made as a result of a poor job by justices. Instead, the rising crime rates and the virtual political revolution in responsible government were major factors. A lay justice system was ineffectual in some urban areas; full time magistrates were often required. Many reformers also saw a need to control local affairs through elected bodies. A great majority of justices were likely pleased to be replaced by others. Increasingly, the sessions had been required to deal with temperance and other social issues; these difficult questions could now be dealt with by others.

However, it was not a total loss for the justices of the peace. They had lost power in sessions, but they had gained greater summary conviction and trial powers, particularly under federal

criminal and temperance legislation. The provincial summary powers of the police and stipendiary magistrates were also increased to reflect the federal legislation; "magistrates" were made the equivalents of two or more justices of the peace acting in a matter together. Furthermore, many areas and communities still relied heavily on justices, judging at least from the justices' records. Limitations in transportation had not improved to the extent that the local JP was unnecessary. This official continued to be the only government official in many rural areas; and the justice was still viewed as a necessary evil outside of urban centres by some government and legal leaders. This judicial officer would continue to occupy a position of trust into the 20th century, especially in rural areas, but the move towards professionalization and replacement of lay court officials had begun.

CHAPTER 3

Renewed Freedom in the Magisterial Courts, 1880-1930

Since the rise of the age of reason during the reformation, Western societies have participated in growing moves toward rationalization, utility, and professionalism in many aspects of political and social life.¹²² The courts could not escape these changes in ideology and the shifting economic imperatives; in fact, they often were at the centre of the debate and movement. With the migration of wealth away from feudal ties to property-based and industrial enterprises, the reasoning of capital-interested elites demanded a justice system that would serve their interests of stability, impartiality, and certainty of result. These pressures were not counterproductive in their own right; however, they would lead to a departure from discretionary forms of justice, particularly in the courts of the wealthy — the chancery and superior courts. With the ripening of the professional barrister and solicitor and their common law influence on the courts of equity over many decades, even these high courts of "discretion" became increasingly inflexible and rationalized. The merger of the common law courts with those of equity in the various nations of the Commonwealth near the turn of this century spelled only the formal death of discretionary justice in the high courts of the land; it had actually already been accomplished much earlier.¹²³

¹²²Richard L. Abel, "Introduction" and "The Contradictions of Informal Justice" in *The Politics of Informal Justice*, ed. Richard L. Abel (Toronto: Academic Press, 1982), vol. 1, 1-13 and 267-319.

¹²³See generally the introductory pages of A. H. Oosterhoff *et al.*, *Text, Commentary and Cases on Trusts*, 4d (Toronto: Carswell, 1992).

Fortunately, the same influences that affected the higher courts did not have as direct an impact on the inferior provincial courts in New Brunswick. In fact, while pressures existed for even these local courts to become more formal, other realities of late 19th century New Brunswick meant that magisterial tribunals enjoyed a resurgence of freedom to function as they always had individually, with an expanded summary jurisdiction under the Dominion criminal and federal and provincial temperance laws. Some of this freedom came as a result of the political climate. The New Brunswick assembly was granted the principle of responsible government in the mid-nineteenth century. This led to an expansion in who was appointed a justice of the peace, an alteration in the process of appointments, and changes in their functions.

In 1850, for example, the justices in sessions no longer had to designate all of the parish officers; property owners were given the authority to elect many of them. Increasingly, especially following the abolition of the Court of General Sessions in 1877 in favour of elected municipal councils,¹²⁴ the commissions of the peace became a reward for those who had assisted the area's Member of the House of Assembly in getting elected or who were considered important enough to deserve the appointment. This "honor" was bestowed liberally on the party faithful, especially after election victories. The records of the Executive Council minutes are littered with MLA's (MPP's) recommendations for local justice and magistrate appointments.¹²⁵ Besides, these officials were still essential in rural areas where they could

¹²⁴*An Act relating to Municipalities*, S.N.B. 1877, c. 3 and also R.S.N.B. 1877, c. 99. Elected municipalities did not occur in the United Kingdom until 1888.

¹²⁵Most of these appointees would never actively engage in judicial or quasi-judicial work; they were appointed only for the honour of the squire's social position. Only a certain number of those named on the commission were intended to provide county justice; those that did not provide active services were often termed "honorary" as opposed to "practising". The same situation appears to have occurred in Quebec (and perhaps elsewhere) where Couturier explains that "la majorité

acknowledge and administer oaths, assist with land transactions, collect local school taxes and merchants' bills,¹²⁶ and enforce penal laws. There was no salary attached, but a schedule of fees could be collected for various acts which could bring in a significant extra income during the latter part of the century.¹²⁷ The office had some importance attached to it, and those appointed could properly place "esquire" after their names; it was sought after by many, and the cost to government for the appointment was seen as minimal. Large numbers were commissioned in this period as we can see from Table I. In fact, between 1871 and 1881, the numbers of JPs in the province nearly doubled.

The flood of political appointments combined with the new independence and clout of New Brunswick legislators meant that for a time, the efforts that were underway in other avenues of life to professionalize and monopolize services for the perceived good of society had less affect on inferior courts. The ethnic backgrounds and educational and vocational experiences of JPs became more varied. The Acadian experience is especially pertinent here. Even though there was early representation in the general sessions by a few prominent Acadians, the majority of magistrates were English-speaking friends of the government in Fredericton. The advent of responsible government and increasing representation of Acadians by Acadians in the Assembly,

des juges de paix étaient inactifs" in the late 19th century. He quotes Sylvio Normand as saying that only 374 of over 2462 JPs in Quebec were active late in the 19th century: Couturier, 67.

¹²⁶The aspect of bill collection was extremely important. The mercantile enterprises depended upon quick, easy, and inexpensive bill collection courts; JP civil courts often served that purpose.

¹²⁷All judicial officials including sheriffs, lawyers, clerks, constables and judges worked on the basis of fees even into this century (above salaries where granted). John G. Lorimer, a justice of the peace at North Head on Grand Manan writing to Clerk of the Peace George G. Lorimer of St. Andrews, Charlotte County states "that Constable Thos. A. Kendrick has repeatedly expressed desire to have the am't of his fees as Constable in the Downey case paid him — and, I have almost as repeatedly, told him to exercise patience, and wait the stirring of the Poo] in St. Andrews Court House, next April [at the general sessions]": NBM, Grimmer Family Papers, P6-25(5), 1875 September 10. See Couturier, 73, for an excellent overview of the relative civil fees necessary for the justices', stipendiaries', county, and supreme courts.

Table I**Number of Justices of the Peace by County by Year**

N.B. Counties	1828	1851	1866	1871	1881
Albert	--	15	29	74	131
Carleton	--	31	71	146	190
Charlotte	22	38	78	111	133
Kent	9	14	31	94	126
Kings	20	20	85	94	152
Madawaska	--	--	--	--	55
Northumberland	16	33	71	118	165
Queens	15	19	50	85	102
Restigouche	--	17	30	56	48
Saint John	31	51	103	154	218
Sunbury	11	18	36	57	88
Victoria	--	12	38	85	68
Westmorland	23	29	87	63	201
Ycrk	25	42	94	99	232
TOTALS	184	356	838	1301	2029

Note: "--" means county did not exist in period.

Sources: *The New Brunswick Almanac...* (Saint John: Henry Chubb & Co.) for 1828, 1851, 1866, and 1881;
Barnes New Brunswick Almanack... (Saint John: Barnes & Company, 1871).

rising Acadian Nationalism, and the emergence of Acadian intellectual movements only served to increase Francophone JP appointments and general participation in the social, political, and legal life of the province.¹²⁸

Although I do not have firm numbers on Acadian magisterial appointments, the sheer frequency of Acadian names on the commissions after 1870 shows both the political and economic awakening of an ethnic elite and also lends important support to my thesis that community justice positions were viewed as important, essential, and desirable offices in all regions of New Brunswick. Magisterial appointments may have provided a way for many Acadians to participate in the legal sector of the society without requiring lengthy legal education. It may also have enabled them to rid themselves of some of the vestiges of the ancient regime dominated courts of general sessions (composed mainly of Anglicans and old guard supporters). Greater access to local courts and magisterial appointments were of significant importance to the growing merchant and business class. Increasing reliances on local courts may have also helped the community and elite move slightly away from heavy dependence on church officials. Jacques-Paul Courturier shows in his doctoral report that Acadians made increasing use of the parochial courts as the 19th century matured; this was contrary to the belief that the Acadians "boycotted" the judicial administration, an assumption which permeated regional scholarship prior to the 1980s.¹²⁹ Courturier also suggests that the inferior courts were the only ones that

¹²⁸One important actor on the political front was Pierre-Armand Landry, the first Francophone lawyer in New Brunswick, an able politician, and the first Acadian Justice of the Supreme Court of the province (1890): see Della M. M. Stanley, *Pierre-Armand Landry, au Service de Deux Peuples* (Moncton: Éditions d'Acadie, 1977).

¹²⁹Courturier, iv.

actively allowed Francophones to speak French; the supreme and county courts were English-language courts.¹³⁰

I suggest that as the numbers of magistrates grew in the province, as the economic and cultural backgrounds of community justices became more varied, and as responsible government and public accountability became more entrenched in the political regime, the flexibility and usefulness of the local courts rebounded and became more legitimate. I have chosen to document this renewal using primarily the records of one magistrate from Saint John County, Willam Henry Moran. Using the Moran day books, I hope to show in this chapter that magistrates encouraged civil settlements between parties, enforced the penal laws imaginatively to discourage further crime, and acted as important community legal resource persons during the period. I could have based my essay on other magistrates for which records exist; there are a few, such as Raymond Young of Caraquet on the Acadian Shore, Police Magistrate Humphrey J. Gilbert of Saint John, or Parish Court Commissioner W. E. S. Flewelling of the Waterford Civil Court in Kings County.¹³¹ But, each justice concentrated on different types of "practice". For instance, Young, whose brother the Honourable Robert Young was a member of the Executive Council for instance, worked largely with mercantile and land transactions while Magistrate Gilbert's legacy of city criminal records are found primarily in newspaper accounts and official returns.¹³² W.E.S. Flewelling, on the other hand, provides an excellent record

¹³⁰Courturier, 90-91

¹³¹Flewelling had been a JP since 1865: PANB, RS581, "Records of J.P. Appointments, 1867 - 1967". It is possible that this exercise began with a request from the Dominion government for lists of the Justices of the Peace in each province so that it could verify documents coming from the provinces.

¹³²"Police Office" report is found in nearly every issue of *The Morning Freeman*, G. E. Fenety, editor.

book with ample evidence of settlement, fees, and processes; however, he served as a parish court commissioner only from 1887 until 1893.

William Henry Moran was a justice of the peace from 1888 until 1911 at Quaco in the Parish of St. Martin's in Saint John County. In 1911, he became a police and stipendiary magistrate for the same area. However, being a magistrate was only a secondary or "retirement" job.¹³³ Moran was born into the care of Caroline Fawns and James Moran, a prominent ship building and mercantile family in New Brunswick, in 1849. The Moran enterprise during the later half of the 19th century kept an office in Liverpool, England, and built and controlled upwards of 25 vessels; this was the largest merchant marine fleet in New Brunswick. St. Martin's was also home to other shipbuilding families, including the influential Vaughan brothers and the Browns; skilled labourers, shipwrights, farmers, and fishermen also made their living in the parish.¹³⁴ The members of the Moran family and the residents of St. Martins were familiar with the varied fortunes of the shipping and lumbering economy of New Brunswick, and his papers show ample evidence of this aspect of the community. However, for me, the records of William Henry Moran provided a glimpse of local justice that is at once important and innovative in our age where our courts are clearly outside the influence and control of local communities and their members.

¹³³Moran retired from his active seafaring life in 1884 at the age of 35. He concentrated his efforts on operating the local store and co-ordinating the Saint John shipping efforts of Moran & Galloway [the business was family controlled until 1879; thereafter, its headquarters and centre of investment moved to Liverpool]. An M.A. thesis is devoted to Moran shipping interests by Alan Gregg Finley, "Shipbuilding in St. Martins, 1840-1880: A Case Study of Family Enterprise on the Pundy Shore", U.N.B., 1979.

¹³⁴By 1871, according to Finley, approximately one-third of the population of St. Martin's parish listed their family's occupation as farming: Finley, 177.

The court books of William H. Moran stand out among magisterial records in New Brunswick as a result of their general detail and good quality over a 36 year span, from the turn of the century to 1931. Many of the official county records have not survived; therefore, a cursory inspection of the records would lead one to believe that justices did only limited notarial-like functions after the abolition of the sessions, but Moran's papers show a different story. I have concentrated my efforts on the ledger entries from 1895 to 1898; these records are important as they focus on a rural justice of the peace (at least in Saint Martins) after the existence of the parish commissioners and police and stipendiary magistrates. For example, Moran records over 80 civil and criminal cases in 1895, 19 civil and 16 criminal matters for 1896, and 75 combined cases in 1897. These matters include criminal cases, initiated civil claims, and settlements handled by Moran for which records exist.

Magistrate Moran was still performing some judicial duties in the St. Martins in 1931, at the age of 82.¹³⁵ His father, James Hamilton Moran, had also been a justice after 1860; in fact, he was the fourth generation of Moran males to hold the office at Quaco.¹³⁶ By March of 1911, Moran had become a police and stipendiary magistrate for the parish, and he remained in that capacity until his death in 1935. This judicial official, in his own lifetime, would have witnessed a massive change in the duties, roles, and perceptions of lay magistrates, from active participants to dormant ones in the court and justice systems of the Province of New Brunswick.

¹³⁵Moran functioned in a variety of capacities, as a notary public, insurance broker, and commissioner of oaths beyond those already listed.

¹³⁶It was not uncommon for families to "pass down" offices to their children in New Brunswick. This was a true for larger offices like that of the provincial secretary and justice of the supreme court; however, the practise continued much longer in the case of magistrates. For another example, Wesley Tozer who passed away a year ago at Red Bank, N.B., also had a long lineage of JP continuance: telephone conversation with Ms. Tozer, February, 1995.

Being born in 1849, Moran would have been keenly familiar with the boom and bust cycles of the New Brunswick economy (shipping and forestry) during the 19th century, with the outmigration of talented young people to the United States and elsewhere, with the virtual collapse of the once formidable merchant shipping fleet, with the Acadian and English language tensions, with the Catholic and Protestant (Orange) agitation, and with the early 20th century struggles of labour and capital. After retiring from his ship's captain responsibilities in 1884, he concentrated his time on management and mercantile responsibilities from his home town.¹³⁷

While not trained for law formally, Moran had finished school, served in the naval cadets in England, had travelled the Atlantic as a mariner, and was an astute business operator with international exposure. This chapter will sub-divide the innovations of magistrates and their courts into four topic areas: settlement, recognizance and selective criminal enforcement, parish or local decision-making, and extra-judicial functions. Next, the chapter will explore some of the limits of magisterial creativity and open-mindedness. Let us in turn begin to look at these forgotten innovations through the records of Moran.

Settlement

Moran used settlement in both civil and criminal cases. For example, of the 19 debt-related actions commenced before Moran in 1896 of which records exist, more than fifty percent or ten

¹³⁷Finley, 51.

of them were settled without trial.¹³⁸ These figures themselves may not be surprising to a barrister today owing to the fact that the great majority of superior court cases are settled, but what is important about this practise is that many of the settlements appear to be made without the assistance of a lawyer and through the efforts and assistance of the adjudicator (Moran). Three defendants appeared and "admitted" to judgement (meaning they had no dispute with the debt claim) and were given payment arrangements. Only five civil trials were held that year, and all of them without the aid of a lawyer. Two cases did not proceed because the defendants had evaded service. The justices' courts were similar to our small claims court environments of today. They were relatively informal with a speedy determination; however, the similarities stop at this point. The justices were not normally legal experts, but some were certainly familiar with mercantile transactions and business realities. Moreover, they would have known the parties before them and their circumstances, they were located within a city district or village and were therefore very accessible to citizens, and disputes were often settled within the matter of a week or two. The accessibility of the official meant the justice could assist readily with settlements between parties before the court date arrived.

One of the many examples of civil settlements in Moran's records occurs in March of 1896, where two individuals (perhaps merchants) commenced a debt action against Charles Hopey. Israel Mosher claimed a debt of \$9.35 and J.S. Titus of \$1.86, and the trial was scheduled for the first day of April at 9 a.m. On the 30th, all the parties met with Moran, and Hopey agreed

¹³⁸This number does not appear to be a fair estimate to the total number of processes handled by Moran during the year; however, it does represent the recorded cases. There is sufficient evidence of a myriad of bill collection cases handled mainly through the mail: Moran Papers, Book A, "Ledger" section.

to pay both individuals within 30 days using the instrument of a promissory note. The actions were dropped, neither case re-appeared for trial or execution, and Moran collected no fees.¹³⁹ The collection of fees was often used as one of the reasons to justify the replacement of these officials; magistrates had a pecuniary interest in proceeding to trial as the court costs due the justice increased. However, from a look at Moran's records, the percentage of cases settled places this reasoning in some doubt at least in Moran's court. I do not mean to imply, however, that the magistrates did not normally receive some fees for settlements — that would be untrue; in a normal case (where parties could afford it I can assume), fees would still be due the justice for the issuance of the initial summons in a settled case. In fact for the entire year of 1896, Moran only received approximately \$24.00 in fee compensation with \$7.40 of this resulting from debt collections (again, this does not include bill collections). Compare this amount with the over \$77.23 in debts that were recovered by the justice in that same year and the overall fees appear reasonable. However, it is evident from the amounts collected that the potential for a significant income supplement existed, especially if abused.

Costs to the plaintiffs and defendants were therefore relatively low as there was less travel and no lawyer was normally involved.¹⁴⁰ There were also lower costs to the province (and municipalities) for as the magistrates did not have a large salary; in fact, justices of the peace had no salary at all (although by the 1850s some of the criminal fees were paid for by the

¹³⁹Moran Papers, Book A, 91-92.

¹⁴⁰Barriers did find themselves before justices of the peace, however; normally, they were present in serious criminal matters and in larger civil cases: Moran Papers.

municipalities) and magistrates' fee earnings were good for the period but modest.¹⁴¹ An indication of the satisfaction of the parties (or perhaps the financial limitations of the community) was the fact that only one appeal was contemplated in 1896 and one in 1898 for instance. They were criminal cases, and I have been unable to determine whether or not they actually proceeded to the County or Supreme Court.¹⁴²

However, while civil settlements are important, the "settlement" (as Moran calls this) in the criminal arena are probably even more interesting. On December 19, 1896, Samuel McCormack initiated an information against William Hopey, Charles Holland, and Charles O'Hara for attacking and knocking him down on a "public highway causing actual bodily harm". Warrants were issued for the arrest of the accused persons and summons documents were served on three witnesses for a hearing to be held on Tuesday December 27, at 10 a.m. The notes concerning the disposition of the case read as follows:

The parties settled this case between themselves, paying the costs. Costs \$10.00.

[Information] Withdrawn by plaintiff.

This is not unlike an alternative measures program; however, no such program officially existed in this period, and it was not an "alternative" in any sense but a regular part of its administration. In fact, this type of action was and still is illegal by the *Criminal Code*. This result probably

¹⁴¹I have not undertaken a detailed study of wages and the related earnings of JPs. This is merely an observation after viewing many JP and magistrate fee records.

¹⁴²I know that at least two appeals were seriously considered as lawyers requested transcripts of the cases before Justice Moran; appeals were the only situations where transcripts were provided (at additional cost to the appellant). Appeals in this period were normally heard by the county courts: Moran Papers, Book A, 115.

served the best interests of all the parties involved. One could say that instead of being treated as a criminal case that it was treated much like a small debt action; no jail term was involved and the debtors received their money.¹⁴³

The Innovations of Keeping the Peace: Selective Enforcement of Criminal Law and Recognizance

"Settlements" are not his only innovative approach to the penal laws; Moran employed other alternative dispute settlement techniques that might today exist in the ambit of the police or crown attorneys to use. Another one of his approaches is the use of what might be termed "selective enforcement". In the late 1890s, there were a number of disturbances of the services of the St. Martin's Baptist Church. I suspect that the disputes had to do with the temperance position of the pastor or deacons. As a rule, Baptist churches were known in the period for their stance against drunkenness and drinking during the height of temperance sentiment in the province. On November 11, 1895, for example, George Vaughan was charged with unlawful behaviour in front "of the Baptist Church". Instead of issuing a warrant for Vaughan's arrest, Moran turns the information over to the deacons of the church supposedly for them to deal with privately (one of the deacons was the complainant?). Another major complaint was made on

¹⁴³With the predominance of private prosecutors, a criminal trial could be avoided if the private prosecutor agreed to drop the charges. Criminal settlements by Moran appear to have been successful in all cases. Two other justices of the peace in Moran's parish were not as fortunate. In 1898, Moran and Justice of the Peace M. R. Daley were forced to deal with accusations against Justices William E. Skillen and W. H. Rourke that they settled charges levelled at Jane Ingraham for selling liquor illegally. Constable Edwin Lewis was called upon no doubt by community pressure and the prosecutor to charge the justices and to have Jane Ingraham re-tried. The trial was important enough for the Clerk of the Peace of Saint John City and County, lawyer L. A. Currey, to be present to prosecute the case. Ingraham was defended by Attorney C. N. Skinner. Ingraham is found guilty of three liquor offences and fined; Justices Skillen and Rourke do not appear to be removed, but they may have dealt with fewer cases: Moran Papers, Book A, 114 and 117.

March 9, 1897, when five men were charged with "making a disturbance by being drunk and disorderly and disturbing the prayer meeting on Monday night, March 8th, in the vestry of the Baptist Church". The five, perhaps only young men owing to the penalty that resulted, were sent a letter warning them that any further incidents "would be punished as the law directs". A note by Moran indicates that the complainant, E.A. Titus, had asked for letters to be sent instead of beginning prosecutions. In October of 1897, Frank Parks who is another young man is warned in a similar fashion by a letter directed to his mother about drunken behaviour at the church; it asked for "Mrs. Parks" to "chasten" her son. In all of these cases, Moran warns that the law would be "enforced" the next time.¹⁴⁴

The circumstances surrounding these church disturbances would be very interesting to understand; however, there is little other information recorded about them, and I can only speculate. It is important to note that Moran and his family were strong supporters of the Baptist cause in the community. Moran's father, James, had donated the land for the church building, and Moran himself had an ardent interest in the Union Baptist Seminary that had its home in Saint Martins for a number of years. Gregg Finley also documents how the family employed a much higher proportion of Baptists at its shipbuilding operations than were present in the general population of the community. Therefore, why would Moran show such deference to incidents that happened surrounding his congregation? It may show his commitment to impartiality; it may also display his earnestness in not wanting to appear to the public as being

¹⁴⁴Moran finally gets tough when on February 9, 1898, Charles Patterson and Walter Carson disturb a Wednesday Baptist prayer service and threaten to hit the janitor; he fines them each \$5 plus \$3.50 costs or in default a month in gaol at Saint John. Both fines are paid: Moran Papers, Book A, 111-112.

merely a pawn of the Baptist Church deacons. It certainly gave the individuals a chance to re-evaluate their actions and endeavour to change their behaviour. As the names of the individuals in the three cases do not re-appear in Moran's books, it is possible that the technique was effective.

Even a more commonly utilized technique was a combination of fine and recognizance, especially for first time offenders. For instance, Justices Moran and Daley heard a case in 1895 against Joseph Cochran where Cochran plead[ed] guilty [the nature of the offence was unfortunately not recorded]. The justices fined him \$50 plus \$4.95 in costs. "The fine was allowed to stand for his future good conduct". The use of this technique is not unknown elsewhere; it is used by "His Honour" Humphrey H. Gilbert, the police magistrate for Saint John City, in 1860 and probably in other cases. Justices of the peace have the historic right to bind people over on the bond of a sum of money in order to encourage them to keep the peace (peace bond or recognizance); the innovation is that in these cases a fine is already made for a crime committed, and the fine is not paid but merely held in abeyance until or in case the offender should break the peace again. I see once in Moran's records where a person was fined and was ordered to pay half the fine, and the final half was allowed to stand for future good conduct (Nov. 21, 1896). This technique was Moran's preferred way of dealing with criminal offenders when the charge was of a summary nature, even in the second decade of the 20th century. More research needs to be completed to see how frequently and broadly settlement was used by other justices and magistrates.

Community Participation in Magisterial Court Decisions

Other sections of this chapter have described techniques that magistrates used on occasion to respond equitably to the circumstances of people involved in civil and criminal difficulties. However, the very organization of justices' tribunals also helped to ensure that there was a level of parish or community participation in decision-making processes. I am referring here to the use of juries in magistrates' civil courts and to the procedural requirement for more two or three justices of the peace to adjudicate certain criminal matters.

As suggested, the settlement or quick resolution of civil suits was the first priority. When settlements were not successfully reached,¹⁴⁵ the courts often sat with three-person juries. A party had a right to demand a jury under provincial legislation for ordinary matters, and a court could deal with more expensive debt and tort actions if it sat with a local jury. Even ideologically, juries have long represented a force against despotic or arbitrary case determinations. The use of juries could only enhance the expectation of sensitivity to local and individual conditions in magisterial courts. The air of "fair" justice existed even if in reality juries had many of the same gender and class limitations associated with magisterial appointees; fortunately, the "venir" issued to a local parish constable ordering the selection of three jurors from the area resulted in minimal elitism when compared to the grand juries of the county.

In criminal cases, important crimes and summary offences often required more than one justice

¹⁴⁵Moran's records show very few cases where juries actually had to determine the outcome of cases. For instance, there is only one example for 1898. However, other juries were requested, but settlements made the holding of trials unnecessary in these cases: Moran, Day Book A.

of the peace or magistrate to be on the bench of the court. This stipulation was not new; for decades "two or more justices of the peace" had convened petty sessions to decide on the outcome of assaults, larcenies, and temperance charges. A bench consisting of government cronies conveys much less sense of justice than a panel of "disinterested" jurors; however, the existence of more than one arbitrator did provide the possibility of a less rigid or tyrannical outcome.

Both the use of the civil jury and the need for more than one justice of the peace to try serious offences helped to enhance the integrity of community justices' court outcomes, enlarged the possibility of a decision trusted by area residents, and enabled a wider-range of individuals to participate in the local justice process. Both of these procedural safeguards were integral aspects of what constituted a magisterial court, and they are therefore important considerations when readers are evaluating the community justice potential in justices' tribunals. The magisterial use of juries and two or more JPs would eventually frustrate the legal certainties desired by the legal lobby, and the existence of these "safeguards" would only solidify the view of many professionals of JPs' courts as antiquated and outdated.

Extra-Judicial Role

A final area of Captain Moran's experience that is useful for us to examine is his assistance given to local residents outside of his formal duties. I have chose three examples to explain briefly. The first one involves Moran's assistance in holding legal documents for others; this is a courtesy extended commonly by lawyers, banks, and trust companies. On the morning of

October 20, 1898, Hannah Scott "called and requested her will and also deed of land to William Fawns which had been left in my [Moran's] care by her some time ago". The note does not say whether these instruments were drafted by Moran; however, he certainly drafted deeds and wills during his years as magistrate (and notary public).¹⁴⁶ Moran would have also been a local source of legal information and advice. For instance on November 11, 1909, "Mrs. Wright" called and arranged for Moran to attend the Divorce Court in Saint John; it is possible that he assisted in some way or was a character witness. When the judge's determination was made in January of the next year, the order was sent to Moran to deliver to the husband (John H. Wright).¹⁴⁷ Evidence from other justices shows that it was often the practise of lawyers or courts to forward documents to the magistrates for local distribution even into the 1950s and 1960s.¹⁴⁸ Moran also acted as a consumer advocate in business related matters; for example, in 1927, Lloyd C. Gillchrist asked Moran to write a letter to a Montreal radio manufacturer to help settle a dispute over a broken radio that had been returned to the company. The aim seems either to have the \$15 radio repaired or the purchase price refunded.¹⁴⁹

Recognizing Limits

My central hypothesis has been that magistrates in New Brunswick exercised a "discretionary" form of justice that gave benefits to the society and communities of the period. These benefits included more flexibility in legal outcomes, less cost to individuals and state, and greater

¹⁴⁶Moran Papers, Book A, 442.

¹⁴⁷Moran Papers, Book D.

¹⁴⁸Interview with Lloyd H. McGibbon, Justice of the Peace in New Brunswick for York County, February 6, 1995.

¹⁴⁹Moran Papers, Book E, loose paper.

accessibility and informality. However, I also must recognize that the cases of the justices of the peace were not always decided in an innovative or enlightened way, for they functioned very much within the limits of their age and tended to be conservative on matters of morality. Marriage cases or, less politely, bastard child situations were dealt with by Moran and others and were certainly not uncommon nor to their particular credit. Moran records three instances of the possibility of children being born outside of matrimony in his books; two of them resulted in forced marriages (1898 and 1921) while one father seems to have escaped the ambit of the warrant for his arrest. The case of Carrie Maud Gough and J. Albert Robertson provides a good example. On February 2, 1898, Gough appeared at Moran's office and "swore a bastard Child of one J. Albert Robertson of Albert Mines, Albert County, N.B." There was a fear that should the child be born out of wedlock that it and its mother would become a charge on the parish's poor rolls; however, if the child's parents were married, there was a greater chance that the parents would be able to provide support for the child [and the legal capacity thereby existed to charge the father of the child for any cost to the parish]. The aim here was clearly a moral or religious one! Accordingly, there was a great push on for the father to be found and for him to marry the mother. A warrant was issued for the arrest of Robertson, and a copy of the information was sent to Gough's father, Captain Frank Gough. On the 5th day of February, Robertson was arrested at 10:30 p.m. and brought to Moran. The magistrate records that Robertson "finally decided to marry Carrie Maud Gough." Rev. Mr. Cornwall was engaged and about midnight J. Albert Robertson and Carrie Maud Gough were married at Fred Gough's home, in the presence of Moran and Constable Lewis. Robertson was then released from arrest

and charged three dollars for the troubles of Moran and the constable.¹⁵⁰

Magistrates were also called upon to make judicial determinations on the sanity and fitness of individuals. This task was no doubt very unpleasant, but the chances for abuse are even more disturbing. In 1896, for instance, Moran places two females into the custody of the Provincial Lunatic Asylum at Saint John, one by the warrant of him and another JP on February 7th and the other on the warrant of him alone on July 2nd.¹⁵¹ Moran records no other instances of this being necessary during his tenure; however, two alarming records exist in the Parish of Simmonds in the 1930s where women were interned into the provincial facility on the oath of their husbands!¹⁵²

Justices were also called upon to deal with vagrants, poor residents and children usually without much satisfaction. A single parent family of the parish living at their grandfather's home is split up on the oaths of Rev. Mr. Scott of the Children's Aid Society (Saint John) and Charles Frederick Beale, chairman of the Commissioners of the Municipal Home (almshouse), on November 16, 1923. The two accused the mother of being "destitute" and a prostitute and of being unable to care for or provide for her children; they also accused the grandfather of abusing the children. Moran interviewed the mother and came to a similar conclusion although no

¹⁵⁰Moran Papers, Book A, 109-110.

¹⁵¹Sworn to by Moran, J.P. and P. Nugent, J.P.: "Warrant to convey Lois McConnell [?] an insane person to the P. L. Asylum, St. John": Moran Papers, Book A, 89 and 91.

¹⁵²In 1957, there is another example from the same collection by the same police magistrate (lawyer): PANB, RS525 (JP Records, Saint John County), "Queen v. Rose Green", 1957; the existence of these records are perhaps evidence that the magistrate in question simply lived in the vicinity of the Provincial Hospital and thereby performed these more often than magistrates elsewhere.

further evidence was tendered or sought. He committed the children, a girl of age 10 and a boy of age 8, to the care of the Children's Aid Society and the mother to the Municipal Home.¹⁵³ Insufficient records exist to evaluate the appropriateness of this action; happily, Moran only records one case of this type.¹⁵⁴ On the 17th of May, 1929, a couple is expelled from the parish on the oath of a sergeant of the New Brunswick Provincial Police owing to the fact that they have no stable means of support, that they have been a financial burden on the parish, and that they have no home of their own and are therefore "common vagrants".

These examples help show us some of the limits of lay justice. For the most part, magistrates came from comfortable families where there was sufficient leisure time to deal with judicial matters on the side. Some were farmers, yes, but the majority were of the mercantile or "influential" classes, especially those appointed before the turn of this century. Most were male, and then only about 70 women appear on the commissions as citizen magistrates in New Brunswick.¹⁵⁵ However, even with these class, gender, political, cultural, and moral biases,¹⁵⁶ the glimpses given by Moran of innovative settlement, criminal processing, and

¹⁵³Moran Papers, Book E, 71.

¹⁵⁴Another case occurred in Kings County on March 21, 1922. Quenie Ryan, described as a neglected 14 year old child and vagrant [within meaning of the *Children's Protection Act*] is sent to the Maritime Home for Girls in Truro. Kings County is ordered to pay \$100 a year for her "imprisonment". This action was instituted by the Woman's Institute: PANB, RS482 (Records of Justices of the Peace for Kings Co.) C, 1922 March 21.

¹⁵⁵The gender of the magistrates appointed between 1870 and 1954 was designated on the basis of the name and dates only. Some names could have been either male or female; in these cases the separation was based largely on the year of appointment. I chose the name inspection method because of the sheer volume of appointments; it was necessary to review over 11,000 names. However, there would be a need to consult census data for a more definite assessment: PANB, RS581, "Record of JP Appointments, 1867-1967", Finding Aid (in electronic form).

¹⁵⁶We have these problems with our provincial and superior court judges today; we should not exclude the novelty and usefulness of the justices' innovations because of problems that we currently even have. Instead, we must work to ameliorate these difficulties in the future.

community service are valuable examples for our current society; the limits shown here simply remind us that in any system we must work for liberal, open-minded, and fair results. Luckily, there are those members of our society that are challenging traditions and cultural norms that aid in limiting the participation of all "persons" in our society.

There are more direct risks for me in citing examples from these records of Moran. Moran was a magistrate with substantial economic and social clout in the community, especially when one considers that his family had employed many residents in their shipbuilding and trading operations; however, he was not the most powerful person in his community, and he demonstrates on a number of occasions that he could see beyond his moral biases on occasion. For instance, the Baptist Church in the village is harassed by a number of young "revellers" several times over the years, and he does not appear to act hastily or differently in these situations. He still makes use of "common sense" and the settlement and deterrent approaches to crime that become his forte. This may sound surprising when it is noted that Moran's family donated the land for the Church and that Moran was an avid spiritual and economic supporter of the congregation.

Beginning of the End

Captain Moran died in 1935. During the later years of his work as a magistrate, it is clear that the freedom to fashion local compromises was being limited, especially as lawyers became more frequent fixtures in the courts of magistrates and parish commissioners. As the 1920s roared on, the inadequacies of the magisterial system in New Brunswick were becoming increasingly

apparent. The fee system was despised and was a source of dispute between municipalities and inferior court officials. There was a growing concern that non-legally trained individuals were incapable of granting impartial and fair justice. This pressure came largely from the barristers of the province as their numbers and hold over the legal area intensified in the 1930s and 1940s.¹⁵⁷ Transportation was becoming easier, the province was experiencing increasing urbanization,¹⁵⁸ and the administrative difficulties of having a large number of magistrates working on cases part of the time became a concern to the growing provincial bureaucracy.

I have attempted to show some concrete examples of where citizen justices and magistrates helped provide innovative, cost effective, and accessible justice to rural communities and areas in New Brunswick. I do not believe that the creativity of Moran was limited to him; I have also seen glimpses of others administering justice imaginatively and with success,¹⁵⁹ especially W.E.S. Flewelling of the Waterford Civil Court. Courturier has also discovered this in the Acadian region,¹⁶⁰ and D.G. Bell has shown this with magistrates in New Brunswick's pre-

¹⁵⁷In 1948, there is a movement to improve the situation of barristers in the province: refer to correspondence of D.R. Bishop and Gerald Teed of the New Brunswick Barristers Society, NBM, Teed Papers, F1/24-43.

¹⁵⁸The urban population only became dominant in Saint John County after 1892: Robert E. Garland and L. Gregory Machum, *Promises, Promises. . . An Almanac of New Brunswick Elections, 1870-1980* (Saint John: University of New Brunswick, Social Science Monograph Series, Special Issue #1, 1979), 146.

¹⁵⁹The history of settlement flexibility was a long one. For instance, in a return to the judicial commission of the 1850s, G. Clements, a J.P. for York County in Douglas, writes: "Sir, I have issued but one warrant in the last twelve months, which the parties settled without coming to trial...I have settled a great deal of business, by writing and advising the parties, with putting them to any cost, which course I have persued [sic] ever since I was appointed magistrate": PANB, RS539 C17, York County Magistrates' Returns, 1850-1852, 1876. John Robinson, a justice of the peace for the same county, expresses to the commission similar sentiments: "very few suits come to trial in the Court before me, as I always in the first place write to the parties to settle their amounts or disagreements which generally has the desired effect, and costs them nothing": PANB, RS539 C15.

¹⁶⁰"Dans un tel contexte, il est donc possible que, faute de connaissances appropriées, les décisions des commissaires des cours civiles paroissiales soient autant, sinon plus, ancrée dans le bon sens et la perception de la justice que dans le droit comme tel": Courturier, 81.

Confederation period.¹⁶¹

The sovereign's justice of the peace, an official designed to provide rough, possibly sensible, discretionary judicial outcomes lost credibility in New Brunswick largely because the type of justice that they provided became unfashionable — more so, repulsive — especially to those educated in precedent, the professional class that dominated government and the courts. New Brunswick magistrates were in a particularly difficult situation in the 1930s because they had not been infiltrated with enough lawyer-types in the upper magistracy to at least make the lower courts palatable to the "progressive" government politicians and administrators. Urbanization, general improvements in education, the increasing ease of transportation, and industrialization all played roles in making local justice appear "hickish" and unacceptable. Lawyers became increasingly accessible. No efforts were made to update the small claims limits of the justices' civil courts. The debt jurisdiction of JP's remained at \$20 and stipendiary magistrates at \$80 from 1900 to 1952; this would mean that fewer and fewer claims would even be recognizable by citizen magistrates as salaries, wages, and costs increased.

In the end, communities, especially the rural centres, were the losers. First of all, their industries were taken over by urban companies or displaced, their local merchants and business folk became less competitive in the face of fierce competition by larger entities, schools became consolidated, more rural populations shifted to urban areas for jobs and services, and finally even the judicial leadership and participation of communities was lost. Rural communities had

¹⁶¹D. G. Bell, "The Little Great: Lay Magistrates Under the Ancien Régime" (Unpublished: Paper delivered to the Atlantic Law and History Conference, Dalhousie University, April, 1995) [referred to hereinafter as "Conference Paper"].

a difficult time and, as we shall see in the next chapter, New Brunswick centralized its services increasingly, making the problem acute.

In Moran's registers, we see these examples of settlement, flexible criminal enforcement, enhanced community participation opportunities, and various notarial functioning.¹⁶² We also discover limits to these processes. Furthermore, buried amongst these case examples we see hints of the larger struggles that are finding their way into the court at Saint Martins and into other rural courts. For instance, Moran notes problems with lawyers; one attorney in particular challenges the courts jurisdiction for want of the proper name on a summons and views Moran as a complete amateur, but the court officer from Kings County finds out in the end that Moran uses the problems that the lawyer introduced to decide the case as he had originally wanted to decide it. And, there is no appeal of this case or of most of Moran's work. We also see the changing economy that will mean a difficult time at Quaco in the coming years, transportation becomes more prevalent and easier as provincial police find their way to the community, and the increased regulation of government is evident in the hunting and gun permits that Moran issues in the 1920s. Indications of the struggle that I will talk about in the next chapter are already present, but Moran provides us with a comprehensive glimpse of community-based and innovative flexibility available within the formal justice system. And, the important point is that this flexibility was still possible at the turn of the century — a finding which many academics had surmised effectively disappeared at Confederation.

¹⁶²Moran was separately appointed a notary public in 1909: records of the "Public Accounts" in Synoptic Proceedings, 1909, 10.

CHAPTER 4

The Conveyancing Myth: "an archaic system" Left to Die

By the time of William Moran's death in 1935, the community leadership role of justices of the peace and other citizen magistrates was already under attack. In other Canadian jurisdictions, police magistrates were appointed primarily from among the attorney class in this period¹⁶³ and had become full-time, professional offices. In New Brunswick, the magistrates were not initially the professional enemy of JPs, even though the stipendiaries constituted the successor to most of their judicial powers. There were too few lawyers interested in the meagre salaries of magistrates to see that happen in New Brunswick, and the government was in no position to offer more money. Most often, senior justices of the peace or local business leaders were appointed as the police or stipendiary magistrates or local parish commissioners and, in that way, magistrates in the province were often drawn from the "citizenry", although frequently along party lines when possible.¹⁶⁴ At the same time, other justices of the peace left the major penal functions to the police magistrates and concentrated on their other responsibilities. The lack of uniform professionalization of the police and stipendiary magistrate in New Brunswick would later serve as fuel to replace all lower magistrates with barristers and the justification to abolish lay offices.

¹⁶³For example, this is true of neighbouring Nova Scotia in many regions; by 1938, legislation was passed requiring police magistrates to have been a barrister for at least three years: R. E. Kimball, *The Bench: A History of Nova Scotia's Provincial Courts* (Halifax: Province of Nova Scotia, 1989), 7.

¹⁶⁴I am speaking in generalities, for many of the early and notable police magistrates were in fact lawyers, especially in the major urban areas. A good example is Police Magistrate Humphrey J. Gilbert of Saint John (1857-c.1890): however, even in Saint John, it was not uncommon for a non-legally trained city councillor or justice to preside as sitting magistrate in the city's police court.

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To this point, my study has attempted to introduce readers to the place of citizen judges in New Brunswick and of the flexible justice that they often dispensed. While there is some indication from other writers that urban justice took a different form,¹⁶⁵ my paper has certainly identified the historical developments and the community role that magistrates played at least in rural areas at the turn of this century. I have tried to show how the rejuvenation of magisterial courts blossomed in the context of responsible government and as a consequence of the partisan patronage atmosphere, a less reserved type of patronage than dispensed by the Loyalist elite. The system, while innovative, was not without its difficulties; in fact, its credibility relied heavily on the moral fibre of the individual appointed, for there was no regular accountability. Indeed, such a system had many problems including its reliance on fees, the large and unfettered authority in the areas of child welfare and mental health matters, and its links to a male-dominated and quasi-class-based system.

In this chapter, I attempt to give an overview of how the well-defined (if historically illusive) magisterial "statue" became worn down, broken, and eventually toppled under the weight of an expanding state that proceeded oblivious to it. This chapter is mired primarily in this century and tells the fate of the community-based magistrates and documents the erosion of geographic communities and their cohesiveness. It is about magistrates, but the general pattern could equally include other histories of communities and their leadership: churches, ministers, clergy, community organizations, postal officials, merchants, store keepers, municipal councils, school trustees, juries, coroners, sheriffs, notaries public, local constables, and many others.

¹⁶⁵I believe that this is partly true. Although after a quick check of some newspaper accounts of the Saint John Police Magistrate Humphrey Gilbert, I think that the differences may have not been as great until after 1900.

I intend to concentrate my efforts on three principle themes in this section: the lawyer and magistrate conflict, the rise of professional policing and greater state surveillance, and the problems inherent in the magisterial roles as defined in New Brunswick. Out of the background will rise the myth that magistrates in New Brunswick served only as second-best deed drafters in the "distant past". This legal professional's version of magistrates as a ghost that needed to be curtailed has been whole-heartedly accepted in the province without further investigation, and it still haunts the courts and judicial officers without even a hint of uncovering the need for a more balanced version of history. In a recent New Brunswick Court of Appeal decision, for instance, Ryan J.A. described magistrates as part of "an archaic system which was discontinued in the 1960s";¹⁶⁶ he stated this while at the same time recognizing that New Brunswick's Provincial Court currently does not provide the level of protection against prolonged detention which would have been unthinkable in jurisdictions with citizen magistrates. This shows in a small way that professionals are not always the best or only avenue of protecting the basic liberties and rights of people.

The sentiment of Mr. Justice Ryan was echoed in the comments of others in the New Brunswick legal community in a recent study on JPs.¹⁶⁷ After stating that the abolition of justices was

¹⁶⁶*R. v. MacPherson*, [1995] N.B.J. 277 (C.A.), paragraph 6. As noted elsewhere, the duties of JPs are handled by the Provincial Court Judges today; these constitute the former county magistrates. While it closely followed (from a professional point-of-view -- although magistrates were lawyers much earlier), the development was not directly parallel to the Nova Scotia reality where stipendiary magistrates located in the major towns became the provincial court. New Brunswick added this extra layer of development (county magistrates) due to the late presence of citizen magistrates in the province. In this way, New Brunswick actually centralized its provincial courts earlier although "voluntarily" based on municipal willingness and revenues.

¹⁶⁷See the study by Anthony N. Doob *et. al.*, *Understanding Justices: A Study of Canadian Justices of the Peace* (Toronto: Centre of Criminology, University of Toronto), 1991.

"part of a general move to 'professionalize' the criminal justice process" and observing that JPs at one time "had the power to draw up deeds", one New Brunswick judge put it this way:

[Justices of the Peace] created many difficulties, due to the lack of professionalism and expertise and... we're happy to see them gone from the business.¹⁴⁸

The conveyancing myth alluded to in the above quote did have some basis in reality, as we shall soon discover; however, it would not be proper to conclude that justices serving in a notary-like or deed drafting role provided their communities with poor service. In fact, I hope to show that JPs in New Brunswick and their counterparts continued to provide much needed service and convenience into the 1980s and even to the present day. They accomplished this in spite of the fact that they were neglected and left to "die off".

Magisterial Integrity In Trouble

As the 20th century dawned, government was plagued by an increasing number of complaints against lesser officials. There were commissions set up to investigate police magistrates, registrars of deeds, municipal official, liquor inspectors, a probate court registrar, police chiefs, and a clerk of the peace (lawyer). The only "official" probe of a justice of the peace during the past century occurred in Madawaska County in 1899. Attorney John M. Stevens of Edmundston was appointed a commissioner to investigate several allegations against Samuel Raymond, J.P., of the same city. The charges included harassment of a female houseowner by civil process,

¹⁴⁸Doob, 39.

being a habitual drunkard, and misappropriating fees. Raymond had been a justice for approximately seven years before the complaints surfaced. His principal occupation was a general merchant and hunting/fishing outfitter. Raymond's poorly kept letterbook can be found today at the Provincial Archives of New Brunswick.¹⁶⁹ Barry R. Plant appeared for the complainants, and Fred LaForest represented Justice Raymond.¹⁷⁰ While the commission evidence and expense accounts are available, the final report of the commissioner to government could not be located. An entry in a book recording justice appointments notes that Raymond was dismissed on December 13, 1899, and that notice was published in the *Royal Gazette* of December 20, 1899.¹⁷¹

Another complaint surfaced against Edward Abildgaard of New Denmark, Victoria County, from a church minister of the village in April of 1907. The letter charged Abildgaard with "using his office as a magistrate to work vengeance on those who have not been his particular friends". It appeared that even the county judge had condemned the actions of Abildgaard in a recent case as being "indecent".¹⁷² There were of course other complaints. A common method of grievance was to petition the Executive Council or the Legislative Assembly; full investigations did not always follow. It is interesting to note that until the creation of the Canadian Judicial

¹⁶⁹While I suggest that the record book was poorly kept, there are few other record sources to compare it too; Raymond's book of justice records is one of only a small number conserved in the province's archival collection for the period.

¹⁷⁰LaForest is the father of a current Justice of the Supreme Court of Canada. Plant held extensive jurisdictions in Madawaska County, including clerk of the circuits and clerk of the county court: *McMillan's Gazetteer and Almanac*. . 1899, listings for County of Madawaska.

¹⁷¹PANB, RS581 (Justice of the Peace Records, 1867-1954), 556. I could also not find any reference to the report in debates of the Legislative Assembly or in the Executive Council minutes for the period.

¹⁷²PANB, R39 (Minutes of the Executive Council, Cabinet Papers), April 1907.

Council, federally-appointed judges could only be complained against by petition.

Regardless of the improprieties of some, however, the office of justice of the peace continued to be a welcomed patronage appointment. In the records of the Executive Council for New Brunswick around 1900, there are many requests to be appointed as a justice and many recommendations from members of the legislative assembly as to who should be appointed to the office.¹⁷³ It was still a well-regarded position in many quarters, especially in rural areas. Extra money could be made processing civil, criminal, and land documents. The office was also considered a sign of affluency or government endorsement; appointments were closely controlled by Assembly members. Even more importantly, perhaps, the office may still have been relevant and useful. This would be especially true where no lawyer or government official resided. Even the minister from New Denmark in his 1907 letter referred to the magisterial office as a "responsible position" and stated that he wrote so that "truth and justice may ever prevail".

Government gradually made efforts to appoint more legal professionals to magisterial offices, but even these measures did not lessen the growing skepticism of lower court officials. The fees collected by magistrates (and local constables) for their time and court costs were a special source of public anxiety. It was alleged that magistrates delayed trials and manufactured extra procedures in order to collect higher civil fees or found people guilty to collect fees in criminal cases; however, my investigation of Moran's papers showed this charge to be untrue at least in

¹⁷³See a summary of appointments recommended by members of the Legislative Assembly: PANB, RS9 (Minutes of the Executive Council Records, Cabinet Papers), 1932 April 5. The list primarily included JP suggestions but also those included school trustees and an auctioneer.

his court, there is little evidence of this difficulty in existing court records. Why these grievances were levelled against the lower courts so often is difficult to understand; all judicial officials from superior court judges to practising lawyers collected fees (and continue to in some cases); therefore, any criticism would have to be taken as criticizing the entire justice apparatus. Furthermore, settlement before the trial which was encouraged by Moran, Fewelling, and others actually reduced or eliminated court costs. Some legislators recognized this so clearly that in 1870, they attempted unsuccessfully to double the jurisdiction of all justices and magistrates so that they could deal with civil matters up to \$40. Trials in the supreme or county courts were very expensive as fees had to be paid to the lawyers, judges, clerk, and sheriff; the only possible costs in an inferior court were the magistrate and constable fees.¹⁷⁴

It should also be noted that fees are a unique way to pay for judicial officials in that they are based on principles of "user-pay" and also functionaries have the discretion whether or not to collect prescribed fees owing to the circumstances of clients before them. Many living justices of the peace that I interviewed suggested that fees were often forgiven or disregarded.¹⁷⁵ Often, payment came in the form of produce, fish, or wood products.

Morality and ethics were other major issues that detracted from magisterial integrity; officials were frequently charged with lax or overly zealous enforcement of liquor and temperance laws. In 1909, the Premier and Attorney General of the time, J. Douglas Hazen, conducted an inquiry

¹⁷⁴Courturier discusses fees extensively; see Courturier, 72-73.

¹⁷⁵Interviews with Y. LeBel, H. Henry, H. Lanyon, L. McGibben, and Louis Murphy (M.L.A. until 1995).

into the case of Joseph Hornbrook, the Police Magistrate for King's County. Hornbrook had only been a magistrate since 1907, and he was charged with leaking search warrant information in temperance cases and with keeping fees that should otherwise have been paid over to the county. The community, Sussex, was clearly split over the temperance issue, and the "temperates" felt that Hornbrook was being paid as an informer.¹⁷⁶ In 1912, John MacKay, the Police Magistrate for the City and Parish of Moncton was investigated for the third time surrounding temperance issues! This third investigation was also handled by the Attorney General of the time, Premier Baxter, on special commission and involved an alleged failure to pay over to the city a fine of \$30. The previous investigations of MacKay had involved his practice of allowing his clerk and himself to accept any fees required to be collected in pre-trial processes and had resulted in no case against MacKay.

Both the Hornbrook and MacKay investigations, as one can see, were very petty in substance and were based to some degree on the temperance movement not feeling that the magistrate was deciding cases properly (or in their favour). It is noteworthy that the government took them seriously enough to have the premier investigate the cases; temperance was a political hotbed! In the third MacKay inquiry, citizen magistrate MacKay did not make use of a lawyer; he instead appeared for himself. In the course of questioning, the complainants' counsel asked a number of questions of MacKay about legal procedures and the law. It was obvious from the questioning that the lawyer did not believe that MacKay knew anything about legal matters. The lawyer asked frequent questions about the differences of the times when MacKay acted as police

¹⁷⁶The outcome of the case is unclear — no findings exist.

magistrate and when he acted as a justice of the peace, presumably trying to challenge MacKay's legal knowledge. It is possible that the lawyer believed that all citizen magistrates knew little about the law. While the findings of this third inquiry are unknown, it is clear from the existing manuscripts that magistrates were no longer granted the flexibility to fashion local compromises and solutions impervious to appeal. The legal profession was having its influence on the lower civil courts and their procedures.

Aversion toward non-legally trained officials was growing, too; the lawyer's tones in both cases suggested that the legal profession had little sympathy for citizen magistrates.¹⁷⁷ For instance, in 1876, parish courts were first organized, and lawyers openly opposed any greater jurisdiction for lay officials. The courts were created to enlarge small civil claims jurisdiction, to make courts more uniform, and to reduce the numbers of active magistrates. On one hand the move can be viewed as a rationalization; however, the assembly chose to open appointments to anyone qualified, professional or lay. In fact, most parish commissioners were appointed from among the experienced justices of the peace residing within the parish in question.¹⁷⁸ The assembly recognized the need for a balance between utility and plurality in order to have more efficient and less technical courts. This course of action may have been a compromise designed to appease both lawyers and magistrates, or it may have been borrowed from the English lay experience; in any event, lawyers were not happy with these developments. It cut into their

¹⁷⁷In many provinces, magistrates were required to be lawyers by this time; for example, such was the case in Halifax as early as 1815: Sandra E. Oxner, "The Evolution of the Lower Court of Nova Scotia" in *Law in a Colonial Society: The Nova Scotia Experience*, ed. Peter Waite, Sandra Oxner, and Thomas Barnes (Toronto: The Carswell Company Limited, 1984), 59 at 78.

¹⁷⁸Couturier, 78: "les nouveaux commissaires soient des personnes disposant d'une compétence suffisante pour occuper la charge".

money pockets and would force them to increase their magisterial court visits.

Equally, citizen magistrate. equally shared a dread of dealing with lawyers in their courts. One early Saint John justice of the peace openly questioned why he had to tolerate attorneys appearing for clients as it lengthened the procedure, increased the time and costs of trials, and unnecessarily made the proceeding more complicated and technical".¹⁷⁹

As the technicalities of the law and those arguing the law before JPs increased, lay justices would become more difficult to accommodate and defend.¹⁸⁰ They had often developed their particular procedures for cases and settlements, based around the part-time nature of their offices and adapted to local geography and economy. Such local procedure might involve court sessions in the evenings or during times when enough "men" were available to sit on the court's jury. And it is true that the variability in the legal knowledge of magistrates did cause many difficulties and perhaps injustices, especially in the eyes of the self-interested, fee-based legal professional. Technicalities might seem like mere distractions to a fair-minded individual but not to one trained in law. And it is clear that the view of legal professionals would prevail, owing to the power of their strengthening professional bodies and to their influence with and as agents of government.

Magistrates (especially justices of the peace) became increasingly a rural phenomenon, and as

¹⁷⁹Bell, *Legal Pluralism*, 93.

¹⁸⁰While legal education stagnated in this early 20th century period, the Barristers' Society was becoming more powerful: D. G. Bell, *Legal Education in New Brunswick* (Fredericton: University of New Brunswick, 1992), 117-121.

they neglected to organize themselves, their influence and importance provincially slowly dissipated.¹⁸¹ Until the advent of modern municipal government, magistrates had met regularly in each shiretown. With the abolition of the sessions, justices focused their part-time activities in their communities and areas; this local focus would be beneficial for their parishes and regions in many cases, but it would result in the loss of their collective or organized identity, as well. It is very difficult for unorganized interests to counter organized lobbyists; an organized magistrate's group could have presented a united front, could have provided some training for its members, could have created a system of obtaining legal advice,¹⁸² and could have espoused the "virtues" of experience-based training. Such efforts were undertaken in the United Kingdom, for example, where an association was formed and a journal published.¹⁸³ However, on the other hand, it is possible that the existence of associations might have restrained the freedom exercised in the inferior courts of Moran and others.

The judicial integrity of police magistrates is reflected in such popular names as "Cousin Droopy Eyes".¹⁸⁴ There is evidence to suggest that magisterial courts were more often centres of local

¹⁸¹It appears that notaries in British Columbia organized separately from the law society: *Canadian Almanac and [Legal and Court] Directory*, (Toronto: Copp Clark and later Canadian Almanac and Directory Limited, 1922, 1932, 1942, 1952, 1967, 1995) in the section on law societies and associations.

¹⁸²Legal advice and assistance was available from the legally-trained clerk of the peace in each county. These clerks were eventually phased out as municipal clerks took on the duties of local government and as full-time clerks took over the court duties. The clerk's (of the peace) role in prosecuting cases institutionalized in the civil service in 1966 when clerks of the peace were renamed crown prosecutors: *Crown Prosecutors Act*, S.N.B. 1966, c. 6.

¹⁸³For example, there is a Magistrates and Judges Association of the Commonwealth, and the U.K. has a Magistrates' Association. There are journals such as *The Magistrate* (London: Magistrates' Association, 1921-); *Court: The Journal of Legal Practice in Magistrates' Courts* (St. Albans, Eng., 1976-); and, *Justice of the Peace Review* (Chichester: Justice of the Peace Ltd., 1983-). Some organizing has been done in Australia. In 1926, the Notary Public Society of British Columbia was formed: *Canadian Almanac and Directory*, 1995, "Law Associations".

¹⁸⁴This was the popular title of a Carleton County police magistrate; the name has been withheld for family reasons: Lanyon interview.

entertainment than solemn courts of justice by the 1930s.¹⁸⁵ However, whatever public integrity that citizen judges lacked in court matters, they were frequently in demand for real estate transactions and other local matters. Furthermore, justice hearings have always been important to family and friends of the parties and also fascinating to members of the public. This public nature of trials and sentences was for a long time a basic assumption built into the system prior to 1900; courts were generally open to the public and hangings and lesser sentences took on the drama of a festival, all in the name of justice and deference to the crown.¹⁸⁶ It is not surprising, then, in areas where the social calendar included church services, Sunday School picnics, birthday parties, pie socials, and the occasional film, that the local seat of stipendiary or commissioner justice might draw a crowd.

Justices Shrink to Become Notaries

"Bonjour, hello", I said, entering the hallway of Yvonne and Louis LeBel's flat in Edmundston, the shiretown of the Madawaska republic.¹⁸⁷ I had come to speak with Yvonne LeBel. It was a cool night in February, 1995. She is one of the few remaining justices of the peace in the province and one of less than 70 women that had been appointed to that office beginning in

¹⁸⁵Gordon E Romky, a Member of the House of Assembly of Nova Scotia during the passage of the police magistrate legislation in 1938 in that province reminisced in 1972, "if my memory serves me right about the only talk was some tales of what a country magistrate did and the were very interesting and good for a laugh": as quoted in Kimball, 25, note 5.

¹⁸⁶Even spruce beer and pies were on sale at the public hanging of Michael Vincent in Hamilton in 1828: Weaver, 23-24.

¹⁸⁷Edmundston is the seat of Madawaska County and is located in the most northwesterly part of New Brunswick. It borders on the State of Maine and the Province of Québec. The area was so remote in the 19th century and the boundaries so uncertain that the residents of all three jurisdictions became known as citizens of the "Republic of Madawaska". Family and work ties are still very close in the area.

1904.¹⁸⁸ I was keen to speak with her about the circumstances surrounding her appointment and of her experiences during the years. I was not to be disappointed; in fact, I would find much more in the hospitality of the Lebel home. Within the very marriage of this couple would exist some of the tensions that would eventually play out on the provincial scene — differently — leading to the rejection and demise of citizen magistrates.

Yvonne LeBel had been initially appointed a justice of the peace to assist with the drawing and certification of documents associated with her husband's law practise in St. Quentin;¹⁸⁹ her husband was frequently away from home tending to other duties which variously over the years included being a barrister, police magistrate, coroner, county magistrate, deputy county magistrate, member of the legislative assembly, probate judge, and chairman of the Expropriations Advisory Board. LeBel also managed a family insurance business and was very busy with her magisterial duties into the 1980s, especially the drafting of deeds, mortgages, and wills.¹⁹⁰ She stopped executing documents for a few years in the 1960s and 70s in order to avoid conflict of interest problems while Louis LeBel chaired the Expropriations Advisory

¹⁸⁸I was somewhat surprised to find approximately 70 women interested in taking on the commissions after 1900. This aspect of magisterial history requires further study. It is known that in the 1930s, many businesses asked for their staff to be appointed as justices of the peace so that documents could be "notarized" or acknowledged (especially insurance companies); it is possible that women served in this way: PANB, RS9 (Minutes of the Executive Council, Cabinet Papers), 1932 April 5, letters from W. L. Peters of Saint John to M.L.A. W. H. Harrison (February 13) and from W. C. Mortimer to Tilley (January 28, 1932).

¹⁸⁹St. Quentin is located in the interior section of Restigouche County in Northern New Brunswick and is well known as a lumbering centre. It is a majority French-speaking locality. During the middle parts of this century, there were two magistrates in the town, Louis A. LeBel (lawyer) and Fred Sommers (merchant), both M.L.A.s of opposing political parties.

¹⁹⁰The job roles of both LeBels were very complimentary, especially when one recognizes that it was extremely difficult to raise a family and pay the bills on the income of a rural lawyer (especially in the 1930s and 40s); other forms of employment were necessary for barristers and their family members.

Board. LeBel worked closely with lawyers in her area, even helping to educate on at least one occasion a new lawyer with the task of deed searching at local registry offices. In her experience, justices and lawyers frequently co-operated with each other; for instance, LeBel would assist with registry searches for a lawyer while the lawyer would provide advice for LeBel on unusual deed and document transactions. This partnership of convenience which existed in few quarters would end abruptly in 1984 at the behest of the law society and of some of those involved in this joint arrangement.¹⁹¹ In fact, this 1984 move is evidence that lawyers certainly did not view these arrangements as equal or even desirable "partnerships".

Justices of the peace appointed after 1930 became for the most part "substitute solicitors" as D. G. Bell has described them in his work on New Brunswick JPs in the 18th century.¹⁹² Magistrates had always fulfilled this function,¹⁹³ but JP's appointed after 1930 saw this as their primary role. Yvonne R. LeBel is representative of this group of people that saw their function not as judicial but notarial; she was appointed on July 27, 1948, for St. Quentin in Restigouche County.¹⁹⁴ Harold H. Henry of Steeves Mountain (Killam Mills, 1934?), Wesley T. Tozer

¹⁹¹LeBel Interview. LeBel felt a bit betrayed by the lawyer that she had helped and others that she knew well who advocated and supported the move to push the government to abolish the justices' jurisdiction at law society meetings.

¹⁹²They still had ample criminal and civil court powers at this stage, but through practise and expectation, these officials had already largely taken on their "modern" form. It might be true to say that most JPs were unaware of their *Criminal Code* functions largely because the customary practise had long excluded them. Only those justices appointed before the 1930s engaged in police functions: Interviews with Lanyon and Henry.

¹⁹³Bell has shown that the work or "practises" of each justice of the peace could vary considerably depending on interests, geographic circumstances, and capability. It may also be true to say that the solicitor-type functions were more profitable than other roles: Bell, Conference Paper.

¹⁹⁴PANB, RS 581 (Provincial Secretary records of JP appointments, 1867-1956?), p. 350. It is unclear why the LeBels considered this option and not a notary public or commissioner of oath appointment during the period. It is likely true that notary public appointments by this period were being restricted to legal professionals; however, more research would need to be undertaken to verify this assertion. Furthermore, a commissioner of oath appointment would have not had the "drafting" authority. Since LeBel was appointed during her husband's tenure as a Member of the Legislative Assembly of

of Sunny Corner (Red Bank, 1953), and Pius J. Thériault of Bathurst (East Bathurst, 1937) are just a few of the others appointed at mid-century with similar outlooks on their duties. The solicitorial role involved drawing up and executing land and mortgage documents, drafting wills, administering oaths and affirmations, taking declarations, functioning as the provincial equivalent of the European "scribe", and providing legal information. Most exercised none of their police or criminal jurisdictions; they might assist a distant lawyer in locating a client, help the police find information, or register a firearm, but they rarely performed their *Criminal Code* functions that had been common in the days of Moran and before. They did continue a number of informal roles; these included helping local residents interact with the municipal or provincial governments, assisting with employment or job networking, acting as a representatives to obtain monetary benefits from governments (such as welfare, pensions, etc.), and representing local sentiment to government officials and constituency representatives.¹⁹⁵ Through custom and usage, the bulk of police, criminal, and court functions were only exercised by the police and stipendiary magistrates and the parish court commissioners after the 1930s.¹⁹⁶

New Brunswick, the existence of this commission is further proof that the real responsibility for the appointment of JPs continued to lie in the hands of the Assembly members. There was also no commission fee until the middle of this century for justices of the peace; other commissions required the payment of a fee or a higher fee.

¹⁹⁵Their political influence should not be overlooked. Justice appointments throughout the period following the notion of responsible government became the political booty of members of the legislative assembly. Often, they had strong political connections in the local riding areas and were therefore effective spokespeople for their "constituents". These connections should not be viewed as sinister ones; in the later period, especially, very able justices were appointed to undertake the many responsibilities that justices needed to fulfil in the rural areas of the province. From personal interviews, these appointed "representatives" were almost uniformly community-minded, accessible, and capable functionaries (although they did not readily admit their political links).

¹⁹⁶There are notable exceptions to this statement. Some of the older justices continued to issue court processes, collect small claims, and function as a minor criminal court into the 1950s; for example, George F. Craig, JP for McAdam ordered the collection of \$125 among two other processes in early 1952 (I am uncertain how Craig exercised jurisdiction over a \$125 bill, but it may have been in his capacity as a "designated" deputy for the McAdam district under the *County Magistrates Act*. This remains a mystery; however, the County Magistrate did enforce the order in 1954): PANB, RG8 RS609 (Records of Police and Stipendiary Magistrates for York County), C (McAdam Township). Official court stenographers were also sometimes appointed as justices in the 1930s and 1940s and acted as sitting magistrates on cases

Justices of the Peace continued to function as substitute solicitors or notaries public until 1984, even though their numbers were dwindling.¹⁹⁷ And, they received a free subscription to *The Royal Gazette* until 1973; this was the only form of regular information that they received from government. The "solicitorial role", particularly the land transactions, would continue to be a source of "professional" complaint from the barristers of the province. It is surprising that the justices retained their conveyancing powers into the 1980s; in fact, that justices continued to act as "solicitors" so long is a testament to their rural value as accessible, community-based functionaries.

In Hartland for example, home of the world's longest covered bridge, a lawyer was no longer present in the town, and no one could "sign papers" for the Bible college or local farmers. There was a police magistrate, Fred Boyd, but he was elderly and less active. Harry Lanyon, recently out of the R.C.A.F. and the owner of a local jewellery store, was appointed a justice of the peace for Carleton County and the town in February of 1950. His main duties as justice included taking statutory declarations for agricultural gas refunds, drawing up land deeds and mortgages, and helping with affidavits to assist residents in obtaining documents like birth certificates. For a time, he was even paid by the local bank on a per item basis for completing chattel mortgage papers. Most of his work was done on a courtesy basis, which he felt aided his business and personal integrity in the community. When he charged fees, they were "two

when the stipendiary was sick or unavailable. These "sitting magistrates" were often women in the period and included Anne McD. Morell in 1940 and 1941 and Mona McMahon in 1940. The work of older JPs and of court officials requires further research.

¹⁹⁷Only three commissions of the peace were issued after 1954; one each in 1955 (Charlton H. Allen), 1956 (J. W. Black), and 1963 (C. N. R. Scott): PANB, RS581 (Justice of the Peace Records, 1867-1954), Finding Aid (electronic).

dollars or less". He never held court or dealt directly with the police, but his accessibility made legal transactions possible in a community without a legal professional.¹⁹⁸

Even in the City of Saint John, it was seen as useful to have an accessible, low cost official able to take acknowledgements and declarations. Louis E. Murphy was appointed a justice of the peace for the city and county in 1938 and served since the 1930s as a city councillor and later as an M.L.A. for the area. Most of his JP work was directed at assisting constituents as a courtesy, without fee. Members of the legal profession are not always sought after or even desired by members of the public for completing some notarial tasks. This is especially the case for the poorer members of our society who view lawyers as expensive. Murphy saw it as his public and moral duty to assist as he could, and his commission allowed him to help.

How did JPs reach the stage of being the equivalent of a notary in New Brunswick? Justices of the peace have always had the ability (and the responsibility) to perform notarial processes; in fact, the existence of public notaries was rare before 1900 and lawyers were unaccessible outside of county centres. As a result of the good chances for remuneration especially before mid-20th century (as opposed to those fees received in criminal and civil court cases), some justices of the peace had specialized in the notarial enterprise, earning a significant supplement to their income.¹⁹⁹ However, by the 1940s, little jurisdiction was left beyond the notarial purview, and this role was still needed outside the towns of the province. How the criminal and

¹⁹⁸Lanyon Interview.

¹⁹⁹D. G. Bell, Conference Paper, 16: Bell describes the work of Munson Jarvis, a JP in the City of Saint John in 1815; he does over 200 fee transactions in a year.

civil jurisdictions were whittled away is the story that follows in this chapter. As suggested, the struggle between lawyers and citizen magistrates would constitute one of the major factors in the eventual eradication of the commissions of the peace. However, the LeBel's of St. Quentin and Edmundston also had ties to another major factor in the legal and judicial revolution in the province that would occur during the middle of this century; Louis LeBel would serve in the legislature from 1948 to 1952 as a supporter of the Liberal Premier John B. McNair, a driving force behind magisterial changes in New Brunswick (or at least the person formally in charge of introducing reforms). The intertwining tale is told below.

The Lawyer as Professional and as State Official

This section deals briefly with the growing provincial bureaucracy and the consolidation of the barristers' monopoly over legal services in New Brunswick during this century. It is very difficult to segregate these two issues in the narrative — the interests of the state and those of the legal professionals. From the 1890s to 1952, the offices of premier and attorney-general in the province were frequently occupied by the same person and, as might be expected, the holders of these dual offices were exclusively lawyers. It is unclear why this tradition of the Premier occupying the chief attorney's office developed in New Brunswick;²⁰⁰ it may have been the fact that the premier was frequently a lawyer and, with a small cabinet of less than a dozen members (six or seven members from 1896 to 1930?), it may have made economic and

²⁰⁰This tradition is clearly a North American one as even in Ontario, P.E.I., N.S., Quebec, and B.C., the offices were sometimes combined before 1900 (premiers chose to hold at least one other major post): *Canadian Parliamentary Guide* (Ottawa: The Mortimer Co. Limited, Printers, 1899). By the 1930s, the practice still occurs in N.B., P.E.I., and Quebec, typically in those provinces with small cabinets. Attorney-generals were kept out of the cabinet in Britain and in Australia.

administrative sense to combine the offices. Clear examples of this situation include A. R. Wetmore (1867-1872), G. E. King (1872-1878), J. J. Fraser (1878-1882), A. G. Blair (1883-1896), James Mitchell (1896), William Pugsley (1907),²⁰¹ J. D. Hazen (1908-1911), Baxter, and John B. McNair (1940-1952).²⁰² The interests of state and profession could have been complimentary, but it is more plausible that the relationship was far more complex. It is as a result of the difficulty to separate interests that I have included the combined story; the parallel or divergent interests of these two groups deserves more study in the future. Interestingly, the continued presence of citizen magistrates into the 1980s may in fact signal that lawyers in politics did have divergent interests from their non-political counterparts.

In the latter years of William Moran's work as a magistrate, it is clear from his records that the freedom to fashion local compromises was being limited, especially as lawyers became more frequent fixtures in the courts of stipendiary magistrates and parish commissioners. In fact, pressure from the growing legal establishment in New Brunswick²⁰³ would constitute the principal link to the demise of the use of lay judges -- first in criminal matters and later in civil

²⁰¹Pugsley was Attorney General from 1900 under the Lemuel John Tweedie administration. Both Tweedie and Pugsley were later lieutenant governors of the province.

²⁰²Honourable John Babbitt McNair was a Rhodes Scholar in 1913, graduating from the University of New Brunswick. He became attorney general in 1935, was defeated in 1939, but returned as premier and attorney general in the general election of 1940. He stayed in power until he was defeated by the Flemming administration in 1952 general election. He was appointed a Justice in Appeal of the Supreme Court of New Brunswick in July of 1955 and became the Chief Justice of New Brunswick in October of that same year: *Canadian Encyclopedia*, "McNair".

²⁰³I do not want to suggest here that the numbers of the Barristers' Society of New Brunswick were continually growing. In fact, the major growth of legal professional numbers occurs in before 1940 and after 1960. Lawyers have their greatest numbers during the twenty year span in the 1950s with about 242 practising barristers. The number of lawyers is 212 in 1939 and 221 in 1960. Geographic distribution does not change significantly throughout the period either, although there is some movement into the rural villages. I am suggesting instead that their influence grows: *Canadian Almanac and Directory*, 1939 and 1960.

affairs. There were of course other factors such as the fee controversies, patterns of urbanization, development of better transportation and communication, relative inequities of the various municipal administrations in New Brunswick, and the development of full-time police. These will be dealt with in turn, but the most important, single factor in the demise of the commissions was the compelling need on the part of New Brunswick's barristers to secure their claim of a professional monopoly over judicial offices and real property transactions. Such a feat had been attempted several times in the province but had never materialized.

The dynamics of this attorney struggle has its roots in the financial insecurity of the early New Brunswick bar. The aftermath of the American Revolution brought more legally trained "men" to New Brunswick than could possibly be supported in the frontier and survival-oriented economy. The Supreme Court under the guidance of Chief Justice Gabriel G. Ludlow compounded the situation by refusing to travel on circuits. The Assembly attempted on a number of occasions to legislate circuit courts; however, the Legislative Council vetoed any attempts until finally the Assembly succeeded in increasing the jurisdiction of magisterial and lower courts in order to make up for the lack of access to the superior courts. Justices were given three pounds exclusive civil authority, and the Inferior Courts of Common Pleas gained the exclusive ability to rule on cases involving up to 20 pounds as long as the matter did not involve land issues. Barristers sometime felt that it was beneath them to practise in the lower or inferior courts and often clients of the courts did not want to pay a lawyer; this made their situations much worse.

Judicial reform attempts in 1832 and again in the 1840s — all lawyer led²⁰⁴ — attempted to pull the reins in on the lower courts and eventually paved the way for the restoration of the inherent jurisdiction of the superior court and the creation of legally-trained county court judges. In fact, the Tweedie government attempted to replace the civil jurisdiction of magistrates, justices, and parish commissioners with the creation of district courts and commissioners. The legislation was assented to in 1901, but it was never implemented.²⁰⁵ Each commissioner or judge was to be a barrister of at least five years standing in cities or towns. A different standard for the commissioner was suggested for rural areas. It was anticipated that the courts would meet twice a month and would even replace the special small claims courts of Fredericton. If the cause was initiated in the court by a barrister, the jurisdictional limits would be \$80 for debt and \$40 for torts; these values were lowered to one-half where the action was not initiated by a lawyer. Pugsley highlighted the fact that no one was to be exempt from the jurisdiction of the court as a result of special privileges, especially barristers; this may have been a reference to the refusal of barristers to submit to the authority of magistrates.²⁰⁶ The matter was re-visited by the legislature in 1902 and a number of amendments were proposed. In 1903, the government reported that it had considered the legislation closely but decided that there was no great demand for the bill and that it might be better to alter the Dominion-financed county courts

²⁰⁴New Brunswick was following the general reforms occurring in the United Kingdom and elsewhere.

²⁰⁵*Synoptic Report, 1901*, 27-28. This bill was supported as a government bill, but not a party measure. This curious distinction may have resulted from the fact that the Legislative Assembly of New Brunswick did not develop a rigid party discipline until early in this century; members of the opposite party would often support a government, especially if they made concessions. Members of the Legislative Assembly were fiercely independent.

²⁰⁶I do not fully understand this provision, but it may have been a reference to the Tweedie-Earle problem of 1902 (see next page) or to the historic privileges of barristers to be subject only to the jurisdiction of the superior courts.

to hear small debt actions; in this way, suitors would not have to finance the costs of the court.²⁰⁷ It is interesting to note also that the government passed legislation in 1902 that authorized the government to take "possession of the books and records" of magistrates; these public records were often lost.²⁰⁸ It is likely that significant pressure from the politically-connected magistrates and their friends in the Assembly averted the implementation of this district court legislation.

The numbers of professionals continued to grow slowly, as evidenced by the creation of the St. John Law Students' Society in 1879 and New Brunswick's first law school in 1892.²⁰⁹ In 1903, the legislature passed an act reconstituting the Barristers' Society of New Brunswick and for the first time making membership of practising lawyers in the province mandatory; even more importantly, the legislation granted the society self-governing status which accorded the modern day professional status on the organization. Ever so gradually in the early part of this century, lawyers began to push out into less urban centres and into the county towns. This had two results: barristers came to represent clients more often in magisterial courts and more lawyers became involved as police magistrates in order to supplement their incomes; however, often the political hassles of being appointed a magistrate and the pressures to stamp out temperance coupled with the potential fee hassles made the office of magistrate little of a gem

²⁰⁷*Synoptic Proceedings, 1902*, 143-144 and *Synoptic Proceedings, 1903*, 83.

²⁰⁸This legislation does not appear to have helped magisterial records survive. Some public records exist, but record books are scarce.

²⁰⁹Bell, *Legal Education*, 67-68.

(at least outside of the major urban areas where case loads were high).²¹⁰

The hostility between magistrates and barristers and perhaps the political nature of both groups can be seen in an astounding yet curious case in Hampton Parish, Kings County, in 1902. Lawyer R. LeBert Tweedie was charged with "knowingly, maliciously and willfully" committing perjury before Stipendiary Magistrate Robert G. Earle.²¹¹ It appears from the twenty-three page court record compiled by Justice of the Peace Samuel J. Morton, the trial judge, that Tweedie had continually misled the court as to the whereabouts of a client and had thereby delayed a trial hearing more than once. The existence of a verbatim transcript of the perjury trial was highly irregular and was not normally prepared unless an appeal was considered likely. The convicting justice found Tweedie guilty (and he states this) but felt compelled to dismiss the case on the advise of the Attorney General! It is difficult to reconstruct Magistrate Earle's reasons for bringing the contempt charges. It is possible that the whole proceeding was politically motivated owing to the fact that R. L. Tweedie was the brother of the current premier, the Honourable Lemuel Tweedie. This may also explain the highly unusual intervention of Attorney General William Pugsley. It may have also occurred in reaction to the government's move to replace magistrates with district courts operated by legal professions that has already been discussed in this section. Or perhaps, it may have precipitated from a grave instance of contempt shown for the magistrate's court; there appeared to be little love loss

²¹⁰While letters of resignation are not as common in the cabinet records as are requests for appointment, the nevertheless occur with regularity; for example, two JPs resign on December 10, 1891: PANB, RS9 (Executive Council), 1891 December 10.

²¹¹PANB, RS482 "Records of Justices of the Peace for Kings County, Parishes of Cardwell, Greenwich, Hampton, Havelock, Kingston, Studholm, Morton, and Sussex", Case File A. 1902 (*Rex v. Tweedie*), Hampton Parish.

between Earle and Tweedie. Justice Morton certainly believed the charges were warranted and, at the very least, this case shows (if not in an extreme way) the strained relationships that developed between some legal professionals having to practice in courts presided over by experience-based judges and some citizen magistrates.²¹²

That the magisterial offices were political or patronage-based positions is easily confirmed in the fact that the provincial government's appointment of the Saint John City magistrate (a lucrative office) nearly overthrew the Blair government in 1890. As Wendall Fulton has explained, only the negotiation of the political pact known as the "Northumberland Deal" by Lemuel Tweedie averted the government's defeat.²¹³ Notably, the city magistrate was invariably a lawyer; this shows the complexity of the partisan issues and the importance of maintaining separate lay and professional turfs.

While both legal professionals and citizen magistrates had political clout, the influence of professionals and lawyers with government and as agents of the state was increasing. The continued appointment of non-legally trained individuals to magisterial commissions would therefore loom before lawyers as an unjustified anomaly. The situation of James McQueen, a successful lawyer who held the post of police magistrate for Shediac (near Moncton) from August of 1918 until December, 1921, provides a good example.²¹⁴ Aside from being a

²¹²R. LeBert Tweedie died in 1903.

²¹³Conversation with Wendall Fulton concerning the entry on Lemuel Tweedie that he is preparing for the *Dictionary of Canadian Biography*.

²¹⁴PANB, RS9 (Executive Council), 1922 January 4.

barrister, solicitor, and notary, McQueen held a post as Master in Chancery and as legal representative for the Bank of Montreal in Shediac. It is not surprising then when McQueen recommends as his replacement a recently retired business associate who had managed Shediac's Bank of Montreal. Perhaps, being police magistrate also shut out too many potential criminal cases as it became more common for lawyers to appear in magistrates' courts. The bank manager, George A. White, would have been familiar with many legal transactions, and it was not often easy for government to find willing replacements, especially owing to the temperance debate, the lowly financial incentives, and the possible accusation of fee-misappropriation. It was not out of the ordinary then for a retired bank manager to be appointed as "Police Magistrate for the Town of Shediac and Police and Stipendiary Magistrate for the County of Westmorland Resident in Shediac Police District". He was commissioned on the same day that the Executive Council accepted McQueen's resignation.²¹⁵

While Mr. McQueen may not have been concerned about the legal training of the local police magistrate in Shediac, the contrary opinion was gaining hold over the leadership of the Barristers' Society of New Brunswick. Efforts by the law society intensified in the pre- and post-war years strongly calling on their fellow lawyers in government to take action to professionalize the police magisterial positions through the appointment of legally-trained county magistrates.²¹⁶ For instance, the barristers at their annual meeting in 1940 were particularly concerned about the practise and procedure in the lower courts and about the large number of

²¹⁵PANB, R59 (Executive Council), 1922 January 4.

²¹⁶PANB, MC288 (records of the Barristers' Society of New Brunswick), MS2/D. (legal profession), 1944.

those courts. The result was the introduction by Premier and Attorney-General J.B. McNair of county magistrate legislation in 1942.²¹⁷

The legislature approved the 1942 bill which provided for the appointment of barristers having at least three years experience to the posts of county magistrates. All city, town, parish, and stipendiary courts would be abolished upon the appointment of the county magistrate. No justice, parish commissioner, police, sitting, or stipendiary magistrate would be allowed to hold courts following the county-wide appointment.²¹⁸ The new magistrate would have the criminal jurisdiction of two or more justices of the peace and would be able to handle debts not exceeding \$100 and tort cases not exceeding \$60.²¹⁹ For a bill proposed in the midst of the war years, there was a fair amount of discussion on it in the legislature. McNair stressed the fact that the system would only become operative in the counties after

the matter has been taken up with municipal authorities and a satisfactory arrangement worked out with respect to payment of salary and other matters related to the office. The magistrate's salary will be fixed and will be paid by the Province and the county in such proportions as the Governor in Council may provide after negotiations with the local authorities. The magistrate will not

²¹⁷The relationship of government to barristers was a close one. McNair continued his law partnership during his premiership, for instance. Mr. Fairweather, the Attorney General in the Flemming administration after the appointment of William West to the Appeal Court, stated in the Legislative Assembly in 1959 that there "has always existed in New Brunswick the closest possible cooperation of the Bench, the Bar, and the Department of the Attorney-General. This is very significant and is something for which I am grateful and will do all that I can to foster." : *Synoptic Report, 1959*, Book I, 229. Lawyers had significant influence but luckily this power was balanced on the other had by their public unpopularity.

²¹⁸The *County Magistrates Act*, S.N.B. 1942, c. 58, did not attempt to take away the non-trial jurisdictions of these officials.

²¹⁹Compare this with the jurisdiction of local and parish courts: \$80 maximum debt and \$32 maximum tort: *Local Courts Act*, R.S.N.B. 1927, c. 121, s. 4. The jurisdiction of stipendiary magistrates varied with the district, but could try larger matters than the parish courts. Justices of the peace had jurisdiction in debt matters to \$20 and in torts to \$8 and frequently were responsible for collecting outstanding municipal taxes: *Justices' Courts Act*, R.S.N.B. 1927, c. 123, s. 2(1).

retain any fees of office.²²⁰

The new legislation dealt with many of the problems that the legal establishment perceived had existed with the system prevailing at the time. The attorney general outlined six main advantages of the change: (1) the magistrate would have legal training; (2) an increase in the efficiency of rural justice would result owing to the fact that the official would make circuits in the county; (3) the administration of justice would become more uniform throughout the province; (4) the "evil" fee system would be eliminated; (5) the costs of justice would be reduced overall, and, (6) the need for jury trials would be reduced. The procedure in civil actions was also to be improved. Agreeably, this review of the myriad of procedures and court distinctions was sadly needed; however, the system would not prove to be less expensive as this could have been done by providing a small salary for existing magistrates. McNair finished the introduction of the bill by stating the following:

A good magisterial system is of great importance to the country. It has been estimated that over 90 per cent of our criminal and quasi-criminal matters are dealt with by magistrates. There is a definite demand for a change in our system and I have no doubt that during the consideration of this bill by the House, many helpful suggestions will be advanced.²²¹

On second reading of the bill, the premier expressed the feeling that a magistrate might act for more than one county and that the salary would vary somewhat depending on the work load of the area served. The aim, like that of the urban police magistrate, would be to have a full-time

²²⁰New Brunswick. *Synoptic Proceedings of the Legislative Assembly* (Fredericton, 1942), 63-64 (hereafter, 1942 *Synoptic Proceedings*).

²²¹1942 *Synoptic Proceedings*, 64.

person on the job; they could not continue to practise law following appointment. During the committee stage of the bill, much of the discussion centred on the cost savings that should be realized by the rationalization. More work is needed here, but it is difficult to see how a paid system would save money. Instead, the intent was to professionalize the provision of justice; for the time being, the justices of the peace would retain their roles.²²² Justices still had authority to undertake pre-trial processes, but it appeared that this jurisdiction would be discouraged. The *County Magistrates Act*, S.N.B. 1942, c. 58, was passed during the session.

It is important to note that the legislation responded to the lawyers' concerns by providing for uniform procedure in the County Magistrates' courts and by ensuring that only barristers could be appointed to the new county positions. While from a rational standpoint these changes can be justified, the new legislation constituted an open attack on citizen magistrates and the involvement of community members in the core of the justice system as adjudicators and jurors. McNair stressed the voluntary nature of the 1942 legislation for political reasons; the salary of the new official was to be paid on a proportional basis by the province and the municipality and so whether or not the legislation was implemented was left to the discretion of the municipal councils. The law society on the motion of William W. West congratulated the government on the introduction of the legislation, but it opposed the optional nature of the statute. In 1944, the society sent a letter to remind the government that many young lawyers would be returning

²²²1942 Synoptic Proceedings, 190-192. When one member observed that the prisoner might have a prolonged wait in jail for a hearing, the Attorney General replied that "no increased hardship would result". This exchange leads me to believe that the use of lesser magistrates for pre-trial matters was to be discouraged after implementation of the bill. Please refer to *R. v. MacPherson*, [1995] N.B.J. 277 (C.A.) for a recent case where a man spent a weekend in jail without being brought before a justice; provincial court judges were routinely not available over weekend periods in some areas.

following the war and efforts should be made to ensure that municipalities created county magisterial positions in order to provide employment for those young, returning veterans.²²³ Owing to the political clout of the municipal councils and JPs, the county magistrate scheme remained voluntary.²²⁴ Half a decade later, only three counties out of 14 had taken advantage of the new courts and appointed county magistrates; these new magistrates included J. Thomas Troy in Restigouche County, John P. Morrissy of Northumberland, and Charles H. Elliott in Victoria.²²⁵ By 1952, there were six county magistrates and two deputies in eight counties; Percy H. Steeves acted as a deputy county magistrate in both Albert and neighbouring Westmorland Counties.²²⁶ These results show that County Magistrates were first appointed in the North and East, these counties were primarily Acadian and generally poorer in an economic sense. Eleven police magistrates (four were non-barristers) administered justice in the more affluent, southern parts of the province.²²⁷

²²³PANB, MC288 (records of the Barristers' Society of New Brunswick), MS2/D. (legal profession), 1944.

²²⁴J.B. Dickson, the Deputy Attorney General stated at the annual meeting of the Barristers' Society of New Brunswick in 1943 that "the Government would be loath to do so [make the county magisterial positions mandatory] in the face of opposition from County Councils and from Justices of the Peace, and he thought it would be a matter of educating the public.": PANB, MC288 (records of the Barristers' Society of New Brunswick), (annual meetings), 1943.

²²⁵Public Accounts in *Synoptic Report*, 1947, 76. Louis A. LeBel served as a Deputy Magistrate for Restigouche County and John P. Barry and Frances L. Fish were a deputies in Northumberland County. The salaries for the County Magistrates varied between \$2100 in Victoria County to \$3480 in the two other counties. Deputy County Magistrates received about \$300. Other expenses including the rental of court room space, travel costs, stenographers were extra. The total costs for County Magistrates including expenses totalled \$9443.65 for the three counties. Comparatively, the total figure for criminal (\$6617.99) and liquor (\$2050.78) prosecutions for the rest of the province was \$8668.77; this fee includes the expenses of police magistrates (\$129.40), official stenographers (\$212.92), material witnesses (\$687.77), other witnesses (\$59.85), and professional services such as crown prosecutors (\$7392.38) and liquor analysts (\$146.20). Lawyers were well-paid at over \$7000 as prosecutors and over \$9000 as county magistrates.

²²⁶A county magistrate was not yet appointed.

²²⁷Police Magistrates who appear not to have been barristers in the province in 1952 are Fred M. Boyd of Hartland, T.J. Caughey of St. Andrews, Dawes Gilmore of St. George, A.J. Kelly of Hampton, G.G. Baird of Chipman, and John Day of Gagetown (representing Charlotte, Kings, and Queens Counties).

The McNair Liberal administration faced an election in 1952. It may be significant that McNair chose that year to introduce a reform of the police/stipendiary magistrate positions in those shires not yet a part of the county magisterial system. Certainly, the opposition would have been small; most of the non-barrister police magistrates were elderly, and the remaining justices primarily concerned themselves with non-court matters.²²⁸ McNair observed the "Local" magisterial court legislation²²⁹ would "materially reduce the multiplicity of classes of magistrates and inferior courts" that existed. However, more importantly for McNair and fellow lawyers, the bill would "provide a uniform procedure for civil proceedings in all inferior . . . courts"; it mirrored the strategy of the county magistrates' statute. The premier stated in the Legislative Assembly:

Our several classes of inferior courts were established very many years ago when conditions were different from those existing today. The procedures in each of them have grown up haphazardly through the years and this bill, in my opinion, represents the second serious attempt at modernization and improvement of a system that has been cumbersome for many years and has proven successful beyond our expectations.

If this bill passes this House and becomes law, I am sure it will prove to be a boon to litigants and solicitors who now must thread their way through the maze of our existing court legislation.²³⁰
[emphasis added]

²²⁸McAdam justice of the peace George Craig in York County contradicts my generalization; he continued to hear criminal and civil trials until 1952; the year coincided with the appointment of a county magistrate for York and marked the introduction of new local magistrates legislation. Similarly, records show that some justices in Victoria County had been active until a County Magistrate had been appointed in 1943.

²²⁹*Local Magistrates Act*, R.S.N.B. 1952, c. 137, repealed by S.N.B. 1973, c. 74, s. 51 (at the time of the subsequent statute revision).

²³⁰*Synoptic Report*, 1952, 346.

Indeed, the "boon" to solicitors would be significant as their colleagues would come to replace even "Local Magistrates" as the initiative spread. In effect, the remaining civil/criminal court authorities of justices of the peace, parish commissioners, and the non-barrister stipendiary magistrates ended with the promulgation of this legislation in 1952. Provincial penal authority was gone in many counties under the provisions of the *County Magistrates Act*. Criminal jurisdiction, while technically still present,²³¹ did not exist in reality due to the general attitude and policies of the provincial government and as we shall see next, the police. I can only surmise through these measures the government encouraged the exclusive use of police magistrates for penal matters; the rapid expansion of police magistrates into the rural areas in the first two decades of this century helps support my assertion that succeeding governments were attempting to create a limited and controllable number of criminal courts as well as support a new policing apparatus.

During the same period as the development of the county-wide magistrate system, the law society was engaged in a strategy to protect and enhance the monopoly of its practising lawyers "in the smaller centres against the J.P. competition."²³² The law society was becoming ever vigilant about consolidating the professional position of lawyers in New Brunswick, especially

²³¹The federal parliament is responsible for criminal procedure (not courts) and the existence of the justice in New Brunswick was recognition of a "justice's" court under the summary offence and preliminary trial matters. The *Interpretation Act* of the province still reads that any reference to "justice" or "magistrate" means a justice of the peace. Confusion in the criminal and penal realms may have been the reason for the passage of an amendment to the *Summary Convictions Act* in 1956 to ensure that the magistrate references only referred to county or local magistrates and did not include JPs: S.N.B. 1956, c. 62.

²³²Letter from M.G. Teed to D.R. Bishop, June 27, 1947: *Teed Papers*, F1-24. A letter from Marcel O. Paulin, a barrister in Caraquet, Gloucester County, was received by the law society in 1946 complaining of the competition from notaries public and JPs in "the drawing of conveyances, wills and other legal documents" and in "the giving of legal advice by such persons": PANB, MS 288 (Barristers' Society of New Brunswick), Annual Reports, 1946, 392.

in the eyes of government (already sympathetic) and the public. In 1940, the bar renewed its efforts to create a lawyers' liability fund. Such a fund was particularly important because it was to be created in order to show government that the society was serious about protecting the "public interest", especially in relation to real estate matters. The renewed calls for a liability fund coincided with similar measures in other jurisdictions²³³ and with the maturation of national law associations such as the Conference of Governing Bodies of the Legal Profession in Canada (national conference) and the Canadian Bar Association. The strategy of the New Brunswick Barristers' Society to rid the province of JP conveyancers centred its campaign on the protection of the public. It needed to create a liability fund to show that it was serious about aiding the public good, and secondly it would then be free to lobby in order to stop magistrates from drafting deeds. In a letter from Gerald H. F. Teed, K.C., to D.R. Bishop, a barrister in Woodstock, Teed clearly describes the battle plan:

The only sound basis as far as the Government is concerned is protection of the public and the two things can be linked together in that way but the [Barristers'] Society will get nowhere on the exclusion of J.P.s alone without the fund to back it up.

I personally think that it is most important that the worst examples of J.P. conveyancing should be collected together and shown to the Attorney-General so that our talk about protecting the public will have some concrete backing.

Barristers Gerald Teed, D.R. Bishop, Harold Drummie, Arthur Limerick, W.J. West, and Roger Pichette would become key-players in the push for more professional control over the justice system in New Brunswick. It is not surprising that Teed, an able and outspoken Saint John

²³³Similar efforts were made in Manitoba in 1943, for example. New Brunswick barristers were also looking further afield to a scheme in New Zealand that excluded magistrates from conveyancing work: Teed to Bishop, June 27, 1947, *Teed Papers*, F1-24.

attorney, would represent the province's bar on the national conference in 1936, and he would also serve as President of the provincial Barristers' Society for several years during the middle of this century. William West would become Attorney General under the Flemming government and serve in Cabinet with Roger Pichette. West would also order the important Nicholson Commission into the administration of justice in the province that reported in 1959; this report would serve as a blueprint for judicial changes in the province for two decades.²³⁴ The others served on the Barristers' Council and/or key committees of the society. D.R. Bishop would chair a committee looking at the matters of liability funds and the problems associated with legal disputes arising out of conveyancing by non-professionals.

It would be wrong for me, however, to paint the members of the law society as in total agreement over the move to rid JPs of their ability to transact real estate transactions and record wills; there was concern even on the committee headed by Bishop investigating the conveyancing issue that "such action might cause a hardship by preventing a Justice of the Peace from doing work in an emergency." Bishop pointed out, however, that any changes to the law would not preclude JPs from handling wills in an emergency and wills "would seem to be the only occasion in which an emergency might cause hardship". There was also reluctance by a perceived "majority" of the province's barristers against any expensive legal liability fund. Bishop suggested that practitioners might be more willing to support changes to their legislation to suppress the activities of the JP's and create the fund if the Assembly refused to amend section 15(4) of their Act that allowed notaries and justices to prepare real estate documents.

²³⁴West resigned in 1958 to sit on the Appeal Court in New Brunswick; he would also serve as Judge for the province's Court of Divorce and Matrimonial Causes in the 1960s.

Accordingly, Bishop agreed with Teed that they should approach the legislature with the problem during the 1948 session.²³⁵ It is clear from the existent letters that the Barristers' Council felt strongly about the need to stop JPs from competing with rural practitioners and about the importance of developing a liability fund.²³⁶ Teed, Bishop, and others were not, after all, dealing with fictitious conveyancing difficulties by some magistrates; in fact, they no doubt felt the suppression of JP conveyances was indeed a noble goal. I do not want to paint these members of the Barristers' Society as merely self-interested; they felt the development of the liability fund, the removal of JPs from real estate matters, and the final creation of a lawyer monopoly in such matters would be in the unfailing interest of the public good.

The barristers of the province did not directly succeed in excluding the justices from deed and mortgage preparations; such a move by the government would have been strongly resisted by members of the Assembly, the municipal councils, and the justices, themselves. Even the law society recognized the strength of these forces in mid-century New Brunswick. However, the attorney lobby did secure the disestablishment of the lower magistrates by supporting the 1942 and 1952 magistrates' legislation. Most importantly, the *Local Magistrates Act*, R.S.N.B. 1952, c. 137, ended the possibility of local justices' courts, and this paved the way for the new Hugh John Flemming government (Progressive Conservative) of 1952 to gradually stop appointing JPs. The barristers did manage to create a liability fund in 1954; and there are only three

²³⁵Teed and Bishop hoped that the expected rejection of their bill changes would raise the eyre of the profession; it is very interesting to see the strategy unfold in society correspondence: *Teed Papers*.

²³⁶Teed felt strongly that the efforts of the society to convince the members of the Legislative Assembly to stop JPs from drafting deeds would not succeed "unless the practitioners other than those residing in the cities press their members [of the Assembly] very hard.": Letter to D.R. Bishop, February 23, 1948, *Teed Papers*, F1-39.

commissions of the peace issued after 1956. It is very likely that the Honourable William John West, by this time the Attorney General in the Flemming government, managed to halt the appointment of local justices. West had supported the idea of a licensed conveyancers act and had moved a Barristers' Society resolution to that effect in 1943; however, not even he was able to stop the existing justices from drafting deeds, mortgages and wills when his government made amendments to the barristers' legislation of the province in 1954.²³⁷ Neither the McNair, Flemming, or subsequent Robichaud government tackled the issue of removing the commissions or powers of the existing justices; that might have jarred the JPs in the Acadian regions, a significant number of the JPs still "practising" at this time. Magistrates were simply left to die off as their threat was minimized.²³⁸

The Conservative Flemming administration and the succeeding Liberal Robichaud government continued the efforts of professionalizing the lower criminal courts and of consolidating control even over the county magistrates. In 1966, Robichaud's government implemented its Programme of Equal Opportunity. County governments were abolished. One might expect that the representative function of justice of the peace might have increased following the disappearance of the county councils, but it is likely that there were too few justices to do this in any comprehensive way. Again, the abolition of county municipal governments further helped

²³⁷The bill created the much needed legal compensation fund for losses caused by attorneys; however, the government was unable to disenfranchise the existing magistrates. Even when a new Barristers' Society bill was passed in 1973, section 15(2)(d) still protected justices in preparing and drawing instruments relating to land: *Barristers' Society Act*, S.N.B. 1973, c. 80. The Act remains unchanged today, except that the society changed its name to the Law Society of New Brunswick.

²³⁸"There was an alternative suggested, that any J P's appointed after, say, the first of March 1948, should not be able to practise law, which I feel might have some hope of success as it would not incur the wrath of the present J P's and before many years have passed the present situation would begin to correct itself.": Letter from Gerald Teed to D.R. Bishop, February 23, 1948, *Teed Papers*, F1-39.

to eradicate local support for magistrates and dissolved another layer of community leadership. And, as part of the rationalization and centralization of government services in New Brunswick, the *County Magistrates Act* was repealed and replaced with the *Magistrates Court Act*, S.N.B. 1966, c. 14. This new legislation provided for supervisory control over magistrates and was soon replaced by the *Provincial Court Act*, S.N.B. 1969, c. 17.²⁹ Under the *Provincial Court Act*, magistrates were called Provincial Court Judges and had jurisdiction province-wide; New Brunswick was among the first provinces to do this. Anyone appointed under the Act as judge would need to have been a barrister for five years. A deputy judge needed two years experience. The court's civil and small debt collection jurisdiction was abolished and transferred to the superior courts.

In 1973, justices were taken off the list of those officials that needed to continue to receive *The Royal Gazette* gratuit, and the statute concerning JPs was not placed in the 1973 edition of the *Revised Statutes of New Brunswick*. The *Justices of the Peace Act*, R.S.N.B. 1952, c. 122, was repealed in the 1984 session and proclaimed in force on Canada Day, 1985. No commissions of the peace were actually revoked (this would have required an order-in-council); instead, all known justices were contacted by a letter from Attorney General David R. Clark advising them of the "expiration" of their "authority as a Justice of the Peace". After expressing the gratitude of the Government of New Brunswick for many years of service, the form letter went on to say:

²⁹One might argue that the state attempted to bring greater supervision and control over the daily business of some lawyers through the increased supervision of centralized court control and also through the appointment of full-time crown prosecutors in place of the on-need-basis of clerks of the peace. Solicitors of the crown were now to be professional civil servants; the clerks of the peace, one of the final officials connected with the sessions of the peace, were abolished on the recommendation of the Byrne and Nicholson Commissions: refer to debate surrounding the *Crown Prosecutors Act*, S.N.B. 1966, c. 6.

The office of Justice of the Peace is a rather ancient office in terms of the history of this province, originating at a time when a very real need was filled by Justices of the Peace in providing a measure of local administration of justice. The circumstances of the province have altered radically especially in the last two decades, and as a consequence, the role formerly occupied by a Justice of the Peace is now performed by a combination of the legal profession and full-time legally trained judges of the Provincial Court and Court of Queen's Bench. These individuals are located throughout the province and today adequately attend to the requirements of the province for local administration of justice.

The letter was gracious, if somewhat incorrect in not identifying the breadth of JP authority over the years. Those wishing to become commissioners of oaths could do so at no charge if the appointment was of value to the justice or the justices' "community". As already identified, the impetus for the change was the concern that a few justices were using their powers to draft wills and land deeds which might cause legal difficulties in the future. Instead, the reality was that most justices were quite elderly and the legislation was simply no longer needed and, in fact, the legislature also passed a bill in the 1984 session creating standard conveyancing forms that would have alleviated any of the outstanding difficulties.²⁴⁰ However, owing to poor records, the Justice Department was unable to notify all justices, and it has become necessary on occasion for the department to advise an elderly person that they should no longer be using their powers as late as 1994, a decade following the repeal of the Act.²⁴¹ All judges in New Brunswick are

²⁴⁰This is an important point as the Law Society of New Brunswick had worked for some time to create standard conveyancing forms to help reduce the growing claims to the lawyers' liability fund for conveyancing mistakes by attorneys. The agenda of the Law Society to have a standard conveyancing statute passed may have precipitated the action to repeal the magisterial legislation.

²⁴¹Technically, no commissions were ever revoked in 1984 or 1985. Those justices still alive, therefore, have all the authorities and privileges of Justices of the Peace and cannot have their jurisdiction terminated by a letter of the Minister of Justice. However, letters have been the practise. Every two or three years, an elderly justice is discovered notarizing a document, and the government must contact the person, advise of the policy of the government, and offer the individual the option of becoming a commissioner for taking affidavits and oaths. A justice was last discovered in the Acadian part of Northern New Brunswick in 1993: Telephone interview with Director of Consumer Affairs, New Brunswick Department of Justice, January, 1993.

ex officio justices of the peace, and the provincial court judges exercise a jurisdiction defined as being the power of two or more justices of the peace acting together.²⁴² However, there are no more citizen magistrates involved in the court system of the province, not even in Aboriginal communities, and the *ex officio* offices exist for merely technical reasons. Less than a dozen magistrates still make use of their commissioners' of oaths powers in 1995 and continue to act informally in their communities as they are able.

Professional Police Keep the Peace

If the lawyers as an arm of the state had an important influence on the restriction of the lay magistrate's judicial role, the development of a professional law enforcement agency in New Brunswick also aided in the effective death of their existing criminal jurisdiction. Magistrates had historically been at the front-line in keeping the peace; they were approached to issue a warrant, to initiate criminal proceedings, or to call out the parish constables. They also were responsible more directly for policing themselves. Moves toward professional police forces would fundamentally change a preventive and reactive system into one centred on catching perpetrators and giving physical protection. Police in the service of government regulators and crown prosecutors (before the 1960s, clerks of the peace)²⁴³ would become the primary point of contact for citizens and criminals alike.²⁴⁴

²⁴²Returning officers and deputy returning officers also possess the authority of a justice of the peace under provisions of the *Elections Act*, R.S.N.B. 1973, c. E-3, s. 88.

²⁴³Moran records a rare example of a public prosecution in rural areas handled by Clerk of the Peace and County Secretary L. A. Currey in Quaco, Saint John County on April 27, 1898: Moran Papers, Book A, 114.

²⁴⁴In other provinces the police are so much the focal point of the system that the magistrates are seen as supplementary appendages to an efficient police operation! Nova Scotia has moved recently so that JPs are only available in the proximity of police offices: *Halifax Chronicle-Herald*, 1996 March 23, D47.

Prior to the 1920s, policing was primarily the responsibility of parishes, cities, and towns. Urban areas like Saint John had early histories of full-time police forces dating from the mid-nineteenth century Orange/Green riots and before; other population centres also benefitted from more dedicated forces, including Moncton, Newcastle, Fredericton, and Woodstock. Even these early forces came under the supervision of magistrates. However, the majority of the province continued to rely until this century on unsalaried, citizen constables²⁴⁵ which were nominated and appointed by the residents of each parish.²⁴⁶ There were steps taken by the government in 1898 to create a fee-based system of constables that would have jurisdiction throughout the province, primarily for the service of court documents and for criminal apprehension.²⁴⁷ Temperance (or *Scott Act*) Inspectors were also employed to enforce prohibition and liquor laws. It was not until 1927 that a province-wide paid police force was created, largely drawn from the former liquor inspectors as the province moved from enforced temperance to alcohol-regulated sales.²⁴⁸ The New Brunswick Provincial Police was short-lived, and it was displaced by the

²⁴⁵They were paid small amounts or fees for travel, serving summons, or performing other services.

²⁴⁶Two JPs or a Police Magistrate had the ability to appoint "Special Constables" to police a parish in the event of an emergency under the *Municipalities Act*. It is still the common law right of any peace officer to require a resident to assist in apprehending law breakers. Those helping constables are also protected against civil and criminal prosecution. The reliance on citizens to perform emergency duties was also in place for firefighting; JPs could enjoin anyone to battle a forest fire under the former *Game Act*. Today, Forest Service Officers have this authority under the *Forest Fires Act*, R.S.N.B. 1973, c. F-20.

²⁴⁷There "was a small little known body called Provincial Constables acting under the Attorney General's Department. Its members were authorized to enforce law beyond the boundaries of their own municipalities: B. J. Grant, *The Evil That Men Do: Crime and Punishment, Three Centuries in New Brunswick* (Saint John: Summerville Press, 1993), 71. Seventeen Provincial Constables were appointed in 1909 (one year after Moran appointed a Notary Public in 1908) and 23 in 1929; those commissioned had to pay a five dollar fee to the Provincial Secretary and were to hold the post upon pleasure. Provincial Constables were even appointed into the 1950s "Public Accounts" in Synoptic Proceedings...1909, 1929, 1951 (4 Prov. Constables appointed in 1951). They were sometime appointed to meet certain needs of communities or in very remote villages.

²⁴⁸Toole: Was there a lot of wife beating then? Boby: There was a lot of squabbles, an awful lot of squabbles. You know, they'd... Toole: Was it mainly because of liquor? Boby: Yup, and that year, too, they'd opened the first liquor store there [Port Elgin, N.B.]. Of course that came in with...the provincial police. We used to say that, "After the liquor law" — because Mr. Baxter, Premier Baxter introduced the liquor law, and he was really condemned for that, you know,

Royal Canadian Mounted Police in 1932 under depression-related factors of fiscal economy. Some local constables were probably overjoyed with the creation of dedicated police as they would no longer have to concern themselves with penal matters; the parish constable appointment did provide some minor income, but the reality was that the post was often difficult to fill.²⁴⁹ The introduction of the New Brunswick Provincial Police in 1927²⁵⁰ and later the R.C.M.P.²⁵¹ meant that policing operations were no longer locally based. Officers worked out of detachments, usually located near the major centres of the county where a resident police magistrate also lived. Police magistrates became the main points of contact for the constabulary,²⁵² and the use of JPs declined because of geography and police convenience. This shift in function was seen as desirable; after all, police magistrates were in fact appointed to deal with criminal and provincial offence matters. Hence, even by the time of the statutory changes in the 1940s and 1950s, most penal decisions except minor liquor offences were made by police magistrates and not justices, and this was seen as the norm.²⁵³

and so forth. So, then when the...Provincial Police were introduced, they said that that was to enforce, to help enforce the liquor law. Well, it was to a certain extent, but I mean there was no policing outside of the cities at all... Maybe a village or two here and there might have had their own constable... [My Husband, Bobby] was the first one [in Port Elgin] you know... So if anything went wrong anywhere, 'Call Bobby, Call Bobby.'": Transcript of an interview with Eleanor Bobby by Janet Toole, PANB, MC1840, March 21, 1989, 30-31.

²⁴⁹The job could prove dangerous and often did not pay enough to make the time and effort worthwhile. There is some evidence to suggest that single young men were appointed as parish constables in some localities; this signalled as right of passage from boy to adult: W. D. Hamilton, *Old North Esk On the Miramichi*, Fredericton, 1979, 787.

²⁵⁰R.C.M.P. took over N.B.P.P. constables: Bobby, 27.

²⁵¹The R.C.M.P. already had a small presence in Saint John, N.B., before 1932 in relation to smuggling and custom matters: Grant, 81.

²⁵²This was the general practice in St. Quentin, Restigouche County: LeBel interview.

²⁵³There were, of course, justices that did act in criminal matters. JPs that did act were generally older and residents of more isolated areas. George Craig, J.P., of McAdam handled civil cases until 1952. W.S. Hargrove handled at least one matter under the *Intoxicating Liquor Act* in 1940: Synoptic Report, Public Accounts, 1940, 71. Parish Court Commissioner J.H.S. Allain also handled liquor matters in 1941: *Synoptic Reports*, "Public Accounts", 1941, 67, and James A. Murray in 1947 (page 79).

The move away from the use of JPs, however, was only possible due to the increasing ease of transportation in New Brunswick. At one time, the local constable would have been charged with choosing the three-person juries for local debt courts and with serving papers and apprehending anyone directed by the magistrate. As automobiles became common and road networks were improved, it became possible for a few police detachments in each county to perform judicial duties. Furthermore, work was increasingly based upon salaried employment as opposed to agricultural or seasonal labour. This meant that the older system was less convenient for people working for wages — members of parishes and communities — to take time to serve as constables or jurors (especially for minor matters). By the 1940s, justices rarely exercised criminal and civil court powers or called a jury; this was handled instead by the police and stipendiary magistrates. And, local constables became redundant as their enforcement jurisdiction was carried out essentially by the paid forces in the provincial service.

Myth Serves Its Purpose

There are many complex circumstances and factors that call out to be discussed as we look at the matter of JP decline and the disappearance of rural leadership and identity. This is especially true given the current realities of the Province of New Brunswick: its highly centralized court systems, the nonexistence of rural government in the hinterland, the multinational control of its natural resources and workforce,²⁵⁴ its ongoing loss of population to other parts of the country, and its increasingly urban focus. Fiscal circumstances are driving

²⁵⁴I refer here to the virtual monopoly of the McCain and Irving families and their expanding business interests.

other provinces toward this New Brunswick model. Accordingly, in this brief study, I have documented the major moves of the state to respond to new realities in this century. As money became available, it created a police force. Most of the money for this new force came from the state sale of liquor and fines from the regulatory scheme. This successful state regulation was just one move among many that demonstrated the growing fiscal thirst and associated need for state control. The provincial bureaucracy and the professional legal establishment co-operated to rationalize the court and justice systems, eradicating local involvement and variation through juries or magistrates, thereby ensuring a level of certainty and monopoly. I have also shown how magistrates, themselves, contributed to their own decline by group inaction, individual stubbornness, fee indiscretions, lack of self-training or creation of training programs, apathy, and inattention to public perception.

I have hinted at other factors. New Brunswick and the other Atlantic Provinces have been plagued by outmigration of their young and trained people for the past century and more. For example, a study prepared for the New Brunswick Committee on Reconstruction by J. R. Petrie shows that the population of New Brunswick had only risen by 60.1% from 1871 to 1941 where as the population of Canada over that same period had doubled.²⁵⁵ The province and the world was also changing dramatically by the 1940s. There was an increasing ease of transportation and communication, a growing access to education and training, an expanding economic enterprise and federal revenues, a move away from localized economies, and a pronounced shift

²⁵⁵New Brunswick, *Report of the New Brunswick Committee on Reconstruction, 1944*, (Fredericton, 1944), Table 6. The same table showed that the population of seven counties had changed by less than 30 per cent; three of these seven counties had lost population!

to an urban-based society. State or bureaucratic intrusion into citizen's lives was also on the rise. All of this meant a changed environment, one that seemed to have little space for legal generalists like citizen magistrates.

Most importantly, I have identified the partially successful assault of the law society on citizen judges; the Society developed a clear strategy to remove any vestiges of judicial and legal authority away from non-professionals. When all of this is combined with the reduction in magisterial jurisdiction, it is little wonder that the myth of the justice of the peace as a fumbling deed drafter crystallized. The myth of course has some aspects of truth about it. There is a body of New Brunswick case law reflecting the needs of residents to clarify their title to land as a result of JP bungling; however, there is even a greater body of law showing the real estate fumbles of trained professionals. Real estate and will transactions should not have been the primary role of magistrates in any event; however circumstances combined to give them that ability and then slaughtered them for taking on the few remaining privileges that they had. The justices were not without blemish for they were politically-appointed creatures and exercised their pull; however, they perhaps did so quite defensively against the massive assault of bureaucratic and professional forces. Such a decentralized and varied group of individuals was unable to guard its interests and those of communities by cooperative action and, in any event, they were no match for the more organized and affluent forces of the state. In many ways, they may not have even viewed their situation as anything to safeguard.

In spite of these forces, magistrates continued to occupy a position of trust in smaller communities even after 1984. Their effective powers (as opposed to theoretical ones) were greatly reduced, but their resilience is a testament to their local value and worth! Even today, those that are able continue to assist their families and neighbours with the completion of statutory declarations and oaths and provide access to the representative sphere of government and state as commissioners for taking affidavits. The presence of the JPs far outlived the period that McNair, West, Teed and others had envisaged.

CHAPTER 5

REFLECTIONS

"A revolution is not blood in a square but a fundamental shift in values".²⁵⁶

The repeal of the *Justices of the Peace Act*, R.S.N.B. 1952, c. 122, in 1985 signified the symbolic achievement of a long-standing objective by New Brunswick's professional forces and signalled a pivotal shift in the province's judicial history. The provincial state and legal bureaucracy had finally managed to overcome the perceived problem that citizen magistrates represented to the formal legal system. While the event was an unhappy one for the few justices still exercising their responsibilities, the demise of the official passed by unnoticed by most citizens. That Her Majesty's Justices of the Peace survived until 1985 is certainly a testament to their resilience and usefulness; on the other hand, the absence of protest or fanfare at their passing shows just how successful the learned attorney lobby and state forces were in characterizing the JP's work as amateur, redundant, and out of keeping with the new utilitarian order of the modern state.

Today, New Brunswick is a leader in providing centralized and uniform judicial services for its residents. There are no complicated jurisdictional alternatives. Most criminal matters are handled by the Provincial Court. All other matters are handled by Judges of the Court of Queen's Bench, including small claims; serious criminal trials; and family, civil, and probate

²⁵⁶A paraphrase of a radio comment by Peter C. Newman on Morningside, CBC Radio, November 1, 1995.

disputes. All judges have province-wide jurisdiction. Appeals from trial courts are decided by the New Brunswick Court of Appeal. This process appears to be very good on the surface, but there are some elements of justice missing in such a system. There is little community involvement; the courts are run by and administered by attorneys. Land and legal matters are exclusively in the purview of legal professionals. In short, the legal realm is a monopoly unto itself. The system is often inflexible, expensive, and frustrating to citizens, victims, and accused persons. Aboriginals and police organizations, in particular, are discovering this across the country in their own ways. Citizens complain that the justice establishment does not respond to their needs: it is slow, expensive, rights and litigation-oriented, adversarial, and difficult for the lay person to understand. These calling-cries were not the hallmarks of the lower court justice that I have attempted to describe in Chapter 3.

Let us briefly review the main points of the magisterial story in New Brunswick. Justices of the peace have existed in the region since the British colonization of Acadie, and they signified a familiar presence in British-secured territories.²⁵⁷ JPs exercised extensive criminal trial powers sitting collectively in the Court of General Sessions of the Peace, and shared decisions over smaller civil matters in the Clerks' Courts. The more senior magistrates (often a mixture of lay and legally trained appointees) presided over the Inferior Courts of Common Pleas which could deal with more expensive civil suits, and these Justices of the Common Pleas also sat for New

²⁵⁷Nova Scotia or Acadie had justices of the peace as early as 1606; however, Virginia was the first to employ a complete English pattern somewhat modified. Virginian courts would later serve as a model for other British usurpations and for Nova Scotia after 1749: see generally Charles J. Townsend, "Historical Account of the Courts of Judicature in Nova Scotia" (1899), 19 Can. L.T. 25.

Brunswick's first century as judges in the supreme criminal courts.²⁵⁸ In 1795, the Inferior Courts of Common Pleas were granted exclusive jurisdiction over any civil matters under twenty pounds. Clerks' courts outside of the City of Saint John were replaced by Justices' Civil Courts also in 1795 — institutions of record that would exist in New Brunswick until 1954. Initially, JP's courts had jurisdiction in debt matters up to five shillings, but this limit was eventually set at twenty dollars by the mid-20th century. Perhaps more importantly for the purposes of understanding the role of magistrates, JPs exercised a wide-range of discretion in court settlement and criminal matters and often served in the place of solicitors or notaries public in the parishes.

Contrary to the general bureaucratic trend in Britain (and Europe, generally) at the turn of the 19th century, New Brunswick did not support a growing salaried bureaucracy. Instead, the infant colony made extensive use of non-salaried justices of the peace to reach its organizational arm into the urban areas and hinterlands, and the powers and responsibilities of magistrates continued to increase until the mid-19th century; in fact, the range of duties became almost overwhelming for me to document — from the handling of misdemeanours to performing marriages. This growth in administrative and local authorities during the latter part of the 18th and first half of the 19th century has been compared in this paper to the class-based growth of JP powers in England by Parliament during its ascendancy in the middle years of this

²⁵⁸ I am in essence speaking here of the circuit courts. When the supreme court of judicature sat outside the capitol, it normally did so under a commission of oyer and terminer into the 1870s. In these cases, the bench of the court consisted of one justice of the supreme court and at least one justice of the inferior court of common pleas. In Saint John, the "circuit court" consisted of one supreme court judge and at least one of the senior justices of the peace for the city and county (there being no Inferior Court of Common Pleas in Saint John). It is possible that JPs also sat rarely on the bench of these courts outside of Saint John where no justice of the Inferior Court of Common Pleas was available.

millennium. While the social class aspect of the English developments bear little similarity with the situation in New Brunswick, JPs were certainly one beneficiary of the provincial parliament's developing power.

The increase in magisterial responsibilities — the first one — coincided roughly with the growing influence of New Brunswick's Legislative Assembly in its own right until 1850. In fact, it is the course towards responsible government that eventually leads to what I have portrayed as a renewal in the justices' sway and energies — a second rise — that triggered a rebound in the usefulness of their community-based courts. The two periods that I have described roughly correspond to the pre- and post-Confederation periods. The divisions may appear to be artificial, and to some degree this is true, especially the rough dates that I have chosen as breaking points; however, a great number of changes occurred in magisterial jurisdiction during this late 19th century period. County administration, long a function of the justices in sessions, was replaced with elected municipal institutions by 1877. The County Courts created in 1866-67 took over the criminal jurisdiction of the sessions. The utilitarian moves to rationalize and reduce the effective number of courts led to increases in the appointment of police and stipendiary magistrates and the creation of the parish courts in 1876 (actually led to more courts and confusion). In contrast, justices of the peace continued to hold their criminal "petty" sessions, their summary offence tribunals, and their small claims courts and, in fact, they continued to occupy an important place in this intervening period as their summary authorities continued to increase under the criminal and temperance statutes of the Dominion government even beyond the criminal codification of 1892.

It is important to note at this stage that while justices were either members of the assembly themselves or had important family, business, or political connections to assemblymen, magistrates can hardly be viewed in any stage of common law history as the pawns of the executive government or merely agents of central surveillance. Justices of the peace often had dual if not multiple "personalities" when it came to the exercise of their duties.²⁵⁹ JPs were indeed representatives of the Crown and therefore acted as an arm of government, but they also broadly represented the community, county, parish, and residents. Moreover, each commissioner of the peace no doubt had a personal agenda which included matters of business, religion, and politics.

Legal academics concerned with Atlantic Canada have for some time assumed that lay judicial officials never recovered following the loss of the sessions powers and after the creation of New Brunswick's county courts at Confederation. However, this study strongly challenges those assumptions. The two principal findings of this study have been that the glimpses seen in existent records of citizen magistrates show a renewal or rebirth of their functions in the late 19th and early 20th centuries and, secondly, that magistrates became casualties of a growing state apparatus under the guises of a more powerful legal profession and an increasingly urbanized and technological society that failed to see any value in magisterial experience.

The importance in my mind of uncovering this resurgence of community justices is that it proves that our court system was decentralized and utilized a semi-autonomous means of providing

²⁵⁹Groer, 19, and implicitly in Weaver, 10-12.

justice through local discretion and innovation not so long ago and that New Brunswickers were served by a plurality of court officers and courts that ranged from being very informal and accessible to being somewhat stuffy and central — each with a purpose. These courts together formed a comprehensive (if inconsistent) judicial system, but an apparatus that nevertheless included community residents in the decision-making process — especially by using lay officials and juries — in ways not deemed acceptable today. Justice was not in the exclusive realm of supreme court judges and barristers! Lower court judges also had an inherent and important role in concert with local juries and citizen prosecutors. Secondly, the people, ideas, and circumstances that intersected to disinherit the JPs of their responsibilities and functions in New Brunswick by 1985 formed a mixture of planned action in the case of attorneys and government officials, of technological circumstances, and of magisterial inaction. In the midst of these forces and changes, elements of local control and community purpose resisted and reacted to the ingredients for greater state control such as the securing of a barrister monopoly over legal affairs, the development of a provincial bureaucracy and police presence, and the changing patterns of life (urban). In fact, this paper documents in part the creation of the modern social welfare state and the complexities of its legal development.

In this final chapter, I will first of all outline the JP renewal or resurgence that I have attempted to document and, secondly, reiterate the story of the forces that challenged magistrates to disappear. We will then briefly discuss some of the implications of the existence of these "courts of conscience" and of the repercussions of the utilitarian forces that both combatted communities and, ironically in some respects, fostered their lingering presence. This chapter

will attempt to discuss some new directions that should be explored in today's context that arise out of this historical discussion: should we decide to preserve some of the community features of the historic common law system of justice? Readers are challenged to question the wisdom of our society's current direction where our collective or state well-being is placed in the opposing court against local consultation and welfare and where the certain economic interests and groups are given exclusive control over important sectors of society such as justice without making those sectors accessible, flexible, and efficient. We must carefully consider the historical evidence of local courts presented in the previous chapters and ask whether it is time to return to a more favourable balance which would promote a level of local empowerment and involvement in justice matters. Have we lost the neighbourhood and hence hampered the possibilities of our justice system — or have we just recreated a modern notion of communities? Indeed, is the change from the local administration of justice and services to a provincial one in New Brunswick anything short of a revolution?

Resurgence of Community Courts

The central theme of this study has been that at the turn of this century citizen magistrates had the ability to respond flexibly and sensibly to the civil and criminal judicial needs of local residents. The irony of the situation was that this development took place at the same time when justices of the peace appeared to be losing their role in local and provincial affairs. Several factors enabled this rebirth or renewal to happen. A primary ingredient was the state of the province's independent political and tough economic environment in the late 1800s. Members of the legislative assembly enjoyed a freer party discipline before 1900 and often held significant

political sway over the policy directions of government. One must also consider the value and power of rural magistrates as appointees of these "independent-acting" MLA's, the state of transportation, and the importance and reliance of the public on magisterial functions. The New Brunswick court system was not always a formal, expensive, highly centralized, and inflexible apparatus as some might describe it today. In the not so distant past, the judicial system could take many faces: this included the rather informal face of rural justices, the relatively high volume criminal courts of urban police magistrates, and the often neglected "courts of conscience" known as parish commissioner courts.

Equity, in its broadest sense (or discretion as others might label it), was exercised beyond the realm of barristers and the chancery courts of the province; this study shows that this "equity" was routinely exercised in the courts of local magistrates and commissioners. Richmond, J.A. of the Nova Scotia Court of Appeal has recently equated this local discretion with "fairness" and "common sense".²⁶⁰ My paper relied principally on the magisterial records of Captain William Moran to show this exercise of discretion; Moran employed his brand of justice to the parties before his court through the frequent arbitration and settlement of civil and criminal cases and the "selective enforcement" of the penal law.²⁶¹ When all else failed, local juries or committee

²⁶⁰Comments of Freeman, J.A. of the Nova Scotia Court of Appeal were cited with approval by Lamer, C.J.C. in the majority decision of the Supreme Court of Canada in *The Reference Re: The Residential Tenancies Act (N.S.)*, [1996] S.C.J. No. 13, paragraph 63.

²⁶¹Today, selective enforcement is still in many quarters viewed as acceptable; however, this responsibility has been almost entirely removed from the formal court system. Instead, the police and the crown attorneys now exercise these responsibilities. Where did community values fit in with Paul Bernardo case and the plea bargain with Karla Homolka, for instance? Are police and prosecutors becoming more aware of community needs and responding somewhat to them? Today, "selective enforcement" is done outside of the neighbourhood and can be rather secretive.

of justices often decided more serious cases. Moran dealt with few repeat offenders in criminal matters, and there was limited evidence of supreme court review of his cases. Indeed, I have suggested that these innovations were not confined to the "squire's" tribunal in St. Martin's Parish. Studies of earlier New Brunswick justices by D.G. Bell, the magisterial records of JP Robert Young and Parish Commissioner Flewelling, and the claims of individual magistrates written for the 1854 review of the justice system all support this assertion; settlement and selective enforcement were commonplace and constituted an equity of the inferior courts. Juries and benches of justices also comprised possible procedural safeguards in these local courts.

I am hopeful that the information that I have presented will show that, within the context of period life, the innovations of magistrates' courts of New Brunswick (and probably elsewhere) provided an accessibility, simplicity, affordability, and flexibility in outcome that is unavailable today — even amongst less formal small claims and administrative tribunals. However, I realize that there are a number of criticisms which could be levelled at my conclusions that magisterial courts were indeed freed-up in a manner that genuinely benefitted the larger community and allowed them to flourish again in the decades surrounding the turn of this century. First of all, let it be known that I am not suggesting that the "community courts" that I have attempted to outline are infallible or perfect; accordingly, I recognize that it would still be useful to explore briefly some of the possible criticisms and issues that have eluded discussion elsewhere in this study. Some of the obvious issues are that justices of the peace tended to represent more conservative elements of society; were almost exclusively male appointees; often exemplified a loose class system; and, were selected chiefly along ethnic, religious, and political lines. I will

attempt to address each of these issues briefly in turn.

Perhaps the most serious of these possible complaints revolves around the issue of the exclusive nature of the appointments. How representative of communities could magistrates have been if they did not reflect the social fabric of parishes and localities? How accessible were these magistrates to Catholics, Aborigines, or women in need; did they command their trust and respect and did they feel free to approach them? Roman Catholics, Acadians, Women, Blacks, Irish, and Aborigines were generally not part of the early appointments of the New Brunswick administration. Early JPs tended to be prominent Anglicans or Scots (Presbyterians). A few French Catholics were appointed in New Brunswick in the early years, but it was not until the mid-1800s that things began to change. It was in the era of responsible government that more non-Anglicans found their way into the magisterial ranks; this is especially true of the Irish, Acadians, and religious dissenters. The laws concerning the appointment of non-Anglicans and non-Presbyterians to government posts were relaxed by 1834.²⁶² By the 1880s, a substantial number of Acadians occupied magisterial positions — although primarily from the mercantile and elite families of Acadian society.

Women were not appointed as magistrates in New Brunswick until 1904, and I have found no records of women occupying the full-time stipendiary or police magistrate posts which

²⁶²"[Le] serment du test" or "big oath" was no longer required by 1834 as a result of an Act of the provincial legislature: Albert, 105-106.

sometimes did occur in other jurisdictions.²⁶³ Even after 1904, the inclusiveness was limited in New Brunswick. Appointments of women as citizen magistrates were I would suggest pragmatic responses to situations. Yvonne LeBel was initially commissioned in order to assist with legal matters of her husband's law practise while he was away at the legislature. Others like Margaret McNair served as stenographers of police courts and took on the responsibilities of sitting magistrates when the normal magistrate was sick or unavailable.²⁶⁴ LeBel eventually made the JP post into an important part of her own occupational experience and performed a myriad of conveyancing and estate work, but this was something that she enjoyed doing and put special effort into developing. The place and acceptance of women as magistrates and how this stride came about calls out for further research and study. What role did these magistrates have on the acceptance of women in the legal profession, generally? Did these magisterial offices provide a way for women to catapult into the legal realm? Or were these developments merely the results of pragmatic situations?²⁶⁵

I have found no records of Aboriginals or Blacks serving as magistrates in any period. New Brunswickers with African roots lived in the province nearly as long as the Europeans,²⁶⁶ with

²⁶³Emily Murphy was appointed as police magistrate, for instance, in Alberta in 1916 and presided over juvenile courts in Edmonton in 1916: W. S. Stewart, *The Macmillan Dictionary of Canadian Biography* (Toronto: Macmillan, 1963). Women received university-based legal education as early as 1893 in New Brunswick; however, few finished the requirements of the bar until Mabel P. French fought to be admitted in New Brunswick in 1907. French was later the first woman admitted to the Bar of British Columbia, in 1912: Lois K. Yorke, "Mabel Penery French (1881 — 1955): A Life Re-Created (1993), 42 U.N.B. L.J. 2 at 4.

²⁶⁴McNair might be related to Premier J. B. McNair.

²⁶⁵See Appendix A for a preliminary list of names of women appointed as justices of the peace in New Brunswick.

²⁶⁶A Black accompanied Champlain on his voyages in 1604; the man had been to North America before and acted as a guide for Champlain.

many coming as free loyalists or slaves in the aftermath of the American Revolution; however, there has never been a significant Black population in New Brunswick as exists in neighbouring Nova Scotia.²⁶⁷ Yet, there are important communities of Blacks near Saint John, in Minto, and in Queens' and Sunbury Counties. The Malicite and Mi'kmaq peoples were not forced into permanent reserve areas until the 1800s and thereafter were often neglected or left alone by government.²⁶⁸ With the union of the British North American provinces, Aboriginal policies became a federal responsibility, and the outdated *Indian Act*, R.S.C. 1985, c. I-5 which was legislated in 1876 still governs many Aboriginal relationships made provision for separate, federally-appointed justices of the peace for reserve areas. While I can find no record of federal JP appointments in New Brunswick, it is safe to assume that Indian Agents appointed under the *Indian Act* were also entrusted with these magisterial duties. As in other areas, the historic interaction of Aboriginals and Blacks with inferior courts deserves further study.

I can do little to expand on the conservatism of some magistrates nor on the point of magistrates as constituting a distinct class. In fact, most evidence points to the fact that many magistrates had little in common: some were merchants, others farmers, and still others professions or entrepreneurs. Some had considerable economic clout like William Moran and Robert Young

²⁶⁷Many Blacks left for Sierra Leone as a result of what has been called the "Back to Africa Movement" of the 1790s. Thomas Peters, a Loyalist and sergeant in the Black Pioneers (a British military force composed of volunteers), spearheaded the calls for better land grants in Saint John and the ancient Annapolis County (now Digby) of Nova Scotia; when these efforts fell on deaf ears, he headed to London to seek better terms for his fellow refugees. This effort did spark the movement, and Peters returned to the Maritime Provinces to promote the scheme along with a benefactor, John Clarkson. For more details, see James W. St. G. Walker, *The Black Loyalists: The Search for a Promised Land in Nova Scotia and Sierra Leone, 1783 - 1870* (Toronto: University of Toronto Press, 1992).

²⁶⁸L.F.S. Upton, "Indian Affairs in Colonial New Brunswick" in *Acadiensis* (Spring 1974), III, 2, 3. See also an article by Judith Fingard in *Acadiensis* about the New England Company and its botched effort to educate Aboriginals in colonial New Brunswick.

(whose records tended to survive) while others possessed only the basics to support themselves and their families. Even the "rascally", penny press of the late 19th century supported this view. Regardless of their individual stature, active magistrates tended to have substantial influence in their communities and some sway in the political constituency.²⁶⁹ This influence cannot be denied; however, it does not have to be viewed as sinister or self-interested; in fact, these connections created benefits for communities and their members. It is also possible that the lack of common interests of magistrates outside of politics may have been the deciding factor in their inability to hold onto their authorities and duties as a collective body; perhaps, they had so few things in common that they did not view themselves as a group! With the disappearance of the sessions in 1877, JPs had little reason to gather together on a county or area basis.²⁷⁰

This study has already recognized and identified other obvious limits of these community court officers. Both the laws and the magistrates of New Brunswick tended to be conservative on matters of morality and religion. This is especially true of the social welfare and family policies in existence before the middle of this century. Moran and others commonly had to deal with instances of children born outside of marriage, those suffering from mental illnesses, neglected children, and orphans. The ancient poor laws adhered to in New Brunswick until the 1960s²⁷¹ required the rate payers to pay for any impoverished people within their parochial precinct (later,

²⁶⁹I am here speaking of "active" JPs; "honorary" JPs had influence in other ways.

²⁷⁰There is one important exception to this statement. JPs often were required to hold court in pairs or groups of three in order to dispose of certain charges. Justices did little of this in New Brunswick after the turn of the century — when stipendiary and police magistrates were appointed. Stipendiary magistrates under the Dominion statutes were given the authority of two or more JPs acting together; they could therefore sit alone and decide a case.

²⁷¹The Poor Law of 1786 was copied from the Elizabethan system in England; it existed until the Robichaud government finally replaced it with a more comprehensive and fair system under his Equal Opportunity reforms: J. M. Whalen, 54.

municipality); hence, children born without a father to support them were viewed as possible charges on the parish. Magistrates ensured that higher parish rates were not required by forcing marriages on occasion.²⁷² Finances were not the only issue here; morality and religious beliefs also played an important role. This action is of course extremely disturbing in today's context, but it demonstrates the influence of religion and the fiscal responsibility of magistrates. This report has also uncovered alarming examples of possible abuses by one magistrate (lawyer) of his power to intern "insane" individuals into the Provincial Lunatic Asylum. This magistrate appears to have detained a suspiciously high number of women within a brief period!²⁷³ There were also disturbing instances of the unnecessary breakup of families, the banishment to the next parish of single women with children due to the possibility of increased poor rates, and the detention of orphans outside of their region or even province. The breadth of the powers of justices of the peace and police magistrates was almost overwhelming; it is difficult to believe that such a range of administrative powers and expertise would be expected of and imposed on individual citizen magistrates, with an expectation that they could perform the tasks well all of the time.

Furthermore, JPs were sometimes accused of scandals, greed, ignorance, blind stubbornness, and prejudicial treatment of minorities and personal enemies (sounds like the criticisms levelled against the professional legal community even in recent decades!). While it is true that some

²⁷²It is perhaps difficult to understand in the modern context, but I have seen ample evidence of at the satisfaction of local officials at being able to return money to the parish or provincial treasury due to frugal spending!

²⁷³The interment of wives by their husbands with the aid of a doctor and/or magistrates is a most curious activity. Were these women in need of the limited medical assistance available at the asylum or is some other more transparent relation happening. Is this event as sinister as it might appear or is it for the benefit of the women or the family or both? These judicial/administrative processes by the magistrates and doctors involved require more investigative work!

magistrates would not be immune from such charges owing simply from the sheer numbers of JP appointments in the province, it is important to look at the sources of these condemnations. First of all, few judicial systems in this country could not be cleared of prejudicial treatment towards ethnic minorities in any era. This realization does not lessen the problem of inappropriate treatment, but it does place it into context with the "professional" courts. Secondly, many of the scandals — particularly those related to the improper retention of fees and fines — came about as a result of issues relating to the lax or overly zealous enforcement of liquor laws. Temperance issues constituted important debates in New Brunswick before and after the turn of this century, frequently dividing communities and counties; frustrations were often directed at community and justice leaders and how they were responding to liquor enforcement. It is therefore important to note that no magistrate was ever convicted of knowingly withholding fees in this century, and only one justice of the peace was formally removed from office for the improper use of authority. Finally, many of the criticisms levelled at the poor education of citizen magistrates came from the reform press of the late 19th century and from the legal profession. The newspaper editors were primarily interested in seeing elected county governments replace the justices in general sessions, a burden most justices wanted removed! Democracy at the local level was the goal, and as I have already noted elsewhere, many of these outspoken editors graciously accepted the honorary title of "magistrate" once elected municipal governments were put in place. This paper has also dealt extensively with the interests of lawyers that saw the uneducated lot of magistrates as unfit to decide cases. Much of this can be attributed to the bar's goal of legal monopoly; however, there were no doubt some genuine concerns of lawyers and others. And, I have indeed uncovered more than one instance

of magistrates apparently using their powers for political or personal reasons; the R. L. Tweedie case was a good example.

However, the majority of citizen magistrates were not investigated for their proceedings nor were they looked down upon by community members. Quite to the contrary, there is overwhelming evidence that local residents (and particularly merchants) relied on magistrates to handle their land dealings and testamentary needs. Even when lawyers became more numerous than JPs in the 1960s and 1970s, rural residents continued to utilize and trust the conveyancing abilities of local magistrates.²⁷⁴ Further evidence also exists to support my assertions. I believe that Moran's benevolent nature was not isolated. He wrote letters on faulty goods for acquaintances, sent correspondence to bill defaulters and others seeking settlement or even partial payment, and carefully used his common law powers of "keeping the peace" for selective enforcement. Other magistrates are known for drafting petitions to provincial officials, helping community members find jobs, clarifying legal matters, assisting with problems encountered while dealing with provincial officials, and for the judicious settlement of accounts and disputes. They were often paid with goods, not cash. Bushels of apples were the reward of Lloyd McGibbon and Harry Lanyon for assisting some farmers with their fuel rebates in the 1970s. The importance of having an official in each parish and community that could help others with minor legal issues and other problems should not be understated. In this century, especially, justices of the peace did not represent the power of governments as much as they

²⁷⁴Discussions with Ronald L. Steeves, Director of Transit and Parking, City of Fredericton, 1995. He described how he purchased his camp property in rural New Brunswick in the 1970s. The person that he was buying the land from suggested that they go and have the deed completed by an aging magistrate, who inexpensively and as they waited completed the document.

acted to resolve peoples' difficulties with governments and others; in this sense, they were more like MLAs and ombudsmen than anything else. These supplementary functions were important to local residents and show the servant-like nature of N.B.'s magistrates.

Forces of Demise

The introduction of stipendiary magistrates did not have the desired effect in New Brunswick; it did not result in the replacement of lay court officers with legally trained ones, even though the move met with success elsewhere in Canada. However, the prolonged appointment and political clout of lay citizens as magistrates did have an effect in New Brunswick; it created a backlash effect. Once the legal professionals were able to erode the political support for local magistrates, they were also able to remove any vestiges of the official from the justice scene. The eventual demise of citizen magistrates and the decline of associated community power and autonomy did not crystallize at the behest of the population, but they were casualties of a growing state apparatus in New Brunswick. The evidence for this assertion is especially strong if we are able to look beyond the strictly judicial functions of justices of the peace and other magistrates. The state was able to reform the court structures to exclude lay officials and juries but could not arbitrarily alter the value of local justices as notaries and solicitors in rural areas nor as local sources of information and representation. To a centralized bureaucracy, a generalist official like a justice of the peace was uncontrollable and perhaps a liability. The state acted (as a result of changing values) through at least three sources to attack the jurisdiction and power of magistrates: through lawyers, the police, and governmental officials. The motivations differed for each group, and their efforts would be successful. What were these changing values

that I elude to here? They could probably best be described as rationalization, professionalization, and centralization. These utilitarian goals were embraced by public administrators as necessary components of the modern state. Some viewed these values or goals as avenues which allowed governments to respond to citizen's needs better, more uniformly, and with greater degrees of justice. But, is better justice and administration always the result of such moves?

Functionally, JPs and magistrates posed the greatest threat to lawyers, and barristers in the province would continue to push for the exclusion of justices both as judges and conveyancers from the late 19th century until 1984. The pre-Confederation legal establishment was strongly opposed to the expansion of inferior court jurisdictions, and even legal reformers called for a rationalization and consolidation of local courts (even though they supported courts of conscience). Stipendiaries were appointed beginning with the aftermath of the Orange Riots and were appointed as the need arose across the province. These ethnic, religious, and political riots constituted the local factor for the creation of stipendiaries, but their introduction was also part of a larger and more pervasive movement.²⁷⁵ Further efforts aimed at rationalization were also made: the sessions were abolished in favour of legally trained County Court judges, reformers managed to secure the creation of parish commissioners with the hope of appointing barristers to the posts, and efforts were made in the 1880s and 1890s to create federally-appointed district

²⁷⁵The appointment of a stipendiary for the Portland Parish was suggested by the Lieutenant Governor and petitioned for by a few city residents. T. W. Acheson, in describing the policing situation in Saint John, states that even 13 years following the appointment of New Brunswick's first full-time magistrate, the City of Saint John still utilized a pluralistic model of justice that differed in each parish. In making sense of this, he describes the stipendiary policing model as part of "the centralizing tendency of the urban order and the influence of the new utilitarian and evangelical ideas of order, progress, efficiency, and equality; he juxtaposes this with the conclusion, however, that the city's "tradition of local autonomy remained deeply ingrained." Acheson, 229.

courts presided over by lawyers. Fortunately for the process of lay (informal) justice, the attempts to put legal professionals in charge of even the local courts by appointing them as parish commissioners and police magistrates failed when not enough attorneys were lured by the meagre profits of these posts; the government was forced to continue to appoint lay magistrates in many instances as the provincial finances were too tight to do anything else.

This essay has strongly documented the historic role of JPs as local notaries²⁷⁶ which included the important responsibilities of preparing and executing deeds, mortgages, wills, and other legal instruments. Not only did this notarial business constitute a significant part of a magistrate's fees for a year, but these responsibilities were important in the agricultural and forestry-based economy where transportation was expensive, time-consuming, and difficult. Lawyers were less likely to be available in rural towns or areas; hence, the local JP or magistrate served an important function by making land and legal transactions possible even in the hinterland. There were other factors that made the use of magistrates desirable to the population. Local justices were numerous, known, accessible, and often respected by area residents. Justices knew the lands and their boundaries from personal knowledge in their vicinity which lessened the possibility of mistakes in real estate dealings.²⁷⁷ JPs' fees were generally less expensive than

²⁷⁶More studies need to be undertaken, but notaries were uncommon in New Brunswick before 1850; they were not even mentioned in Peter Stubs' important "kitchen" manual for justices of the peace and merchants, called *The New Brunswick Manual*, published in Saint John in 1841. Stubs was an attorney in Charlotte County. Notaries have their roots in the ecclesiastical tradition and are still appointed in Great Britain through the Court of the Faculties.

²⁷⁷Lawyers also potentially had an intimate knowledge of land ownership in their areas; however, lawyers were less likely to practice in rural communities.

those of a practising attorney.²⁷⁸ And, if the truth be known, lawyers were never very popular.²⁷⁹

The Attorney-Magistrate struggle over control of land and mortgage transactions heated up in the 1930s. New Brunswick lawyers wanted a more secure monopoly over the provision of legal services in the province, and conveyancing transactions were a major source of income for the lawyers.²⁸⁰ This was not a uniquely New Brunswick phenomenon; in fact, a national movement towards a more organized profession was developing and had other implications.²⁸¹ The growing hallmark of professionalism was seen as a group's commitment to serving and protecting the public. These changes became especially true as the professions grew to include teachers, nurses, and others. Professionals would need to convince politicians and the public of the better service and protection that their self-regulation and accompanying monopoly would provide. The barristers of New Brunswick such as Teed and Bishop employed this strategy to rid themselves of the "troublesome" magistrates by attempting to prove to government that JPs were incompetent and by promising that lawyers would create a liability fund for the transactions

²⁷⁸I have no firm data to back this statement up; however, I do have the perceptions of others, including Louis Murphy, a Saint John Member of the Legislative Assembly (until 1995) and JP. Murphy suggested that many of his constituents needed a free or low cost alternative to lawyers when it came to notarizing documents: Telephone conversation with Louis Murphy, Fredericton, January, 17, 1995.

²⁷⁹Criticism of the bar in 19th-century New Brunswick hinged on two related arguments, that lawyers' political involvement threatened to corrupt public life and that their professional monopoly perpetuated an outdated, cumbersome, expensive and sometimes oppressive justice system": from an excellent article, Greg Marquis, *Anti-Lawyer Sentiment in Mid-Victoria New Brunswick* (1987), 36 U.N.B. L.J. 163 at 165. In this sense, JP courts would have been "progressive"; the bar has accomplished a turnaround by the 20th century!

²⁸⁰Conveyancing was the principle business of barristers practising in the smaller centres; for them, money was in conveyancing not in drafting wills.

²⁸¹The Conference of the Governing Bodies of Law Societies in Canada was created in 1926 with the aid of the Canadian Bar Association to promote mutual cooperation. The Federation of Law Societies of Canada grew out of the Conference body: Federation of Law Societies of Canada, *Handbook/Manuel 1994/95*, Montreal, 1994.

of their members that would provide superior protection to the public.

While we have seen that the wishes of the New Brunswick Bar with respect to magistrates²²² were not fully realized until 1985 with the repeal of the *Justices of the Peace Act*. Still, the rationalization of local courts under the McNair and Flemming governments did effectively freeze the influence of local magistrates. The financial and transportational situation had changed significantly by 1942 to allow for judicial reform and court consolidation. The governments found an easy way out of the dilemma: simply stop appointing JPs and hopefully the problem will disappear in time. In spite of the reforms, however, some rural justices of the peace continued to practice in their solicitorial roles until 1985.

As I have already suggested, lawyers were not the only group of individuals attempting to secure a monopolized turf. Government officials were beginning to perform a greater supervisory role over local officials including crown attorneys, court stenographers and staff, sheriffs, and coroners. Local courts and their officers were finding themselves subject to a new level of accountability to government as the court systems were "modernized" and made more uniform. For instance, the *ad hoc* arrangement of appointing a local lawyer as a part time clerk of the peace with prosecutorial functions by 1966 had developed into a full time position where attorneys were employed by the Crown to prosecute criminal cases. Stenographers and clerks positions also developed into full-time employment.

²²²The legislative justice reforms in the middle of this century would eventually lead to a replacement of all lower magistrates with professional county magistrates. The change was a mixed blessing for barristers; it would rid the province of lay tribunals but would also take away magisterial positions from some lawyers acting as police magistrates as after 1942 there would only be a maximum of two magistrates in each county.

The development of full-time policing across the province also affected the jurisdiction of magistrates, especially the justices of the peace. Parish and county constables had carried out rural policing duties in early New Brunswick. The ethnic and social upheavals of the 1840s in the province led to the first paid constabulary²⁴³ and magistrates in larger population centres. This development eventually resulted in the expansion of police magistrate offices to towns across New Brunswick in about 1900. The enforcement of prohibition laws in the late 19th century also resulted in the expansion of police-like services — first of all as local temperance inspectors and decentralized provincial constables and later as a motorized provincial police force to regulate the new liquor commission system in 1927. The revolution in transportation made this shift from local to provincially-based constables possible. Police officers tended to use the police magistrates almost exclusively; accordingly, JPs were excluded from the criminal court processes and from the enforcement of Federal laws, except in areas where no police or stipendiary magistrates were available. Governments could not effectively enforce more elaborate regulatory schemes such as prohibition or liquor laws without a dedicated police force.²⁴⁴ The modern welfare state could not exist today as we know it without a dedicated bureaucracy and a mobile constabulary.

The replacement of justices of the peace, parish commissioners, and lay stipendiary magistrates with full-time officials came about as the result of a myriad of intersecting factors. While

²⁴³The former keepers of the watch were paid for their night surveillance duties; however, the new police force in Portland, for instance, were paid very well (60 pounds) to attract good candidates: Acheson, 227.

²⁴⁴In effect, the opponents of the liquor commission scheme worried about increased crime and social disorder if alcohol were readily available again; government was only able to pacify the opposition by creating a formalized police force. In a sense, the police force was a prerequisite in all Canadian jurisdictions as liquor "regulation" swept the "dry" provinces.

lawyers were a significant influence in these changes, the cause of the JP decline is better described as resulting from the general rise of the state and that state's intervention in its citizen's lives. Lawyers were of course central to this process both as players and as agents of government and the state. Lawyers, police, and other officials were all needed to respond to and administer the growing centralized and regulated systems. All of these things placed additional burdens on geographic communities that were already feeling great shocks as a result of decades of outmigration to urban areas and other jurisdictions. In this rational order — the new order — justices of the peace and other citizen magistrates were viewed with suspicion and disapproval. The myth of their bumbling nature was all that was known about them. They were relics of the past, too out-dated to play a role under the new regime. This was especially true given their use of local juries and magisterial benches; such a system would not seem possible in the complicated, modern, salaried society. They could not be co-opted into the court administration in New Brunswick as happened in the other provinces still using JPs because their court functions had long since lapsed. They were therefore expendable. The myth had eventually brought success.

Implications of Resurgence and Demise

There has been much talk in Canada about youth and adult diversion, mediation, arbitration, and initiatives such as sentencing circles. All of these innovations are about bringing the community in on the decision-making level for small crimes and civil disputes. Much of the discussion of these issues has emanated from attempts to make justice less adversarial and more sensitive to cultures and communities. However, these debates are not new in Canada. My study has

brought evidence forward that shows that British-based local court systems in this country, particularly in New Brunswick, did as late as this century involve local community members in case determination and sentencing and also often attempted to find solutions outside of the formal criminal and civil systems. Local juries of three were empanelled until the 1930s (and perhaps later) in New Brunswick to decide matters in stipendiaries' and justices' civil courts; juries were also employed in determining some criminal matters brought before magistrates. Jury use strengthened and preserved trust in the magisterial courts on a local level but also gave state reformers and legal professions more reasons to push for the exclusion of justices' tribunals. It is apparent that the administration of justice was viewed as a community or county affair as opposed to a provincial or federal one. By far, the greatest majority of cases found their way to these inferior courts as opposed to other more "superior" tribunals; for instance, Premier McNair speaking in the Legislative Assembly estimated in 1942 that nearly 90 percent of all judicial issues were handled by magisterial courts. Justices and magistrates like Moran were granted significant levels of discretion and autonomy in ways that have become impossible today in our more "professional" courts and tribunals. Far more striking is the fact that after the turn of this century, the importance of JPs was not based on their civil and criminal court jurisdiction, but instead rested on their role as substitute solicitors and local community representatives. These functions have received the least study.

These levels of discretion and the plurality of courts available need to be studied further, especially as they might help inform the debate on needed changes to our current judicial

apparatus.²⁸⁵ The decisions and findings of lower courts were always reviewable, but with the overwhelming evidence of informal arbitration, settlements, and the flexible enforcement of the penal laws by the lower courts, it would be difficult not to admit that the formal justice system did tolerate a variety of forms — forms that depended on the seriousness of the crime or the value of the civil action. The implication of this, to emphasize the finding, is that the equivalent of today's ADR (alternative dispute resolution) and diversion were fundamental, acceptable, and inherent aspects of the formal justice apparatus, not inferior cousins. When you add in the jury use in inferior courts, the parallels with the current community-based and Aboriginal justice models would be difficult to ignore. Again, I am not attempting to downplay the innovations and cultural achievements of various First Nations' traditions, but I am attempting instead to point out that JP courts did provide New Brunswick residents with a judicial flexibility that may inform and help bolster (in a small way) the legitimacy of ADR and diversion discussions.²⁸⁶ The legal profession would be hard-pressed to disregard these parallels. Small claims tribunals followed in a similar tradition by providing cost-effective and less formal solutions to problems, but these courts do not take an active role in seeking inter-party settlement. The emphasis on adjudication even in small claims tribunals is perhaps the result of having legal professionals as adjudicators. While some flexibility on the civil side exists, it is important to note that there are currently few options for less formal or alternative criminal dispositions, even dealing with minor crimes. And, there are certainly no more holistic and more healing-based options. The

²⁸⁵The reality is, on the other hand, that only a small percentage of the estimated 4000 appointed JPs actually held courts, primarily in the rural areas. The estimate is from *Le Moniteur acadien*: Courturier, 90 at note 121.

²⁸⁶Settlement techniques are an important part of the superior court process; however, few people have the economic clout to be heard before that court. The costs of courts include substantial amounts for the preparation and filing of court documents, the payment of lawyer fees, witness and evidentiary costs, and substantial waiting periods.

findings of this study could be used to justify the inclusion of alternative approaches to justice as a fundamental or integral aspect of the formal legal system.

This study has also relied on the idea that the justice system for many decades represented a balanced approach toward community involvement on the one hand and the need for experienced legal actors and the legally trained on the other. However, this essay has showed clearly how those trained in the "law" managed to squeeze out many elements of community participation. For instance, New Brunswick magistrates faced opposition to their conveyancing and estate work — a legacy that continues to haunt their memory in New Brunswick. It is interesting to note that today deeds and land transactions are being increasingly automated and taken out of the hands of lawyers by the state. Law societies see these changes and realize that other forms of work must be found and concentrated on in order to employ their membership in the face of technological innovations. Accordingly, many professional legal associations are focusing increased attention on forms of mediation. With these developments underway, there are dangers that lawyers will attempt to monopolize or "colonize" mediation and arbitration services in the coming years, as they have with administrative tribunals and magisterial courts. This move could take away the role of non-legally trained mediators and arbitrators and could also limit the possibilities of future community voluntarism in the area. These moves could also challenge the ability of individuals and groups to develop and maintain their own systems, experts, and leadership that help them meet local needs and conditions. I am not suggesting here that lawyers should be excluded from the ADR field, for they have a strong history here as well. But, there should be a serious discussion underway in our society about the extent of

professionalization desirable in these important areas, and efforts should be made to preserve a place for more pluralistic approaches to issues.

We must ask ourselves in this decade whether there is still room for community or lay participation in our legal system? I think that there is and that such room is critical in order to broaden our ability to adapt and find solutions in the future. One way that might assist in ensuring a place for communities in ADR and diversion processes is to attempt to introduce the concept of plurality and community action into law school curriculums. This might help to eradicate some of the elitism of the "rule of law" doctrine and help teach students how to foster and deal with community approaches to justice. This strategy was suggested by Edson L. Haines in order to restore the use of the civil jury in Ontario in the 1950s. Haines expressed the thought that law students could be trained in how to use the jury to their client's advantage to settle disputes; civil "lawyers use juries as the most potent weapons in the effecting of a settlement".²⁸⁷

There are some definite advantages to placing disputes outside of the adversarial court processes, and many of these would benefit the legal profession. Civil settlement and criminal flexibility help encourage residents and neighbourhoods to solve their own problems, especially day-to-day difficulties. This lessens the growing burden of courts. Secondly, peaceful approaches help empower individuals and encourage healing and reconciliation; this discourages, I believe, frustration with others, with the legal system, and the escalation of small problems into bigger

²⁸⁷Edson L. Haines, "Preface" in *Jury Trials* (Toronto: Richard De Boo Limited, Special Lectures of the Law Society of Upper Canada, 1959), iii-iv.

ones. This re-balancing of our judicial system might also help restore its integrity. Finally, the direction of some cases away from trial actions might help eradicate backlogs and create more court time for more serious issues to be debated and litigated. These ideas deserve serious consideration by governments, legal professionals, and others.

Closing Comments

In 1948 in the Parish of Douglas, the death of the local magistrate meant that another justice of the peace had to be appointed without delay. The local MLA for that constituency in York County had difficulty finding a suitable candidate but chose Lloyd S. McGibbon, a natural diplomat and trusted resident. As McGibbon jokingly states about his magisterial appointment, "They sent the certificate...not brains." While political considerations no doubt played a role in his appointment, it appears that few were willing to take on the load of responsibilities that came with the Crown commission, and McGibbon at age 26 was honoured to give it a chance. McGibbon provides a clear example of the rural notary function practised by magistrates appointed after 1930; like Yvonne LeBel and Harry Lanyon, the majority of his JP duties consisted on drafting wills and deeds; certifying loan, pension, and agricultural subsidy documents; issuing licenses; and, assisting with passports, jobs, and provincial and county government inquiries.

Justice McGibbon commented during an interview with me in January of 1995 that "when you lose the neighbourhood, you lose the nation".²⁸⁸ While I had originally embarked on a mission

²⁸⁸McGibbon Interview.

to explore the role of lay judges at the turn of this century and to explain the disappearance of JPs and magistrates from the legal landscape of New Brunswick, his statement hints at the heart of a key finding of this study and should not be hastily overlooked. For several reasons, the role of magistrates and their courts were nearly lost. First of all, utilitarianism became the accepted wisdom, and justices of the peace became an obstacle to centralization — hence viewed as inefficient and obsolete. The extensive right to local juries and the continued existence of multiple JP benches helped justify ideologically the reformers' positions on local courts; juries were after all inefficient and less controllable. Secondly, the legal profession and reformers pushed for a monopoly on legal services; the view became prevalent that only specialized experts were in the best position to deal with legal complexities. And, finally, magistrates were an easy group of individuals to cast doubt upon owing to their patronage-based appointment process and their lack of formal legal training.

However, instead of finding an aging and dilapidated system of courts and officials at the turn of the century as the professional lobby had concluded, I discovered vibrant inferior courts and very active community leaders. Even with the shift of most of the court work to the stipendiary magistrates, JPs continued to serve in a solicitorial capacity. McGibbon knew about his community and the needs of local residents intimately, and he saw the many changes in society throughout the years. There were the cases in transportation, the innovations in communications, and the shifting patterns of population (urbanization). However, more importantly in the New Brunswick context, there was the rationalization from county administrations to provincial regulation beginning in the 1950s. This nearly radical level of

centralization that others such as D. G. Bell and Stephen G. Tomblin have already observed, was to not only spell the end for local magistrates and other leaders but for community participation in justice and in many government service decisions as well. As McGibbon had suggested, the modern state had forgotten its local roots. In forgetting and casting aside its history as outdated and parochial and unenlightened, it has nearly lost the knowledge of the practises of citizen magistrates and a possible key to restoring the usefulness and sensibility of the embattled legal system.

The magisterial experience is not presented here as a societal salvation. The evidence of this brief study provides an important basis for future discussion in ADR, in court reform, and concerning community participation in the justice system. Central bureaucracies, legal professionals, and the changed world of transportation and communications have benefitted our society in countless ways. They helped to usher in an era of economic redistribution and increased opportunities for people of all means and backgrounds. Legal professionals have assisted in many areas, too, primarily in helping to protect the rights of accused individuals and in working to eradicate cruel punishments and the enslavement of working people. Reform-minded citizens, then, brought much needed change; unfortunately, they confused fairness and justice with uniformity and formal education. These things are not necessarily related. My study has shown that it is possible to mix these approaches, even though there will always be tensions between them. We must challenge the entrenched professionals of today who explain that it is not possible to re-balance the system; for them, there will always be two options:

"real" courts and alternative measures, and alternative approaches are only supplementary.²⁸⁹

We must enjoin them to look at examples of where utilitarian and centralized approaches have taken away some of our identity and sense of belonging and where they have actually lessened accessibility, cost effectiveness, and sensibility. We must show them how the justice system at various times was able to accommodate and appreciate several approaches to "formal" justice.

I have attempted to show some concrete examples of where lay justices and magistrates helped provide innovative, cost effective, and accessible justice to areas of New Brunswick. I do not believe that the creativity of Moran was limited to him; I have also seen glimpses of others administering justice imaginatively and with success. After reading this paper, I believe that it would be difficult for anyone not to suggest that JPs did serve an important function within their geographic areas, that these "courts of conscience" did not always apply formal legal outcomes, and that this situation is proof of an accepted pluralism within the formal system where various approaches were utilized to resolve civil and criminal troubles. The degree of flexibility and innovation at the turn of this century will always be open to debate; indeed, the scale of innovation varied with each magistrate and each locality and every case. Again, the existence of settlement, selective enforcement, the organizational structure allowing some community participation, and a "common" equity at the inferior court level is difficult to deny.

²⁸⁹Edward Veitch, "But That Is Theory and Has No Relation to Realities" (1988), 37 U.N.B. L.J. 116 at 117: "Anyone who believes that the legal establishment — professors, lawyers, administrators, and judges — can easily or will quickly be persuaded to give up habits of a lifetime in favour of some temporary vogue for 'speedy justice' surely requires treatment." Prof. Veitch's tongue-and-cheek remarks provide us with the professional view of pluralism. He will forgive me if I say that he has missed the point of the "re-balance"; it is not to provide 'speedy justice', but to create a more comprehensive form of justice than ever exist in the hallowed halls of a court room. Veitch importantly continues and states on page 120: "If we [legal professionals] are to rid ourselves of the image of the 'gunlinger' then the process of re-education must begin in the law schools. However, we must admit that the addition of a couple of ADR courses will not suffice. What is required is a concerted effort on the part of law schools and the law societies in the manner of a cultural revolution."

Current community-based methods of policing and court enterprises are testaments to the fact that discretionary and local approaches to justice and government may not be dead. In fact, the increases in rural society incorporations²⁹⁰ and a renewed look by the New Brunswick government at local consultation processes for rural areas show that communities feel the need to be empowered and able to respond to their concerns. Perhaps the experiences and innovations of early lay justice officials will help inform this current debate. It is not clear that moves for judicial monopoly and uniformity have been declared the final victors in the struggle between discretion and rationalization and plurality and uniformity. It is possible that a renewed justice system with liberal elements of neighbourhood responsibility and input may be on the horizon of change. It is nice to know, therefore, that the positive experiences and aspects of magistrates and justices might be able to be employed to assist in this transition, and that three hundred years of service to the territory inhabited by the Mi'kmaq, Malecite, Acadians, loyalists, and many others might not be forgotten.

²⁹⁰Rural New Brunswickers are increasingly creating commissions and societies that took very much like municipal service providers using the *Companies Act*, R.S.N.B. 1973, c. C-13. These societies include such service providers as fire departments and local recreation commissions.

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