SEDITION IN NOVA SCOTIA: *R.* v. *HOWE* AND THE "CONTESTED LEGALITY" OF SEDITIOUS LIBEL

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"Nova Scotia had found [in Joseph Howe] not only its John Wilkes but also its Charles James Fox." — *W.S. MacNutt, 1965*

Introduction

New Brunswick was the first jurisdiction in what is now Canada to attempt to legislate on the subject of criminal libel. In February 1797, at the climax of a protracted constitutional struggle between the executive and legislative branches, New Brunswick's House of Assembly passed a bill enacting Fox's *Libel Act* of 1792, "a liberal but limited advance" affecting sedition law when "the reformers finally triumphed, briefly."[1] Though supported by the Loyalist Attorney-General, Jonathan Bliss (a future chief justice of the province), the bill was rejected by the Council and did not become law. Though never in force in New Brunswick, Fox's *Libel Act* was in force in Nova Scotia, where reception of the criminal laws of England was not statutory but judicial, and those acts passed "in amelioration of the common law and [which] increased the liberty of the subject" were in force by analogy with the common law itself. Thus, Fox's *Libel Act*, being declaratory of the common law, was good law in Nova Scotia from the moment of its coming into force in England. Joseph Howe, defending himself on a charge of seditious libel in 1835, not only took for granted that Fox's *Libel Act* was in force but also referred to it as the "Declaratory Act."[2] Fox's *Libel Act* was good law because it 'declared' (clarified) received criminal procedure by removing "doubts respecting the functions of juries

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[1] F.M. Greenwood & B. Wright, "Introduction: State Trials, the Rule of Law, and Executive Powers in Early Canada," in F. M. Greenwood & B. Wright, eds., *Canadian State Trials, Volume I: Law, Politics and Security Measures, 1608-1837* (Toronto: University of Toronto Press, 1996) at 29, 30. For the constitutional struggle, see D.G. Bell, "The Reception Question and the Constitutional Crisis of the 1790's in New Brunswick" (1980) 29 U.N.B.L.J. 157.

[2] J.A. Chisholm, rev. & ed., *The Speeches and Public Letters of Joseph Howe* (Halifax: The Chronicle Publishing Co. Ltd., 1909) 66.

in cases of libel."[3]

Legal proceedings for the political offence of sedition figured prominently in episodes of dissent and political protest in Nova Scotia from the first stirrings of agitation for reform in 1819-20 to the events immediately preceding the commencement in 1836 of the twelve-year struggle for responsible government. Yet while much has been written about the movement for political reform in the province, the role of the courts as an arena of struggle has received little critical attention. "As E.P. Thompson and others have shown in the English context," states Barry Wright, "the historical record of the uses of law (and the contestation of these uses) casts considerable light on the nature of authority and social conflict. It illuminates the relationship between discretionary power and the rule of law, the repressive and ideological roles of law, as well as law's social meanings."[4] Though similar research on early Atlantic Canada remains in its infancy,[5] the publication of the first volume in The Osgoode Society's series, *Canadian State Trials,* points the way ahead.[6] Two Nova Scotian sedition cases — *Wilkie* (1820) and *Howe* (1835) — suggest that the administration of criminal justice was relatively non-repressive by comparison with contemporary British, not to mention Upper Canadian standards of constitutional liberty. Moreover, legal principles and procedures that seem too technical from a post-*Canadian Charter of Rights and Freedoms* perspective on criminal justice history or historical criminology, were uniquely significant for both the perpetrators and the victims of these prosecutions. For the oligarchy, the cases reflect the importance of law in the executive-cum-judicial regulation of political discourse. For those subject to the proceedings, Wright's "contested legality" formed a major part of the pre-Responsible Government battlefield, gradually turning political controversies into movements of political protest.

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[3] 32 Geo. 3, c. 60 (GB).

[4] B. Wright, "Sedition in Upper Canada: Contested Legality" (1992) 29 Labour/Le Travail 7.

[5] Basic misunderstandings persist; see, for example, P. A. Buckner & J.G. Reid, eds., *The Atlantic Region to Confederation: A History* (Toronto: University of Toronto Press, 1994) at 259 & 302, where William Wilkie (1820) is "tried and convicted on a charge of seditious libel," while Joseph Howe (acquitted in 1835) is "charged with libel." The important point is missed that the crime was the same in both instances. Even W.S. MacNutt, whose account of the *Howe* case is longer and better informed, misunderstands the nature of the proceeding ("libel suit"): W.S. MacNutt, *The Atlantic Provinces: The Emergence of Colonial Society, 1712-1857* (Toronto: McClelland & Stewart, 1968 [repr. of 1965 ed.]) at 200.

[6] Greenwood & Wright, *supra* note 1. Seven of the seventeen chapters relate to Atlantic Canadian topics, appropriate recognition of the fact not only that Nova Scotia is Canada's oldest common-law jurisdiction but also that it served as the model for the legal system of Québec, 1764-1974, before the *Quebec Act.*

This article examines how sedition law was used to deal with political dissent in Nova Scotia and how these uses were contested. Though politics and conflict over privilege and abuse of power were not unknown to the civil courts, the principal legal engagements of the proto-reformers involved prosecutions for sedition. There had been prosecutions for treason and sedition during the American Revolution,[7] but it was not until after the end of the Napoleonic wars that officialdom, faced with the stirrings of extra-legislative political opposition, seized on the repressive mechanisms of the criminal law in an effort to quash political dissent. Nevertheless, sedition proceedings were infrequent. The sheer paucity of cases in Nova Scotia, unlike Upper Canada, suggests that they were indeed isolated and extreme exceptions. Their infrequency is indicated in the archival court records for Nova Scotia, which reveal two prosecutions between 1820 and 1835. This excluded the possibility of summary deportation proceedings, such as those taken under the authority of Upper Canada's *Seditious Aliens Act* (1804-1829), a counterpart of which Nova Scotia did not have. There was, however, one parliamentary privilege proceeding of questionable constitutionality taken against a member of the House of Assembly in 1829-30 for slandering a fellow member.[8] The consequent "Barry riots" owed something to the mercantile-official élite's virtual monopoly of political power, which aggravated class tensions and fuelled the political conflict. In any event, taking into account the province's tiny population, much smaller than Upper Canada's, the very rareness of sedition proceedings in Nova Scotia highlights their impact and historical significance.

Important differences may be discerned between the *Wilkie* and *Howe* prosecutions for seditious libel, one striking example being the sentence imposed on conviction in the earlier case. In 1820, criticism of the ruling class, ranging from the Council of Twelve who governed the province to the magistrates who governed the town and district of Halifax, led to the successful prosecution of William Wilkie for

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[7] See J. Phillips & E.A. Clarke, "Rebellion and Repression in Nova Scotia in the Era of the American Revolution" in Greenwood & Write, *supra* note 1 at 172; D.G. Bell, "Sedition among the Loyalists: The Case of Saint John,1784-6" in Greenwood & Wright, *supra* note 1 at 223; B. Cahill, "The Sedition Trial of Timothy Houghton: Repression in a Marginal New England Planter Township during the Revolutionary Years" (1994) 24:1 Acadiensis 35; and B. Cahill, "The Treason of the Merchants: Dissent and Repression in Halifax in the Era of the American Revolution" in P.A. Buckner, G.G. Campbell & D. Frank, eds., *The Acadiensis Reader: Volume One*, 3rd ed. (Fredericton, N.B: Acadiensis Press, 1998) at 146.

[8] John Alexander Barry ([ca. 1790]-1872) was expelled from the House of Assembly and ordered imprisoned by the speaker.

publishing a seditious libel.[9] The heavy sentence — two years' hard labour — meted out to the radical pamphleteer Wilkie occurred in the context of official concern about political dissent, and in particular about published criticism of the status quo, seen as an indicator of the potential popular appeal of radicals in particular and reformers in general. Official perceptions and objectives were clearly articulated in the policy of using sedition proceedings to silence and marginalize political dissenters — implicitly constructing criticism as disloyalty. By these measures, the first stirrings of reform were quieted and the beginning of the reform movement deferred for nearly a decade. Then, in 1835, a thirty-year-old newspaper proprietor and editor, Joseph Howe (1804-1873), was subjected to a sensationally unsuccessful seditious libel prosecution and was soon launched on a political career which culminated in his appointment as lieutenant-governor of Nova Scotia a few weeks before his death. As a result of Howe's acquittal, the government was extremely reluctant ever again to resort to the courts to deal with its political opponents. There would not be another seditious libel prosecution in Nova Scotia for nearly a century.

This study centres on *Howe*, which J.M. Bumsted rightly describes as "probably the most famous single court case on the subject [of seditious libel] in Canadian history."[10] It is more outstanding and influential than *Wilkie*, though both involved the 'tried and true' common-law offence of seditious libel. The range of repressive legal measures available was, for all practical purposes, limited to sedition, which reflected both the opportunities and threats posed by the printing-press as the catalyst for written mass-communication of political ideas and the promotion of political dissent. In Nova Scotia, unlike Upper Canada and Great Britain, there was no local sedition legislation to supplement the common-law offence. Furthermore, the government did not respond to Howe's acquittal by adopting punitive English legislation, such as the 1819 *Act for the more effectual Prevention and Punishment of blasphemous and seditious Libels*.[11] Instead, the government responded by forswearing any further trials for sedition. The *Howe* case also highlights the

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[9] See G.V.V. Nicholls, "A Forerunner of Joseph Howe" (1927) 8 Canadian Historical Review 224; B. Cahill, "Sedition in Nova Scotia: *R.* v. *Wilkie* (1820) and the Incontestable Illegality of Seditious Libel before *R.* v. *Howe* (1835)" (1994) 44 Dalhousie L. J. 458. For the relationship between *Wilkie* and *Howe* as exercises in the official repression of political dissent, see J.S. Martell, *Origins of Self-Government in Nova Scotia, 1815-1836* (Ph.D. thesis, University of London, 1935) at 375-76.

[10] J.M. Bumsted, "Liberty of the Press in Early Prince Edward Island, 1823-9" in Greenwood & Wright, *supra* note 1 at 522.

[11] (1819) 60 Geo. 3, c. 8 (U.K.) — one of the so-called "Six Acts," a series of repressive measures enacted in the wake of the Peterloo Massacre; see generally J.R. Spencer, "Criminal Libel — A Skeleton in the Cupboard" (1977) Crim. L. R. 383 at 465.

arbitrary nature of the administration of sedition law, a side-effect of the executive dominance of colonial government, which lacked even the appearance of institutional separation of crown and judiciary. Sedition proceedings, and tension between the rule of law ("British justice") and executive control of its administration, furnished a rich panoply of constitutional and legal arguments which Joseph Howe deployed to contest legal repression.

After first exploring the political and legal background to the *Howe* prosecution, this article examines in detail its inauguration, progress, resolution, consequences and meaning. As with *Wilkie*, the *Howe* case illustrates the repressive use of the criminal law as well as the promise and potential "of counter-hegemonic struggles in the criminal courts."[12] Both cases underline the importance of sedition law as a mechanism for repressing political dissent, and one to which resort had not been made in Nova Scotia since the American Revolution. The government's having recourse to prosecution for a scandalous common-law offence was intended to buttress the authority of the magistrateship by criminalizing published criticism. It was an exercise in brinkmanship fraught with both risks and limitations, deriving from basic principles of criminal justice. The ideological consensus underpinning the rule of law depended on the perception that it could withstand political manipulation. From the perspective of the accused, the presumed blindness of justice offered the possibility of contesting the repressive uses of law. This contestability, however, provided meagre resources for resisting, much less overcoming repression. Victims of politically-inspired prosecutions were limited to self-defensive, and sometimes self-defeating struggles, within a process which hardly constituted equality before and under the law. The tables were turned with the acquittal of Howe, the results of which not only embarrassed at least some of the complainant magistrates into resigning, but also decisively raised petit-bourgeois political consciousness; helped relaunch reform as a movement of political protest and the Reformers as a political party; and brought them to power in a dozen years.

Investigating the importance of law to accused and prosecutors alike emphasizes that legal 'histories of resistance' must reduce myth-encrusted heroes such as Joseph Howe to a human scale. There are historiographical difficulties inherent in extrapolating a general theory from any case study, however celebrated the case and detailed the study. Moreover, ideologically-weighted concepts such as "élite" and "popular dissent" must take into account the general absence of class consciousness among the petite bourgeoisie of urban Halifax — to which both Wilkie and Howe

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[12] Wright, *supra* note 4 at 10.

belonged — even during the 1830s. Sedition prosecutions were intended not only to discredit opposition spokesmen and muzzle the press, but also to punish extra-legislative political criticism by stigmatizing it as unjustified and unreasonable. A sustained and systematic examination of the leading case reveals not only that sedition law was an instrument of repression, but also that its Achilles heel in the form of legal contestability could be successfully exploited.

The Political Background

Nova Scotian politics in the period 1830 to 1835 were in a state of ferment and flux.[13] The Tory-Loyalist Ascendancy, which had endured for forty years, crashed and burned in the Brandy Election of 1830 — partly as a result of the Barry riots — but no new consensus emerged to replace, much less revive the *ancien régime*. The progression of Joseph Howe, the dutiful son of a 'Boston Tory' of 1776, from conservative to reformer climaxed in his 1835 trial for seditious libel, which D.C. Harvey viewed as the culmination of Nova Scotia's twenty-year-long intellectual "Great Awakening."[14]

In a seminal article published in 1974, Kenneth McNaught described *Howe* as one of Canada's "two most significant cases involving political freedom of the press" — the other being *Dixon* for seditious libel arising from the Winnipeg General Strike of 1919.[15] McNaught failed to mention an important early New Brunswick case (*Hooper*, 1830), where the proprietor-editor of the *British Colonist* (Saint John) was prosecuted for seditious libel after publishing, under the author's suggestive Puritan *nom-de-plume* ("Hampden"), a letter castigating the legal profession and the administration of justice. Hooper, like Howe and Fred Dixon after him, defended himself — but was discharged rather than acquitted, due to a hung jury and the trial judge's advice to the attorney-general to stay the

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[13] See B. Cuthbertson, *Johnny Bluenose at the Polls: Epic Nova Scotian Election Battles, 1758-1848* (Halifax: Formac, 1994) at 60-92, 288-310.

[14] D.C. Harvey, "The Intellectual Awakening of Nova Scotia" in G.A. Rawlyk, ed., *Historical Essays on the Atlantic Provinces* (Toronto: McClelland and Stewart, 1967) 99; D.C. Harvey, ed., *The Heart of Howe: Selections from the Letters and Speeches of Joseph Howe* (Toronto: Oxford University Press, 1939) 89-91.

[15] See K. McNaught, "Political Trials and the Canadian Political Tradition" (1974) 24 U.T.L.J. 164-166; and B. Cahill, "*Howe* (1835), *Dixon* (1920) and *McLachlan* (1923): Comparative Perspectives on the Legal History of Sedition" (1996) 45 U.N.B.L.J. 281. McNaught distinguishes between criminal (i.e., defamatory) libel and seditious libel, and wrongly places *Howe* in the former category.

proceedings.[16] Whether Hooper's discharge or Howe's acquittal established, preserved or strengthened the freedom of the press is a moot point which, regardless of how it is decided, does not provide the key to understanding either the legal or historical context of Howe's trial for sedition. Yet traditional scholarship fails to offer a properly contextualized legal or political analysis of *Howe*, which was by any definition a state trial.[17]

Another question which requires attention is whether the prosecution of Joseph Howe for sedition would have taken place at all had Howe's newspaper not been the voice of radical political opposition to Halifax's corrupt, inefficient and unreformed government. This self-perpetuating gerontocracy of justices of the peace, based on the old English model, had ruled Halifax since its founding in 1749. It had been resisting any and all attempts at civic incorporation since 1785, when Saint John, Canada's first city, was incorporated. Published criticism of the magistrateship tended to be construed as criticism of the executive branch — the lieutenant-governor and council — who "were equally supreme in the control of town affairs as those of the province at large."[18]

The movement for local government reform was inaugurated by the 1834 grand

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[16] Concerning *Hooper*, which was New Brunswick's last known seditious libel case, see W.S. MacNutt, "Hooper, John" 9 Dictionary of Canadian Biography 399; W.S. MacNutt, *New Brunswick: A History, 1784-1867* (Toronto: Macmillan of Canada, 1984) at 223. *Hooper* was one of the fifteen seditious libel prosecutions identified by Bell in New Brunswick's history: D.G. Bell, "Sedition among the Loyalists: The Case of Saint John, 1784-1786" in Greenwood & Wright, *supra* note 1 at 240 n. 38. How little resort was made to seditious libel prosecutions in Nova Scotia after 1835 is a good deal less striking than the situation in New Brunswick after 1786. The reason, of course, was Joseph Howe's acquittal.

[17] The original records of the trial had already disappeared or were not consulted for William Annand's *editio princeps* of 1858. A stenographic report formed the basis of *Trial for Libel / on the / Magistrates of Halifax, / The King vs. Joseph Howe, / Before the / Chief Justice and a Special Jury / Supreme Court - Hilary Term* (Halifax: [Joseph Howe], 1835), 102 p. (Canadian Institute for Historical Microreproductions [CIHM], no. 62316). This was reprinted in W. Annand, ed., *Speeches and Public Letters of the Hon. Joseph Howe* (Boston: J.P. Jewett, 1858) at I:14; and Chisholm, *supra* note 2 at 22 (all quotations taken from the latter). Studies include J.A. Chisholm, "*The King* v. *Joseph Howe*: Prosecution for Libel" (1935) 13 Can. Bar Rev. 584 (unhistorical); J.M. Beck, "'A Fool for a Client': The Trial of Joseph Howe" (1974) 3:2 Acadiensis 27 [hereinafter "A Fool for a Client"] (political history); repr. J. M. Beck, *Joseph Howe, Volume 1: Conservative Reformer, 1804-1848* (Kingston and Montreal, 1982) 129-46 [hereinafter *Joseph Howe*]; P.A. Buckner & D. Frank, eds., *Atlantic Canada Before Confederation. The Acadiensis Reader: Volume One*, 2nd ed. (Fredericton, N.B: Acadiensis Press, 1990) 243-260; and B. Cahill, "A Forerunner of J.B. McLachlan? — Sedition, Libel and Manipulating the Myth of Howe" (1996) 44 Collections of the Royal Nova Scotia Historical Society 189.

[18] T.B. Akins, "History of Halifax City" (1895) 8 Collections of the Nova Scotia Historical Society 88.

jury, in tandem with Howe as editor of the *Novascotian*, and sponsored in the House of Assembly by Charles Rufus Fairbanks (master of the rolls in Chancery), the only proto-reformer among the Tory judiciary,[19] with the cooperation of his father-in-law, William Lawson, who was the only independent liberal among the solidly Tory merchantocracy. "[I]rregularities [in the administration of justice in the Commissioners' Court]," Joseph Howe was to assert in his defence,[20] "formed a part of the general system, which justified the charges of grand juries, the surprise of the executive, the investigations of the Council, and the publication of the alleged libel."[21] A second letter from "The People," published in the *Novascotian* of 1 January 1835 (see **Appendix**), was a mere pretext on which to ground the prosecution of Howe for publishing a seditious libel. Otherwise, the magistrates would have solicited the prosecution two months earlier, in November 1834, when the first letter from "The People" was published. Then, however, the attorney-general would have had to deal with a reformist grand jury working hand-in-glove with Howe to expose sessional misgovernment. The wider context within which both letters from "The People" appeared reflected continuing complaints by the Halifax grand jury of 1834[22] against abuse of office, dereliction of duty and public corruption. Howe's war of words against the magistrates in the columns of the *Novascotian* was helped considerably by the official grand jury documents which he had obtained and published in collusion with the foreman. These papers included not only the grand jury's address to the lieutenant-governor

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[19] It was Fairbanks who, despite considerable opposition from the vested interests, brought in the abortive Town of Halifax Incorporation Bill in February 1835. The member for Halifax township, Fairbanks was soon afterwards forced to vacate his Assembly seat by an unlikely combination of Tories and radical whigs, led by Thomas Forrester, who very properly considered the presence of senior judges in the Assembly to be unconstitutional.

[20] Chisholm, *supra* note 2 at 58. The Commissioners' Court was "a court for the summary trial of actions" — a small claims court — unique to Halifax township. It had been established by act of the Legislature in 1817, about two years after the Police Court. The establishment of these tribunals, both staffed by lay magistrates, resulted from government's attempt to reform and regularize the administration of justice in Halifax; see P. Girard, "The Rise and Fall of Urban Justice in Halifax" (1988) 8:2 Nova Scotia Historical Review 8(2) at 60.

[21] The best account of the second reform movement, 1829 to 1834 — the revolt of the shopkeepers (Howe's "middling" class[es], alias the petite bourgeoisie) — which culminated in the Howe prosecution early in 1835 — is to be found in D.A. Sutherland, "The Merchants of Halifax, 1815-1850: A Commercial Class in Pursuit of Metropolitan Status" (Ph.D. thesis, University of Toronto, 1975), 244-252.

[22] The grand jury was the local government watchdog, having more or less arrogated to itself especial responsibility for auditing the accounts of the district officers.

but also its various presentments.[23] Moreover, "by mid-January [1835] the Committee of the Council had confirmed many of the charges of the [former] grand jury."[24]

The end of term of the 'activist' grand jury in December 1834 raised the possibility that Howe would be the sacrificial lamb if and when the reaction occurred. He would answer for the *lèse-majesté* of the old grand jury, while the government bided its time, taking "six weeks to determine upon this prosecution"[25] — six weeks in which to determine whether the new grand jury was politically sound and compliant. This undermines David Sutherland's contention that "Joseph Howe, in his defence speech, argued that certain members of the magisterial board [Court of Sessions] and Grand Jury had supported the prosecution in the expectation that a libel trial would force reform of the municipal government."[26] Granted, a simple majority of the twenty-three members of the grand jury had to approve the indictment for the trial to proceed, but Sutherland goes too far in suggesting that the promoters and managers of the prosecution intended it to be a test case in the impact of political protest. The evidence suggests instead that the prosecution of Howe was a desperate, rearguard action to quash the nascent local government reform movement.

Though the magistrates had not been criticized in their judicial capacity, and the editor of the newspaper in which "The People" was published had not had any dealings with the Court of Sessions which might have given rise to the alleged libel, it was Howe who was the focus of hostile interest. By the end of 1834 their worships had had enough. Though they were losing the war of words in the press, it must have required a degree of brazenness to denounce as a libel a letter in which

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[23] Howe went so far as to state during his defence that the old grand jury's final presentment "at the close of the December term is a grosser libel than this letter [the second from 'The People']": Chisholm, *supra* note 2 at 60. The presentment had been published in the *Novascotian* on 11 Dec 1834.

[24] Beck, "Fool for a Client," *supra* note 17 at 33. Howe was to quote the committee's report in the course of his defence; it remains unclear how he obtained a copy.

[25] Chisholm, *supra* note 2 at 33. The six-week period would have been ca. 1 Jan-10 Feb 1835 — from the publication of the second letter signed "The People," to the delayed commencement of Hilary Term in the Supreme Court. It may not have occurred to Howe that the magistrates dared not move against him until they had taken the measure of the new grand jury.

[26] Sutherland, *supra* note 21 at 263 n. 74; the reference is to Chisholm, *supra* note 2 at 52 ("Some of them [magistrates] have urged on this prosecution, not from unkindness to me, but in order that others, whom they know to be criminal ... .might be exposed"). Cf. Beck's intriguing speculation, which attributes this motive to Howe himself: "Fool for a Client," *supra* note 17 at 31 n. 22.

Sir Colin Campbell, the recently-appointed lieutenant-governor of the province, was obsequiously praised, not as chief *executive* but as "Chief *Magistrate*"[italics added].[27] The grand juries of the years 1832 through 1834 were of "radical whig" tendency;[28] thus, the magistrates chose the interregnum between the retirement of the old year's grand jury and the summoning of the new to make their pitch for a prosecution. They would have known that a prosecution for seditious libel precluded any inquiry into the truth of the statements: "the greater the truth the greater the libel," ran the old saw.[29] Cut to the quick by the former grand jury's publication of presentments and other classified documents critical of the Court of Sessions, the magistrates seem to have viewed the prosecution as a tactical imperative, a means of restoring lost face.

The *Howe* prosecution was the cumulative effect and culmination of the second reform movement. The official document precipitating the magistrates' complaint was the final presentment of the outgoing grand jury in December 1834, which Howe described as a "grosser libel" than the second letter from "The People," and which he published on 1 January 1835. Howe, perhaps deliberately, was courting danger; he disregarded his own safety and risked a public prosecution. It is very doubtful whether the second letter from "The People" would have been made the ground of a seditious libel prosecution had it not been published by Joseph Howe in the *Novascotian*. Having lost the initiative and then counter-attacked after it was too late to retrieve the situation, the magistrates sought to settle scores with the one who was not only the most visible but also the most vulnerable of their enemies, and whose conviction would yield the highest return in political vengeance. The Court of Session had only nominal authority over the grand jury, whose presentments they routinely ignored, and they could not prosecute or sue them for a libellous presentment. Howe's newspaper was the voice of a reformist grand jury, so it was Howe on whose head the hammer of justice descended. The second letter from "The People" triggered a proceeding which seems to have been already determined upon

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[27] Campbell, a political neophyte, cooperated with the old year's grand jury by expeditiously referring their complaints about the Court of Sessions first to the Council and then to the Assembly: Journal of the House of Assembly [JHA], 2 Feb 1835, and *passim*. On Campbell's administration (1834-1840) see S.W. Spavold, "Nova Scotia under the Administration of Sir Colin Campbell" (MA thesis, Dalhousie University, 1953); P.A. Buckner, "Campbell, Sir Colin" 7 Dictionary of Canadian Biography 142.

[28] Beck makes the astute observation that "the grand juries of the 1830's ... provided the political education for the leading Reformers of Halifax, Howe included": "Fool for a Client," *supra* note 17 at 29.

[29] As Howe was later to observe in his defence, "The truth would be no defence in a criminal action, as the magistrates very well know or they would not have brought it": Chisholm, *supra* note 2 at 36.

by the magistrates in the well-founded hope that the inexperienced lieutenant-governor, in his misplaced desire to please everyone, would grant their request for a public, political libel prosecution.

The Legal Background

At a special meeting of the Sessions held on 8 January 1835, the *custos rotulorum* (chief magistrate) of the District of Halifax, James Foreman,[30] advised his fellow justices of the quorum[31] that they had been asked — by whom is not recorded — to take into consideration a letter signed "The People," published in Joseph Howe's *Novascotian* on New Year's Day,[32] which reflected on the magistrates.[33] Rather than consult with the attorney-general, as the chief justice was later to suggest they should have done, the magistrates took their complaint directly to the lieutenant-governor. Sir Colin Campbell, whom the subscribing magistrates asked "to direct the Crown officers to take immediately the necessary steps for prosecuting the party who has made them [the charges],"[34] referred the complaint to Attorney-General Archibald.

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[30] The septuagenarian Foreman, a prominent and influential merchant, had been *custos* of the district of Halifax since 1828; see D.A. Sutherland, "Foreman, James" 8 Dictionary of Canadian Biography 299-300. Lending both his signature and his prestige to the magisterial complaint was to be among Foreman's final acts as *custos*; before the end of January he had resigned, pleading old age: Minutes of Council, 26 Jan. 1835: NSARM RG 1, vol. 196 at 115.

[31] For example, twelve of those justices of the peace (out of a total of thirty-two), who acted judicially at the Quarter Sessions; in other words, a quorum over whom the *custos* presided. (At least three of the current active magistrates did not sign the complaint.)

[32] The bearer of the *nom de plume* was George Thompson (1800-1856), an old friend of Howe's: G.E. Fenety, *Life and Times of the Hon. Joseph Howe: The Great Nova Scotian and ex-Lieut. Governor* (Saint John, N.B: Progress Office, 1896) at 104. This was the second letter from "The People." The first, which contained a transparent reference to the *Wilkie* case ("The odium that has hitherto attached to the character of professed reformers ...") and in which Thompson predicted the introduction of "rational and radical reform," had been published in the *Novascotian* of 19 Nov 1834, before the grand jury's campaign against the magistrates began in earnest. Howe had the second letter in type for 10 December, but was sufficiently concerned about its incendiary nature to defer printing it until those grand jury documents of a similar tenor had appeared.

[33] 'Sessions / 1834': NSARM RG 34-312 series P vol. 11, [n.p].

[34] Foreman *et al.* to Campbell, 8 Jan. 1835: NSARM MG 20, vol. 700, f. 49 (Royal Nova Scotia Historical Society fonds). The signatories, apart from the custos himself, were John Albro, Samuel Head MD, John Howe Jr., John Liddell, *William Henry Roach*, George Norton Russell, *James Noble Shannon*, John Leander Starr, *Joseph Starr*, *James Heaton Tidmarsh* and Richard Stout Tremain. (Italics denote those magistrates who were to resign in consequence of the verdict in *Howe*.) All but two of them — Head and Howe – were merchants; J.L. Starr (nephew of Joseph) was also a member of the grand jury for 1835.

The attorney-general, annoyed perhaps at being somersaulted by the complainants, pointedly asked "whether the Magistrates wish the Publisher or Author of the Publication in the Nova Scotian of the 1st Instant signed 'The People' to be prosecuted." Unsurprisingly, he did not get an answer. The magistrates forbore advising the attorney-general whom to prosecute "for a libel," as that fell entirely within his discretion.[35] Nevertheless, the "party complained of" was the writer of the letter, not the editor of the newspaper who had published it. Archibald responded by feigning complete ignorance of the magistrates' request, which had been placed in his hands after being minuted. Though he was to admit during the trial that the name of the author had never been demanded, Archibald also maintained that "had the author been given up," he "would not have proceeded against the publisher."[36]

The magistrates who laid the complaint assumed the high prerogative view of libel — that the defamation of any Crown servant was seditious. The question of whom to prosecute was left to the attorney-general, the magistrates having succeeded in their primary aim of soliciting a prosecution directly from the lieutenant-governor. As there were no lawyers among the justices of the session, there was no mention of libel, let alone sedition, and consequently no recognition of the fact that publication, authorship or the procuring of either might ground the charge. Nor perhaps were the magistrates aware that libels "having a direct and immediate tendency to a breach of the peace [i.e., seditious libel], are indictable in the [Quarter] Sessions."[37] The magistrates retained legal counsel only after the government had ordered the prosecution of Howe — there was no point doing so beforehand. Lieutenant-Governor Campbell might well have consulted with Attorney-General Archibald, who might well have advised against a prosecution. As matters stood, however, the attorney-general was not consulted and it was left to him to decide *whom* to prosecute not *whether* to prosecute.

While Howe, as editor of the *Novascotian,* was criminally responsible for any libel published in his newspaper, there was no legal reason why he alone should have been prosecuted, had the overarching political purpose not been to kill the messenger. The precedent established by *Wilkie*, where the author rather than the

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[35] 'Sessions / 1834' (under date 24 Jan 1835).

[36] Chisholm, *supra* note 2 at 77.

[37] J.G. Marshall, *The Justice of the Peace, and County & Township Officer, in the Province of Nova Scotia: being a guide to such justice and officers in the discharge of their official duties* (Halifax: Gossip and Coade, 1837) at 296. Judge Marshall, whose JP's manual was based on Richard Burn's classic, makes no reference to the recently adjudged *Howe*.

publisher was prosecuted for a seditious libel, was not followed. In both cases, the victim of the prosecution was pre-selected; whether he was author or publisher was immaterial, as both lay under the blanket of the common-law offence of sedition-libel. Though the publisher "had full permission to give up the author [George Thompson] whenever he pleased ... the name had never been demanded."[38] It therefore seems probable that the decision to prosecute Howe, and Howe alone, was dictated by political considerations and was taken at the highest level. The governing Council seized the opportunity to rid themselves of a meddlesome editor, just as they had disposed of the gadfly William Wilkie fifteen years earlier.

The important decision which then had to be made by the crown was how to institute proceedings. The usual procedure in England for initiating a prosecution for political libel was not by indictment. "The Attorney-General himself usually prosecuted," writes Spencer. "The prosecution was nearly always begun on the Attorney-General's *ex officio* information — a procedure which short-circuited the preliminary stages through which prosecutions ordinarily had to go, and so obviated the risk of an independently-minded [grand] jury refusing to find a true bill against the suspect."[39] But the only *ex officio* criminal information known to Nova Scotia's justice system was that authorized by imperial statute for a breach of the revenue laws.[40] An *ex officio* information had not been filed in *Wilkie*, which Archibald as king's counsel had prosecuted and which certainly met Beamish Murdoch's criteria for use "in cases of sedition, riots of a public nature, and libels against the executive government;"[41] in *Howe,* the alleged libel was against the county government. The reason why the attorney-general did not lay an *ex officio* criminal information was that he did not wish to assume direct personal responsibility for inaugurating the

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[38] Chisholm, *supra* note 2 at 77; the attorney-general did not deny this assertion by the accused, but suggested that the name should have been volunteered: "[H]ad the author been given up, I would not have proceeded against the publisher." Clearly Archibald had in mind *Wilkie*, where it was the author not the publisher who was proceeded against.

[39] Spencer, *supra* note 11 at 384.

[40] Murdoch, *Epitome of the Laws of Nova Scotia* (Halifax, N.S: Joseph Howe, 1833) at 4:181-2.

[41] On the other hand, both Attorney-General Archibald in his reply to the defence and Chief Justice Halliburton in his charge to the jury took the view that *ex officio* criminal informations were legal and might be expedient. "Such an opinion savors strongly of the high prerogative lawyer," Murdoch wrote, "and is hardly in keeping with the genius of English liberty and law": *supra* note 40 at 181. On no subject did Murdoch express himself more strongly than the unconstitutionality of *ex officio* criminal informations. In Nova Scotia, this prosecutorial instrument was treated as if it were a prerogative writ; it was rarely applied for and even more rarely issued — out of the Court of Chancery. In Upper Canada, on the other hand, the *ex officio* criminal information "was widely resorted to": Wright, *supra* note 4 at 18.

prosecution. "I could have proceeded by that mode [*ex officio* information]," Archibald was to declaim during his reply to the defence, "but I have never been inclined to ride upon the prerogative of the Crown, and I therefore laid the matter before the grand inquest [jury] of the county. ... One gentleman [who?] named the other course to me, but I said No; I will proceed by a fairer mode of indictment."[42] Archibald chose to proceed by indictment so that he might shift responsibility from himself to the grand jury by giving them the opportunity to quash the bill — and himself the opportunity to enter *nolle prosequi* on the indictment. Unfortunately for the attorney-general and more so for the victim of the prosecution, the grand jury did not rise to the bait. Had the grand jury thrown out the indictment, it is unthinkable that Archibald would have filed an *ex officio* information. Preferring an indictment was the lesser of two evils because it imputed the reality as well as the appearance of constitutionalism and held out the realistic possibility that the grand jury might refuse to find 'true bill' on the indictment. Though the attorney-general had no choice but to act once he had been ordered to do so by government, he could nevertheless exercise prosecutorial discretion by choosing the less oppressive means of inaugurating the prosecution.

On 4 February 1835, Joseph Howe received from the attorney-general an official letter informing him that the crown intended to prosecute him for libel at the next term of the Supreme Court, which was six days away. Howe published the full text of the letter in the following day's edition of the *Novascotian.* It was already the worst-kept secret in Halifax that the crown intended to proceed by way of indictment. Obviously, Howe was concerned that the chosen instrument might be the dreaded *ex officio* criminal information — technically legal, and flourishing in Upper Canada under the *Sedition Act* — and, that the attorney-general would not run the risk of the grand jury's quashing the indictment and compelling him to enter *nolle prosequi.*

Due to the overlong legislative session, Hilary Term 1835 in the Supreme Court had been statutorily delayed by one month.[43] Chief Justice Brenton Halliburton, in his legislative capacity as president [speaker] of the Council 'in general assembly conven'd', would not have been available to preside over any trials until the legislature had been prorogued — on 19 February. The same was true of Attorney-General Archibald, who, as speaker of the House of Assembly, would also

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[42] Chisholm, *supra* note 2 at 74.

[43] (1834-35) 5 Wm. 4, c. 1: *An Act to alter the Sitting of the next ensuing Term of the Supreme Court at Halifax.*

have been unavailable. Term commenced on Tuesday, 10 February, and was immediately adjourned for a week, there being no criminal business other than the indictment against Joseph Howe,[44] which the attorney-general stated he would be prepared to submit to the grand jury on 17 February.

The grand jury for the year 1835 was impanelled on the opening day of Hilary Term and formally charged by the chief justice.[45] The date was later than usual, but in good time for the spring sitting of the Quarter Sessions on 3 March. Both Howe's half-brother Joseph Austen and the two magistrates, James Noble Shannon and John Leander Starr, sought and received permission to withdraw when, on 17 February, the attorney-general came to the grand jury room and presented to the foreman an indictment against Joseph Howe for libel. Howe afterwards read into the record a passage from the now lost indictment which makes crystal clear that the charge was seditious libel:

> The jurors of our Lord the King upon their oath present, that Joseph Howe, late of Halifax, in the County of Halifax, printer, being a wicked, *seditious* and ill-disposed person, and being a person of a most wicked and malicious temper and disposition ... [and] greatly disaffected to the administration of His Majesty's Government in this Province, and wickedly, maliciously, and *seditiously* contriving, devising, and intending to stir up and excite

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[44] *Howe* does not appear on the Attorney-General's docket of causes for Hilary Term 1835: NSARM MG 1, v. 89, doc. 250 (S.G.W. Archibald fonds).

[45] The members of the grand jury were Joseph Austen, Edward Bartlett (foreman), Clement Horton Belcher, *Stephen Newton Binney*, *William Anderson Black*, Robert M. Brown, William Carritt, James Cogswell, *Edward Cunard*, *Lawrence Hartshorne*, William Hunter, William Kidston, Joshua Lee, William Macara, John Munro, Alexander Murison, William B.T. Piers, Andrew Belcher Richardson (secretary), Gasper Roast, William Biddolph Robertson, William Saltus, **James Noble Shannon, John Leander Starr** and *John Williamson*: "Extracts from the Minutes and proceedings of the Grand Jury for the County of– Halifax– Supreme Court / Hilary Term [1835]" NSARM RG 34-312 series P vol. 14. (Italics denote those members of the grand jury who were afterwards appointed magistrates to fill vacancies by resignation resulting from the verdict in *Howe*; four of the five, excluding only Binney, declined to serve as magistrates. Boldface denotes those members of the grand jury who were already magistrates.) Occupationally, as many as sixteen of the grand jurymen were merchants. There were also one bookseller, two doctors, one superannuated army officer, one newspaper proprietor, one grocer, one tradesman, and one unascertainable. By and large, the grand jury of 1835, by comparison with its progressive reforming predecessors of 1832 through 1834, was a neo-conservative, quasi-reactionary body dominated by merchants, and could hardly have been expected to side with Howe against the magistrates — two of whom were among its members. Moreover, both Shannon and J.L. Starr had signed the complaint to the lieutenant-governor which precipitated the prosecution.

> discontent and *sedition* among His Majesty's subjects....[46]

By 1835, criminal procedure had advanced to the point where proving publication of the alleged libel, which formerly had been sufficient to convict the accused, was sufficient only to commit him for trial. The crown's only witness was Hugh Blackadar, editor of the principal tory organ, the *Halifax Journal*, the proprietor of which, John Munro, was also a member of the grand jury. Contrary to the practice in criminal defamation cases, the second letter from "The People," which formed part of the indictment, was ordered read — because the libel was a public or political one. After protracted discussion, a decision not having been reached, the grand jury adjourned for three days. When it resumed deliberations on 20 February, three members absent without leave and the same three others excused, the eighteen members present returned true bill on the indictment; the trial was scheduled for Monday, 2 March 1835. "Previous to the Grand Jury coming to a decision," reported the *Novascotian* on 26 February,

> the Box containing the bill, and all their Records, was found to have been taken from the Jury Room — and no little confusion arose in consequence. It was finally discovered in the Treasurer's Office, whither it had been carried by the Messenger of the House of Assembly, who presumed that it belonged to some of the Committees which usually occupied the room.

On 24 February, four days after the grand jury approved the indictment, the magistrates in a body went up to the Supreme Court and sought an interview with the Chief Justice. Speaking on behalf of his colleagues, Richard Tremain, the senior magistrate, read a resolution which he stated had been passed at a meeting of the magistrates convened that morning, to the effect, "[t]hat it was resolved unanimously, that leave be asked of this Honorable Court to grant to Mr Joseph Howe, in his defence at the approaching trial, every facility for substantiating, and proving the charges made by him in the *Novascotian* of the 1st Jan. last." His Lordship said, that such interference was out of the usual course, that he considered it extra-judicial, and that he could take no notice of it. He referred them, however,

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[46] Chisholm, *supra* note 2 at 36-7 [emphasis added]. It is curious that Howe did not print the indictment in his pamphlet record of the trial: *supra* note 16. It has proved impossible to substantiate Roy's claim that "the text of the indictment is to be found among George Johnson's Papers relating to Howe ...": J.A. Roy, *Joseph Howe: A Study in Achievement and Frustration* (Toronto: The Macmillan Company of Canada Ltd., 1935) at 49 n. 28. Johnson (1837-1911), who was appointed official biographer after the death of George Monro Grant in 1902, might very well have had the records of the trial in his possession at some point.

to their counsel, the Attorney General, with whom they might consult upon the course to be adopted."[47]

The same meeting of the Court of Sessions which passed the extraordinary resolution respecting the accused, now that the prosecution was assured, also attended to other business arising therefrom. Another of the magistrates who had signed the complaint successfully moved a resolution that a retainer be paid out of the Police Magistrate's budget to barristers Charles Twining and James F. Gray as their counsel.[48] It was further resolved that magistrates Dr Samuel Head and Richard Tremain, both of whom had signed the complaint, and David Shaw Clarke, clerk of the peace, "be a Committee to superintend the progress of the Trial of the Indictment against Mr Joseph Howe for a Libel upon the Magistrates." The Twelve were nothing if not well organized and well prepared. "They [the magistrates] have taken six weeks to determine on this prosecution," Howe was to observe during his defence, "leaving their adversary but a few days to prepare; and finally, they have brought their action by indictment, well knowing that the court could not admit evidence but on the side of the Crown."[49]

While Attorney-General Archibald's reasons for proceeding in a manner at variance with English practice in public libel prosecutions can be surmised, the grand jury's reasons for proceeding as they did are less clear. If the trial jury were to be the heroes of the piece,[50] then the grand jury were the villains — or at least the anti-heroes. A body which, when Howe was a member of it in 1832, could be described as politically "militant,"[51] had clearly undergone a sea change. The role of the grand jury is the crux of the *Howe* prosecution, because the political reasons for committing the accused for trial are too easily obscured by the legal machinery. Though the indictment is no longer extant, it is possible to know exactly what offence was charged. Connivance between the magistrates and the government, which led to the lieutenant-governor's ordering the attorney-general to prosecute,

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[47] *Acadian Recorder* (Halifax): 28 Feb 1835. For Tremain's leading role in the affair, see D.A. Sutherland, "Tremain, Richard," 8 Dictionary of Canadian Biography 892, who argues persuasively that "it was in character for Tremain to initiate the magisterial demand that Howe be tried for criminal libel."

[48] 'Sessions / 1834', *loc. cit.*

[49] Chisholm, *supra* note 2 at 33. Having read Murdoch, whose *Epitome* he published, Howe understood that the grand jury was "a court of preliminary enquiry in criminal matters": Murdoch, *supra* note 40 at 3:172.

[50] Chisholm, *supra* note 2 at 82.

[51] *Joseph Howe*, *supra* note 17 at 136.

was matched by connivance between the magistrates and the grand jury — which led to their finding true bill on the indictment. It is salient that the same two magistrates who were also members of the grand jury put their names to the request for a prosecution. This may help explain why most students of the *Howe* case have neglected to investigate the central role played by the grand jury, who concluded that (in Howe's words) "the indictment in which I am charged with sedition and rebellion"[52] was well enough supported by the crown's evidence to warrant a trial. The grand jury could have quashed the indictment on procedural or other grounds, or insisted that the author, rather than (or in addition to) the publisher of the alleged libel be charged, and that the indictment be redrawn accordingly. They might have denied the innuendo (the construction placed by the crown on the alleged seditious words), or concluded that publication of the alleged libel was immaterial, because the statements made in the letter were not seditious on the face of them. Furthermore, they might have concluded that, since an action for libel lay where an indictment was sustainable, a private action rather than a public prosecution should have been brought. In short, the grand jury were under no obligation - except political - to return true bill on the indictment.

Though the grand jury had ample opportunity to quash the indictment, they chose instead not to run the risk of antagonizing the government by forcing the attorney-general either to discontinue the prosecution or to lay an *ex officio* criminal information. Returning true bill suggests timidity on the part of the grand jury in the exercise of their investigative function — at least where political trials were concerned — and their action was not even remotely comparable to the independence and assertiveness of earlier, reformist grand juries. If the neo-conservative grand jury of 1835 had been of the same political stripe as that of 1834, then the bill would certainly have been rejected. Everything turned on the composition of the new grand jury: whether to prosecute; whom to prosecute; by what means to prosecute.

The attorney-general, exercising his discretion in the interests of the accused, took the high road of indictment, which committed the crown to proving that the charge as laid warranted a trial on the evidence. Perhaps Archibald, who by his choice of prosecutorial instrument had given the grand jury the power to act, was anticipating that they would quash the indictment, which in turn would have enabled him to enter *nolle prosequi*. He summoned one (and only one) highly objectionable and interested witness to speak to the indictment — perhaps in order to suggest that

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[52] Chisholm, *supra* note 2 at 52.

the charge was groundless and the prosecution malicious, and that the indictment should therefore be quashed. If this was the strategy, it failed; the grand jury was 'packed' as effectively as special juries for libel trials were in England before the passage of the *Juries Act, 1825*.[53]

Archibald's chief concern throughout the preliminary hearing seems to have been to inculcate the notion that the crown had a weak case. Thus, he exercised his prosecutorial discretion in such a manner that the ill-advised proceeding reflected more on the complainant magistrates and on the government (who at the behest of the former gave the order to prosecute) than on either himself or on the accused — "a personal friend."[54] Archibald did not wish to emulate the example of the attorney-general of England, Sir James Scarlett, who a few years before had been carrying on a series of political libel prosecutions, which "roused considerable resentment and were generally thought to have been a mistake."[55] Taking a longer view of the political implications of the prosecution than either the magistrates or the executive government, "Archibald was deliberately moderate, fully realizing that this was one jury trial he could not possibly win."[56] The attorney-general's involvement was strictly *ex officio*; Archibald publicly dissociated himself from the magistrates and their quest for a prosecution.

According to McNaught, "[i]n cases where strong public emotions are aroused — such as those attaching to race or freedom of the press — it may be that the defendant is well advised to conduct his own courtroom defence."[57] Yet the main tendency in the historiography of *Howe* has been to denigrate the legal character and effectiveness of Howe's defence, and to excuse the milquetoasts at the Halifax bar for failing to come to his defence. Whether or not Howe had a case was not for lawyers (much less historians) to prejudge, or for the trial judge to determine, but for

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[53] An omnibus *Juries Act*, consolidating and repealing four earlier acts, 1796 through 1833, was passed in Nova Scotia in 1838.

[54] Chisholm, *supra* note 2 at 73.

[55] J.R. Spencer, "The Press and the Reform of Criminal Libel," in P.R. Glazebrook, ed., *Reshaping the Criminal Law: Essays in Honour of Glanville Williams* (London: Stevens, 1978) 266 at 271 n. 33.

[56] J.M. Beck, "Rise and Fall of Nova Scotia's Attorney General: 1749-1983" in J.A. Yogis, ed., *Law in a Colonial Society: The Nova Scotia Experience* (Toronto: Carswell, 1984) at 129. Beck's characterization of Archibald elsewhere in the same volume (130) as "the last non-party attorney general of Nova Scotia" speaks volumes about his discomfiture during the trial, though of course 'non-party' did not mean non-political.

[57] McNaught, *supra* note 15 at 156 n. 22.

the jury to decide. Beck's statement, "[t]he suggestion that Howe could not get a lawyer to take his case has little basis in fact,"[58] itself has little basis in fact. Of the handful of lawyers whom Howe canvassed — there were about thirty-six barristers resident and practising in Halifax in 1835[59] — none was prepared to accept his brief.[60] Howe afterwards described the response of the legal profession:[61] "'I went,' said he, 'to two or three lawyers in succession, showed them the Attorney-General's notice of trial, and asked them if the case could be successfully defended? The answer was, No: there was no doubt that the letter was a [seditious] libel; that I must make my peace, or submit to fine and imprisonment'."[62] The lawyers excused themselves — not because the defence case was weak legally, but because the crown's case was perceived to be far too strong politically. The bar was intimidated by the degree of government interest in, and sponsorship of, the prosecution; in the forefront of the collective memory stood *Wilkie*, an exemplary warning to lawyers not to act as public defenders of accused seditionists. The lawyers were constrained by the *Wilkie* precedent, where the accused was indicted, tried, convicted and sentenced to prison for a libel on the magistrates of Halifax, *inter alia*. Defending Howe, whose cause was assumed to be lost, was deemed a pointless risk, too dangerous to take. Perhaps, also, none of the lawyers wanted to find himself in the unenviable position of facing down Attorney-General Archibald, the recognized leader as well as *ex officio* head of the bar.

Thus, political considerations outweighed legal ones in the standoffishness of the Halifax bar. Even its most politically progressive members — reform-minded lawyers such as James Boyle Uniacke, the brothers William and George Renny Young, Lawrence O'Connor Doyle and Alexander Stewart — preferred not to commit themselves to the defence of a newspaper editor charged with publishing a

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[58] Beck, *Joseph Howe*, *supra* note 17 at 35.

[59] This amounted to 45 per cent of the provincial bar, or about one lawyer for every 400 persons living on the Halifax peninsula at the time. The size and distribution of the bar can be computed from *Belcher's farmer's almanack* (1832-1930); population figures derive from the 1827 census, cited by Howe in his defence: Chisholm, *supra* note 2 at 41.

[60] E.M. Saunders speculated that Howe could not obtain legal representation because of his "social position": E.M. Saunders, *Three Premiers of Nova Scotia* [Toronto: W. Briggs, 1909] at 56. Tradesmen — Howe was described as a "printer" in the indictment – were not gentlemen.

[61] Had Howe not been charged with *seditious* libel, he would have had no difficulty finding counsel. Thomas Forrester (the "Whig Radical"), charged with defamatory libel in 1825, had the cream of the bar appearing in his defence.

[62] Thanks to Fox's *Libel Act*, whether the publication was a libel, seditious or otherwise, was for the jury to decide.

seditious libel. Howe could not even count on friends and collaborators such as the former MHA, Beamish Murdoch, whose unsuccessful re-election bid in 1830 Howe had supported, and whose *Epitome* had only recently been published by Howe and printed on the *Novascotian* press. Nevertheless, Murdoch was one of the battery of lawyers present in court to witness Howe's chastisement. Though sympathetic to Howe, Murdoch was not so careless of his professional reputation and prospects as to have an accused seditionist for a client.[63] So Howe was left entirely to his own devices, the victim of lawyers' lack of intestinal fortitude.

Joseph Howe was an autodidact whose only formal education was apprenticeship — not to a lawyer, but to a printer. Having attended neither grammar school nor college, he had not enjoyed the privilege of an academic education. Ten years earlier, however, before becoming a newspaper proprietor, Howe had seriously considered becoming a lawyer.[64] It was to prove beneficial to his cause that Howe was both widely and deeply read, a believer in lifelong learning. In the brief time available to him between notice of trial and its commencement — six days — he immersed himself in the legal literature, which consisted then of one or two English treatises on libel and extensive case law. Howe's command of the leading late 18th and early 19th-century English cases on seditious libel, as well as of the pertinence of Fox's *Libel Act*, in the passage of which the struggle of newspaper editors and proprietors against public libel prosecutions had culminated, was to appear remarkably sure during the trial:

> The law infers malice from the publication itself, and it throws the onus of rebutting that inference on the party accused. To rebut it, he must ... explain the reasons for his conduct, and show that he was innocent from ignorance, or that some public exigency justified him in violating the strict rule of law. ... If this doctrine of intention were not clearly recognized by the English law and if the jury were not made the exclusive judges of the circumstances which influenced the accused, there would be no safety for the press, no freedom of discussion at all.[65]

Moreover, Howe made constructive use of the leading seditious libel cases reported

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[63] See generally P.V. Girard, "Patriot Jurist: Beamish Murdoch of Halifax, 1800-1876" (Ph.D. thesis, Dalhousie University, 1998) at 190 *et seqq*.

[64] Howe to [Mrs Austen], 24 Nov 1824; cited in "Joseph Howe and the Bar" (1932) 10 Can. Bar Rev. 597.

[65] Chisholm, *supra* note 2 at 64.

in the first (pre-1820) series of Howell's State Trials.[66] He also quoted Blackstone, and Thomas Starkie ("an eminent authority on the law of libel")[67] — the first American edition of whose treatise appeared in 1826, and who remained the leading English authority on libel throughout the nineteenth century.[68]

Howe also quoted Hone's Trials and read into the record four stanzas of one of William Hone's parodies of the Book of Common Prayer (*The Political Litany*), as a result of which Hone, a London bookseller, was prosecuted in the Court of King's Bench. Hone underwent three trials in as many days in December 1817 on *ex officio* informations for blasphemous libel.[69] Like Howe, Hone defended himself eloquently and was acquitted in what was generally regarded as a landmark decision for the liberty of the press. His use, however jocular, of 'subversive' material such as Hone's Trials suggests that Howe was consciously positioning himself within the English tradition of radical printers, exemplified in late-eighteenth-century London by John Stockdale, whose successful defence (by Thomas Erskine) to a charge of seditious libel led directly to the passage of Fox's *Libel Act*.[70]

Those scholars who quote the old saw about a fool for a client neglect the very material fact that Howe was not the defendant in a private action but the accused in a public prosecution. Had he been charged with treason or a felony, rather than a high misdemeanour, the court would have appointed a barrister to defend him.[71] As it was, the most that Howe was able to obtain from the bar was not legal representation but the loan of treatises and law reports, from which he crammed for

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[66] He cited or quoted *R.* v. *Stockdale*, (1789) 22 St. Tr. 237 (K.B.) — *ex officio* information for seditious libel; *R.* v. *Perry et al.*, (1793) 22 St. Tr. 953 (K.B.) — *ex officio* information for seditious libel; *R.* v. *Shipley* [Dean of St Asaph], (1783-84) 21 St. Tr. 847 (K.B.) — indictment for seditious libel; *R.* v. *Peltier*, (1803) 28 St. Tr. 529 (K.B.) — *ex officio* information for public defamatory libel; *R.* v. *Rowan*, (1793-94) 22 St. Tr. 1033 (K.B.) Ir. — *ex officio* information for seditious libel; and *R.* v. *Reeves*, (1796) 26 St. Tr. 529 (K.B.) — *ex officio* information for seditious libel.

[67] Chisholm, *supra* note 2 at 35-6, 64-5.

[68] T. Starkie, *A [Practical] Treatise on the Law of Slander, Libel, Scandalum Magnatum, and False Rumour*, E.D. Ingraham, ed. (New York, 1826 [1st American ed.]).

[69] Chisholm, *supra* note 2 at 67 ("Hone's Trials"). Howe would have consulted one of the numerous contemporary editions of *The Three Trials of William Hone, for Publishing Three Parodies* (London, 1818); none of Hone's three trials was reported.

[70] "[Thomas] Erskine, through whose exertions the Declaratory Act [Fox's *Libel Act*] was passed, confirming the right of juries to decide on the law and the facts, and whose views of the true bearing of the law of libel are now generally recognized...": Chisholm, *supra* note 2 at 66.

[71] On this subject generally see Murdoch, *supra* note 40 at 190.

a week. While Howe was thus preparing for his day in court, the lawyers were looking backwards some fifteen years to the *Wilkie*, where an easy conviction had been obtained by the same king's counsel who was now prosecuting attorney-general.

The Trial

J.R. Spencer's evocation of "the machinery by which political libel trials used to be stage-managed [in England] — *ex officio* criminal informations and special juries"[72] — applies in the latter, though not the former respect to Nova Scotia, which held its first seditious libel prosecution against a newspaper only after such proceedings "had largely died out in England."[73] On Monday, 2 March 1835, *R.* v. *Howe* came to trial in the Supreme Court before Chief Justice Brenton Halliburton and a special jury. According to Spencer's narrative of English practice, "the trial was further stage-managed in that a special jury was usually summoned to hear it — on the usually correct hypothesis" that a hand-picked or packed jury would "have little sympathy with radicals."[74] Indeed, the very fact that a special jury was summoned, in term time, to try an indictment emphasizes the political character of the prosecution, and was only possible because there was no other criminal business on the docket. Howe "laboured ... under the difficulty that the special juries in libel cases were chosen from the grand jury panels, whose members, because of large property qualifications, were likely to be heavily tory in complexion."[75] The petit jury, five of whom had served with Howe on the "militant" grand jury in 1832, and three others of whom had served on the grand jury the following year, instead consisted largely of merchants and tradesmen.[76] The court-appointed foreman was

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[72] Spencer, *supra* note 11 at 387.

[73] Spencer, *supra* note 55 at 273. Elsewhere, however, Spencer points out that "political libel prosecutions ... continued in large numbers for the next 40 years [after the passage of Fox's *Libel Act*], and in many of the cases the government was seeking to silence discussion of what would now indisputably be regarded as legitimate topics of public interest": Spencer, *supra* note 11 at 385. The analogy with *Howe* is obvious.

[74] The summoning of a special jury was one of a number of distinguishing features which marked out political libel prosecutions: Spencer, *supra* note 11 at 384.

[75] J.M. Beck, "Nugent, Richard" 8 Dictionary of Canadian Biography 657. (The reference is to an action for private libel, but applies equally to a prosecution for public libel.)

[76] Beck gives a helpful prosopography of the trial jury: *Joseph Howe*, *supra* note 17 at 136; cf. Sutherland, *supra* note 21 at 264 n. 77. Sutherland's occupational analysis shows one butcher, six merchants, one ship chandler, one "gentleman" and three tradesmen. Five of the jury were serving magistrates ("It may appear strange to you, gentlemen, that when I found that five magistrates had been

Charles John Hill, a failed auctioneer and former business partner of the police magistrate, John Liddell, one of the twelve magistrates who had signed the complaint. The accused, unrepresented by counsel, was arraigned and pleaded not guilty.

In some respects, the proceeding must have been more painful for the attorney-general than for the accused. Archibald held no brief for the complainant magistrates, whose motives he distrusted, and who had not consulted him on whether to bring a prosecution charging Howe "with sedition and rebellion."[77] Conscious that his very appearance as chief crown prosecuting attorney screamed government involvement, Archibald confined himself to having the last word to the jury. Despite his avowed disinclination "to ride upon the prerogative of the Crown"[78] by laying an *ex officio* criminal information — as the attorney-general of New Brunswick had done in *Hooper* — Archibald did not hesitate to exercise his prerogative right of reply, though the defendant had called no witnesses.[79]

The task of presenting the crown's case fell to one of the magistrates' retained counsel — James F. Gray — who, though a well-regarded lawyer of ten years' standing, was to prove no match for the accused. His having been retained by the magistrates, moreover, helps to explain why it was Gray, rather than the solicitor-general or one of the king's counsel, who presented the crown's case. This was contrary to regular practice and underlines the unusual circumstances surrounding the genesis of the prosecution. Gray explained the indictment without direct reference to its "seditious" aspects; showed how Fox's *Libel Act* had altered criminal procedure bearing on libel; and defended both the mode of proceeding (indictment rather than information) and the choice of indictee (publisher rather than author). He justified the choice by reference to the common-law principle that it is publication which makes libel criminal. As chief crown attorney, Gray was at pains to defend the magistrates for soliciting the prosecution. But arguing that the

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drawn upon the panel, I did not strike them off"): Chisholm, *supra* note 2 at 48, 24. One prospective juror, a former magistrate whose identity was not revealed, asked to be excused and was. It appears strange indeed that a former magistrate should have disqualified himself from serving, while five current ones went unchallenged by the accused.

[77] Chisholm, *supra* note 2 at 52; cf. 37, 38, 40 ("discontent and sedition"), 52 ("sedition and rebellion"), 71 and 72 ("mutiny and sedition").

[78] For the text of the attorney-general's reply see Chisholm, *supra* note 2 at 73-9.

[79] This right of reply reserved to the attorney-general was similar to the prerogative exercisable in England, where prosecuting counsel had no such right unless a law officer; see Wright, *supra* note 4 at 18.

magistrates as a public body could not seek redress by private action did not explain why Howe was being prosecuted for sedition rather than defamation.

Referring to Fox's *Libel Act*, Gray made clear the crown's assumption that the Act was good law in Nova Scotia. He proceeded to expound at some length the application of this act, by means of which the fact-finding powers of libel juries were very considerably enhanced, where, previously, responsibility for publication had been the only matter within the purview of the criminal trial jury. There was much more to the jury's role than simply determining whether the libel was seditious; they were to determine whether there was a libel.

When Gray finished his address, the crown's only witness was called but refused to answer. Printer Hugh Blackadar,[80] perhaps suspecting that he was being manipulated by the powers that were in order to repress "a fellow-publisher and liberal,"[81] declined to testify when summoned. He was only spared a citation for civil contempt by the accused's readiness to testify against himself and the court's willingness to rule the evidence admissible. No defence counsel would ever have permitted an accused to incriminate himself by turning King's evidence. The prothonotary then read the alleged seditious libel in open court, which was routine procedure in sedition and the other public libels — but not in defamation. When the accused enquired whether he was not entitled to know the names of the "prosecutors ... [t]he Chief-Justice answered that the court knew nothing on that subject; they referred to the Attorney-General."[82] This ruling clarified the nature of the prosecution as a political or state trial; the attorney-general, as chief law officer of the crown, appeared in his place to help prosecute a crime against the state. Though Howe was perhaps a little uncertain as to the procedure in sedition trials, neither he nor anyone else could have been ignorant of the nature of the libel charged and the purpose of the prosecution.

There were no crown witnesses to cross-examine, the accused having offered himself as chief and sole witness for the prosecution, nor could defence witnesses be called. After the prothonotary read into the record the alleged seditious libel,

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[80] As an employee of John Munro's *Halifax Journal*, Blackadar was doubtless expected to toe the proprietorial line in support of the magistrates. The proprietor himself, Munro, was disqualified from testifying for the crown because he was a member of the grand jury which had returned true bill on the indictment.

[81] L.K. Kernaghan [Yorke], "Blackadar, Hugh William" 9 Dictionary of Canadian Biography 54.

[82] Chisholm, *supra* note 2 at 30.

which the accused admitted to having published in his newspaper, Howe immediately began the presentation of the defence case. His famous speech — it took six-and-one-quarter hours to deliver — was divided into two distinct parts, fact and law. The first, and by far the larger, attempted to disprove seditious intention by adducing the facts on which "The People's" statements were based, and arguing that the publication of what was true and in the public's interest to know could not amount to a seditious libel. The second deployed to maximum effect Fox's *Libel Act* and English case law. Howe's strategy was "to rebut the legal inference of malice,"[83] with a view to disproving seditious intention. He aimed to turn the tables on his prosecutors by persuading the jury that the imputation of malice rested with the magistrates for soliciting the prosecution. If the government took the view that the magistrates had been defamed in the exercise of their public duty, then Howe would demonstrate to the jury that there was no sedition because there was no defamation.

Constrained by neither professional knowledge nor precedent (the *Wilkie* verdict), Howe defended himself against the charge of sedition as if he had been entering a plea to an action for defamation. Howe believed that he could make out a complete defence to the charge — not to justify the publication of a seditious libel, but rather to demonstrate his *bona fides*. By launching an all-out attack on the magistrates, Howe succeeded in turning the jury's attention away from the government which had ordered him prosecuted for sedition, to the magistrates whom "The People" had allegedly defamed. His careful preparation, political astuteness and intuitive, Erskinian understanding of the potential of Fox's *Libel Act* enabled Howe to exploit not only the resources of criminal trial procedure, but also the government's sheer misjudgement in ordering the attorney-general to proceed against him. He also contrived to turn the prosecution into a judicial test of the liberty of the press — a feat which gave rise to the durable myth, fostered by Howe himself, that by his acquittal he had established freedom of the press in Nova Scotia. No one has since bothered to ask whether it was unfree before; it was not.

The larger part of Howe's speech consisted of a very detailed exegesis of the content of the alleged libel. It was so detailed that one suspects that Howe must have inspired, if not actually ghost-written the second letter from "The People." Perhaps he wished to inculcate in the minds of the jury the notion that truth and public benefit might be a defence to seditious libel if *mens rea* could thereby be disproved. Like Crown attorney Gray, therefore, Howe lost no time invoking Fox's *Libel Act*,

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[83] Chisholm, *supra* note 2 at 70.

the significance of which he understood only too well:

> Formerly, in cases of libel, instead of the jury being called on to give a general verdict, founded on their own view of the law and the facts, they were directed to determine only whether the matter in question had been published by the party arraigned; and if it had, the judge assumed his guilt, and a wicked minister often awarded the punishment ... Men charged with libel are not now to be tried by the mere fact of publication, nor even by the tendency of what they print, though that may be most evil and injurious, but as they are tried for all other crimes — by the intention, the motive, with which they committed the act.[84]

Howe criticized the magistrates for taking refuge behind the shield of crime against the state: "If they were serious, why did they not bring their action on the case, lay their damages, and submit their administration to the most ample inquiry?" They doubtless knew, as did Howe from his study of libel (both crime and tort), that the truth of the allegations would have made a complete defence to an action for defamation. However, under the mistaken impression that it was the magistrates who had elected to proceed by way of a criminal prosecution,[85] Howe accused the magistrates of "well knowing that the [Supreme] court could not admit evidence but on the side of the Crown."[86] Howe could not have known that the complainants had had no say at all in the prosecution beyond soliciting it.

The legal heart of Howe's defence is best summed up in his own words. "In the trial of indictment for libel," he declaimed, with a firm grasp of how to rebut the legal inference of malice from the publication itself, by disproving criminal intention,

> as their worships the magistrates very well know, the defendant is not allowed to prove the truth of his publication, and therefore is cut off from what, in an action on the case, is often his strong ground of defence. But he has the privilege of explaining to the jury anything which may illustrate the motives and intentions by which he was influenced, to satisfy them, that so far from wishing to provoke a breach of the peace — so far from incurring the guilt of which he stands accused, that his motive was praiseworthy, his intentions honourable, and his act demanded by the circumstances in which

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[84] Chisholm, *supra* note 2 at 31-32, cf. 66.

[85] "[A]n *ex officio* information could not have been filed, but upon the oaths of the parties charged, negativing the truth of the charge": Chisholm, *supra* note 2 at 74. Of course, this provision applied only in cases of defamation.

[86] Chisholm, *supra* note 2 at 33.

> he was placed. This privilege I shall now proceed to exercise. It is one that the court will not deny, as it is so essential to the safety of persons similarly accused.[87]

Howe's object was to rebut the legal inference of malice, and thus defeat the accusation of libel by disproving seditious intention. His task was to demonstrate that the letter which he had published was not a libel — not because it was not defamatory, but because it was not seditious. By in effect pleading justification, a doctrine which has yet to penetrate sedition law, Howe inverted the common-law maxim to read, "the greater the truth the less the libel" — *absente malitia*. The most paradoxical aspect of his defence is that Howe anticipated the modern truth and public benefit defence to criminal defamation — neither then nor now a defence to seditious libel — in order to disprove seditious intention. This was the heart of the matter. In doing so, he eviscerated the charge against him.

The proceeding should have ended there. But the attorney-general being present — it was after all a prosecution by the state — Archibald exercised his prerogative right to follow the defence. Despite having "the strategic advantage of the last word to the jury (which was not enjoyed by other prosecutors),"[88] Archibald was not nearly so well prepared as Gray, because he had not presented the crown case, as he had done in *Wilkie* when a mere king's counsel. The contrast with Howe could not have been greater: "I asked them [the lawyers] to lend me their books, gathered an armful, threw myself on a sofa, and read libel law for a week. By that time I had convinced myself that they were wrong, and that there was a good defence, if the case were properly presented to the court and jury."[89]

Even in seditious libel proceedings instituted by means of regular indictment, the attorney-general's *de facto* monopoly over criminal prosecutions worked to the crown's advantage. In neither *Wilkie* nor *Howe* was the crown's case conducted personally by one of the law officers. In *Howe*, on the other hand, Attorney-General Archibald, well realizing the political importance of the prosecution, exercised "the right to make the strategically-important last address to the jury."[90] In English practice — honoured more in the breach than the observance in Nova Scotia — the defence was given the tactical advantage of the right to address the jury last, unless

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[87] Chisholm, *supra* note 2 at 34.

[88] Wright, *supra* note 4 at 18.

[89] Chisholm, *supra* note 2 at 23.

[90] Wright, *supra* note 4 at 51-52.

a law officer had led for the crown. No basis to claim that right existed in *Howe*: the prosecution had not been brought by *ex officio* criminal information; unlike *Wilkie*, a king's counsel did not prosecute; the solicitor-general did not appear; and the attorney-general did not present the crown's case. After the first appointment in 1817 of king's counsel to appear for the crown in criminal proceedings, the law officers seldom prosecuted personally, even in Halifax. The attorney- or solicitor-general's presence came to represent not the crown prosecutorial but the government as *de facto* prosecutor. *Howe* was an example of a sedition proceeding undertaken by law agents acting indirectly for the government[91] — in this case, one of the magistrates' two retained counsel.

The accused can be forgiven for not knowing enough to object to the attorney-general's abuse of due process. Yet scarcely had Archibald risen to reply when he was interrupted by Chief Justice Halliburton, "who said that as the hour was late, and the jury had been confined so long, it would be better to adjourn the court." Beamish Murdoch — *an amicus curiae* — "remonstrated; Mr. Howe ... had brought his defence to a close much sooner than intended in order to avoid the necessity of adjourning the trial. It would be unfair, therefore, to allow the other side the advantage of the night to reconstruct their case." The accused dissociated himself from this well-meaning intervention. Howe's work was done; the jury's had not yet begun. "The jury were consulted, and the foreman expressed their wish to remain; it was therefore determined to do so, but the crowd and the excitement being so great, and the difficulty of preserving order evident, his Lordship adjourned the court."[92]

The trial resumed on Tuesday morning, 3 March. Attorney-General Archibald was at pains to deny the newspaper report in which the magistrates had been advised to consult with him as 'their counsel': "I am not the retained counsel of these parties; ... My learned friends [Twining and Gray] who have conducted this case are their counsel."[93] Archibald wanted to nourish the impression that he was watching counsel on behalf of the government - nothing more. The real reason, of course, was that the government, whose servant Archibald was, wanted to distance itself from the possible consequences of its own actions. Archibald also reiterated the procedural point made by Gray, namely that "no private action would lie upon publication [of

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[91] "Most sedition cases in Britain were conducted by an individual taking a government reward or an agent retained by the state": Wright, *supra* note 4 at 18 n. 30.

[92] Chisholm, *supra* note 2 at 72-73.

[93] Chisholm, *supra* note 2 at 73.

a seditious libel]."[94] This was not mere criminal libel - defamation; this was sedition. "That is not the law as respects public bodies," stated Archibald. "It does not allow the defendant to escape in this way." The attorney-general then sketched the common-law crime of sedition, omitting Fox's *Libel Act*, which had already been covered by lead counsel.[95] Archibald's contention that the defendant's rebuttal of the crown's inference of malice was "unknown to the law" differed from Howe's constructive application of the Act, according to which the jury was not required to convict solely on the basis of the sense ascribed to the alleged libel in the indictment. In other words, the effect of construing the Act as Howe did was to undermine the common-law rule that the intention of the writer is to be gathered from the words written. The accused had argued forcefully that if the crown had the right to infer malice from the content of the alleged libel, then the jury had the right to reject that inference, and to determine on other grounds the presence or absence of seditious intention.

Recognizing the weak self-interestedness of the crown's case, Archibald focused more on its procedural than on its substantive aspects. Indeed, he came dangerously close to suggesting that the government had prosecuted for sedition in order to forestall the magistrates impoliticly initiating an action for defamation:

> If the nature of the charge [against the magistrates] would have allowed of a private prosecution, the defendant would then have been obliged to put his justification upon the record, and to prove the truth of it by witnesses placed in the box and examined on oath, not by hearsay, nor even by the report of a committee of His Majesty's Council.[96]

Descending to Howe's level, Archibald betrayed grudging admiration for the effectiveness of the defence case by appearing to dispute the truth of the allegations made by "The People." The attorney-general's discomfort showed in his extraordinary admission: "had the author been given up, I would not have proceeded against the publisher."[97] The argument was not only disingenuous but circular,

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[94] Chisholm, *supra* note 2 at 74; cf. 27.

[95] "The law in regard to seditious libel is as it was before the passage of Cox's [sic: Fox's] Libel Act": *McLachlan* v. *R.*, (1923) 56 N.S.R. 413 at 417 (N.S.S.C. in Banco), *per* Harrington, counsel for the appellant.

[96] The report to which Archibald was referring had been presented on 26 Jan 1835: Minutes of Council, NSARM RG 1 vol. 196. The appointment of the committee resulted from Lieutenant-Governor Campbell's having tabled in Council the address from the former grand jury, critical of the Court of Sessions, which Howe (at the request of the foreman) published in the *Novascotian* on 10 Dec. 1834.

[97] Chisholm, *supra* note 2 at 77.

because the aim of the prosecution was not to stop "The People" from writing letters, but to stop Howe from publishing attacks on the magistrates in the columns of the *Novascotian*.

Archibald used Howe's ignorance of criminal procedure as an excuse to brag about his own restrained exercise of prosecutorial discretion: "He [the accused] was under a misapprehension ... when he supposed that an *ex-officio* information could not have been filed, but upon the oaths of the parties charged, negativing the truth of the charge."[98] Archibald was gilding the lily, for he knew better than anyone that all that could be proved against Howe was publication, which was sufficient to make the indictment for seditious libel stick. Proving seditious libel was another matter, and that accounts for the strain and ambiguity discernible in Archibald's summation, as well as for the palpable tension between himself and the chief justice — political opponents and very unevenly matched lawyers.

Though Archibald's notion of the responsibility of the press did not dovetail with Howe's notion of its freedom,[99] it seems most unlikely that he would have advised government to prosecute Howe for seditious libel had his advice been sought or followed. Unfortunately, it was not; the lieutenant-governor had apparently been soliciting, receiving and acting upon political advice from his confidential advisers, who knew less law than the accused and far less about political trials as the art of the possible than did the attorney-general, who was an experienced politician. Though Archibald ridiculed the defence as mere "assertion without proof," he was nevertheless careful to answer the procedural argument that the magistrates could and should have brought an action for defamation. Howe's speculation that the magistrates forwent such a proceeding in order to deprive him of his sure defence was too close to the truth to go unanswered. Had the government not directed the attorney-general to prosecute for sedition in order to prevent the truth from triumphing as it undoubtedly would have done in a civil proceeding? Among the procedural advantages of the public prosecution over the private action were that the magistrates did not have to swear that the charges were false (when they knew them to be true), and that if the prosecution failed the costs would be borne by the crown. Perhaps it was all for the best. Archibald's vague admonitions about the

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[98] This important distinction between ex officio and private criminal informations, which were not abolished in England until 1938, was further developed by Chief Justice Halliburton in his charge to the jury: "A private party may have his information, but then he must come into court and swear that the charges are false": Chisholm, *supra* note 2 at 80.

[99] Chisholm, *supra* note 2 at 71-72.

inadmissibility of hearsay evidence and the immateriality of the truth of a libel fell on deaf ears — despite his reminding the jury that Howe had "stated a great variety of things which could not be evidence, which are mere hearsay, and which the court would not have permitted counsel to use."[100] But the great variety of things which Howe had stated were not meant to be evidence. Howe's defence was built on the bedrock of law, not the sand of fact; and it was as ingenious as it was brilliant in its simplicity.

The proceeding must have induced in Chief Justice Halliburton a sense of *déjà vu*; he had been on the bench in 1820, when Chief Justice Sampson Salter Blowers delivered his charge to the jury in *Wilkie*.[101] Fifteen years later, Halliburton, having succeeded Blowers in 1833, now found himself presiding over only the second seditious libel trial to have occurred in the province. The charge was a congeries of evasion, irrelevancy and prejudication, which strikingly illustrated Halliburton's too limited experience at the bar; as a lawyer, the chief justice was much the inferior of his contemporary, the attorney-general. Indeed, the only constructive parts of his charge were those which regurgitated the attorney-general's reply. Like Archibald before him, Halliburton was at pains to explain the nature of the prosecution in order to justify, if not cloak, its purpose. As the trial proceeded, it became clear that it was the crown, not the accused, that was on the defensive. Again like Archibald, Halliburton enumerated only to eliminate the other possible ways of proceeding — private prosecution, action for defamation, etc. — arguing very unconvincingly that it was necessary for the crown to act because it was impossible for the magistrates to do so.

Though there was nothing positively erroneous in the chief justice's restatement of the law, Halliburton misrepresented the defence case by observing, "[t]he course taken by the defendant has not been to induce you to believe that this paper is not a libel."[102] In fact the opposite was true; Howe had been at pains to persuade the jury that the letter was *not* a libel. Moreover, he strove to rebut the legal inference of malice (false defamation about public officials in relation to their official capacity) by arguing that demonstrated truth and public benefit positively disproved seditious intention. Having drunk deeply from Thomas Erskine's speeches, Howe stood four-square on Fox's *Libel Act*, which was conspicuous by its absence from both the

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[100] Chisholm, *supra* note 2 at 74.

[101] Halliburton, then senior puisne judge, also presided at the trial of Forrester for defamatory libel in 1825: *Halifax Journal*, 24 Jan. 1825.

[102] Chisholm, *supra* note 2 at 81.

attorney-general's summation and the chief justice's charge to the jury. One could get the impression that procedure in criminal libel had not undergone any statutory reformation whatsoever.

Despite his failure to draw the jury's attention to Fox's *Libel Act*, it is clear from the chief justice's charge that §2 of the Act, whereby "the Court shall give their Opinion and Directions on the Matter in Issue, as in other Criminal Cases," prescribed the procedure actually followed. Halliburton gave his opinion that "the paper charged is a libel, and your duty is, to state by your verdict that it is libellous." By expressing himself thus, however, he misdirected the jury, for it was by no means their duty by their verdict to declare that the paper was a libel but rather to determine whether it was a libel. Halliburton went even further by pointing out to the jury the implications of a verdict of not guilty: if the publication was not seditious, neither then could it be falsely defamatory — the very point which Howe had been endeavouring to prove. Halliburton's instruction would have carried greater weight if Fox's *Libel Act* had not passed or was not in force in Nova Scotia. As matters stood, however, the trial judge appeared to misdirect the jury as to their powers under the Act. The jury's duty was not simply to rubber-stamp the accused's admission that he had published the alleged seditious libel. Not to be misled by the trial judge's misdirection and non-direction, the jury disregarded his instructions and, in but twice the time it took to convict Wilkie (about five minutes), acquitted Howe.

Conclusion

Howe was the first, and would be the only, acquittal of an accused seditionist in Nova Scotia. "Your verdict will be the most important in its consequences ever delivered before this tribunal," Howe admonished the jury in his defence, implying that the liberty of the press might be in jeopardy if it were to find against him.[103] A defence which persuaded a trial jury, applying Fox's *Libel Act*, to return a verdict of not guilty cannot reasonably be described as "from the point of view of the law...magnificently irrelevant."[104] Such an interpretation ignores the truism that the

[103] Cf. "... your verdict will protect me to-day against the persecution of the sessions": Chisholm, *supra* note 2 at 69, 70.

[104] Beck, *Joseph Howe, supra* note 17 at 140; cf. "The law was completely against him": J.M. Beck, *Politics of Nova Scotia : Volume One : 1710-1796* (Tantallon, N.S: Four East Publications, 1985) at 109. Howe himself, under the extreme pressure of the moment, knew better than his biographer that Fox's Libel Act was in force in Nova Scotia and that therefore the law was completely *for* him. What was against him was the *Wilkie* precedent, and that alone; but 1820 was not 1835. The watershed was 1830,

jury was ultimately the judge of both law and fact. The trial judge could only advise and warn, direct and instruct — and then consent to the verdict, regardless of what it was. The jury's responsibility in sedition cases was greater still because there was no clear, positive law defining seditious libel;[105] that was for the courts to determine by reference to case law. As part of received English criminal procedure — consistent with Nova Scotia's common-law reception protocol — Fox's *Libel Act* was deemed automatically to be in force. It was declaratory, affirmative and ameliorative of the common law of libel, and tended to enhance the liberty of the subject. To be sure, both Attorney-General Archibald and Chief Justice Halliburton passed over in deafening silence an Act which they knew to be the strongest weapon in Howe's tiny legal arsenal. However, Gray had already elucidated it in presenting the crown's case; and the accused made much of it in his defence. The attorney-general and the chief justice may therefore have concluded that the less said about it the better. They could hardly have taken exception to Howe's account of it, which was correct and compelling in every way.

The suggestion that the law was disregarded by the jury is likewise mistaken. The opposite is true; the law was scrupulously regarded by a jury exercising their prerogative under Fox's *Libel Act* to give a general verdict on the evidence. They found that there was no seditious *libel*, not because the statements in "The People" were true or because their publication by the accused had been for the public benefit, but because there was no seditious *intention*. Howe's forensic enabled the jury to infer absence of malice from truth and public benefit, these being the two elements which would afterwards combine in the *Libel Act, 1843* ("Lord Campbell's Act") to form the justification defence to criminal defamation. That the crown inferred malice from the publication, without attempting to prove seditious intention, was an attempt to presume the accused guilty, as it were, until he could prove himself innocent.

The verdict in *Howe* demonstrates that Fox's *Libel Act* could redound to the benefit of the accused in sedition. The Act provided Howe with scope to rebut the legal inference of malice, which operated as a presumption of guilt. Howe destroyed the crown's case against him and pointedly gave the jury that "clear and distinct direction" which was not forthcoming from the trial judge: "Their lordships [*sic*] will

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a year of revolution in France and political awakening in Nova Scotia: the "Brandy Election" and the dissolution of the Loyalist Ascendancy.

[105] Beck, again following Archibald, seems to regard this as an argument for the defence, requiring rebuttal by the crown: Beck, *Joseph Howe*, *supra* note 17 at 135.

tell you that you are the sole judges of the fact and of the law; and that although every word of what I have published were false, and its tendency most injurious, that you are to try me solely by the motive and intention by which I was controlled."[106] Though his lordship was to say none of those things, the jury had been well enough instructed in law by the accused. Howe galvanized the jury to the full exercise of their powers on the verdict which Fox's *Libel Act* had confirmed to them. Chief Justice Halliburton was not the skilled and experienced lawyer that his predecessor Blowers had been, and Blowers (a former attorney-general) had stated the law much more succinctly and accurately before sending the *Wilkie* case to the jury fifteen years earlier. Nor was Wilkie so astute or learned a self-defender as Howe. He did not grasp that demonstrating the truth and public benefit of an alleged seditious libel was useful only if it tended to disprove seditious intention.

Though the bar was, for Howe, the career path not taken, he had conducted an intensive study of both the state-trials case law and the treatises. By no means "magnificently irrelevant" from the point of view of law, Howe's defence exploited to the full the resources of criminal procedure. Though the accused undoubtedly "stated a great variety of things which could not be evidence,"[107] he had also stated more law than either the attorney-general in his summation or the chief justice in his charge to the jury. To the extent to which doubts respecting the function of juries in libel cases were removed by Fox's *Libel Act*, Howe construed the remedial statute liberally. Hence the correctness of the jury's decision "to take its view of libel, not from Archibald, not from Halliburton, but from Howe, and bring in a verdict of 'not guilty.'"[108] Despite the brilliance of his forensic oratory, Howe's triumph was more forensic than oratorical in character. To paraphrase Beck,[109] the accused had in effect convinced the jury that the procedural law applicable to their function in a seditious libel case empowered them honourably to acquit him.

The crown's case had failed, but no actions or private prosecutions for defamation were brought as a result. Two days after the verdict, ten magistrates, including eight of the twelve complainants and three of the magistrates whom Howe had criticized by name in his defence, met to consider their response to Howe's acquittal. A resolution to "institute proceedings" for defamation was tabled but

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[106] Chisholm, *supra* note 2 at 32.

[107] Chisholm, *supra* note 2 at 74.

[108] Beck, "Fool for a Client," *supra* note 17 at 38.

[109] Beck, *Joseph Howe*, *supra* note 17 at 141.

voted down by a margin of four to three — with three of the magistrates abstaining.[110] It was not as though "The People" and its publisher were criticizing the magistrates (who were not lawyers) in their judicial capacity, but rather in their governmental character. If Howe had been alleging judicial rather than fiscal corruption on the part of the magistrates, then the executive government would have had much stronger grounds for ordering that he be prosecuted. (Moreover, Philip Girard's argument that Howe's radical "Free Trade in Law" bill of 1850 was ideologically continuous with his sedition trial fifteen years earlier would be more persuasive.[111]) Howe, unlike William Wilkie, was by no means so foolish as to attack the administration of justice in the Quarter Sessions or the Inferior Court of Common Pleas.

Had Howe completed his monographic "History of the Struggle for Responsible Government" [ca. 1842], the seventh of the twenty-odd chapters of which dealt with his sedition trial, we would have a better idea of how he viewed its significance in the context of a political struggle, which he thought was over but which was in reality about to enter its final, twelve-year-long phase.[112] How then do we make sense of the seditious-libel proceeding against Howe? Its very notoriety belies the fact that sedition proceedings were comparatively rare in the criminal justice history of Nova Scotia. The difficulty lies in liberating the trial from the decontextualized politico-biographical approach which has dominated the historiography, much to the detriment of sociolegal history. What is needed is an analysis of sedition in Nova Scotia which takes into account the insights of historical criminology. Perhaps the most unsatisfactory aspect of Beck's *Howe* is that he characterizes the successful civil actions for private defamatory libel brought against the radical reformer, Richard Nugent, Howe's successor as editor of the *Novascotian,* as "political" or as "state" trials, but withholds such apt and accurate descriptors from the sedition trial of Joseph Howe, to which they are far more applicable. What was true of Nugent in 1843 was true *a fortiori* of Howe eight years earlier: he appeared to be the target

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[110] Court of Sessions minutes, under date 5 Mar. 1835. Mover of the resolution was J.L. Starr, seconder John Howe Jr. (I owe this reference to the unpublished research of D.C. Harvey: NSARM MG 1 vol. 441 f. 108.)

[111] P. Girard, "Married Women's Property, Chancery Abolition, and Insolvency Law: Law Reform in Nova Scotia 1820-1867" in P. Girard & J. Phillips, eds., *Essays in the History of Canadian Law : Volume III: Nova Scotia* (Toronto: The Osgoode Society for Canadian Legal History, 1990) 114-115. *An Act to authorize Her Majesty's subjects to plead and reason for themselves or others in all Her Majesty's courts within this Province*, S.N.S. 1850, 13 Vic., c. 13, was Howe's valediction on the sedition trial. He was at the time provincial secretary in Nova Scotia's first Reform cabinet.

[112] Democratic government was not achieved until 1847-48.

"of political enemies who, unable to contend effectively with the chief reform organ, sought to get rid of its...editor by pursuing him mercilessly."[113] Thanks to the conviction of Wilkie, Howe was charged with seditious libel; thanks to the acquittal of Howe, Nugent was not.

Conventional examinations of political controversy in the 1830s make it appear that there was no repressive use of the criminal law — Howe was not arraigned for political crime. Historians interpreting these events must view the intended purpose of the prosecution in light of its altogether unexpected result. Current research suggests that Beck's analysis of *Howe* is fairly wide of the mark — there was no criminal defamation. The only significant difference between *Howe* and *Wilkie* was the verdict and its consequences for the accused. Most importantly, there was the revelation that the political use of the criminal law could be contested legally. The tables really could be turned. The *Howe* sedition case resolved imbalances between the rule of law and the political use of it, while highlighting controversial issues such as executive control of the public prosecution process, jury selection and the political character of the judiciary.

For the government, criminal justice administration was and had always been an important means of staking the outer limits of acceptable political discourse. The *Howe* case reflects the degree of official apprehension of political dissent achieving public consensus. Ergo, the aim was to quash the opposition, silence the means of communicating reform politics and depict press criticism of the status quo as unwarrantable and unpatriotic. It is evident from the different outcomes of *Wilkie* and *Howe* that the repressive use of sedition law was not merely a question of élite predetermination or prosecutorial instrumentality. To argue otherwise is to underestimate the unusualness of peacetime political crime and the near-uniqueness of public libel prosecutions, and to neglect the importance of legally contesting - successfully - legal repression. While executive control of public prosecutions is undeniable, an in-depth sociolegal analysis is needed to understand politically repressive use of the criminal law relative to its successful legal contestation. The Supreme Court may be seen as more or less a level playing field, though the rules of the game were made by the ruling élite. Moreover, Attorney-General Archibald may to some extent be seen as an independent prosecutor, the perception of whose independence was reinforced by his position as Speaker of the House of Assembly, and *de facto* leader of the popular party in the legislature.

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[113] *Supra* note 75 at 657.

A number of factors underlie this point. As in Upper Canada, the official élite made common cause with the merchantocracy, but this did not necessarily widen the possibilities of repressive action against the petite bourgeoisie, for whom both Wilkie and Howe were spokesmen. Despite being exceptional and infrequent, sedition proceedings were not mentioned in dispatches to Whitehall, so the Colonial Office had no reason to suspect that legal repression was excessive or beyond the pale of peace, order and good government. The absence of grievances about oligarchic influence on the administration of criminal justice was a measure of public confidence in the system, within which Wilkie unsuccessfully, and Howe successfully, contested the charge of sedition.

Criminal justice administration was influenceable, without being manipulable, because its claim to legitimacy derived from popular assent to the notion of equality before and under the law, the 'rule of law' being consensual. Political use of the criminal law was not the same as peacetime recourse to martial law against civilian offenders. An advantage of the former was the potential to legitimate the actions of government by portraying the true prosecutors as the innocent victims of unfair and untrue public criticism. Yet having recourse to repressive law undermined the legitimacy of the official exercise of prosecutorial authority by suggesting that its formal claims (disinterest, impartiality) subserved the government's agenda. If the exercise succeeds, as in *Wilkie*, it can be tried again; if it fails, as in *Howe*, it cannot — at least not until three generations have passed — without risking the loss of public confidence in the essential fairness and restraint of the criminal justice system. Resorting to a common-law offence as amorphous as sedition was a form of political brinkmanship. Political crime, then as now, lacks credibility. Howe was deeply scandalized by the nature of the charge against him, which he ridiculed as the last refuge of scoundrels. Manipulating the criminal justice system in the direction of state or political crime was risky, precisely because of the ideological constraints of the rule of law concept. Law was not merely a political tool in the hands of government. Public confidence in the system, while tolerating repressive use of the criminal law, also encouraged its victims to contest such uses. Howe's faith in the impartiality of "British justice" convinced him that the government's using seditious libel prosecutions to stifle public criticism was a repressive use of the criminal law which could be successfully contested.

Howe's crash-course mastery of sedition law *à la* Thomas Erskine figured prominently in his defence to the charge. Unlike Wilkie, he argued not for truth as a defence to seditious libel but for a narrower definition of it that excluded fair comment. Yet there was no criticism of the administration of justice — as in *Hooper*, and also to some extent in *Wilkie* — and no allegations that the magistrates

were guilty of misfeasance. This is what distinguishes *Howe* from both *Wilkie* and *Hooper*, where the crown's case was stronger and the verdicts guilty. While the resort to sedition law bore the legitimacy of precedent, it was a double-edged sword, as Attorney-General Archibald realized. Despite the chief justice's rather unsubtle attempt to direct a verdict of conviction, the government could not depend on a trial jury to toe the line; and, because of Archibald's unwillingness to allow either of the law officers lead for the prosecution, Howe was able to exploit with spectacular success the very public forum of a trial at bar in the Supreme Court. As Howe's triumph demonstrates, the government's prosecutorial monopoly and control of the judiciary did not mean that a struggle such as Howe's was a purely self-defensive reaction to an undefendable charge arising from the repressive use of the criminal law. The fact that truth could not be pleaded as a defence to seditious libel did not mean that there was no defence.

The *Howe* case is a uniquely rich exemplification of contested legality. An analysis of Howe's great speech in his own defence reveals not only the legal sophistication of the accused, but also highlights the importance of law-finding in the verdicts of libel juries. Howe's arguments from fundamental freedoms and legal and equality rights thoroughly discredited the charge against him. They derived from his belief in the jury's obligation to safeguard hard-won constitutional liberties, such as freedom of the press (only recently achieved in England), and to oppose by their verdict repressive use of the criminal law by government. The very nature of sedition law and the deep interpenetration of government and the judiciary under the *ancien régime* placed in high relief concerns about crown prosecutorial responsibility, the independence of the grand jury, and the impartiality of the bench.

The fact that the Nova Scotia government controlled the inauguration of state-criminal proceedings was hardly a controversial departure from English practice, as it was in Upper Canada in the 1820s and New Brunswick in 1830-1. The attorney-general's monopoly over crown prosecutions (which by no means precluded private prosecutions[114]) was benign — except when the government ordered the prosecution of a suspected political criminal. Despite the fact that the *ex officio* criminal information formed no part of received English criminal procedure in Nova Scotia, Attorney-General Archibald could easily have proceeded by that mode - simply because the offence charged was sedition (a public libel) rather than defamation (a private libel).[115] That he did not to do so, and explained

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[114] See generally Murdoch, *supra* note 40 at 174 *et seq.*

[115] Murdoch, *supra* note 40 at 181, 177.

why in his summation, is a most telling illustration of the triumph of constitutionalism over legal repression.

The role of constitutionalism in contesting the use of repressive legal instruments like the *ex officio* criminal information was a central theme in *Hooper*. However, resort to so extraordinary a prosecutorial weapon was unheard of in New Brunswick until 1830 and unheard of in Nova Scotia altogether. *Hooper* illustrates that this instrument offered the government distinct procedural advantages, such as the Damoclean sword of delay of trial — Hooper's was deferred for eight months. Even in seditious libel trials proceeding by way of regular indictment, the crown prosecutorial monopoly worked in the government's favour, because either of the law officers could exercise the prerogative right to address the jury last. By 1835, satisfaction with Attorney-General Archibald's impartial and disinterested exercise of prosecutorial discretion was so general that no one, least of all the accused, noticed that he had exercised a right of reply which was very inappropriate under the circumstances: neither he nor the solicitor-general nor a king's counsel had led for the crown. In general, there was a high degree of public confidence in the nonpartisan exercise of public prosecutions, which not only precluded the use of the *ex officio* criminal information against Wilkie or Howe, but also discouraged further sedition prosecutions after 1835.

On the other hand, the right of an accused to counsel was also well established. According to Beamish Murdoch, writing a few years earlier, "in treasons and misdemeanours he [the accused] has the full benefit of counsel to argue and address the jury for him."[116] Though defence counsel played no role in *Wilkie*, *Hooper* or *Howe*, this is not generally recognized as evidencing the state-trial nature of the prosecution. Pro-lawyer sentiment was being articulated by Howe in the columns of the *Novascotian* at the same time as the legal profession was being excoriated in the pages of John Hooper's *British Colonist*.[117] Howe did not appear on his own behalf because he lacked confidence in counsel's ability to do so. Towards the beginning of his defence Howe stated, "[u]naccustomed as I am to the forms of courts and to the rules of law, I would gladly have availed myself of professional aid"[118] — had he been able to obtain it. Small wonder that the experience of being an accused seditionist unable to retain counsel generated in Howe an intense lifelong

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[116] Murdoch, *supra* note 40 at 190.

[117] *Novascotian*, 4 Feb. 1830.

[118] Chisholm, *supra* note 2 at 30.

antipathy to lawyers.

The grand jury provided more ammunition for contestability than prosecutorial discretion or the threat of jury-packing. The grand jury did not exclude magistrates and was therefore subject to manipulation both by the Court of Sessions and by the presiding judge of the Supreme Court, who exercised a highly controversial prerogative to appoint the foreman. Joseph Howe had far more to fear from the grand jury, which sent him for trial, than from the special jury which tried and acquitted him. As far as the trial jury was concerned, neither the process of jury selection nor the freedom to give a verdict according to conscience was an issue. A special jury could be summoned to try an indictable misdemeanour, without endangering the accused's right of peremptory challenge, which Howe (unlike Wilkie) did not exercise.

The trial jury's freedom to render a general verdict was based on the recognition that Fox's *Libel Act* was of full force and effect in Nova Scotia and that it applied to all forms of libel, public (seditious, obscene, blasphemous) as well as private (defamatory). Trial by jury and verdict according to conscience — central to civil-libertarian opposition to the development of sedition law in eighteenth-century England, and virtually suspended in Upper Canada under the *Seditious Aliens Act* (1804-1829) — were taken for granted in Nova Scotia. As is clear from *Howe*, Erskine's famous arguments on the trial jury's right to deliver a general verdict were recapitulated, and Nova Scotia's instantaneous reception of the common-law declaratory *Libel Act* was reconfirmed. Upper Canada, where the need was greater because of a punitive sedition statute, did not have the benefit of Fox's *Libel Act*. Ultimately, it fell to the jury in *Howe* to become the voice of popular protest against oppressive prosecutions and Sessional misgovernment, as that role had been abdicated by the new neo-conservative grand jury. Though the accused in his defence suggested no such thing, the trial jury by their verdict sent a clear message to the Council and the magistrates that the local government was inefficient and corrupt and required reform or replacement.

Sedition proceedings raised constitutional issues that went beyond the government's repressive use of the criminal law to the active involvement of the Tory-Loyalist judiciary in the legislative process. The celebrated prosecutions of the Dean of St Asaph (1783-4), Stockdale (1789), Perry (1793), Rowan (1793-4), Reeves (1796), Peltier (1803) and Hone (1817) figured prominently in Howe's

defence.[119] More importantly, Nova Scotia, which never had sedition legislation, had always had the benefit of Fox's *Libel Act*, which was not in force in Upper Canada. Yet the common law also proved to be a double-edged sword, while the long struggle for, and ultimate achievement of responsible government virtually prevented the recurrence of sedition prosecutions. Along the way, the wholesale reform of town government, in the shape of Halifax's long-deferred incorporation as a city in 1841, was also achieved. A failed prosecution for sedition against a progressive, reformist newspaper editor became the spur to a mass movement of political protest and to political reform, however gradual. It not only discouraged further legal repression, but also perhaps forestalled the descent into rebellion which engulfed the Canadas two years after *Howe*. What would have happened in Nova Scotia had Howe been convicted?

As an episode in Canadian law and Canadian history, *Howe* clearly demonstrates the very broad applications of a judicially-legislated offence like seditious libel. As J.M. Bumsted has written in another context, "Seditious libel was the classic Anglo-Canadian charge used by those seeking to muzzle public criticism."[120] Seditious libel had more of sedition than of libel about it. The long-term politico-legal effect of *Howe* was to extinguish sedition as a crime in Nova Scotia; there would not be another prosecution for nearly ninety years. Before *Howe*, seditious libel prosecutions were an assured conviction; after *Howe*, they were deemed risky, counter-productive and not worth pursuing.

Sociolegal history is essential to understanding the interrelationship of law and politics and government's use of the former to regulate and control the latter. Certainly the Nova Scotian sedition cases - *Hoffman* (1753), *Wilkie* (1820), *Howe* (1835) and *McLachlan* (1923) - document the overwhelming importance of political crime both to the colonial state and to the experience of "conservative" reformers such as Joseph Howe, not to mention radical ones such as William Wilkie and J.B. McLachlan. Sedition law was an extreme and usually effective means of censoring extra-legislative political discourse. Prosecutions were designed to intimidate influential public opinion-makers and neutralize potential leaders of a popular opposition, by stigmatizing *pro bono publico* criticism as untrue and unfair and imputing a spirit of disloyalty to it. Yet while serving to justify and excuse its repressive use by government, the law was multi-purpose. Victims of the

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[119] Chisholm, *supra* note 2 at 65-69.

[120] J.M. Bumsted, *The Winnipeg General Strike of 1919: An Illustrated History* (Winnipeg: Watson & Dwyer, 1994) at 118.

prosecution could use the machinery of the criminal law to contest legal repression by government. Sedition as an instance and instrument of the repressive use of criminal law reveals tensions between rule of law and rule of government, state and people, authority and discretion — articulated in concerns about government control of public prosecutions, the grand jury and the judiciary. Howe's great hopes and expectations for British justice had everything to do with constitutionalism and nothing with legalism. Howe's optimistic sentiments bespoke his fundamental belief in the system, his belief that the rule of law was the guarantee of the liberty of the subject and of equality before and under the law. The source of Howe's immense popular appeal as a victim who refused to lie down was not that the government had deprived him of his constitutional rights, but that they had falsely and maliciously accused him of, and prosecuted him for a crime which he had not committed. He used the law decisively to remedy its misuse by government, a strategy which highlighted the political inexpediency of legal repression. What had worked before would not work again because it was wrong.

The positive effect of Howe's success, however, should not be exaggerated. The fact that public prosecutions were always initiated by government meant that trials in the Supreme Court were risky self-defensive exercises, which, while not precluding the possibility of unanticipated acquittals, made their occurrence improbable. And it is evident that claims of contestability, which defied precedent and the collective wisdom of the legal profession, were weak on their face — given government control of the prosecution process in state trials. Nevertheless, the effect of Howe's acquittal was to checkmate legal repression by holding the magistrates accountable, and embarrassing the government in such a manner as to kick-start reform in the legislative sphere. The reform leadership-in-waiting — in other words, the lawyers who would not defend Howe in that most public of all public forums, the Supreme Court — declined to do so in part because they realized that the more important struggles ultimately had to take place in the political arena, in the House of Assembly, and not in extra-parliamentary forums such as the grand jury and the liberal press. Repressive prosecutions, the political use of the criminal law and ancillary crimes against the state could only be effectively resisted if "high-profile" acquittals were procured. Legal successes, especially surprising ones, caused massive loss of face and credibility on the part of government, and unquestionably discouraged resort to sedition law after 1835. However, constitutional reform could only be secured by political action in the legislature. From 1836, when the final battle was joined, until 1848, when final victory was won, the legislature - not the courts - would be the arena of political struggle in Nova Scotia.

Nevertheless, legal contests such as *Wilkie* and *Howe* bulk large in the

pre-confederation experience. The defeat of reform in 1819-20 played an important role not only in the government's further recourse to sedition law but also in Howe's strategy of resistance. The law, having changed significantly in 1792, had not changed in the interval since Wilkie's conviction; but, in the political sphere, the *ancien régime* had fallen and public opinion in Halifax had become more enlightened as the abuses complained of by Wilkie grew progressively worse and the magistrates more petty-tyrannical and irresponsible. The importance of these legal struggles should not be overlooked by sociolegal historians. Barry Wright's contested legality model is instructive for understanding the exercise of hegemonic authority over movements of political protest and petit-bourgeois radicalism, through repressive use of the criminal law. Sedition as a range of indictable offences is still with us, though there have been no prosecutions since *Boucher* (for seditious libel) in 1949, and despite the recommendation of the Law Reform Commission of Canada in 1986 that sedition should be abolished.[121] While the definition of seditious intention has grown so narrow as almost to render prosecutions nugatory, the scope of the offence is potentially as wide as ever. Moreover, while the means of contesting the legality of crimes against the state have been greatly expanded by the legal and equality rights entrenched in the *Canadian Charter of Rights and Freedoms*, criminal procedure remains essentially unaltered. Revisiting historical experience of legal repression, and nuancing the more conventional and superficial interpretations of it, remind us that those "fundamental freedoms" now guaranteed by the *Charter* once were threatened and became established at a cost. As for Howe, it seems not a coincidence that the first of the two scholarly biographies of him (by James Roy) was published during the centenary of his sedition trial. *Howe* was decisive not just for the history of Canadian state trials, but for the history of political protest in Canada, in which it was a turning-point. The trial of Joseph Howe meant that Nova Scotia's constitutional reconstruction would be achieved not by rebellion, as in the Canadas, but by a 'quiet revolution.'

Appendix: The Alleged Seditious Libel

"There is no truth at all i' the oracle:
The Sessions shall proceed — this is mere falsehood." — SHAKESPEARE.[122]

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[121] Law Reform Commission of Canada, *Criminal Law: crimes against the state: Working Paper 49* (Ottawa: The Commission, 1986) at 64.

[122] *The Winter's Tale* (3.ii.141); the speaker is Leontes, King of Sicily, whose wife Hermione has just been exculpated from an indictment for high treason, for adultery and encompassing the death of the king.

Mr. Howe,

Sir, — Living, as we do in a free and intelligent Country, and under the influence of a Constitution which attaches to our rulers the salutary restrictions of responsibility in all matters of government, is it not surprising that the inhabitants of Halifax should have so long submitted to those shameful and barefaced impositions and exactions, which have from year to year been levied on them, in the shape of Town and County Taxes. Repeated attempts have from time to time been made, by independent minded persons among us, to excite amongst their countrymen some spirit of resistance or opposition to those unwarrantable and unequal exactions, which have been drained from the pocket of the public. But it seems to me, that the torpid indifference to public matters which has hitherto been the general characteristic of the people, has at length become quickened and aroused by a calm and deliberate reflection on what must be their future condition if they any longer neglect to look after the servants of the State. In a young and poor country where the sons of rich and favoured families alone, receive education at the public expence — where the many must toil to support the extortions and exactions of the few; where the hard earnings of the people are lavished on an Aristocracy, who repay their ill timed generosity with contempt and insult; it requires no ordinary nerve in men of moderate circumstances and humble pretensions, to stand forward and boldly protest against measures which are fast working the ruin of the Province. Does there, Mr. Editor, exist in any free state save Nova Scotia, a responsible Magistracy, who would for 30 years brave and brook the repeated censures of the Press, without even attempting a justification of their conduct, or giving to the public some explanation that might refute those **unjust and licentious libels**, which have repeatedly been a disgrace to them or to the press of the country. Are the journals of our land exclusive; do they admit only the wild and reckless portion of the people, and shut their columns against the sober and discreet supporters of the men in power? I cannot think this, Mr. Howe; and yet weeks have elapsed since charges too grave to be slighted and too plain to be misunderstood, have been placed, through the medium of the press, before the eye of the public, and yet no champion of the sacred band has taken the field to deny or to explain. I candidly and willingly admit that there are in the ranks of the Magistracy, individuals justly entitled to the esteem and respect of their fellow townsmen, but they have mostly left the Arena, disgusted with the scenes that were enacted by their more active and energetic brethren. I will venture to affirm, without the possibility of being contradicted by proof, that during the lapse of the last 30 years, the Magistracy and Police have, by one stratagem or other, taken from the pockets of the people, in over exactions, fines, &c. a sum that would exceed in the gross amount £30,000; and I am prepared to prove my assertions whenever they are manly enough to come forward and justify their

conduct to the people. — Can it not be proved, and is it not notorious, that one of the present active Magistrates has contrived for years, to filch from one establishment, and that dedicated to the comfort of the poor and destitute, at least £300 per annum? Can it not be proved, that the fines exacted in the name and on the behalf of our Sovereign Lord the King, have annually for the last 30 years exceeded £200; and of this sum His most Gracious Majesty has received about as much as would go into the Royal coffers, if the long dormant claim of the Quit Rents was revived imprudently. Is it not known to every reflecting and observant man, whose business or curiosity has led him to take a view of the municipal bustle of our Court of Sessions, that from the pockets of the poor and distressed at least £1000 is drawn annually, and pocketed by men whose services the Country might well spare. Those things, Mr. Howe, cannot much longer be endured, even by the loyal and peaceable inhabitants of Nova-Scotia. One half of the most respectable of the middling orders have this year [1834] been sued or summoned for the amount of their last years' Poor and County Rates; and nearly the whole town have appealed or are murmuring at the extravagant amount of the assessment for the present year. I will venture to affirm, and have already affirmed in a former number,[123] that £1500 ought to defray all ordinary expences for the County; and by the speech of His Excellency at the opening of the Session, we are informed that the people of England have, with their wonted generosity, relieved us of a large portion of the extraordinary expenses which the visitation of Providence rendered necessary. In fine, Mr. Howe, the affairs of the County have been for years conducted in a slovenly, extravagant and unpopular manner, and the people have been entirely in the dark, as regards the collection and appropriation of their monies; but they have now amongst them a Chief Magistrate,[124] who has pledged himself to be candid, and I trust we will find him impartial also. I am neither a flatterer, nor physiognomist, but I cannot help observing in the martial tread and manly mien of our present Governor, some of the outward features of the late Sir John Sherbrooke,[125] and if the inward man be corresponding, there is yet some hope for THE PEOPLE."

Source: *The Novascotian, or Colonial Herald* (Halifax NS), 1 January 1835

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[123] *Novascotian*, 19 Nov 1834.

[124] Major-General Sir Colin Campbell took office as lieutenant-governor of Nova Scotia in July 1834.

[125] Lieutenant-General Sir John Coape Sherbrooke, who died in 1830, was lieutenant-governor of Nova Scotia, 1811-1816; afterwards governor-general of Canada.