THE NEW BRUNSWICK ORIGIN OF CANADIAN JUDICIAL REVIEW

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Inevitability and conspicuous lack of debate are said to characterize the assumption by the Canadian judiciary of the power to patrol the boundaries of our federal constitution. B.L. Strayer maintains that "judicial review was accepted almost at the outset of our constitution as a legally legitimate part of the governmental system."[1] "Judicial review," according to Paul Weiler, came "to be exercised in Canada immediately after Confederation and encountered so little inquiry or debate that it must have been tacitly assumed by everyone to be proper."[2] Constitutional writers concede that the Fathers of Confederation did have conflicting views about both the efficacy and necessity of judicial review and that the *B.N.A. Act, 1867* did not explicitly vest this power in the courts. They regard the role of the courts as the umpire of the federal system as virtually foreordained, however. B.L. Strayer denies that judicial review is part of our common law inheritance but believes it to be an outgrowth of the Imperial system and "implicit in the royal instructions, charters or Imperial statutes creating the colonial Legislatures."[3] W.R. Lederman insists that judicial review flows almost inescapably from a written constitution and an independent judiciary with a guaranteed core of substantive jurisdiction which he finds in sections 96 to 101 of the *B.N.A. Act*.[4]

Constitutional scholars maintain, therefore, that the propriety of an appointed judiciary overruling a democratically elected legislature was an issue that really only emerged in the debate about the *Canadian Charter of Rights and Freedoms*, which enhanced greatly the potency of judicial review. But does this prevailing, indeed monolithic, view coincide with what occurred in Canada shortly after Confederation? This article suggests it may only reflect a preoccupation with the

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*Faculty of Law, Queen's University. This is a revised version of Chapter 10 of my book, Chief Justice William Johnston Ritchie (Ottawa: Carleton University Press, 1991). I wish to thank Professor David G. Bell of the Faculty of Law, University of New Brunswick, Fredericton who has generously and unstintingly made available to me any Ritchie material which he has uncovered in the course of his own research. To my knowledge, Professor Bell is the first legal scholar to draw attention to the Steadman Opinion, which sheds new light on judicial review of legislation in Canada. I also acknowledge the important contribution made by Norman Siebrasse, a research assistant, to the development of this article. I have throughout referred to the constitution as the B.N.A. Act because of the historical context of the material.

[1]B. L. Strayer, *The Canadian Constitution and the Courts*, 3rd ed. (Toronto: Butterworths, 1988) at 340. See also J. Smith, "The Origins of Judicial Review in Canada" (1983) 16 *Canadian Journal of Political Science* 115 at 115-124.

[2]P. Weiler, *In the Last Resort* (Toronto: Carswell/Methuen, 1974) at 165.

[3]Strayer, *supra*, note 1 at 2.

[4]W.R. Lederman, *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981) at 109-174.

constitutional experience of central Canada, as New Brunswick history reveals a significantly different picture. It was in New Brunswick that Chief Justice William Johnstone Ritchie became the first superior court judge in Canada to assume the power to hold a provincial statute invalid for contravening the division of powers. The assertion of this power created controversy within the New Brunswick judiciary and led to a heated conflict between the legislature and the New Brunswick Supreme Court. The New Brunswick legislature openly defied what it regarded as an aggressive assumption of judicial power and, at least in the short run, prevailed over the court.

Hazelton Saga

The controversy had its genesis in the person of one Horace L. Hazelton and concerned the administration of the estate of Charles Valentine, who had died in Boston in about January 1850. A Massachusetts court dismissed the first executor for failure to discharge his duties and Horace L. Hazelton, a lawyer of long standing in Massachusetts, was appointed administrator, with Lawson Valentine and his brother acting as sureties of the administration bond. Hazelton failed to administer the estate and the bond became forfeited. He eventually filed his accounts in a Massachusetts probate court which established that a substantial unaccounted balance remained in his hands. He was apparently unable to pay this amount because he had wrongfully invested the assets of the estate in several mines in New Brunswick and the mines proved to be unprofitable. Lawson Valentine became administrator of the estate and acknowledged his debt to the estate of $25,000 as a surety on Hazelton's administration bond. Valentine then sued Hazelton in New Brunswick to recover $25,000 as money paid by the plaintiff for the defendant's use. Chief Justice Ritchie of the New Brunswick Supreme Court tried this action and on 12 October 1867 found that even though Valentine had not in fact paid the $25,000 to the estate, Massachusetts law considered the debt to be paid by operation of law on appointment of the surety as administrator.[5] Ritchie, applying conflict of law rules, held for Valentine, on the basis that as the action could be maintained in Massachusetts, the New Brunswick courts would enforce those rights. On 21 February 1868 Valentine had Hazelton confined to gaol in Saint John for failure to pay the debt.

It was also in 1868 that New Brunswick enacted "An Act in amendment of Chapter 124, Title 34 of the Revised Statutes, 'Of Insolvent Confined Debtors'."[6] It provided that a person confined to gaol in a civil suit might apply to a county court judge and, if after examination the debtor established that he possessed no property other than property exempted from execution and had not made any

[5] *Valentine* v. *Hazelton* (1867), 12 N.B.R. 110.

[6] S.N.B. 1868, c.16.

transfer of property with intent to defraud the creditor who had confined him, the judge had a duty to discharge the debtor from confinement.

In 1869, Hazelton attempted to secure his freedom by invoking this procedure. But before James W. Chandler, a country court judge, could proceed to determined whether Hazelton qualified for a discharge from gaol, Samuel R. Thomson, counsel for Valentine, obtained a writ of prohibition to restrain Chandler. Before Chief Justice Ritchie of the New Brunswick Supreme Court, Thomson argued successfully that Chandler had no jurisdiction to release Hazelton as the 1868 statute was *ultra vires* the New Brunswick legislature.[7] Since *The Queen* v. *Chandler*[8] represented the first time that a Superior court was called upon to determine the constitutionality of statute under the *B.N.A. Act*, both the argument of counsel and Ritchie's decision will be considered. Thomson made what would now be the obvious argument that the impugned statute concerned insolvency and that, by virtue of section 91(21) of the *B.N.A. Act*, only the federal parliament had the power to pass such a law. For Thomson the propriety of judicial review was assumed rather than argued: the provincial legislature had clearly exceeded its authority "and it now only remains for the Court to interpose its authority."[9] No reliance on section 2 of the *Colonial Laws Validity Act* (now often cited as the genesis of the power of judicial review in Canada) is mentioned in the summary of argument.

In contrast, the points raised by Isaac Allen Jack, counsel for the imprisoned Hazelton, were by no means obvious. He entirely neglected the argument that the statute came within property and civil rights. He did attempt (as a final argument) to suggest that arrest and discharge of debtors related to procedure in civil matters and therefore fell within provincial jurisdiction by virtue of section 92(14). Ritchie did not even address this argument, as Jack was unsuccessful in persuading him that the 1868 amendment was not an Insolvent Act. Chief Justice Ritchie replied simply, "Is not this man now in gaol an insolvent debtor: and is it not by virtue of his insolvency that he seeks relief under this Act?"[10]

Jack's main argument was that the New Brunswick Supreme Court lacked the power of judicial review. In the first place, he relied on the local precedent of citing *Regina* v. *Kerr* in which Chief Justice Ward Chipman had maintained in 1838

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[7]Thomson's decision not to argue that the 1868 statute was *ultra vires* before Judge Chandler himself may have been motivated by the fact that another county court judge, James Steadman, had previously refused to consider the issue of the constitutionality of the same 1868 statute. See *infra*, *The Steadman Opinion* at 16.

[8](1868), 12 N.B.R. 556. In this report Hazelton's name is incorrectly spelled Hazleton.

[9]*Ibid.* at 558.

[10]*Ibid.*

that it was "a thing unheard of under British institutions for a judicial tribunal to question the validity and binding force of any such law when duly enacted."[11] In response, Ritchie distinguished *Kerr*, but not on narrow or technical grounds. When *Kerr* was decided, said Ritchie, the legislature had "the same power to make laws binding within the Province that the Imperial Parliament has in the Mother Country,"[12] but the *B.N.A. Act* had "entirely changed the legislative constitution of the Province"[13] by depriving it of the right to legislate on matters assigned to the Parliament of Canada. Ritchie formalized this point by raising the argument of repugnancy. He maintained that the court was now required to elect between two statutes and, where an Act of the British Parliament conflicted with a provincial statute, the provincial statute must give way. In his decision, Ritchie drew attention to a qualification made by Chipman – "a law not objectionable on account of its repugnancy to an Act of Parliament relating to the colonies"[14] – and asserted that the province, in defiance of the *B.N.A. Act*, had purported to legislate on a subject assigned to the federal parliament. He asked the rhetorical question "under these circumstances can there be any doubt as to what we are bound to do?"[15]

> We think not. We must recognize the undoubted legislative control of the British Parliament, and give full force and effect to the statute of the Supreme Legislature, and ignore the Act of the subordinate, when, as in this case, they are repugnant and in conflict. The general and large legislative power which the local Legislature formerly had, as put forward by Chief Justice Chipman, they do not now possess; their powers are now controlled and limited by the Imperial Statute.[16]

Thus Chief Justice Ritchie set out clearly what would become the traditional argument for the reconciliation of judicial review and parliamentary supremacy – the supremacy of the Imperial Parliament.

In introducing the *Kerr* precedent, counsel for Hazelton maintained that the court formerly had no power to hold invalid an Act of the legislature assented to by the Lieutenant Governor because of lack of conformity with royal instructions. Jack may have implied thereby that the *B.N.A. Act* should be construed as directory rather than mandatory, in the same way that royal instructions to the Lieutenant Governor had previously been treated. When Ritchie countered this with his argument as to repugnancy Jack responded by contending that this

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[11](1838), 2 N.B.R. 553 at 557.

[12](1868), 12 N.B.R. 556 at 565.

[13]*Ibid.* at 566.

[14](1838), 2 N.B.R. 553 at 557.

[15](1868), 12 N.B.R. 556 at 566.

[16]*Ibid.*

doctrine would only follow "where the interests of the people of the United Kingdom were in question, and not to a Colonial Act."[17] This reinforced the suggestion that the division of powers in the *B.N.A. Act* should be construed as being directory, since the people of the United Kingdom had no significant interest in which level of government in Canada enacted insolvency legislation.

It is not surprising that Ritchie should have balked at the argument that an act passed in the normal manner by the Imperial Parliament should be construed as merely directory, in the manner of royal instructions. However, Jack went on to indicate that a year had elapsed since the enactment of the 1868 amendment and thus it could be inferred that the Act had been approved by the Governor General on the advice of the federal Minister of Justice. Ritchie failed to see the cogency of this argument and replied "You surely do not contend that the assent of the Governor General would make an Act law, where there was no right to legislate."[18] But this seemed to miss the thrust of Jack's argument, which was that the legislature, and not the supreme court, was the appropriate forum to determine initially whether a right to legislate existed. Thus Jack maintained that it was the duty of the court to uphold the Act, "especially in this case where the government of Canada have put a construction upon the British North America Act and regarded our Provincial Act as not conflicting with it."[19] Jack did not simply argue for deference to the legislature but implied that the *B.N.A. Act* should be construed as speaking to Canadian legislators. If their assessment that a statute was within their power and this was confirmed by the executive of the next higher level of government signified by non resort to disallowance, the statute should not be impugned by the courts.

In his response Ritchie portrayed judicial review as unproblematic, asserting that it was "difficult to conceive how the Imperial Parliament, in the distribution of legislative power, could have more clearly or more strongly secured, to the respective legislative bodies, the legislative jurisdiction they were respectively exclusively to exercise."[20] He emphasized that the constitution was "to a great extent, a written one" and powers exclusively assigned to one level of government are "completely taken from the others, as if they had been expressly forbidden to act on it; and if they do legislate beyond their powers, or in defiance of the restrictions placed on them, their enactments are no more binding than rules or regulations promulgated by any other unauthorized body."[21] This may well be so, but it begs the important question of who should have the power to determine

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[17] *Ibid.* at 557.

[18] *Ibid.*

[19] *Ibid.* at 557-558.

[20] *Ibid.* at 560.

[21] *Ibid.* at 566-567.

the limits of legislative authority. A political policing of jurisdictional boundaries is certainly not impossible. A written constitution may be directed to politicians as well as to judges, and could be a useful tool even in purely political disputes as to jurisdiction.

The decision rendered by Ritchie appeared out of keeping with the man. Ritchie as a colonial politician in New Brunswick had waged a determined fight for responsible government and greatly resented imperial interference in domestic affairs of the colony. One would have thought that he might have emphasized the domestic roots of the *B.N.A. Act* but instead he regarded it as simply an Imperial Statute and an ordinary one at that. This was exemplified when he wrote that "in construing an Act of Parliament as in construing a deed or a contract, we must read the words in their ordinary sense... ."[22] After referring to the situation in the United States where bankruptcy is a federal matter and insolvency a state matter, he noted that "the wisdom of Parliament,"[23] by which he clearly meant the Imperial Parliament, had relieved the courts of the need to distinguish between the two by granting both powers exclusively to the federal parliament. The Fathers of Confederation received no accolade but, more significantly, by wrenching the constitution from its domestic setting, he rendered their intention irrelevant, setting the stage for the Privy Council to adopt a highly legalistic approach to the constitution.

Nor does the decision in *Chandler* accord with what is known about Ritchie's views on Confederation. Although Ritchie had been appointed to the bench in 1855 and therefore did not participate actively in the events leading up to Confederation, he had been clearly labelled an anti-confederate,[24] even though he was well acquainted with those who represented New Brunswick, and his brother, John William Ritchie, was a Father of Confederation being a Nova Scotia representative at the London conference. One might thus have expected that he would be inclined to guard jealously the powers of the New Brunswick legislature. Yet he did not even refer to Jack's argument that the 1868 Act could be supported on the basis of 92(14) as a matter of civil procedure. This might reflect his full acceptance of the new reality of Confederation and an appreciation that the *B.N.A. Act* placed a high priority on finding mutually exclusive spheres of legislative power. Another factor which may have reduced Ritchie's reluctance to strike down what appeared to be a beneficial and humane provincial statute was his

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[22]*Ibid.* at 560.

[23]*Ibid.* at 561.

[24]In a letter from New Brunswick county court judge William Wedderburn to Sir Leonard Tilley, dated 28 Dec. 1882 Wedderburn said: "I need not say I am exceedingly glad to hear that Fraser is to succeed Judge Duff. Although it is another instance of how opportunely all those who have conspicuously opposed Confederation (from Chief Justice Ritchie downward) are reaping the benefits of that great Act." MG 27 I D15 vol. 21, N.A.C.

disapproval of the conduct of Hazelton. Ritchie had a stringent moral code and was noted as a scourge to evil doers. He would, undoubtedly, have taken an unfavourable view of a lawyer misappropriating trust funds from an estate. This may have diminished his inclination to be deferential to the legislature by upholding the statute when the benefit would accrue to Hazelton.

Another important factor which must be taken into account is that approximately one month prior to the *Chandler* case, Sir John A. Macdonald on 21 May 1869, introduced a bill to establish a national Supreme Court.[25] Section 53 of that bill provided that the Supreme Court "shall have and possess exclusive original jurisdiction...in all cases in which the constitutionality of any Act of the Legislature of any Province of the Dominion shall come in question," but omitted any reference to the impugning of a federal statute. Section 50 also provided that the federal cabinet might direct a special case to be laid before the Supreme Court for its opinion as to the constitutionality of "any Act passed by the Legislature of any Province" and again no mention is made of a reference dealing with the constitutionality of a federal statute. The inference from the 1869 bill was that Macdonald clearly envisaged a one-sided and restricted concept of judicial review, as only provincial legislation could be impugned and then only by the Supreme Court of Canada and not by provincial trial or appellate courts. The fact that Macdonald proposed vesting exclusive jurisdiction to engage in judicial review in the Supreme Court also seemed to imply that he did not believe that the lower courts possessed such a power inherently. In any case, judicial review was for Macdonald merely a supplement to the federal government's power of disallowance.[26]

Ritchie was among the many judges who commented on Macdonald's bill and his observations, dated 1 February 1870 - eight months after the *Chandler* decision - set out his understanding of judicial review in categorical terms:

> The *British North America Act, 1867* is the Supreme Law of the Dominion, and

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[25]Bill 90, *An Act to establish a Supreme Court for the Dominion of Canada*, 2d Sess., 1st Parl., 1869. It received only two readings.

In 1870, when Macdonald next proposed to establish a Supreme Court, Edward Blake specifically asked whether "the Supreme Court would decide only questions as to the constitutionality of Provincial Acts, or would it extend to Acts of the Dominion of Canada?" Macdonald evaded the question and talked about the power of the Governor General to reserve bills for the consideration of the Crown. Canada, House of Commons debates (18 March 1870) 506.

[26]In a report, dated 8 June 1868, Macdonald, in his capacity as Minister of Justice, said: "Under the present constitution of Canada, the general government will be called upon to consider the propriety of allowance or disallowance of provincial Acts much more frequently than Her Majesty's Government has been with respect to the colonial enactments." The report on disallowance is to be found in W.E. Hodgins, *Correspondence, Reports of the Ministers of Justice and Orders in Council upon the subject of Dominion and Provincial Legislation 1867-1895*. (Ottawa: Government Printing Bureau, 1896), at 61-62.

> must be universally and implicitly obeyed. All Acts of the Parliament of Canada, or of the Legislatures of the respective Provinces, repugnant to the Imperial Statue, are necessarily void; and of like necessity when cases come before the legal tribunals, it pertains to the judicial power to determine and declare what is the law of the land.[27]

Ritchie insisted that section 101 of the *B.N.A. Act* empowered the federal parliament only to establish a general court of appeal for Canada and any additional courts for the administration of federal law. He noted that the "Imperial Statute" gave exclusive power to the provincial legislatures over property and civil rights in the province and over the administration of justice, including the constitution, maintenance and organization of provincial courts. He then looked at the list of eight subjects over which the new Supreme Court was to have exclusive and original jurisdiction according to section 53 of the bill. After citing section 53(1) which provided exclusive jurisdiction as to the constitutionality of any Act of a provincial legislature, Ritchie stated:

> Is it not obvious, that if exclusive jurisdiction to determine questions, no matter what their nature may be, is vested in this Court, and so taken from the present local Courts, the exclusive rights professed to be secured to the Local Legislatures, are virtually and practically taken away? If so, much of the jurisdiction of these courts can be thus destroyed, why not the balance?[28]

Ritchie condemned Macdonald's idea that judicial review could be conferred exclusively on a new Supreme Court and limited to questioning the constitutional validity of provincial statutes while excluding federal statutes.

> Is it not as well the right, as the solemn duty of every Court in the Dominion, to pronounce what the Law is as declared by the Imperial Statute; and if the civil rights of the inhabitants, or the administration of justice in any Province, are interfered with, save by the Imperial Parliament, as possessing transcendent power, or the Local Legislature, to whom within the Dominion they are exclusively confided, will it not be the duty of the Provincial Courts to protect and enforce those rights, even at the risk of a conflict with a Court established regardless of the *Union Act*, and attempted to be supported by such a clause as this?[29]

In the light of Ritchie's observations on Macdonald's Supreme Court bill attaching such importance to 92(13), property and civil rights in the province and 92(14), administration of justice in the province (two heads he failed to consider in *Chandler*) it might be inferred that Ritchie used the challenge in *Chandler* as a preemptive first strike in an attempt to establish an inherent power of judicial

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[27]W.J. Ritchie,C.J., *Observations of the Chief Justice of New Brunswick on a bill Entitled "An Act to Establish a Supreme Court for the Dominion of Canada"* (Fredericton: G.E. Fenety, 1870) at 1. It is reproduced as appendix 2 in G. Bale, *Chief Justice William Johnstone Ritchie* (Ottawa: Carleton University Press, 1991) at 339-371.

[28]*Ibid.* at 15.

[29]*Ibid.* at 18.

review in provincial courts. Ritchie may have established in his submission on the Supreme Court bill that the federal parliament lacked the jurisdiction to deprive provincial courts of the power of judicial review. Nevertheless, the wide powers possessed by the provincial legislatures over the courts imposed problems for this supposedly inherent power with which Ritchie's analysis failed to cope.

The Steadman Opinion

Isaac Allen Jack, counsel to the imprisoned Hazelton, was not alone in doubting the power of the courts to undertake judicial review. Indeed, many of his arguments echo those of Judge James Steadman, a county court judge who, in an earlier case brought under the same insolvency statute, had denied that he had power to strike down duly enacted legislation. This earlier judgment of Steadman's may explain the decision by counsel for Valentine to apply to a superior court for an order of prohibition rather than arguing the constitutionality of the statute before Judge Chandler himself.

Steadman's opinion, rendered in 1868, was not published until February 1873, when New Brunswick's Provincial Secretary ordered 200 copies printed for the benefit of the legislature.[30] Just when Steadman had formulated fully his ideas opposing judicial review of legislation remains uncertain. He recited in what might more appropriately be called an essay in constitutional law rather than an opinion, that he had declined to take jurisdiction to determine the constitutionality of a New Brunswick statute in 1868 and that he proposed to give the reasons which influenced his prior judgment together with observations upon two cases subsequently determined by the New Brunswick Supreme Court.

Publication of the *Steadman* opinion or essay on constitutional law in 1873 – when the propriety of judicial review in New Brunswick remained controversial – must itself have created friction within the New Brunswick judiciary. It is surprising conduct for a judge to expand into a detailed essay a decision rendered five years earlier, not included in the law reports, and then have it published by the legislature, particularly when its basic premise was that the judiciary had no power to engage in judicial review and that Chief Justice Ritchie and other members of the New Brunswick Supreme Court were usurping authority.

Steadman's argument was driven by a conviction that parliamentary supremacy was a fundamental premise of the British constitution: the judiciary possessed the power to interpret and administer laws but not to hold any law invalid. At the most basic level Steadman disagreed with Ritchie on two points. First, while he recognized that the *B.N.A. Act* had changed the form of government substantially by creating an additional body of executive and legislative power, he did not

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[30] *Journal of Assembly of the Province of New Brunswick* at 116 (20 March 1875).

believe that the constitution had been so "entirely changed" as to strike at the bedrock of parliamentary supremacy:

> If Parliament had intended the *British North America Act* to work such a change in our Constitution, and to make it the standard by which the legal tribunals were to judge and determine all statute law, it would have been considered a matter of sufficient importance to have been made a subject of special enactment as involving a principle so entirely adverse to the theory of all British institutions.[31]

In contrast, the Constitution of the United States granted judicial powers explicitly and judges by their oath of office were compelled "to decide every question by the standard of the constitution as the *supreme law*."[32] Second, Steadman contended that "[j]urisdiction in the judiciary to declare a law void can only be sustained upon the theory that the *British North America Act* has reduced the respective legislatures of the Dominion to the character and capacity of ordinary municipal governments."[33] Before Confederation the colonial legislature "constituted the supreme legislative authority of the colony, possessed of the same power within the colony that the Parliament of Great Britain possessed within the United Kingdom;"[34] "the object and aim of the [B.N.A.] Act is not to restrict the legislative prerogative of the Sovereign but to extend that power."[35] Both these beliefs were emphasized in the closing words of the opinion:

> In conclusion, to use the language of Blackstone, "what Parliament does no power on earth can undo" and so what the Parliament of Canada does or the Legislature of any Province does, no power within the Dominion, save the legislative, can undo or successfully resist.[36]

This does not mean the division of powers was to be ignored. Rather, Steadman argued that sections 91 and 92 of the *B.N.A. Act* were directed not at the courts, but at the legislatures. In his view, the powers of reservation and disallowance found in sections 55, 56 and 90 of the *B.N.A. Act* were not alternative methods of regulating the division of legislative power, but the *exclusive* method. While this was not stated expressly, Steadman argued that it should be inferred in view of the subordinate position of the judiciary:

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[31] J. Steadman, J., *Opinion of Judge Steadman of the York County Court, Delivered in 1868, upon the power of the Judiciary to determine the constitutionality of a Law enacted by the Parliament of Canada or a Provincial Legislature, with his reasons therefor. Also – observations upon two cases involving the same question since determined by the Supreme Court of N.B.* (Fredericton, 1873) at 7. It is reproduced as appendix 1 in G. Bale, *Chief Justice William Johnstone Ritchie* (Ottawa: Carleton University Press, 1991) at 311-338.

[32] *Ibid. at 19.*

[33] *Ibid.* at 12.

[34] *Ibid.* at 2.

[35] *Ibid.* at 6-7.

[36] *Ibid.* at 25.

> Although the rule which governs the construction of ordinary statute law is that "what is exclusively given to one person to do is necessarily prohibited to all others," still without express jurisdiction conferred upon the judiciary, it is not within their province to determine a question involving the constitutional exercise of that authority. By the [B.N.A.] Act the *negative legislative power* of the sovereign was preserved over laws passed by the Provincial Legislatures. It is a clear principle, that jurisdiction cannot be taken by one Court where it is expressly conferred upon another and higher tribunal, which the sovereign authority is, possessing power to create a judiciary. It is not consistent to submit the judgment of a supreme sovereign tribunal to the investigation of any subordinate tribunal, however, competent it may be to determine the question.[37]

Steadman also noted that the power of disallowance in the British colonial system "ha[d] always been found sufficient to restrain the colonial legislatures within proper limits, and to prevent unnecessary conflict with the laws of Parliament."[38] He said that there was no instance on record of any court in British North America before Confederation ever holding a statute invalid.[39] Steadman was certainly correct in asserting that the British colonial system placed major emphasis on disallowance. B.L. Strayer notes that in the period 1691 to 1775 some 59 statutes of the royal province of Massachusetts were disallowed.[40] Swinfen records that of the 265 cases brought on appeal to the Privy Council from all the American colonies in the last century before the Revolution, only four cases involved judicial review and in the period 1818–1865 he states that the Privy Council heard no such cases from any jurisdiction.[41]

But B.L. Strayer suggests that it was familiarity with the British doctrine of judicial review of colonial legislation that facilitated the Canadian judiciary assuming an analogous function under the *B.N.A. Act* .[42] However, if Confederation–era judges and lawyers appreciated that reservation and disallowance were the dominant methods by which imperial policies prevailed over those of the colonies, the persuasiveness of Strayers' suggestion diminishes.

Steadman had a sophisticated response to the argument that the assent of the Governor–General could not make an Act law where, as Ritchie put it, "there was no right to legislate." Steadman recognized that a right to legislate depended on

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[37]*Ibid.* at 6.

[38]*Ibid.* at 9.

[39]*Ibid.* at 3.

[40]Strayer, *supra*, note 1 at 13.

[41]D.B. Swinfen, *Imperial Control of Legislation 1813-1865* (Oxford: Claredon Press, 1970) at 44, and L.P. Beth, "The Judicial Committee of the Privy Council and the Development of Judicial Review" (1976) 24 *American Journal of Comparative Law 22*, at 34, 42.

[42]Strayer, *supra*, note 1 at 14.

who was the authoritative interpreter of the division of powers. He argued that the provincial legislature could not legislate in violation of such division of powers. However, an Act passed provincially and not disallowed federally defined the scope of the division of powers:

> It is urged that the consent of the Queen in the one case and of the Governor General in the other, cannot extend the powers of legislation or render valid a law not within the authority conferred by the *British North America Act*. It is not to be supposed that the exercise of the negative authority, in its assent or dissent, has the effect of extending or limiting the legislative jurisdiction. *The office and purpose of the negative power is to determine what is within the powers conferred.* And the Act having placed this jurisdiction in the Sovereign and Governor General, the question involved in the proposition does not arise. By the assent the law is declared and affirmed to be within the authority, and no other tribunal is created by the Act or invested with the jurisdiction to question the correctness of that decision. It is wholly a question of legislative authority, and having been once determined by the jurisdiction specially named for that purpose, and always aided by high legal authority, *why raise it again?*[43]

Thus Steadman could maintain that "the judiciary is never called upon to say what Parliament is or is not authorized to do, but simply to interpret and determine upon what Parliament has done."[44] Steadman dismissed the argument that legality required that the legislature be kept strictly within the delegated authority by in effect denying the validity of a positivistic view of law: "Legislators like judges and all other men are fallible, and the question [as to the limits of jurisdiction] must be determined by mere opinion not by facts, and different minds may arrive at very different conclusions."[45]

Steadman responded to the repugnancy argument by maintaining a clear distinction between repugnancy arising out of conflicting laws in relation to the same subject and an issue of excess of legislative capacity. He made explicit reference to the *Colonial Laws Validity Act*, which declares "that laws of the colony repugnant to an Imperial Statute relating to the colony shall be void only to the extent of such repugnancy,"[46] but argued that the doctrine of repugnancy can only arise when "two different laws are enacted concerning some one subject."[47] Consistent with his view that the division of powers was to be politically policed, he held that issues of the respective legislative authority of the Canadian Parliament or a provincial legislature do not give rise to a conflict with an imperial statute; rather, "it is a question of a political nature, growing out of

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[43]Steadman, *supra*, note 31 at 14, first emphasis added, second in original.

[44]*Ibid.* at 21.

[45]*Ibid.* at 10.

[46]*Ibid.* at 5.

[47]*Ibid.* at 9.

a conflict between legislative authorities, and therefore not within the sphere of ordinary judicial inquiry or judicial control."[48] The appropriate control in this political process was the power of disallowance, not judicial intervention. For Steadman, repugnancy could only have formed a basis for judicial review if the *B.N.A. Act* "had said it *shall not* be lawful for the Queen to enact laws with the advice and consent" of the provincial legislature "except upon the subjects assigned" and the power of reservation and disallowance had not been preserved "for the purpose of determining what was within the subjects so exclusively assigned."[49]

Steadman recognized that with divided legislative authority there would be instances when the power of disallowance would not prevent enactment of conflicting laws. In such an instance, he said, "there can be no good reason assigned why the rule applied to different statutes enacted by the same legislative body, should not be applied here, and preference given to that law which is found to be last in order of time."[50] Intriguingly, Paul Weiler, proposed approximately a century later that the courts should not engage in judicial review but restrict their role to holding the provincial statute inoperative when there was patent repugnance between a federal and provincial law.[51] To solve the problems of explicitly contradictory laws, Weiler would resort to federal paramountcy whereas Steadman would grant paramountcy to the later enactment on the basis of his idea of the indivisibility of the English Crown. Steadman and Weiler would both restrict the judicial role in policing the bounds of federalism to the absolute minimum but for different reasons - Steadman because of his belief in parliamentary supremacy and Weiler because of his belief that judicial review of the division of powers is so inherently unprincipled that it should be left to the political process.

Some more practical concerns also buttressed Steadman's opposition to judicial review. He believed in "the absolute necessity for fixing with certainty the binding force of all statute law,"[52] and contended that "the unavoidable uncertainty in the interpretation of law is enough, we should not unnecessarily add thereto."[53] Using disallowance to police the boundaries of the federal constitution would settle the constitutionality of a statute within a one or two year period for provincial and federal statutes. Judicial review, on the other hand, could be invoked at any time

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[48]*Ibid.* at 15.

[49]*Ibid.* at 18-19.

[50]*Ibid.* at 21-22.

[51]Weiler, *supra*, note 2 at 172-179.

[52]Steadman, *supra*, note 31 at 10.

[53]*Ibid.* at 16.

by persons anxious to avoid a statutory responsibility, with unpredictable consequences: "It is impossible to know what the opinion of the Court will be if called on to pronounce upon the validity of [their Act of the legislature]."[54]

Steadman's main argument was that an Act passed by the provincial legislature and not disallowed by the federal power could not be *ultra vires* as this was the manner in which the limits of power were defined. At the same time he hinted at the distinct and possibly conflicting argument that the combined legislative power of the Dominion could amend the *B.N.A. Act* "so far as it affects the internal government of the Dominion or any Province thereof."[55] To contend otherwise, Steadman asserted, would be to deny "self-government, the most vital principle of the British Colonial system of government."[56] The *B.N.A. Act*, Steadman insisted, could have been enacted by each of the colonial legislatures instead of by the Imperial Parliament provided it received the assent of the Sovereign and therefore could be amended subject to the same consent. The *B.N.A. Act* was an Imperial statute not because the colonies lacked power to enact it, but simply because of the difficulty of obtaining consensus. This argument was not clearly developed by Steadman: for our purposes it serves to show his belief in the independent and sovereign status of the colonial legislatures, subject always to the power of disallowance.

Steadman thus insisted that Canada should have a flexible constitution as similar as possible in principle to that of the United Kingdom. He regarded it as "very unwise...to surround the constitution with a *legal band* rendering it unable to yield to any public necessity or public pressure."[57] Amendment by the Imperial parliament was not an adequate answer because Steadman believed in the sovereignty of the people speaking through their legislatures and their retaining the power to change their constitution subject only to the power of reservation or disallowance.[58]

Steadman thought it a weak argument to contend that without judicial review the provincial legislatures would be at the mercy of the federal parliament. Perhaps he perhaps placed too much reliance on the power of disallowance in the Queen in Council to prevent federal legislation encroaching on provincial authority. But he also indicated that the provinces could rely mutually on each other and on their representatives in the parliament of Canada to protect their interests. Ultimate power resided in the electorate to discipline any unwise

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[54] *Ibid.* at 10.

[55] *Ibid.* at 7.

[56] *Ibid.*

[57] *Ibid.* at 19.

[58] *Ibid.*

encroachment on either federal or provincial powers by the other level of government.

Steadman clearly rejected the propriety of deriving legitimacy for judicial review from the United States. He denied that the *B.N.A. Act* was supreme law in the sense that the constitution of the United States was supreme. The *B.N.A. Act* "is not the supreme law in the sense that it controls through any inherent authority in the judiciary, all Statute Law of the Dominion Parliament and Provincial Legislatures."[59] Such a power would contradict the constitutional principle of supremacy of the legislative authority. He also indicated that the judicial review would be anomalous because the provincial legislature "always had the power, and has now, to abolish entirely any court, and to constitute any other court in its stead with such jurisdiction as it may choose to confer."[60] Presumably, this opinion was based on sections 92(14) and 129. For Steadman the extent of the power of the provincial legislature over the judiciary made the courts an inappropriate umpire of the constitution.

Legislative Response To The Continued Incarceration of Hazelton and To Judicial Review

Returning now to the Hazelton saga: Lawson Valentine, after recovering a judgment for $25,000, had Hazelton imprisoned in Saint John. Valentine through proceedings in Massachusetts attached all Hazelton's property there and Hazelton applied to go into bankruptcy, but the Massachusetts court would not take jurisdiction because he was confined in a foreign gaol. Hazelton's dilemma came to the attention of George Edwin King, New Brunswick's attorney general, and in March 1870 he introduced "A Bill Relating to Imprisonment for Debt" which would limit imprisonment in a civil suit to twelve months. King conceded that it was not a very bold enactment but it had the advantage that it could be passed by both branches of the legislature. He maintained that "when society exacted of a man that he should remain one year confined in gaol, he should be fairly entitled to his discharge, having fully atoned for any mistake he may have made in conducting his affairs."[61] He noted that the new federal bankruptcy legislation had the effect of reserving imprisonment for debt to the poor man because the law applied only to traders and thus excluded most persons from its benefits. Even a trader could not go into bankruptcy unless he owed $500. King indicated that although his bill had general effect, it would have particular effect in the case of Hazelton. After outlining the predicament in which the unfortunate debtor found

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[59] *Ibid.* at 6.

[60] *Ibid.* at 24.

[61] *Debates of the House of Assembly, of the Province of New Brunswick During the Session of 1870* (3 March 1870) at 56.

himself, King indicated that passing the bill would be an act of mercy and charity for "[t]he only chance of escape for that man lies in this legislative body, or the grave to which he, as well as all of us, are hastening."[62]

S.R. Thomson, the lawyer who represented the creditor, Valentine, read of the introduction of the bill and wrote to the Speaker of the House of Assembly complaining that the legislation was retrospective and *ultra vires*.

> Apart from the impropriety of affecting the rights of any one by an *ex post facto* law, this Bill is, as I humbly conceive, *in pari materia* with the Act formerly passed by the Legislature since the *British North America Act, 1867*, and which upon my application to the Supreme Court was by that court declared to be, under that Act of the Imperial Parliament, *ultra vires* the legislature of this Province.
> I hope that the House will pause before it passes the proposed law, and thereby save my client the trouble and expense of a second application to the Court.[63]

William H. Needham thought that Thomson's letter was a "sort of threat"; in his opinion the act was valid because it was "simply legislating on civil rights."[64] Concurrently, Needham had introduced a more ambitious bill which would have abolished imprisonment for debt.

Thomson acted on his threat to prevent the legislature from releasing Hazelton and on 10 March 1870 less than a week after King's bill passed the House and before it had been enacted as law, obtained an injunction issued out of the Supreme Court in Equity by Justice John Wesley Weldon forbidding the sheriff or gaoler from releasing Hazelton on penalty of £1000. The injunction stated that sheriff and gaoler were not to discharge Hazelton out of their custody "by virtue of any such Act or Acts or for any other reason whatsoever" and the custody of Hazelton was to continue "until orders shall be made to the contrary."[65]

Needham was outraged: "The idea of an inferior tribunal daring to issue an injunction against an Act of the Legislature," he said, "was preposterous."[66] On 12 March 1870 he introduced a bill for "the protection and indemnification of all persons for carrying out the Acts of the Legislature." Premier Andrew Rainsford Wetmore said that the injunction was "a most extraordinary aggression on the part of the Judges of the Supreme Court - that a Judge by putting his name to a paper could prevent the operation of any Act passed by this Legislature."[67] King, who

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[62]*Ibid.* at 57.

[63]*Ibid.*

[64]*Ibid.* at 58.

[65]Saint John, *Daily Morning News* (12 Mar. 1870).

[66]*Supra*, note 61 at 88.

[67]*Ibid.*

would later become premier himself and a respected puisne judge of the Supreme Court of Canada, thought the issuing of this injunction to be "a most extraordinary and alarming extension of judicial power." He said the duty of a judge had generally been thought to lie in the interpretation of existing law, but "to extend their power to issue an injunction to a man not to act under a law passed or to be passed, was an assumption of power of such an alarming nature that this Legislature would not hesitate for one moment to put its foot on it and stamp it down."[68] On 16 March 1870 Needham's indemnification bill received first and second readings and, to make it clear to the courts whose authority was superior, he introduced a bill "to declare void the injunction issued by His Hon. Justice John Wesley Weldon, one of the Judges in Equity, in the matter of Horace L. Hazelton," and a separate bill "to declare void the judgment of the Supreme Court in the case of the Queen against James W. Chandler."[69] Both bills received second reading on 17 March 1870.[70]

Introduction of these bills demonstrated the attitude of the province's leading politicians towards judicial review, and their views were made more explicit in the debate which took place when Needham moved that the House go into committee on his indemnification bill before it received its final reading. Needham again indicated that the injunction issued by Justice Weldon gave rise to the bill but he also noted that county court judges, one of whom must have been James Steadman, had discharged debtors under the 1868 amendment respecting insolvent debtors and then the Supreme Court had held the act *ultra vires*. Needham thought it possible that these county court judges and sheriffs who had discharged confined debtors might be liable to creditors even though they had acted under the law enacted by the legislature. The bill, originally introduced by King to counter Ritchie's holding in *Chandler*, which would restrict the length of imprisonment in a civil matter, had passed the Legislative Council and awaited only the assent of the Lieutenant-Governor to become law.[71] "The moment that Bill becomes law," Needham said, "we are placed in this anomalous position, that the law commands the prison door to be thrown open...and a Judge issues an injunction to keep that prison door locked." He continued:

> It is a grave matter whether we have power to pass such a law or not. If we have not power it is time we knew it. If we are powerless in reference to the rights settled on us by the Charter of 1867, it is time we acknowledged our imbecility and petitioned Her Majesty to abolish our Legislature.[72]

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[68] *Ibid.*

[69] *Ibid.* at 105.

[70] *Ibid.* at 109.

[71] The Legislative Council had amended the maximum period of detention by increasing it from one to two years.

[72] *Supra*, note 61 at 121.

Premier Wetmore agreed with Needham and added that he had read Chief Justice Ritchie's decision in *Chandler* with great care and thought the House might have been right in passing the 1868 amendment and that "the judgment of the Supreme Court, if the question had been brought up on appeal, would not have been sustained."[73] The Speaker of the House, however, urged that the indemnification bill should not be passed. "Though he held the rights and liberties of this House as sacred as any other man," the Speaker said "he did not see the necessity for bringing on a contest between this House and other judicial powers and bodies, while they are exercising a power they think they have a right to exercise."[74] In reply Needham quoted from Chief Justice Chipman that "it was a thing unheard of in British institutions for a Judicial tribunal to question a law when duly enacted." He asked the rhetorical question "Has the Supreme Court, under the change in our Constitution, any more power than before?" to which he replied:

> If they had he would like to see it pointed out; but has the House of Assembly any more power over the Supreme Court than they had before? Hear it ye men of New Brunswick. They have! for we can annihilate them by a word of our breath as easy as we can a County Court. If they would turn to the 129th section of the British North American [sic] Act of 1867 they would find it.[75]

Here again was the argument used by Steadman that section 129 was a clear indication of legislative supremacy. The legislature did appear to be supreme in that it had power to "annihilate" the courts.

Needham referred to the memorandum prepared by Sir John A. Macdonald, dated 8 June 1868, on the power of disallowance possessed by the federal cabinet over acts of the provincial legislature and surmised that it was the sole mechanism for restraining provincial legislation. Needham made essentially the same argument that Steadman had made previously against judicial review:

> Though [a provincial law] might be a direct violation of the North America Act, yet the Judges of the Supreme Court have not the power to decide upon its constitutionality... [This] will be proved by examining the North America Act, Sections 90, 55 and 56, that when a Bill passed this Legislature, the moment it received assent of the Lieutenant Governor it became law, and remains so until annulled...subject only to the approval of the Governor General and the Privy Council of Canada... . It is a fallacy to say that because we have a written charter the judges of the Supreme Court have a right to take upon themselves the power to decide upon the constitutionality of law, when in that charter it is placed directly in the hands of the Governor General and Privy Council [Canadian cabinet]."[76]

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[73] *Ibid.*

[74] *Ibid.* at 122.

[75] *Ibid.*

[76] *Ibid.* at 188-189.

Needham asked rhetorically: "Was the Supreme Court the head of the country? They have no power to decide upon the constitutionality of our laws,"[77] and he concluded with a passionate appeal to democratic values:

> Hon. members need not tell him that because he was a lawyer he was setting up his opinion above the Judges of the Supreme Court. Though he had to bow to them in Court, he was their master here, and they had to bow to him. He stood on higher ground than they did because he helped to make the laws, but they were but expounders of them. While he knew they acted conscientiously, he did the same, and he was not prepared to yield to them when they declared an Act of ours unconstitutional which had been passed under the authority of our Charter and had received the sanction of the Governor General, who alone has the power to determine whether it was constitutional and legal. He would ask the members to stand up in defence of the people's rights. They had now a chance to talk about the people's rights and they could do it honestly and in truth. The case was the Supreme Court *versus* the people. He was on the side of the people, and the members of the House should assert their rights.[78]

Some members of the House expressed a reluctance to mount the barricades and defend the people against judicial aggression. Mr. Moore counselled caution and said "When we undertake to legislate in reference to any matter and it is proved to be not within our jurisdiction, then it becomes a grave question whether it would be considered an act of the Legislature at all." Moore implored the Assembly "as guardians not only of the people's rights, but of the character of this Legislature, not to pass this act without giving it more consideration than it had yet received."[79]

However, the vast majority of the House were closer in opinion to Needham than to Moore. The Attorney General King advocated passing the indemnification bill in order to guard the independence of the Legislative Assembly. He thought the injunction issued by Justice Weldon was "extraordinary" and in a completely different category than the judgment of Chief Justice Ritchie:

> Whatever difference of opinion there might exist as to the judgment of the Supreme Court in the case of the Queen against Chandler, whether it was based upon a proper consideration of law or not, no one would for a moment suppose that the injunction granted by the Judge of the Supreme Court, brought before the House, stands in the same position.[80]

King indicated that the bill to allow any person to be freed from gaol after a confinement of two years in any civil suit did not refer to solvency or insolvency.

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[77] *Ibid.* at 121.

[78] *Ibid.* at 123.

[79] *Ibid.*

[80] *Ibid.* at 124.

If the legislature could not pass that bill, King insisted, it could not pass an act abolishing imprisonment for debt. But King maintained that the *B.N.A. Act* conferred power to pass laws relating to private rights and "[t]he lawyer that would say he had no power to pass that Act [abolishing imprisonment for debt], and that it was interfering with insolvency, would utter an opinion that would be entitled to no credit whatever."[81] While King may have implied that the bill he had introduced was distinguishable from that which Ritchie had found *ultra vires*, this must have been largely an attempt to forestall another finding of unconstitutionality. The substantive difference between the bills was merely that the former provided for release of the debtor only after an inquiry by a judge, whereas in the latter release was automatic. If the former act was unconstitutional, the latter was a colourable attempt to evade the constitutional restriction.

While King was diplomatic in defence of his new bill, he did not hide his disapproval of the courts: "Having tasted blood in the case of Queen against Chandler, the spirit of the Court was aroused, and one of the Judges [Weldon] took it upon himself to make a dead set, not only against our past legislation, but anything we may think fit to pass."[82] King adopted the words of Ritchie in *Chandler*, that a body usurping power lost esteem, but turned the words against the court.

The response of King to the mounting conflict between the New Brunswick legislature and the courts was of great significance, as it revealed the opinion of a well educated and thoughtful lawyer to the issue of judicial review of legislation immediately after Confederation.

> We have no Court of Appeal established now, and under the laws of the country there is no existing body who have the right to decide upon the constitutionality of [an Act]. Suppose a man is released under the Act passed the other day, the Judges decide it is unconstitutional and the Court claims indemnity, but where is the constituted authority to decide the question? Why should you ask us to stultify ourselves when the law constitutes no authority upon the matter?... It is a wicked thing to trample upon the Judiciary, because we are here today and may pass what we think is right, but other people may come tomorrow, and once open the floodgates and breakdown the spirit of the Judiciary and evils would flow in upon you, from which there would be no escape. But there may be a question whether any body that is under the control of a legislative body and that receives from the legislative body no distinct functions to decide upon its Acts, should...have the power to decide upon the acts of the legislative body which gives it life and breath.[83]

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[81] *Ibid.*

[82] *Ibid.*

[83] *Ibid.*

When asked what was the paramount authority in the country, King replied: "The three estates of the realm and not the Supreme Court." The three estates, in a provincial context, must have been the two branches of the legislature, the House of Assembly and the Legislative Council,[84] and the Lieutenant-Governor. These three estates, he said "vitalize the institutions of the country, and among them the Supreme Court."[85]

King, who had received his education at both Mount Allison College in New Brunswick and Wesleyan University in Connecticut was alert to the ways in which the Supreme Court of the United States differed from Canadian courts.

> In the United States a Supreme Court is provided for in the very instrument that gives force to any of their acts of legislation, which instrument is the fundamental constitution of the United States, on which the Government itself is built, and that same instrument gives sanction to the co–ordinate body – the Supreme Court of the United States,and they all exist together in a co–ordinate and concurrent life, but here there is nothing of the sort. Here it is a body you bring into life, and you have the power to put an end to it, and is it wise to allow that body to decide upon the validity of your acts in a mere matter of Government, for if a Supreme Court has power to decide upon the matter, so has a County Court or Magistrate's Court. Is it wise and consistent with the best interests of the country that the Courts of the country should, by virtue of their existence, have power to determine upon these matters and control our actions. I think it is a serious question whether they have or not.[86]

King noted that in Ottawa a Supreme Court was being proposed which would have the power to determine the constitutionality of Provincial statutes. He thought that "The Dominion Parliament have this power if they give it expressly" and then provincial legislation would be subject to control by that court. He thought it would be unwise for provincial courts to exercise the power of judicial review because it would lead to conflict between the judicial and legislative power within the province. King thus was of the opinion that the judiciary did not have any inherent power to hold a statute to be *ultra vires* because it conflicted with the division of powers in the *B.N.A. Act* but this power might be conferred upon the courts by parliament.

The desire to assert legislative supremacy prevailed and King's indemnification bill entitled "An Act for the protection of all persons acting under any Act of the

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[84]The Legislative Council was abolished in New Brunswick by S.N.B. 1891, c.9, but did not come into effect until "after the closing of the first Session of Legislature of 1894, or until the dissolution of the present House."[84]

[85]*Supra*, note 61 at 124.

[86]*Ibid.*

Legislature" passed the House of Assembly by twenty-five votes to three.[87] Section 1 referred to the 1868 amending Act which Ritchie had held to be unconstitutional as though it were still a valid law and provided that Judges of the County Court could not be restrained by injunction from "doing any act or thing authorized by the said Act." The legislature made certain that their decision to intervene and assist Hazelton by passing the *Act relating to Imprisonment for Debt* would prevail over the injunction issued by Justice Weldon to restrain the sheriff and gaoler from releasing him. Section 2 of the indemnification bill provided:

> All Sheriffs and other officers of the law acting under the authority and according to the requirements and directions of any Act passed or to be passed by the Legislature of this Province, shall not be subject to any attachment, for or by reason of any act or thing by them done under and by virtue of any such Act.[88]

William Needham then withdrew his bill to declare void the injunction Chief Justice Ritchie had issued in *Chandler*, saying that the object sought would be achieved without.

The New Brunswick judiciary was not called on to determine the validity of either of the two statutes enacted in 1870 to assist Hazelton and thus the legislature prevailed over Ritchie's judgment in *Chandler* and Weldon's injunction. On 7 April 1870 Horace Hazelton was finally released from the Saint John gaol, more than two years after his incarceration. Isaac Allen Jack, son of his lawyer, recorded in his journal that "Osgood came down with all the necessary papers today the act for that purpose having rec'd the Gov. Genl's [Lt.Gov.] assent and Hazelton is at last free. I called and saw him at Osgood's and was told there was quite a convocation at the gaol when he left."[89] On the following day, Hazelton travelled by train to the United States and Jack recorded in his journal that "I am truly delighted he is off but he got off only by means of the most damnable legislation ever perpetrated in this province - perhaps any part of the empire."[90] Presumably Jack regarded the legislation freeing Hazelton as damnable because the legislature exercised its purported supremacy over the courts. An Act relating to Imprisonment for Debt did possess an unusual feature - it was to "remain in force for one year after the passing of this Act, and no longer." This sunset provision might have been introduced in anticipation that imprisonment for civil debt would soon be abolished; but this was not done in New Brunswick until 1874.

The imprisonment of Horace Hazelton had given rise to more extended

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[87] *Ibid.* at 189

[88] S.N.B. 1870, c.30.

[89] Isaac Allen Jack Journal (7 April 1870): A20, New Brunswick Museum.

[90] *Ibid.* 8 April 1870. Back in the United States, Hazelton sued Lawson Valentine for the tort of false imprisonment: see also note 112.

controversy over the propriety of judicial review of legislation than had previously taken place in Canada. The debate in the New Brunswick House of Assembly in 1870 indicated that most legislators, including several thoughtful lawyers, did not accept the proposition enunciated by Chief Justice Ritchie in *Chandler* that it was the duty of the courts to police the division of powers set out in the *B.N.A. Act*. Open doubts about the propriety of judicial review persisted for some time in New Brunswick. At the opening of the legislature on 27 February 1873 the Lieutenant-Governor said that he was happy to report that the controversial *Common Schools Act* of 1871, impeached as unconstitutional, had been sustained unanimously by the Supreme Court of New Brunswick. In the debate that followed, Michael Adams stated that he did not believe that the provincial Supreme Court had any right to determine the constitutionality of the school law and that it was impolitic for the government to approve or assent to such a doctrine. John James Fraser thought there was merit in the opinion of Adams but was not fully prepared to concede the point, believing it to be a debatable question. On this point a Fredericton newspaper, which subscribed fully to Adams' position, editorialized:

> No one doubts that the Legislature could abolish the present Supreme Court and set up an entirely new Court in its stead, or that the Legislature now controls every officer through whom the Court executes its decrees. What real authority has the Court as opposed to the Legislature? Is it not almost mockery that such a body should set itself above the Legislature? Is it not almost criminal negligence in the Government and legislature to submit to such an imposition?

The newspaper concluded with a warning to the government and the legislature that they should take care "lest they bequeath to their successors a weakened and impaired Constitution."[91]

Owan McInerney in the Legislative Council also objected to inclusion of the section of the speech from the throne expressing satisfaction that the *Common Schools Act* had been sustained because he did not think the Supreme Court had power to review it in the first place. On 22 March 1873 the provincial secretary made a motion ordering the printing of the essay prepared by Judge Steadman, arguing that the judiciary lacked the power to determine the validity of acts passed by the provincial legislature. This was the last significant volley fired in the conflict between the legislature and the courts in New Brunswick over the propriety of judicial review. Chief Justice Ritchie's position, that it was the duty of the court to engage in judicial review prevailed, but opponents had fought a spirited campaign in New Brunswick and had won the first battle over the incarceration of Hazelton.

Judicial Review Prevails

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[91]"The Legislature and the Supreme Court". *Colonial Farmer* (10 March 1873) 1.

An early reference to Ritchie's decision in *Chandler* came from Sir John A. Macdonald. In a report dated 12 August 1869 regarding statutes passed by the legislature of Nova Scotia, he noted that Nova Scotia had passed an amendment to the *Relief of Insolvent Debtors Act*, which Macdonald thought unconstitutional because bankruptcy and insolvency were assigned to the dominion Parliament. He conceded that the amended act "may be considered more as an Act for the relief of indigent debtors, than a law of Insolvency" and recommended that it should be left to its operation with the attention of the Nova Scotia government directed to it. Macdonald then said: "A measure of a similar nature was passed in the session of 1868 by the legislature of New Brunswick and the court there has declared the Act to be unconstitutional. Probably, if the question arises in the courts of Nova Scotia, the same decision will be arrived at."[92]

Thus Macdonald gave fairly explicit approval to Ritchie's initiative in holding a provincial statute unconstitutional on the basis of a failure to conform to the divisions of powers in the *B.N.A. Act*. Probably Macdonald welcomed the judicial intervention for a number of reasons. The provincial legislatures were enacting a large number of statutes, and insuring that the legislatures remained within their proper sphere became a burdensome task. Another likely reason Macdonald did not object to the sharing of the supervisory task with the judiciary was his faith that he had created a centralist constitution and generally speaking only provincial legislation would be held invalid by the courts. As well, relying solely on disallowance would have involved his government in a number of contentious issues. The New Brunswick school question, for instance, was an issue that Macdonald was delighted to leave to the courts. This political acquiescence might be a better explanation of the legitimacy and acceptance of judicial review than reliance on the precedent of the *Colonial Laws Validity Act*.

Canadian courts also followed the lead of Ritchie's vigorous decision. The Quebec Superior Court in *L'Union St. Jacques de Montréal* v. *Dame Julie Belisle* considered Ritchie's *Chandler* decision favourably and applied it. A widow had challenged the constitutional validity of a provincial act which allowed a financially embarrassed benevolent organization to modify its obligations to its beneficiaries. In a concurring majority opinion Justice Drummond explored the background for judicial review, quoting extensively from Marshall in *Marbury* and Ritchie in *Chandler*. In holding the legislation *ultra vires* the Quebec legislature because it infringed on the federal bankruptcy and insolvency power, the judge wrote that the "question under consideration is not the moral character of the Act, but the power – the authority of the framer. The decision of this court does not tend to impair the supremacy of the Imperial Parliament, but to maintain it, in its full

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[92]W.E. Hodgins, *supra*, note 26 at 472.

power."[93]In *Re Goodhue*, the first case in which a constitutional challenge was brought to the Ontario Court of Appeal, the court held that while judicial review was inherent in the new federal structure, the impugned legislation was *intra vires* the Ontario legislature.[94] The Privy Council did not have any opportunity to consider the *B.N.A. Act* until 1873[95] and it was not until 1878 in *A.G. Quebec* v. *Queen Insurance Co.*[96] that the it held a provincial statute imposing a tax on certain insurance policies to be *ultra vires* a provincial legislature. The Privy Council assumed the legitimacy of judicial review and consequently did not discuss its propriety. This indicated that judicial review might have been thought inevitable.

By the time Telesphore Fournier introduced the successful bill in 1875 to establish a Supreme Court of Canada, judicial review of both federal and provincial statutes by all levels of courts was an accepted fact. Sections 54 and 56 of the Supreme and Exchequer Courts[97] recognized clearly that the constitutional validity of an act of Parliament or of a provincial legislature could be impugned in the courts of the provinces, but with the consent of the local legislatures a judge might cause the issue to be removed to the new Supreme Court. Judicial review was much less controversial in 1875 than during Confederation debates, and two reasons for this might be surmised. First, the government of Alexander Mackenzie, being more sympathetic to provincial interests than that of Macdonald's, wished to reduce the political turbulence arising from wide use of a federal power of disallowance. Thus judicial review had greater appeal to them as a mode of keeping provincial legislatures within their proper sphere. Second, Ritchie's decision in *Chandler*, and the series of cases that followed on its course, had promoted a new understanding of judicial review.

In 1879 Chief Justice Meredith of the Superior Court of Quebec compared Ritchie's decision in *Chandler* to *Marbury* v. *Madison*, in which Chief Justice John Marshall enunciated that the constitution empowered the Supreme Court of the United States to hold an act of Congress unconstitutional. Marshall had based his decision on the notion that because the Constitution was fundamentally a legal document, and akin to a written contract, the courts were its most appropriate final interpreters. The actions of government institutions must therefore respect its terms or else render the fundamental document a nullity. Chief Justice Meredith made this analogy in *Valin* v. *Langlois*:

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[93](1872), 20 L.C.J. 29 at 45. This case was overruled by the Privy Council and the statute upheld on the basis that it related to "a matter of a local or private nature in the province."

[94](1872), 19 Grant 366.

[95]*R.* v. *Coote* (1873), L.R.4 P.C.599.

[96](1878), 3 App. Cas. 1090.

[97]S.C. 1875, c.11.

> Chief Justice Marshall, than whom a higher authority cannot be cited, in the case of *Marbury* v. *Madison*, speaks of "Legislative acts contrary to the constitution," as not being law, and Chief Justice Ritchie, in *The Queen* v. *Chandler, in re Hazelton*, speaking of legislatures with limited powers, observed, "and if they do legislate beyond their powers, or in defiance of the restrictions placed on them, their enactments are no more binding than rules or regulations promulgated by any other unauthorized body."[98]

Ritchie's decision in *Chandler* for the first time enunciated the power and duty of a Canadian superior court to ensure legislative adherence to the constitutional distribution of power. By the time Steadman's opinion was published in 1873, the issue of judicial review had been determined and Steadman's elaborate reasons for contending that the judiciary lacked the power to determine the constitutionality of a statute could not change the new reality. Had Steadman been a superior court judge instead of a county court judge, judicial review might have been a more contentious issue throughout Canada and not just in New Brunswick. Supremacy of parliament was after all one of the fundamental principles of the British constitution, and if the preamble did not have the effect of reaffirming this for the new Canadian nation, it was difficult to know what significance to attribute to it. This was made clear by Dicey, who in early editions of his book on constitutional law stated "The preamble of the *British North America Act*, 1867, asserts with *official mendacity* that the Provinces of the present Dominion have expressed their desire to be united into one Dominion 'with a constitution similar in principle to that of the United Kingdom'."[99] Dicey then asserted that "if preambles were intended to express the truth" one should read United States for the United Kingdom because "no one can study the provisions of the *British North America Act*, 1867, without seeing that its authors had the American constitution constantly before their eyes, and that if Canada were an independent country, it would be a confederacy governed under a constitution very similar to that of the United States." He noted, however, that the power of the Canadian federal government and Parliament greatly exceeded that of the federal government in the United States and this was the most noticeable "in the authority given to the Dominion Government to disallow provincial Acts." The power of disallowance, Dicey conceded, might have been "given with a view to obviate altogether the necessity for invoking the law Courts as interpreters of the Constitution," but he concluded that in both the United States and Canada, "the Courts inevitably become the interpreters of the Constitution."[100]

This analysis and the "inevitability" of judicial review which Dicey perceived

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[98](1879), 5 Q.L.R. 1 at 16-17.

[99]A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 3rd ed. (London: Macmillan, 1889) at 155 (emphasis added).

[100]*Ibid.*, at 155-57.

were based on an assumption of the legitimacy of judicial review, because the Judicial Committee of the Privy Council, which he called "the true Supreme Court of the Dominion," had by that time rendered decisions about the respective powers of the federal Parliament and provincial legislatures. If Dicey had written before these decisions, it seemed likely that rather than attribute "mendacity" to the preamble, he might have applied more conventional canons of interpretation and argued in favour of parliamentary or legislative supremacy and against judicial review of legislation. The power of reservation and disallowance, by providing alternative means of enforcing the constitutional allocation of power, would have allowed a consistent interpretation of the document as a whole, without necessitating judicial review.[101]

The contingent nature of judicial review can also be illustrated by the fact that even in 1907 Lord Halsbury in *Webb* v. *Outrim*[102] found the concept impossible to accept. At issue was whether the *Commonwealth of Australia Act* of 1900 precluded the state of Victoria from taxing the salary of a federal employee resident in Victoria. Counsel contended that "under a constitution which gives the legislature certain powers, and the legislature goes beyond those powers, the Act is unconstitutional." Lord Halsbury replied "That is a novelty to me. I thought that an Act of Parliament was an Act of Parliament, and you cannot go beyond it... . I do not know what an unconstitutional Act means."[103] Halsbury's failure to understand the nature of judicial review in regard to a federal constitution was described as a major blunder.[104] However, it was perhaps a major blunder only in the light of what had previously happened in the Privy Council and had it been uttered 40 years before in regard to the *B.N.A. Act* , it might not have appeared strange. At minimum, Steadman's argument against judicial review based on legislative supremacy would have found a very sympathetic hearing from a judge such as Lord Halsbury.

An early constitutional writer, W.H.P. Clement, said of *Chandler* that:

> The case may well be referred to, as being one of the earliest decisions emphatically enunciating the doctrine that, under the *B.N.A. Act* , it necessarily devolves upon courts of justice to inquire into the validity of post–Confederation Canadian legislation. The fact that the Governor–General had not disallowed the provincial

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[101]In later editions Dicey toned down his criticism of the preamble by substituting the words "diplomatic inaccuracy" for "official mendacity": see A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 7th ed. (London, Macmillan, 1908) at 161.

[102][1907] A.C. 81.

[103]An extract of the argument is quoted in M. Ollivier, *Le Canada, Pay Souverain?* (Montreal: Lévesque, 1935) at 233.

[104]R.T.E. Latham, "The Law and the Commonwealth" in W.K. Hancock, ed., *Survey of British Commonwealth Affairs Vol.1* (London: Oxford University Press, 1937) at 566.

> Act in question, was decisively held by the court to be immaterial, upon an inquiry as to its legal validity.[105]

Yet no modern constitutional law text or casebook, with the sole exception of Strayer's *The Canadian Constitution and the Courts*, even mentions *Chandler*. Why this curious neglect of what was in fact the earliest case to enunciate the principle that the courts have a duty to engage in judicial review?

One reason may be that it portrayed judicial review in an unfavourable light. Although *Chandler* has never been explicitly overruled, even as early as 1892, W.H.P. Clement wrote that it could no longer be "considered a correct exposition of the law."[106] Ritchie had construed "bankruptcy and insolvency" to comprehend all legislation relating to impecunious debtors whereas a later judicial consensus restricted its ambit to legislation establishing a system for bankruptcy and insolvency. Ritchie himself subsequently held that "there may be many cases where the abolition or regulation of imprisonment for debt is in no way mixed up with or depending on insolvency."[107] A cynic might attribute Ritchie's change of opinion to a desire to avoid precipitating another bitter controversy similar to that which followed in the wake of the *Chandler* decision. The fate of poor Hazelton must surely have caused Ritchie to endeavour to construe the *B.N.A. Act* so that the benefits of provincial law would be available to debtors unless such law conflicted with federal insolvency legislation. Perhaps more importantly, the early judicial attempts to find exclusivity of legislative jurisdiction were giving way to greater recognition of concurrency might have been partly as a result of the unfortunate outcome of holdings such as that in *Chandler*. Ritchie should not be faulted too much for lack of prescience in this regard for he relied in large measure on the conclusion of section 91, which stated that any matter falling within the subject enumerated in section 91 "shall not be deemed to come within" the class of matters set out in section 92, to argue for strict exclusivity, and as a matter of textual interpretation, this is indeed a powerful argument against concurrency. But the *Chandler* holding was effectively repudiated, and the consensus would be that Ritchie's erroneous decision required legislative intervention to release a poor old man confined in the Saint John gaol. It seemed that the first case to enunciate the principle of judicial review provided ammunition for Paul Weiler's thesis that courts often perform this function poorly. Naturally constitutional law scholars, who generally approve of the concept of judicial review, prefer to forget this uncomfortable decision. But there is no doubt that judicial review has both advantages and disadvantages and the *Chandler* case, by revealing its down side, can surely be accommodated rather than suppressed.

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[105]W.P. Clement, *The Law of the Canadian Constitution* (Toronto: Carswell, 1892) at 397.

[106]*Ibid.* at 396-397.

[107]*Armstrong* v. *McCutchin* (1874), 15 N.B.R. 381 at 384.

The greatest contributing factor for the neglect of the *Chandler* case is that judicial review has been regarded as an inevitable necessity of Canadian federalism. W.R. Lederman has maintained that judicial review flows almost inescapably from the independence of the judiciary and the guaranteed core of substantive jurisdiction which, in his opinion, necessarily flows from sections 96 to 101 of the *B.N.A. Act*. It remains, according to Lederman, "a matter of governmental necessity that the last word on such distributions and divisions of powers is peculiarly appropriate to superior courts" because "historically... they determine even the limits of their own powers under the relevant constitutional laws and statues."[108] B.L. Strayer concludes that:

> While in the abstract it may be argued that judicial review is not inevitable in a federal system as some survive without it, given the Imperial system at the time of Confederation and the prior history of judicial review, it was surely implicit that the limitations on legislative power would, where necessary, be enforced by the courts.[109]

Conclusion

If judicial review were either inevitable or as natural as rolling off a log, there was little credit to be earned for engaging in it, even for the first time. However, the *Chandler* case, particularly when read in conjunction with the ensuing debate in the New Brunswick Assembly, and the contemporaneous but neglected *Steadman* opinion, should suggest that acceptance of judicial review was not entirely foreordained.

Judicial review has now received explicit affirmation through section 52(1) of the *Constitution Act, 1982* making it part of the supreme law of Canada. But the importance of the tradition of parliamentary supremacy persists because the notwithstanding clause of section 33 of the *Charter* permits Parliament or a legislature to enact a statute limiting the rights or freedoms guaranteed by section 2 and sections 7 to 15. Peter W. Hogg has described this as "a concession to Canada's long tradition of parliamentary sovereignty, because it means that, with respect to most *Charter* issues, the last word remains with the competent legislative body, and not the courts."[110] Professors Russell and Weiler in opposing recent proposals to eliminate the override have contended that "nothing in our constitution is so distinctively Canadian as this manner of reconciling the British tradition of responsible government with the American tradition of judicially

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[108]Lederman, *supra*, note 4 at 169.

[109]Strayer, *supra*, note 1 at 49.

[110]P. W. Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985) at 692.

enforced constitutional rights."[111] The Hazelton saga[112] which took place more than 120 years ago reminds us of the strength of this tradition of parliamentary supremacy by revealing that the New Brunswick legislature initially opposed the role of the courts in umpiring the division of powers and in an initial skirmish prevailed over the judiciary.

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[111]P. Russell and P. Weiler, "Don't scrap override clause – it's a very Canadian solution" *Toronto Star* (4 June 1989) B3.

John D. Whyte has mounted a strong attack on the "notwithstanding clause" in an article entitled "On Not Standing for Notwithstanding" (1990) 28 Alberta L. Rev. 347 to which Peter H. Russell responded in "Standing Up for Notwithstanding" (1991) 29 Alberta L. Rev. 293. At p. 309, Professor Russell concluded that "a democracy which puts its faith as much in its politically active citizenry as in its judges to be the guardians of liberty is stronger than one that would endeavour to vest ultimate responsibility for liberty and fundamental rights exclusively in its judiciary."

[112]It is intriguing that the introduction of judicial review in Canada centered around an American citizen. Horace Lovejoy Hazelton, born in Sanborton, New Hampshire, on 21 November 1808, was educated at Phillips Exeter Academy and Dartmouth College. He did not complete his studies at Dartmouth but read law with Stephen C. Lyford of Meredith, N.H. and commenced the practice of law in about 1833 in Meredith Bridge (now Laconia) N.H. In 1846 he became a bank commissioner in New Hampshire and the following year moved to Massachusetts. He practised law in Boston and lived nearby in Newton, where he was a neighbour of Lawson Valentine and attended the same church. Valentine invited Hazelton to become the administrator of his father's estate and on 6 January 1863 Hazelton posted a bond for $70,000 upon which Lawson Valentine and his brother Henry were sureties. Lawson Valentine repeatedly sought an accounting from Hazelton without avail and finally requested his resignation. On 6 January 1866 Hazelton resigned the trust and filed an account showing that he owed the estate more than $40,000. Lawson Valentine succeeded Hazelton administrator of the estate. Hazelton's debt remained outstanding and on 18 July, 1866, while temporarily in New Brunswick, Hazelton was arrested on a *capias* with the required affidavit signed by Leland Fairbanks Jr., a New York attorney and the husband of the sister of Lawson Valentine.

Imprisonment for debt had been abolished in Massachusetts but not in New Brunswick and this prompted the action to be brought in New Brunswick. Clandestine activity surrounded the commencement of the suit, with Fairbanks registering at the Park Hotel in Saint John as "Wm. Kingston" at the time of the arrest of Hazelton upon the *capias*. When the New Brunswick judgement was obtained, Valentine took the unusual step of assigning the judgement to his New Brunswick counsel, Samuel R. Thomson, and made an affidavit for the United States Circuit Court stating he had no legal or equitable interest in the judgement against Hazelton. In Hazelton's action against Lawson Valentine for the tort of false imprisonment, it was alleged that Valentine had said that he intended to keep Hazelton confined in Saint John as long as he lived, and that should he predecease Hazelton, he would leave enough money to his heirs for that purpose. To this interrogatory however, Valentine replied "Not to my knowledge or belief." Hazelton failed in his tort suit against Valentine: *Hazelton* v. *Valentine*, (1873) 113 Mass R. 472. Valentine, however, had vindictively exploited the survival of the remedy of imprisonment for debt in New Brunswick in the 1860s.

Breaches of trust in the administration of estates must have been viewed with more leniency at this time for H. L. Hazelton was not disbarred but instead appointed by the Massachusetts Superior Court as examiner of students for admission to the bar in the county of Suffolk in 1873-4. Hazelton died at Hingham, Mass. on 19 October 1883.