HENRY DUNDAS' PLAN FOR REFORMING THE JUDICATURE OF BRITISH NORTH AMERICA, 1792

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When Henry Dundas became Secretary of State for the Home Department on 8 June 1791, he assumed responsibility not only for the United Kingdom but also for the British colonies overseas.[1] Though India was the pearl of the "second empire," those territories which in the next century were to become the Dominion of Canada concerned Whitehall policy-makers. Preserved for the Crown during the American Revolution and a homeland for dispossessed Loyalists in its aftermath, continental British North America by the early 1790s was in a state of ferment and flux. Two days after Dundas assumed office, the *Constitutional Act* (or "Canada Bill") was passed by the House of Commons. Under the provisions of the *Act*, a new province - Upper Canada - was formed out of the western district of the old province of Quebec, henceforth to be known as "Lower Canada."

Peninsular Nova Scotia had meanwhile become a crucible of tension and conflict between pre-Loyalists and Loyalists. In the spring of 1790 Halifax witnessed the spectacle of an impeachment of the puisne judges of the Supreme Court by a House of Assembly, of which one-third of the members were Loyalists. In the spring of 1791 the Privy Council had relieved Chief Justice Richard Gibbons of Cape Breton of the suspension imposed on him by Lieutenant-Governor Macarmick three years before. During the interregnum the office of chief justice had been put in commission and administered by three "assistant judges," none of whom was a lawyer. The chief justice of Saint John's [Prince Edward] Island, Peter Stewart, having once been suspended by the former governor, Walter Patterson, and restored by the Privy Council, was once again the subject of formal complaints by the pro-Patterson group and was not finally exonerated by the Privy Council until 1792.

Creation of a new province raised the question of the structure and components of its civil establishment, especially the judicature: whether the existing system in an adjacent province should be extended, imitated or modified, or whether an entirely new system would have to be devised and implemented. The ultimate aim was to facilitate the administration of justice while decreasing, or at least increasing no more than was absolutely necessary, the overall charge on the parliamentary grant. However desirable in terms of economy, it was not always possible to reduce the scale of administration or even to retain the *status quo*. In some cases, such as Lower Canada, the judicial structure needed complete renovation. In others, such as New Brunswick and Nova Scotia, achieving struc-

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[1]On the administration of colonial affairs in the period 1782 to 1801 see R. B. Pugh, *Records of the Colonial and Dominions Offices* (London: HMSO, 1964) at 6. On Dundas' tenure see C. Matheson, *Life of Henry Dundas First Viscount Melville, 1742-1811* (London: Constable, 1933) at 149ff; and especially H.T. Manning, *British Colonial Government After the American Revolution 1782-1820* (New Haven:Yale University Press, 1935) at 158ff.

tural uniformity was considered to be necessary. The original intention in 1784 had been that the parliamentary grant for the judicial establishment in New Brunswick would be the same as Nova Scotia: a chief justice and an attorney-general. So loud was the clamour for offices in the new government, however, that Governor Thomas Carleton was authorized to appoint three puisne judges in addition to the chief justice. The former successfully petitioned for their salaries to be placed on the parliamentary grant, so that from June 1785 onwards the estimate for New Brunswick included an extra £900 for "three assistant judges" at £300 each.[2] Dundas' conservative attitude towards, if not conspicuous hostility against, puisne judges is ironic, not only because the three original puisnes of the Supreme Court of New Brunswick were all experienced lawyers, but also because the fourth appointed puisne judge, John Saunders (1790), was an American member of the English bar who went on to become third chief justice of the province. Only the chief justices of Nova Scotia and Upper Canada at the time when Dundas was writing could claim such a professional distinction.

In a letter to Lieutenant-Governor Alured Clarke of Lower Canada in October 1792 Dundas stated, "The consequences of a due and uniform administration of Justice in the Provinces of America and the West Indian Colonies has [*sic*] of late directed my particular attention to that important object."[3] From internal evidence, it is apparent that the document had actually been composed between the appointment of William Osgoode to the new post of chief justice of Upper Canada in December 1791 and his departure for Quebec in April 1792. In London at the same time was Osgoode's close friend and contemporary from both Christ Church, Oxford, and Lincoln's Inn, Thomas A.L. Strange, who had been appointed chief justice of Nova Scotia in October 1789.[4] Strange had at least one conversation with Secretary Dundas early in 1792, and it is easy to suspect that the information in the Nova Scotia segment of the "proposed Plans" came in part from Strange's memorandum to Dundas of March 1792.[5] The impeachment of the puisne judges was then pending before the Lords Committee of the Privy Council for Trade and Plantations, of which the Home Secretary was an *ex officio* member. It seems likely, then, that Dundas would have sought from Chief Justice Strange his views on how to prevent the recurrence of such an extreme measure. Were the puisnes to have been transferred from the provincial to

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[2](1784-85) 40 *Journal of the House of Commons* [hereafter *JHC*] at 391 and 970. See also W.S. MacNutt, *New Brunswick. A History, 1784-1867* (Toronto: Macmillan, 1963 [repr. 1984]) at 50-51.

[3]H. Dundas to A. Clarke (3 October 1792); quoted in A. Doughty and D. McArthur, *Documents Relating to the Constitutional History of Canada, 1791-1818* (Ottawa: King's Printer, 1914) at 109.

[4]So intimate were Osgoode and Strange that they arranged between themselves for the latter to succeed the former in Upper Canada in 1794, only to have their plans upset by the departure of their mutual patron, Dundas, from the Home Department: W. Osgoode to T.A. Strange (23 June 1794); T. A. Strange to W. Osgoode (29 August 1794); T.A. Strange to J. King (2 September 1794), CO 217/37/92-97, Public Record Office (mfm. at PANS). It is Strange to whom S.R. Mealing refers when he says, "Osgoode failed in an attempt to nominate his own replacement in Upper Canada in 1794 when he moved to Quebec": "Osgoode, William," in VI *Dict. Can. Biog.* (1987) at 558. See also D.F. Chard, "Strange, Sir Thomas Andrew Lumisden," in VII *Dict. Can. Biog.* (1988) at 832.

[5]CO 217/63/353, Public Record Office (mfm. at PANS).

the parliamentary establishment, it would of course have been impossible for the House of Assembly to try to impeach them. If the New Brunswick establishment was to be altered and then used as a model for Nova Scotia - the reverse had originally been intended - then the analogy was deemed not to extend beyond the puisne judges: the salary of Chief Justice Ludlow was to be fixed at £600 (an increase of £100), while that of Chief Justice Strange was to remain at £850.[6] The rationale was that to attract a native English or Irish barrister to a colonial chief justiceship, it was necessary to attach an exorbitant salary to the office. A like inducement was neither necessary nor justified in the case of a native American lawyer and judge, such as George Duncan Ludlow, however weighty his claim to preferment or influential his English patrons.

The principal focus of interest, understandably in view of the recent passage of the *Constitutional Act*, was not the Atlantic provinces but the Canadas. Enclosed in his letter to Major-General Clarke, quoted above, was a foreshortened and variant text of "Mr. Secretary Dundas' proposed Plan of Judicature for the Province of Lower Canada," transcribed below.[7] Concerning the document enclosed to Clarke, Dundas wrote,

> I have in consequence (after having communicated on the Subject, as well with Gentlemen of considerable legal knowledge, and who have had much professional practice in Canada, as with others,) formed a Plan for altering and amending the Judicature in Lower Canada herewith transmitted to you, which you will recommend to the Legislature of the Province for their consideration, and I trust adoption.[8]

Dundas' plan served as the basis for an omnibus, and radical judicature bill. The evolution from plan to law was fraught with controversy - it presupposed the abolition of the Courts of Common Pleas - but in 1794 *An Act for the Division of the Province of Lower Canada[,] for amending the Judicature thereof and for repealing certain Laws therein mentioned* passed the legislature during its second session.[9] Though the final form of the *Judicature Act* was chiefly the handiwork of

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[6](1790) 45 *JHC* at 384.

[7]This alternative version is in the same form as the other sections of the document, in which a "Proposed Plan" is contrasted with a "Present Establishment." The latter consisted of a chief justice at a salary of £1200 per annum; six judges of the Common Pleas at £500 apiece; and an attorney-general at £300.

[8]One of these professional men was almost certainly James Monk, who was in England from 1789 to 1792 trying to obtain reinstatement to the office of attorney-general of Quebec, from which he had been dismissed. Monk had kept terms at the Middle Temple in the 1770s, and was called to the English bar in November 1791. Dundas' confidence in Monk is reflected in the fact that when the post of attorney-general of Lower Canada fell vacant in 1792, Monk was reappointed to his former office: Doughty and McArthur, *supra*, note 3.

[9]34 Geo. 3, c. 6 [1794]. For the text of the *Act* and the background to its passage, see Doughty and McArthur, *supra*, note 3 at 109ff. See also L.F.S. Upton, ed., *The Diary and Selected Papers of Chief Justice William Smith 1784-1793*, II (Toronto: The Champlain Society, 1965) at xxxviii; *id.*, *The Loyal Whig. William Smith of New York & Quebec* (Toronto: University of Toronto Press, 1969), at 210. The *Act* was "reserved" by Governor-General Lord Dorchester on orders of the Secretary of State, but proclaimed into law in December 1794.

the moribund Chief Justice William Smith, one detects in the original plan the inspiration and influence of James Monk, whose intemperate zeal to reform the judicial system had alienated the vested interests in London as well as in Quebec and cost him the attorney-generalship of the old province in 1789. The restored Attorney-General Monk accurately predicted establishment of a permanent Court of King's Bench at Montreal - which the English merchants there, whose cause Monk championed, especially desired - but he probably destroyed his own chances of succeeding Smith as chief justice of Lower Canada by applying to be chief justice of the Court of King's Bench at Montreal before such a tribunal had even been created.[10]

By the time Henry Dundas relinquished the Home Department in July 1794, it was only his proposed plan for Lower Canada which had culminated in legislation. None of the other changes was implemented either during his term of office or that of his successor, the Duke of Portland. The document itself, which does not appear to be a holograph, was filed away and ended up among "Canada: Promiscuous Papers 1790-1800," where it was calendared as undated.[11] When Dundas ceased to be Secretary of State responsible for administering the colonies, his plans for reforming the judicature of America and the West Indies were shelved and forgotten. Lower Canada, on which he had focused particular attention, formed the solitary exception because the governor there was instructed to turn the reform plan into legislation, and succeeded in doing so. In Upper Canada, on the other hand, thanks to the determined efforts of Lieutenant-Governor Simcoe and Chief Justice Osgoode, reform went ahead despite Dundas' imminent departure and his inclination to leave the judicial system more or less as it had been at the creation of the new province. In 1788 the western territory had been divided into four districts, each with a Court of Common Pleas. There was no central criminal court - no Court of King's Bench - however, and the Common Pleas had no criminal jurisdiction. Serious criminal causes could only be tried once a year under a commission of oyer and terminer and general gaol delivery. The first parliamentary estimate for the civil establishment of Upper Canada (January-November 1792) provided for a chief justice and two - not four - judges of the common pleas, and by a misnomer continued to provide for the latter after the Courts of Common Pleas had been abolished by the *Judicature Act*.[12] This misconception reflects, or is reflected in, Dundas' expectation that Chief Justice Osgoode would preside in the Court of Common Pleas. Perhaps it was Osgoode's intention to do so, but it never materialized: he presided only at the criminal assizes held annually in each district under a special commission of oyer and terminer. Superior appellate jurisdiction in civil matters was vested in the Lieutenant-Governor and Council by Section 34 of the *Constitutional Act* - but only as a court of appeal from judgments rendered in the Common Pleas; there was no court having plenary original jurisdiction in both civil and criminal matters.

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[10]See generally James H. Lambert, "Monk, Sir James," in (1987) VI *Dict. Can. Biog.* at 512.

[11](1890) Rep. Can. Arch. at 325. The current reference is CO 42/88 ["Quebec Miscellaneous"] /312-318, Public Record Office.

[12]See for example (1792) 57 *JHC* at 113.

Dundas' prescription for Upper Canada was less reform than the maintenance of the *status quo*, so the initiative for an omnibus judicature bill came not from Whitehall, as in the case of Lower Canada, but from within the provincial administration itself. Dundas thought, mistakenly as it turned out, that the jurisdiction of the Common Pleas might be made "coextensive" with that of the Common Pleas at Quebec and Montreal - which were to be swept away by the *Judicature Act*.[13] But a more radical remedy, emulating the legislative example in Lower Canada, was conceived: abolition of the Common Pleas with its unlimited civil jurisdiction and lay bench, and its replacement by a single superior court with plenary civil and criminal jurisdiction throughout the province. Lieutenant-Governor Simcoe perceived the need of a Court of King's Bench with full powers, such as had existed at Quebec from 1764 to 1777, and instructed Chief Justice Osgoode to draft a judicature bill. His labours bore fruit in *An Act to Establish a Superior Court of Civil and Criminal Jurisdiction and to Regulate the Court of Appeal*, which was passed at the third session of the Legislature of Upper Canada in 1794, after Osgoode had left to assume the chief justiceship of Lower Canada.[14] Ironically, the parliamentary estimate continued to refer to the two puisne judges of the Court of King's Bench as judges of the Common Pleas, and the only judge of the Common Pleas who was a lawyer - William Dummer Powell - became first puisne judge of the Court of King's Bench.[15]

The Court of King's Bench of Upper Canada, like the Supreme Courts of Nova Scotia, New Brunswick, Cape Breton Island and Saint John's Island, possessed all the powers of the three superior courts of common law at Westminster Hall. Judge Powell, moreover, like Osgoode's successor as chief justice, John Elmsley; Osgoode and Monk in Lower Canada; Strange in Nova Scotia; and Saunders in New Brunswick, was a member of the English bar. Most of the other judges were members of the colonial bar, although a few, such as Deschamps in Nova Scotia, were not lawyers at all. Within months of the preparation of Dundas' plan for judicial reform, in July 1792, the report recommending that Judges Deschamps and Brenton be acquitted of the charges of incompetence and

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[13]"I have always conceived that it is intended to constitute the Supreme Court in Upper Canada upon the same principle [as in Lower Canada]": H. Dundas to Dorchester, 17 July 1793, quoted in Doughty and McArthur, *supra*, note 3 at 108. It had earlier been suggested (by Chief Justice Smith?) that "One supreme court of Common Pleas for each province will give uniformity, energy and dispatch to the Administration of Justice" *ibid.* at 106.

[14]34 Geo. 3, c. 2 [1794]. The text is in Doughty and McArthur, *supra*, note 3 at 146ff. The quadrilateral Court of Common Pleas was, in part, effectively reestablished almost simultaneously with its abolition by *An Act to establish a Court for the Cognizance of Small Causes in each and every District of this Province*: 34 Geo. 3, c. 3 [1794]. See in general F.H. Armstrong, *Handbook of Upper Canadian Chronology and Territorial Legislation* (London: University of Western Ontario, 1967) at 105ff.

[15]Provision in the estimate for judges of the common pleas suggests that the appointment of two such judges with province-wide jurisdiction had been preordained. Powell (appointed in December 1791) and Peter Russell (appointed in June 1793) both subsequently became puisne judges of the King's Bench. Russell's earlier judicial appointment, however, is not noticed in the article on him in (1983) V *Dict. Can. Biog.* at 729.

partiality which had been brought against them by the House of Assembly had issued from the Committee of the Privy Council for Trade and Plantations. Their lordships stated,

> It is always to be wished that the Office of Judge should be conferred on Men of sufficient Learning in the Law, but under the Circumstances in which many of the Provinces have hitherto stood, it is not to be expected that there should be always found a sufficient number of able and learned Lawyers to supply the Bar and fill the Bench in your Majesty's distant Colonies of equal Knowledge with those who are bred to the Profession in this Country.
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> And tho' your Majesty is careful to provide some Person of superior Knowledge to preside in those Courts as Chief Justice, yet you are often obliged to fill up the Commission with mere Laymen, who if they are Men of Understanding, may be very useful as assistant Judges in matters that are not involved in Legal Difficulty. . . .[16]

As Secretary of State responsible for the colonies, and himself a prominent Scottish lawyer, Dundas would have influenced the preparation of the Committee's report. Most characteristic of his thinking on colonial judicature was the unjustified assumption that puisne judges as a rule were legal amateurs. Though it was impossible for every colonial judge to be an English, or even English-educated lawyer, it was no longer tolerable for any judge not to have been "bred to the profession." By the early 1790s, the lay Supreme Court judge was an anachronism; Isaac Deschamps was the exception. The issue was not whether every judicial vacancy could be supplied from England; but whether it could, and wherever possible ought to be, supplied from the local bar. The choice lay not so much between English and native lawyers as between native lawyers and non-lawyers.

The reform plan concentrated not only on the structure of the judicial system but also on judicial personnel and qualifications, and Dundas was clearly biased against puisne judges. He was sceptical about their usefulness, and wished to limit their number and curtail their authority. The reform plan and the Privy Council report not only originated from the same source, but also appeared within months of each other and addressed problems relative to the administration of justice, which had been brought directly to the attention of Whitehall by colonial officials. Though the report - or rather the subsequent Order in Council approving it[17] - had the immediate effect of removing the burden of impeachment from Judges Deschamps and Brenton, the plan for judicial reform went unexecuted in the four Atlantic colonies. Had war with France not interposed to distract everyone's attention from domestic concerns, and Dundas remained longer at the Home Department, he might well have seen to it that the plan was

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[16]PC 2/137/130, Public Record Office.

[17]Order in Council, 1 August 1792: PC 2/137/151, Public Record Office.

implemented. In the event, when Judge Isaac Allen of the Supreme Court of New Brunswick died in 1806 the third puisne judgeship did not lapse but instead was filled by a layman with powerful interest "at home," Edward Winslow.[18] Four years later a third puisne was added to the bench of the Supreme Court of Nova Scotia; but the puisne judges continued to be excluded from the parliamentary grant for the civil establishment. In Nova Scotia, therefore, the anomaly of a professional but semi- independent judiciary persisted. The *Judges Act* of 1809, which augmented the number of puisnes, provided that no person could henceforth be appointed a judge of the Supreme Court without having been ten years at the bar and five years in practice.[19] Had the *Act* been applied retroactively, it would have led to the exclusion of one of the incumbents, Brenton Halliburton, subsequently chief justice, who had ascended the bench in 1807 with less than four years' standing; and quite possibly also to the exclusion of the other, George Henry Monk, who, if Edward Winslow is to be believed, was no lawyer at all. Writing as late as 1806, Winslow could make the only slightly exaggerated claim that the objection of his not being a professional man had "never been considered of much weight in the appointment of puisne Judges in the Colonies."[20] Paradoxically, although such had indeed been the case in Nova Scotia on three or four occasions, it had never been so in the two decades of New Brunswick's existence as a separate government. The determining factor was whether the appointment was made in Whitehall, or Fredericton or Halifax; whether the judges were on the parliamentary grant for the civil establishment, or their salaries were a charge on the local legislature. It was not whether the candidate was a member of the bar or a layman, but where the power of dispensing judicial patronage lay.

The situation which Dundas' plan was intended to rectify points up one of the most typical phenomena of 18th-century British North American judicature: membership of the English bar, except if one were a native Englishman, did not guarantee preferment in the colonies. Conversely, lack of professional standing, except if one were a native Englishman, did not rule out appointment as a puisne judge in the colonies.

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[18]The succession to Judge Allen, whose death occasioned the first vacancy on the Supreme Court bench in seventeen years, was the subject of considerable controversy among members of the New Brunswick bar, one of whom, William Botsford, then judge of the Vice-Admiralty Court, had been recommended by the administrator to succeed to the vacancy. See W.O. Raymond, *Winslow Papers, A.D. 1776-1826* (Saint John: Sun Printing Company, 1901) at 567ff. Winslow quoted in his own defence the example of George Henry Monk, appointed to replace Deschamps in 1801, whom he alleged was not a professional man. The opposite had naturally been asserted by Lieutenant-Governor Sir John Wentworth when explaining Monk's appointment (J. Wentworth to Portland, 26 August 1801, CO 217/75/58, Public Record Office [mfm. at PANS]), and it is now impossible to determine whether Monk, despite the proliferation of judicial offices which he held over a thirty-year period, was in fact a lawyer. No record of his ever having been admitted an attorney of the Supreme Court is extant, although there is some evidence of his having practised in that capacity. Winslow in any case, like both Deschamps and Monk, had been a first justice of the Inferior Court of Common Pleas and *custos rotulorum*. He accumulated relevant experience as a gentleman magistrate or lay judge.

[19]50 Geo. 3, c. 15 [1809]: *An Act ... for declaring the qualification of persons hereafter to be appointed [Assistant] Justices of the said [Supreme] Court, their number and salaries.*

[20]E. Winslow to E.G. Lutwyche (12 October 1806) in Raymond, *supra*, note 19 at 567.

However sincerely Dundas may have intended to alter and improve the *status quo*, his plan for reform was a conservative, if not reactionary, document. The singular exception, of course, was Lower Canada, where the problems inherited from Dundas' penultimate and immediate predecessors had been worsened by the failure of the *Constitutional Act* to address the administration of justice in either of the Canadas; where the complaints had been longest and loudest; and where fundamental reform soon came about directly as a result of Whitehall's initiative. Such was not the case either in Upper Canada or in the maritime provinces. The report on the impeachment of the puisne judges in Nova Scotia, for example, made clear that at a time when the colonial bar had become fully professionalized, the Privy Council Committee for Trade and Plantations, of which Dundas had been a member in the mid-1780s, was still prepared to tolerate non-lawyers on the bench of the superior courts.[21]

The assumption was that while the chief justice had to be a lawyer - preferably one sent out from England - the assistant judges did not have to be lawyers and could therefore be drawn directly from the lower court bench rather than the bar. Despite the example set by Monk in Lower Canada in 1794 (in fairly untypical circumstances), the attitude of Whitehall policy-makers did not change significantly until 1797, when the Loyalist attorney-general of Nova Scotia became its chief justice - the first appointment of the kind ever made in the colonies.[22] Nova Scotia thus led the way not only in 'patriating' the colonial judiciary, but also in professionalizing it.

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Dundas' Plan for Reforming the Judicature of British North America, 1792

In the proposed Plans for altering and amending the Judicature of the undermentioned Governments in the West Indies and in North America,[23] it is assumed as a

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[21]The truth of the situation was implicitly acknowledged by Chief Justice Strange, who in his memorandum to Dundas (*supra*, note 5) indicated that the fundamental purpose of the impeachment could be achieved by superannuating Judge Deschamps, who was willing to retire on pension. It speaks volumes about an English lawyer's perception of the state of the legal profession in Nova Scotia that those members of the bar whom Strange was prepared to recommend for a judgeship were all Loyalists. He did not consider Solicitor-General Uniacke, who was dean of the bar but also leader of the pre-Loyalist opposition in the legislature, a fit person to supply a vacancy upon the bench.

[22]By the merest of coincidences Sampson Salter Blowers failed to become chief justice of Nova Scotia in 1789, when the lieutenant-governor's application on his behalf was received in Whitehall only after Dundas's predecessor, Grenville, had offered the post to Strange: CO 217/61/173, PRO (mfm. at PANS). Of the four chief justices of Nova Scotia, 1754 to 1797, two – Pemberton and Strange – were English members of the English bar; one, – Finucane – was a member of the Irish bar; and one – Belcher (the first) – was a native New England member of both the English and Irish Bar.

[23]The sections dealing with the West Indies have been omitted.

principle, that the first of all Monies raised within the same respectively, or arising from out of the 4 and 1/2 per Cents;[24] shall be applicable to the payment of the Officers appointed for the distribution of Justice.

Each Court to be a Court of Original Jurisdiction for the hearing and determining of all Causes, Civil and Criminal, or wherein the King is a Party,[25] (Admiralty Causes strictly speaking, only excepted.).[26]

North America.

See Judicature for Upper & Lower Canada on separate Papers.

New Brunswick

Proposed Plan	Present Establishment
Chief Justice-------£600	by Grant of Parliament
Two Puisne Justices	Chief Justice------£500
each £300----------600	Three Assist. Judges
1200	each----------900
Attorney General 200	Attorney General--150
	Solicitor Genl. No Salary
1,400	£1550

Quere. Whether the proposed Plan should not be carried into execution by degrees, i.e. as the Present puisne Judges die, or otherwise vacate their Seats? or whether it should be adopted immediately?[27]

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[24]The "four and a half per cents," which existed from about 1663 to 1838, were an export tax levied on goods shipped to England from the West Indes, and were intended to help defray the cost of the civil establishment: L.J. Ragatz, *The Fall of the Planter Class in the British Caribbean, 1763 to 1833* (New York: Octagon Books, 1963) at 104.

[25]The supreme court of judicature under colonial constitutions had both king's bench (criminal) and common pleas (civil) as well as exchequer (Crown litigation) jurisdiction.

[26]Distinct courts of vice-admiralty already existed in the colonies by virtue of the commission to the governor or lieutenant-governor as "vice-admiral."

[27]As judicial resignations were almost unheard of, judges vacated their seats either by death or promotion to higher judicial office. No puisne judge in New Brunswick died between 1789 and 1806, and when the chief justiceship fell vacant in 1808 it was filled not from the bench but from the bar.

Nova Scotia

Proposed Plan
The proposed Establishment for New Brunswick appears a proper one for Nova Scotia, as to the Puisne Judges and Attorney General. The present Puisne's at Nova Scotia have no Salary from hence but have an allowance from the Island [*sic*!] of 400 each currency. =[28]
Chief Justice--------£850
Two Puisne's
300 each----------600
Attorney General---200

1650

Present Establishment by Grant of Parliament
Chief Justice---------£500
Three Assist. Judges each £300----------£900
Attroney General---£150
Solicitor Genl. No Salary[29]

£1000

[28]Though two puisne judges had sat on the bench of the Supreme Court of Nova Scotia since 1764, their salaries had not been made a permanent charge on the provincial revenue until the statute 29 Geo. 3, c.12 [1789]: *An Act to Provide for the better support of the Puisne Judges of His Majesty's Supreme Court*. The incumbents were non-lawyer Isaac Deschamps (appointed in 1770), a former first justice of the Inferior Court of Common Pleas of Kings County, and lawyer James Brenton (appointed in 1781), a former solicitor and attorney-general, and (from 1773 to 1787) judge surrogate of the Halifax District Court of Vice-Admiralty. It is remarkable that as late as February 1794 Secretary Dundas made his approval of the appointment of a third puisne judge contingent on the legislature's voting an adequate salary: J. Wentworth to H. Dundas, (6 December 1793); H. Dundas to J. Wentworth, (14 February 1794), CO 217/65/8-9; 102, Public Record Office (mfm. at PANS). The prospective candidate was the well respected New York Loyalist, Isaac Wilkins, first justice of the Inferior Court of Common Pleas of Shelburne County, but a clergyman by profession rather than a lawyer. No such appointment was made.

[29]The status of Solicitor-General Richard John Uniacke was peculiar in that he, like Solicitor-General Ward Chipman of New Brunswick, had been appointed from England, and so technically was on the parliamentary grant for the civil establishment. He received no salary from Parliament, however, and the House of Assembly (of which he was a member from 1783 to 1793) voted him an annual stipend.

Island of Cape Breton

Proposed Plan
Chief Justice---------£500
Attorney General----200

700

Present Establishment by Grant of Parliament
Chief Justice-------£300
Attorney General--100

400

N. B. From the present low state of the Province it is clear in the outset that a responsible Chief Justice and Attorney General would be sufficient for the distribution of Justice; as the Island improves and requires it, Two Puisne's may be added with a Salary of £250. each.[30]

Island of St. John

Proposed Plan
The Establishment for Cape Breton appears proper for St. John's, which amounts to---------£700

Present Establishment by Grant of Parliament
Chief Justice--------£300
Attorney General--£100

400

The above Plans with the one proposed for Lower Canada comprize the whole of the North American Governments with the exception of Upper Canada which seems to require no alteration, for the reasons already stated as to that government.[31]

Should it be thought necessary that in all Cases there should be two Puisnes Judges as well as a Chief, provision must be made accordingly for Cape Breton, St. Johns, and Bermuda. At present where there exists Assistant Judges they are to be looked on as little more than nominal; they have their share of the Fees, but have no Salary.[32]

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[30]The acting chief justice of Cape Breton from 1791 to 1797 was Ingram Ball, a soldier by profession.

[31]The reference is obscure, but seems to mean that if the chief justice were to preside in a unified and centralized Court of Common Pleas, no alteration to the original establishment would be necessary. Apparently Dundas' intention was not to transfer the jurisdiction of the Common Pleas to an entirely new court, but to concentrate it in a single, reconstituted Court of Common Pleas amalgamating the four district courts, and having general provincial jurisdiction. If this is the case, then Dundas' plan for reforming the judicature of Upper Canada incorporated the judicial elements of the original estimate for the civil establishment, which was tabled in the House of Commons on 8 February 1792, and which anticipated by two years the statutory abolition of the district courts of common pleas.

[32]New Brunswick, where until 1807 all the puisnes were lawyers, was the most conspicuous exception to this very general rule. Even in Nova Scotia (since 1773), however, the puisnes had had the power

Quere. If care be taken in the appointment of the Chief Justices and Attorney Generals, whether the Courts would not be quite strong enough at least for the present?

According to the proposed Plans the total amount of the Establishment of the Courts of Judicature in America will be £6,350. including Upper & 6,900. Lower Canada £13,250[33]

The amount of Expence of the present Establishment of the Courts of Judicature in America is--------£4,780 including Upper & 3,900 Lower Canada £8,680

Mr. Secretary Dundas' proposed Plan of Judicature for the Province of Lower Canada

That there be two Courts of Original Jurisdiction within the Province - One for the District of Quebec the other for the District of Montreal: To take Cognizance of all Causes whatsoever within the Province. as well civil as criminal, & where the King is a party, those purely of Admiralty Jurisdiction and such as are brought for Sums under £20 (and for which Provision is hereinafter made) excepted. The first to consist of His Majesty's Chief Justice for the Province of Lower Canada and *two* Puisne Justices with the following Salaries.

Chief Justice------£1200
Puisne Justices---£1000
£500 each 2200

The other to consist of His Majesty's Chief Justice of the Court of K[ing's] B[ench] at Montreal

with a Salary of----£800
and *two* Puisne Justices
£500 each----------1000
£1800.

In aid of these two Courts, a Provincial Court to be established at Quebec and another at Montreal for those Districts respectively, with one Judge to each, to hold Pleas in civil Suits where the demand is not above £20. and from which there shall be no appeal. The Judges of the Provincial Courts to have a Salary of £200. each---£400.

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to adjudicate in the absence of the chief justice.

[33]Adding £4,570 or 34.5 per cent at one stroke to the cost of the judicial establishment in America and the West Indies would probably have deterred the ministry from going ahead with Dundas' practical but ambitious and expensive plan.

N. B. The Districts of Quebec and Montreal to include the whole Province.

To make a distinction between the Chief Justice of the Province and the Chief Justice of the Court at Montreal: The first to have Cognizance of criminal Causes, solely without his Brethren. The other only jointly with them as in civil Causes. The former may also try all Felonies arising within the Province - The Court at Montreal only those arising within that District. If the Province particularly wish it, a similar Provincial Court to the two above mentioned may be constituted for what is now called the District of Gaspée, or such other space between Quebec and Montreal as shall be described for its Jurisdiction.

The total Expence of the present Courts of Justice established at Quebec, including the Judge of Vice Adm[iral]ty Court is £4500. The total Expence of the proposed establishment including also the Judge of Vice Adm[iral]ty Court is £4600.

Upper Canada

Chief Justice	£1000.
Two Judges of Common Pleas each £500	1,000.
Attorney General	300.
Not necessary. Solicitor General - none appd.	
	£2300.

This Establishment seems to require no other alteration, it being the intention of Chief Justice Osgoode, to preside in the Court of Common Pleas-and Lt. Govr. Simcoe may be instructed to propose a Bill for making the said Court coextensive as to it's jurisdiction with the Courts at Quebec and Montreal.[34]

[34] *Supra*, note 31. The bill eventually proposed, and which achieved passage through the legislature as the *Judicature Act* of 1794, was quite different from what Dundas had intended. Rather than a provincial court of common pleas with added criminal jurisdiction, there was a court of king's bench with added civil jurisdiction as the supreme court of judicature for the whole province.